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Interim Measures under Rule 39 of the Rules of the European Court of Human Rights
Protecting Human Rights in Cases of Urgency

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Acknowledgements

During my law studies I have been increasingly interested in international human rights law and while on exchange at Stockholm’s University, I had the opportunity to take courses concerning this subject. Following my studies I began an internship at the UNHCR Regional Representation for Northern Europe, where the subject of human rights, particularly international refugee law, was a daily subject.

Following my year on exchange and inspired by working at the UNHCR, I was determined to write my final thesis on the subject of human rights. Subsequently, after having discussed this field of law with my supervisor, Professor Davíð Þór Björgvinsson, I was captivated by the concept of interim measures and Rule 39 of the Rules of the European Court of Human Rights.

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1 Introduction

“It is not an exaggeration to say that the application of Rule 39 has preserved the physical integrity, the liberty and even the lives of many people who by definition are vulnerable.”¹ These are words spoken by the then President of the European Court of Human Rights, on the occasion of the opening of the judicial year in January 2011. They underline values that lie at the very core of the European Convention on Human Rights.

Even though the European Court of Human Rights² is not a national appeal court, the organ is in many cases the only hope for individuals who face deportation and have either exhausted national remedies or live in a country where viable national remedies are simply not available.

When national courts seek to keep up with immigration legislation, the ECtHR has through the years interpreted the European Convention on Human Rights³ as a living instrument and applied its terms in new ways. This has chiefly been done in cases deriving from decisions to remove foreigners to a state outside the scope of the ECHR, where human rights standards may be disregarded.⁴

In a system that is instituted for protecting human rights, there is a need for certain safeguards to ensure that a final decision is not left ineffective because irreparable damage has occurred.⁵ Human rights protection may thus undoubtedly require interim measures of protection to secure the effectiveness of its purpose.⁶ The so-called interim measures of the Court, enshrined in Rule 39 of the Rules of Court, are often the last resort to prevent deportation of individuals that will result in violation of human rights protected by the ECHR. Such measures are of supreme importance in the context of people seeking asylum and fleeing persecution and should lead domestic authorities to comply with international standards and respect core human rights.⁷

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² Hereafter referred to as the ECtHR or the Court.
³ The Convention for the Protection of Human Rights and Fundamental Freedoms. Hereafter referred to as the ECHR or the Convention.
⁵ Rudolf Bernhardt: Interim Measures Indicated by International Courts, p. 95.
1.1 Objectives of the Present Study

The main objective of this thesis is to study the interim measures already mentioned according to Rule 39 of the Rules of Court. The study will focus on the binding character of such measures, which has been established through the Court’s case law. The legitimacy of the binding character will be discussed after scrutinizing important aspects of Rule 39 in the study. In addition, the current issue of non-compliance of interim measures by certain Contracting States will be addressed.

The Court’s case law regarding the subject will be examined with the study mainly being limited to asylum cases in relation to deportation of refugees and Article 3 of the Convention, where applicants are at risk of being subjected to ill-treatment should the deportation in question take place. However, in order to throw as clear a light on the subject matter as possible, the author will also touch upon other types of cases and provisions as needed. The main focus will nevertheless be on the aforementioned type of cases.

1.2 Research Question

As will be demonstrated in the research, the Court has held that interim measures under Rule 39 of the Rules of Court are binding on Contracting States, even though they are not explicitly included in the text of the Convention. This fact leads to questions regarding the legitimacy of the binding character of such measures, which will be dealt with in the present thesis. In this context, the question as to whether the binding character of Rule 39 is an unwarranted limitation of the Contracting States’ sovereignty, or whether this should rather be seen as a logical step in successfully promoting the protection of human rights, will be discussed. In addition to this, non-compliance of interim measures – an issue of current interest and importance – will be dealt with.

1.3 Research Structure

Based on the objectives outlined above, the thesis is divided into seven main chapters. After this introduction, the concept of interim measures and Rule 39 of the Rules of Court will be presented in Chapter 2. The role and nature of Rule 39 will be outlined along with the history of interim measures under the Court. Amendments and developments of the rule on interim measures will be dealt with and the most recent developments concerning Rule 39 requests discussed.

In Chapter 3 the application of Rule 39 will be looked into. The scope of the rule will be examined, including the grounds for issuing interim measures under Rule 39, the procedure
and the time frame that applies when the rule is ordered, both regarding before and after the rule has been applied.

Following this coverage on the application of the rule, Chapter 4 specially examines the application of Rule 39 in asylum cases. The principle of non-refoulement is a cornerstone of asylum law and international refugee law. It is therefore essential to tackle the content of this important principle in this chapter, both in the context of refugee protection under the 1951 Convention Relating to the Status of Refugees and in regard to the ECHR and Article 3 under the Convention. The Court’s case law on this matter will be looked into, both concerning deportations of applicants to their country of origin, as well as indirect expulsions to a third country under the Dublin Regulation. The Court’s finding in the landmark case of M.S.S. vs. Belgium and Greece will be specifically explored concerning the Dublin Regulation. Finally, the concept of diplomatic assurances will be scrutinized, due to its controversy.

Chapter 5 particularly enquires into the binding character of Rule 39. The development of the Court’s opinion as to the binding nature will be reviewed and previous case law will be scrutinized in this context, with a specific coverage of the landmark cases Cruz Varas and Others vs. Sweden and Mamakulov and Askarov vs. Turkey. The compliance of interim measures will be discussed, encompassing the current concern of non-compliance by Contracting States and effects of non-compliance.

In Chapter 6, considerations on the binding character of Rule 39 will be continued by looking into the legitimacy of the binding nature of interim measures. When exploring the legitimacy, the Court’s use of the living instrument doctrine will be delved into and thereby its evolutive interpretation of Article 34 of the Convention. Following this, the commitment-based legitimacy of the binding nature of Rule 39 will be deliberated. The essential right to individual application under Article 34 of the ECHR will then be addressed in relation to the legitimacy of the binding nature of Rule 39. Subsequently, the role of the Vienna Convention on the Law of Treaties in interpreting the Convention will be considered with regard to the core purpose of the ECHR and interim measures, relevant international rules and principles and finally with regard to state practice on interim measures. The growing number of non-compliance instances will further be addressed in the chapter and the possibility of an explicit legal basis in the Convention contemplated upon.

In conclusion, the findings and results of the study will be summarized in Chapter 7.

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9 ECtHR, M.S.S. vs. Belgium and Greece, January 21st 2011 (30696/09).
10 ECtHR, Cruz Varas and Others vs. Sweden, March 20th 1991 (15576/89).
2 Interim Measures and Rule 39 of the Rules of Court

2.1 Interim Measures

Provisions on interim measures are provided for in conventions and rules of various international courts, quasi-judicial organs and tribunals. Before starting to explore Rule 39 of the European Court of Human Rights, it is in order to discuss the concept of interim measures in general terms. What are interim measures and what is the primary purpose of such measures?

The concept of interim measures stems from a procedural mechanism most often referred to as provisional measures. They have been incorporated into international law out of domestic law as a tool for a court to stop the execution of a decision if it has been challenged in pending proceedings before the court. Such provisional measures have in other words been used to guarantee equal rights of the parties to legal proceedings and the central aim is to protect efficiency in the judicial system. From this we can deduce that provisional measures are protective measures. In modern law, the predominant function of such provisional measures is to preserve the integrity of the final judgment. The purpose is also to ensure the effectiveness of the court’s jurisdiction and authority.

In certain cases, when necessary, applicants seek interim relief if there is a danger that the respondent state of the applicants may cause them irreparable harm. In these types of situations urgent actions need to be taken. An individual who proves that she or he is a victim in grave danger and also a potential victim of a violation of a right guarded by the ECHR, may be protected by interim measures.

Interim measures have been explicated as follows: “Interim measures in the human rights systems may be defined as an instrument, the purpose of which is to prevent irreparable harm

15 Shabtai Rosenne: Provisional Measures in International Law, p. 4.
to persons who are in a situation of extreme gravity and urgency, which a favourable final judgment would therefore not be able to undo.\footnote{Clara Burbano Herrera and Yves Haec: “Letting States off the Hook? The Paradox of the Legal Consequences Following State Non-Compliance with Provisional Measures in the Inter-American and European Human Rights Systems”, p. 332.}

The orders in question are urgent ones and they may be prohibitory or proactive whereby either party to the case could be required to take action or to abstain from a certain action. Accordingly, interim measures are a practical and necessary tool for preventing possible irreversible harm to individuals such as danger to an individual applicant’s health and well-being.\footnote{Hannah R. Garry: “When Procedure Involves Matters of Life and Death: Interim Measures and the European Convention on Human Rights”, p. 404.} The importance and purpose of interim measures has been stressed in a number of decisions and orders by international courts and institutions.\footnote{ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 113.}

With the appearance of international human rights, where the key role is the protection of the rights of individuals, the purpose of interim measures has been expanded. The protection of the fundamental rights of individuals has been added to the previously mentioned objective of ensuring a fair and equal balance of the parties’ rights in legal proceedings and preserving the integrity of decisions of international justice. The purpose of interim measures is therefore in absolute accordance with the key role of international human rights law; protecting the core rights of individuals.\footnote{Laurence Burgorgue-Larsen: “Interim Measures in the European Convention System of Protection of Human Rights”, p. 99.}

\section*{2.2 Role and Nature of Rule 39}

The work of the European Court of Human Rights is governed by the Convention and the Rules of Court. The rules are adopted by the Plenary Court under Article 25 of the ECHR, agreed upon and amended by the Court without any reference to Member states if needed.\footnote{Catharina Harby: “The Changing Nature of Interim Measures Before the European Court of Human Rights”, p. 74.}

The Court may, under Rule 39 of the Rules of Court, order interim measures to any state party to the European Convention on Human Rights. This may be done by the Court at any stage of the proceedings.\footnote{Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights, p. 1.} Usually, the measures requested by the Court are directed towards
the respondent state, even though there is nothing in the text of Rule 39 that prevents the Court from making an indication to the applicant.\textsuperscript{25}

The Convention itself does not contain any provision that allows for interim orders to be addressed to the parties, hence there is no explicit legal basis in the Convention for granting interim measures.\textsuperscript{26} The reason for this unfilled gap in the content of the Convention can be explained by the reluctance of the state parties, when signing the Convention in 1950, to establish a control machinery that might challenge their own sovereignty.\textsuperscript{27} When the Convention came into force, it represented a new system for international protection of human rights. In addition, experts have stated that this absence in the Convention is not surprising, as the system created by the ECHR was not made to operate in the practical way it has since then proved to operate.\textsuperscript{28} Despite this, Rule 39 of the Court provides that the competent Chamber or its President may order interim measures to the parties.

Rule 39 of the Rules of Court reads as follows:

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. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may 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.

From the content of the rule it can be seen that the Chamber or the President of the Court can on their own initiative or at the request of a party or of any other person concerned, order any interim measure appropriate. To ensure the effectiveness of the right to request interim measure in an individual application, Rule 39 provides that the Court may order to the parties in a case before the Court that interim measures are 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 in dispute.\textsuperscript{29}

\textsuperscript{25} Catharina Harby: “The Changing Nature of Interim Measures Before the European Court of Human Rights”, p. 77. In ECtHR, Iiascu and other vs. Moldova and Russia, July 8th 2004 (48787/99), par. 11 the Court made an indication to the applicant who urged under Rule 39 to call off his hunger strike.

\textsuperscript{26} Christian Tomuschat: Human Rights: Between Idealism and Realism, p. 249.

\textsuperscript{27} Rudolf Bernhardt: Interim Measures Indicated by International Courts, p. 96.

\textsuperscript{28} R. St. J. Macdonald: “Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights”, p. 731.

\textsuperscript{29} Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights, p. 2.
With regard to terminology, Rule 39 interim measures have also been referred to as *Rule 39 indications*, since the Court gives an indication to the respondent authorities to stop the act complained of. Furthermore, interim measures refer to the Court ordering states to confirm that they will not carry out the measure in question, for example an expulsion or extradition.\(^30\)

The Court only grants requests for an interim measure on exceptional basis if the applicant at issue would otherwise face a real risk of serious and irreversible harm.\(^31\) The majority of these urgent and serious cases concern the suspension or expulsion of an individual from a Contracting state who is facing a real risk of ill-treatment on return.\(^32\) The applicants in such cases are thus most often alleging that they would suffer treatment contrary to the ECHR if sent to another country outside the circle of the state parties to the Convention.\(^33\) Nevertheless, the receiving country which may allegedly violate the Convention can also be a member party to the ECHR.\(^34\) Interim measures under Rule 39 have also been applied to prevent harm by reason of the refusal of urgent medical treatment or to handle unacceptable prison conditions.\(^35\)

When fulfilling its role of protecting the basic rights of individuals, the ECtHR normally steps in when the alleged violation has already occurred. The Court explores whether the event at issue in the past was compatible with the ECHR. Rule 39 orders in deportation cases are distinguishable in this respect as the alleged violation of rights has not yet taken place. The focus is on the future; it is the imminent danger of future violations which requires measures to exclude the danger.\(^36\)

The primary role of Rule 39 is thus to enable the Court in taking necessary measures to deal with urgent situations. The purpose is to preserve the substance of the parties’ rights who are pending a final judgment on the relevant issue, and thus enabling the Court to give effect to the consequences which a finding of responsibility following adversarial process will entail.\(^37\)

In this regard, interim measures under Rule 39 aim at maintaining the *status quo*. An example of this would be if the removal of an individual were to be suspended until a

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\(^30\) *Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights*, p. 7.

\(^31\) *Factsheet on Interim Measures*, p. 1.

\(^32\) *ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99)*, para. 104.

\(^33\) Christian Tomuschat: *Human Rights: Between Idealism and Realism*, p. 251.


\(^35\) *ECtHR, Shukaturou vs. Russia, March 27th 2008 (44009/05)*.


\(^37\) *ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99)*, para. 113.
specified date or until further notice. The result of ordering the interim measures should be protection provided by the state in accordance with the legally binding order of the ECtHR.

2.3 History of Interim Measures under the European Court of Human Rights

2.3.1 Introduction

When the European Convention on Human Rights was drafted, no provision was made allowing for interim measures. Looking back to the drafting of the Convention, it can, however, be seen that the drafters discussed whether such measures should be included in the Convention. The draft of July 12th 1949 contained a rule included in Article 35 of the Convention, permitting the use of interim measures. This possibility on interim measures was not mentioned in the preparatory works of the Convention (travaux préparatoires) and accordingly they were omitted. The omission has been explained in a report by the Commission of Experts, where it is stated that at the time of the drafting of the Convention, it was not considered urgent to codify interim measures, and that the matter could be dealt with later. The primary concern for the drafters was rather to focus on establishing a system of human rights protection after World War II. This led to the establishment of a Convention in 1950, devoted to the protection of human rights, with no reference to interim measures.

The need for a power to issue interim measures began to emerge not long after the Convention came into force in 1950. In fact, the need became evident very early in the work of the European Commission and subsequently the Commission began to make informal interim measure requests to Member States, asking them to suspend implementation of death penalties, deportations and extraditions while it was examining the applications. The first inter-state case request was made in 1957, just two years after the Commission began working. The British Government was asked, at the request of the Government of Greece, not

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38 Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights, p. 8.
43 Hereafter referred to as the Commission.
to execute an individual who had been captured by the British authorities and sentenced to death.\textsuperscript{45}

This discerned need of ordering interim measures seemingly arose in situations relating to expulsion in the coming years. In the 1960s and 1970s, numerous applicants complained over imminent expulsions where they held that the receiving state would mistreat them and thereby violate Article 3 of the Convention.\textsuperscript{46} The Commission, in spite of not enjoying explicit power to order interim measures, developed a practice of contacting the respondent governments and requesting that the decision to expel the applicants in question would be suspended until the organ itself could examine the matter.\textsuperscript{47} During these years, the Member States complied with nearly all of the cases where the Commission had made an informal request to suspend the deportation of an applicant.\textsuperscript{48} This shows a clear practice of an early respect for interim measures, even though the power to order them was not to be found in any legal documents by the Convention or the Court.

This practice, as well as the absence in the Convention of a provision on interim measures, led to a Recommendation by the Consultative Assembly of the Council of Europe to the Committee of Ministers in 1971, advocating for an additional protocol to the ECHR to be drafted. The recommended protocol was intended to provide direct power to order interim measures in the appropriate contexts.\textsuperscript{49} Nonetheless, the Committee of Ministers did not approve of the Recommendation and therefore no clear power to order interim measures was given. The reason for the refusal was primarily that it was thought to be unnecessary, as previous practice demonstrated that states already complied with the measures requested informally by the Commission.\textsuperscript{50}

\textsuperscript{45} \textit{Decision of the Commission, Greece vs. the UK, June 2\textsuperscript{nd} 1956 (176/56)}.
\textsuperscript{47} R. St. J. Macdonald: “Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights”, p. 733.
2.3.2 Codification – from the Commission to the Court

2.3.2.1 Rule 36 of the Rules of Procedure

In 1974 the Commission, motivated by the climate of confidence, decided to adopt interim measures under Rule 36 of its Rules of Procedure. By doing so, the practice of the earlier years was codified.51

Rule 36 under the Rules of Procedure reads as follows:

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

Once again in 1977, the Consultative Assembly pressed the Committee of Ministers to advise the Member States of the ECHR not to deport or extradite individuals who might be facing treatment in violation of Article 3 of the Convention in the receiving non-state party country.52 The Committee of Ministers fulfilled this request by adopting a Recommendation to Member States “to comply with any interim measures which the European Commission of Human Rights might indicate under Rule 36 of its Rules of Procedure, as, for instance, a request to stay extradition proceedings pending a decision on the matter.”53

2.3.2.2 Rule 34 of the Rules of Court

The Rules of Court also provided for interim measures in Rule 34 of the Courts original Rules from 1959.

Rule 34 under the Rules of Court reads as follows:

1. Before the constitution of a Chamber, the President of the Plenary Court may, at the request of a Party, of the Commission, of any person concerned or proprio motu, bring to the attention of the Parties any interim measures the adoption of which seems desirable. The Chamber, when constituted, or, if the Chamber is not in session, its President, shall have the same right.

2. Notice of these interim measures shall be immediately given to the Committee of Ministers.

The Court, however, did not deal with interim measures requests until 1989, in the case *Soering vs. the UK*.\(^{54}\) The reason for this was that the Court could only order interim measures after the request was presented to the Commission and the Commission or the state(s) referred the case to the Court.

### 2.3.2.3 Protocol 11 and Rule 39 of the Rules of Court

Protocol No. 11 to the European Convention on Human Rights entered into force on November 1st in 1998. The Protocol established a full-time single Court, abolishing the Commission and replacing the Convention’s former monitoring machinery.\(^{55}\) With the new Protocol the system was streamlined and most importantly, all applicants now had direct access to the new Court set up in Strasbourg.\(^{56}\)

While the entire protective system was being restructured, the Commission recommended yet again that interim measures should be made an explicit part of the Convention.\(^{57}\) Various bodies such as the Court, the Committee on Migration, Refugees and Demography of the Parliamentary Assembly and the Swiss delegation supported the recommendation, but despite immense support, the Committee of Ministers again declined to incorporate interim measures into the Convention.\(^{58}\) Rule 36 of the Rules of Procedures became Rule 39 of the Rules of Court, providing for interim measures orders by the Court today.

### 2.3.3 Recent Developments concerning Rule 39 Requests

Interim measures were relatively rarely requested in the first decades after the Convention came into force. For instance, only 182 requests for such measures in cases concerning expulsion had been made by 1989.\(^{59}\) In the following years, applications for interim measures increased significantly and in 2008 the Court received 3,178 requests for such measures.\(^{60}\) Between 2006 and 2010 the number of requests for interim measures to the Court under Rule

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\(^{54}\) *ECtHR, Soering vs. the United Kingdom, July 7th 1989 (14038/88), para. 77.*


\(^{59}\) Philip Leach: *Taking a Case to the European Court of Human Rights*, p. 32.

\(^{60}\) Philip Leach: *Taking a Case to the European Court of Human Rights*, p. 32.
39 increased by over 4,000%. In 2010, the caseload for applications under Rule 39 peaked and the Court received the highest number of interim measures requests in its history.

Given this steep rise in the number of requests under Rule 39 while the Court was already overburdened with applications, the President of the Court issued a public statement in 2011 on Rule 39 interim measures. In it, the President reaffirmed that the Court is not an appeal tribunal in immigration and asylum matters for the Contracting States and asserted that it should only intervene in exceptional cases. The Court stressed that this increasing workload concerning Rule 39 requests, resulted in a risk that the applicants facing a genuine threat to their lives if deported, would not have their cases examined in time to stop the deportation.

In April 2011, the High Level Conference on the Future of the Court took place in Izmir, Turkey, at the initiative of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe. In the Declaration adopted at the conference, the Committee of Ministers expressed concerns regarding this increasing workload in Rule 39 requests. It also welcomed the improvements in the Court’s practice that had already been set up. The Declaration expected a notable reduction in the number of Rule 39 requests after having recalled points namely regarding the role of the Court, the individual application and the requirement for states to provide national remedies with suspensive effect to individuals.

In July 2011, following the earlier mentioned public statement by the President of the Court, mentioned above, and the Izmir Declaration, a revised practice direction of the Court on Rule 39 requests was introduced. Later the same year, a centralized procedure was established, ordering that all interim measures requests should be considered by a special Rule 39 unit against a standard checklist. The new system is outlined to improve efficiency and stability and ensure rapid identification of cases. Hence, with this streamlined approach, the Court is better equipped to deal with the applications.

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62 Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights, p. 6.
64 Statement Issued by the President of the European Court of Human Rights Concerning Requests for Interim Measures (Rule 39 of the Rules of Court), p. 2.
66 Izmir Declaration at the High Level Conference on the Future of the European Court of Human Rights, para. 12.
Since these changes have been made, the number of interim measures requests has significantly dropped.\textsuperscript{71} Statistics show that while the Court received 2,778 requests under Rule 39 in 2011, it received 1,972 interim measures requests in 2012 and the tally was down to 1,588 requests in 2013.\textsuperscript{72}

The Court’s effort in reducing Rule 39 requests has thus proved quite successful. However, the Court is facing added difficulties regarding states’ non-compliance with interim measures while it was established in 2005 that such measures are binding upon Member States.\textsuperscript{73} This matter will be examined in Chapters 5 and 6.

\textsuperscript{71} Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights, p. 6.
\textsuperscript{73} ECtHR, Mamaikulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99), para. 129.
3 Application of Rule 39

3.1 Scope of Interim Measures under Rule 39

The necessary standards for an international tribunal to order interim measures towards states may vary depending on the wording of each instrument authorizing the measures. But what is generally in common with international tribunals regarding interim measures, is that the applicant requesting for such measures is required to demonstrate urgency and the likelihood of irreparable injury.\(^{74}\)

When reading the text of Rule 39, as listed in Chapter 2.2, the scope of the rule seems very broad. The judicial practice of the Court has however developed in such a way that the rule is only applicable to cases in which there is an imminent risk of irreparable damage.\(^{75}\)

The grounds on which Rule 39 is applied are not put forward in the Rules of Court, but the Court has determined them through its case law.\(^{76}\) The requirements for applying interim measures under Rule 39 were put forward in the landmark case *Mamatkulov and Askarov vs. Turkey*,\(^{77}\) ruled by the Court in 2005. The Court stated: “Interim measures have been indicated only in limited spheres. Although it does receive a number of requests for interim measures, in practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage.”\(^{78}\)

From this it can be gathered that in order for interim measure requests to be accepted and issued to a member state, an individual must meet the following criteria:

1. There must be a threat of irreparable harm of an extremely serious nature;
2. the harm in question must be imminent; and
3. there must be, *prima facie*, a clear risk of a violation of rights protected by the ECHR.\(^{79}\)

According to this, the Court does not readily apply Rule 39. If necessary urgency is not demonstrated, the Court must refuse to order interim measures.\(^{80}\) Damage is considered irreparable when there is no remedy available at law that will adequately compensate for it. If the potential damage can in some way be compensated, interim measures are considered

\(^{74}\) Jo M. Pasqualucci: “Interim Measures in International Human Rights: Evolution and Harmonization”, p. 16.
unnecessary. Thus in case of deportation, a real and personal risk of harm in the country of return must be shown. From this it follows that interim measures under Rule 39 will in general only be granted if the applicant can show that there is an imminent risk of irreparable damage to his life or limbs. Furthermore, the alleged ill-treatment of the applicant in question must attain a minimum level of severity. For example, the severity of ill-treatment was considered sufficient in the Court’s case of Shamayev and Others vs. Georgia and Russia, which concerned the extradition of Chechen individuals to Russia by Georgian authorities. The Court held that threats, harassments, detentions, enforced disappearances and killings of persons of Chechen origin amounted to serious persecution and that the extradition of one applicant to Russia would constitute a violation of Article 3 of the ECHR.

In addition to this, the applicant at issue must demonstrate that domestic remedies have been exhausted by providing copies of all decisions made in the home country. The Court and the Commission have however in certain cases decided to waive this rule and make an interim measures request in advance of the domestic decision. Such an order is conditional on the outcome of the domestic court hearing. The type of cases in which this has been done are those where deportation is planned to occur immediately after the rendering of the domestic decision, resulting in making an interim measures application impossible. The Court exercises this practice rarely.

It should be noted that the applicant requesting for interim measures to be ordered, does not have to meet the same high standard of proof applied to an individual application under Article 34 of the ECHR. What must be established is a probability of the requirements mentioned above. Evidence of this lower threshold is supported by the fact that more than 50% of all cases where interim measures are requested are declared inadmissible. The Court has stated: “It follows from the very nature of interim measures that a decision on whether they should be indicated in a given case will often have to be made within a very short lapse of time.”

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83 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 70.
84 ECtHR, Shamayev and Others vs. Georgia and Russia, April 12th 2005 (36378/02).
of time (...). Consequently, the full facts of the case will often remain undetermined until the Court's judgment on the merits of the complaint to which the measure is related. It is precisely for the purpose of preserving the Court's ability to render such a judgment (...) that such measures are indicated. Until that time, it may be unavoidable for the Court to indicate interim measures on the basis of facts which, despite making a *prima facie* case in favour of such measures, are subsequently added to or challenged to the point of calling into question the measures' justification.”91

Where individuals can demonstrate the risk they are facing, it is not necessary to prove that they are at more risk than any other member of a group they are a part of.92 This principle also applies to the application of Rule 39.93

When deciding if an interim measure should be granted to an applicant, both the credibility of the applicant’s request as well as the presentation of evidence are very important.94 It is critical that all relevant supporting documents are submitted to the Court to establish the extent of the risk the applicant is facing. The Court will primarily rely on the current and future situation of the applicant when determining the existence of risk, but information from the applicant’s past experience may also be relevant.95 General documents with information on the relevant country from organizations such as the UNHCR,96 Amnesty International and other NGOs97 might be adequate. Most importantly there must be a solid evidence to link the applicant with the particular risk arising in his specific situation.98 Medical reports and country conditions documents would constitute as examples of evidence which has proved to be helpful in confirming the applicant’s request.99

In deportation cases, the Court has had a tendency to take into consideration all the circumstances of the applicant’s case, including foreseeable consequences if the interim

91 ECtHR, Paladi vs. Moldova, March 10th 2009 (39806/05), para. 89.
92 ECtHR, NA. vs. the United Kingdom, July 17th 2008 (25904/07), para. 116; ECtHR, Saadi vs. Italy, February 28th 2008 (37201/06), para. 132.
96 The United Nations High Commissioner for Refugees.
97 Non-Governmental Organizations.
98 Philip Leach: *Taking a Case to the European Court of Human Rights*, p. 34.
measures are not taken with regard to country conditions as well as the personal circumstances of the applicant.100

3.2 Grounds for Issuing Interim Measures under Rule 39

In the Practice Directions on interim measures made by the Court, the following is stressed: “Any request lodged with the Court must state reasons. The applicant must in particular specify in detail the grounds on which his or her particular fears are based.”101 In addition, the nature of the alleged risks must be stated along with the Convention’s provisions which might be violated.102

In the majority of cases, requests for the application of Rule 39 most often relate to expulsion cases and the right to life under Article 2 of the ECHR and the right not to be subjected to torture or inhuman treatment under Article 3 of the ECHR.103 As regards deportation cases concerning Article 3, they will be dealt with in Chapter 4.5 of the present thesis.

The Court does however not limit its application to these previously mentioned grounds as interim measures have also been ordered in cases involving alleged violations of other provisions of the Convention. The right to respect for private and family life under Article 8 of the ECHR104 is an example. Rule 39 requests under Article 8 are in practice rarely granted, but when they are, it is most commonly done in the context of deportation and childcare.105 The request is likely to be submitted if the applicant shows the existence of a special bond between him or her and the persons from whom he or she will be separated.106 Rule 39 requests under Article 8 can however arise in any sphere and in the case Evans vs. United Kingdom107 the applicant complained that national law permitted her ex-partner to withdraw his consent to store embryos created by them before she underwent treatment for cancer. The applicant alleged violation of Article 2 and Article 8 of the ECHR, but the Court based its examination on Article 8 since the Grand Chamber found that the embryos did not have a right to life. After considering her case, the Court decided to order interim measures under

101 Practice Directions on Requests for Interim Measures, p. 52.
102 Practice Directions on Requests for Interim Measures, p. 52.
103 Factsheet on Interim Measures, p. 2.
104 ECHR, Evans vs. the United Kingdom, April 10th 2007 (6339/05); ECHR, Nunez vs. Norway, June 28th 2011 (55597/09); ECHR, X. vs. Croatia, July 17th 2008 (11223/04).
105 ECHR, Neulinger and Shuruk vs. Switzerland, July 6th 2010 (41615/07).
107 ECHR, Evans vs. the United Kingdom, April 10th 2007 (6339/05).
Rule 39 and ensure that the embroys were preserved until the Court had completed its examination.\(^{108}\)

The Court has also applied Rule 39 in cases concerning the right to liberty and security under *Article 5 of the ECHR*\(^ {109}\) with regard to conditions for individuals in detention. The applicant in the case *Aleksanyan vs. Russia*\(^ {110}\) was held in pre-trial detention, charged with numerous offences. During the detention his health worsened significantly and he was ultimately diagnosed with AIDS. The Court applied Rule 39 and ordered the Russian authorities to immediately ensure that the applicant received treatment in a specialist AIDS hospital and that he should be examined by a mixed medical commission. This case established the first time that the ECtHR ordered a release of an individual held in pre-trial detention.\(^ {111}\)

Another example of the expanded application of Rule 39 is in cases concerning the right to a fair trial under *Article 6 of the ECHR*.\(^ {112}\) Interim measures have however only been granted very rarely on the basis of Article 6.\(^ {113}\) The case *Öcalan vs. Turkey*\(^ {114}\) concerned the applicant’s access to lawyers and the right to a fair trial. The Court ordered interim measures under Rule 39 and requested the Turkish authorities to ensure compliance with ECHR Article 6 in domestic criminal proceedings against the applicant, and to ensure the effective exercise by the applicant of his right to lodge an individual application to the Court through lawyers of his own choosing.\(^ {115}\)

Lastly, *Article 4 of the ECHR*, expressing the right not to be held in slavery or forced into labor, should be mentioned in the context of cases concerning sexual exploitation and trafficking. In a 2010 report by the Council of Europe\(^ {116}\) it was stressed that Rule 39 orders have been made to suspend removal where the individual fears being subjected to forced

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\(^{109}\) ECtHR, Aleksanyan vs. Russia, December 22\(^ {nd}\) 2008 (46468/06), ECtHR, Ilijkov vs. Bulgaria, July 26\(^ {th}\) 2001 (33977/96).

\(^{110}\) ECtHR, Aleksanyan vs. Russia, December 22\(^ {nd}\) 2008 (46468/06).


\(^{112}\) ECtHR, Öcalan vs. Turkey, May 12\(^ {th}\) 2005 (46221/99); ECtHR, Shtukaturov vs. Russia, March 27\(^ {th}\) 2008 (44009/05); ECtHR, Othman Abu Qatada vs. the United Kingdom, January 17\(^ {th}\) 2012 (8139/09).


\(^{114}\) ECtHR, Öcalan vs. Turkey, May 12\(^ {th}\) 2005 (46221/99).

\(^{115}\) Philip Leach: *Taking a Case to the European Court of Human Rights*, p. 32.

\(^{116}\) Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights.
labor, sexual exploitation or trafficking under ECHR Article 4. The rapporteur encouraged Member States and the Court to be aware of the gender perspective of Rule 39.\textsuperscript{117}

In another context, many individuals have requested the Court to order interim measures under Rule 39 in order to prevent their transfer between European Union member states under the Dublin Regulation.\textsuperscript{118} Rule 39 requests have been made in respect of Dublin transfers complaining that the reception conditions in the receiving Member State to the treaty are in violation of the ECHR, e.g. Article 2 and Article 3 of the Convention.\textsuperscript{119} Such cases will further be dealt with in Chapter 4.5.4.2.

\subsection*{3.3 The Procedure}

Any individual who intends to submit an application before the European Court of Human Rights under \textit{Article 34 of the ECHR} can submit a Rule 39 request at any stage of the Court proceedings. The individual can submit a Rule 39 application regardless of his or her nationality as long as he or she is placed under the jurisdiction of one of the Member States to the Convention, within the meaning of \textit{Article 1 of the ECHR}.\textsuperscript{120} In cases where a whole family is facing an imminent risk of irreparable harm, the members of the family can apply both together and individually. The Court then decides whether the applications will be considered separately or be joined together.\textsuperscript{121}

When applying, individuals should comply with the requirements set out in the Court’s Practice Directions on requests for interim measures, made by the Court.\textsuperscript{122} The request for interim measures may also be made by “any other person concerned”\textsuperscript{123}, such as a relative of a person held in detention.\textsuperscript{124} The Court may also make an interim measures order of its own motion.\textsuperscript{125}

When submitting a request for interim measures to the Court under Rule 39, it is advisable for the applicant to simultaneously notify the respondent state directly that such a request is

\begin{itemize}
\item \textsuperscript{117} Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights, p. 10.
\item \textsuperscript{118} Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person.
\item \textsuperscript{119} Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights, p. 9.
\item \textsuperscript{120} Article 1 on the Obligation to Respect Human Rights: “The High Contracting Parties shall secure to everyone within their jurisdiction the right and freedoms defined in Section 1 of this Convention.”
\item \textsuperscript{121} Toolkit on How to Request Interim Measures under Rule 39 of the Rules of the European Court of Human Rights for Persons in Need of International Protection, p. 8.
\item \textsuperscript{122} Practice Directions on Requests for Interim Measures, p. 52.
\item \textsuperscript{123} Rule 39(1) of the Rules of Court.
\item \textsuperscript{124} Philip Leach: Taking a Case to the European Court of Human Rights, p. 31.
\item \textsuperscript{125} Rule 39(1) of the Rules of Court.
\end{itemize}
being made. This may help in ensuring that the state is in a position to act quickly if the Court decides to grant the request for interim measures.\textsuperscript{126}

With the passage of Protocol 11 to the Convention and thereby the founding of Rule 39, it was established that interim measure applications should be automatically registered instead of being registered only after the request is accepted or rejected, as was customary before the advent of Rule 39.\textsuperscript{127}

The Court deals with every request for interim measures under Rule 39 as soon as possible, but if the request is not complete or sufficiently substantiated, the Court may decline to deal with it.\textsuperscript{128} The Court may of its own motion ask for additional information to be submitted by the applicant, but such omissions will delay the Court’s decision.\textsuperscript{129}

The procedure is conducted in writing, and every request the Court receives is examined individually. When the Court has reached a decision to either grant or refuse the applicant the application of Rule 39 interim measures, the applicant is informed of that decision by letter. However, the Court’s reasoning for the conclusion is not stated in the letter. Member States have criticized the lack of reasoning when Rule 39 is applied. It has been discussed whether the Court should give reasoning in order to improve the state’s understanding on what amounts to irreparable harm and to address necessary issues at national levels as well as enabling states to more appropriately challenge the application of interim measures.\textsuperscript{130} Despite this criticism the Court has nevertheless remained reluctant to provide reasons. This has been explained by the Court by stating that the giving of reasons would delay the urgent matter of applying interim measures and it would as well inappropriately enlarge the Rule 39 assessment stage beyond the question of whether there is a \textit{prima facie} risk to an examination of the merits of the case.\textsuperscript{131} However, the Court constructs the wording of a Rule 39 ordering in an especially clear manner in some cases, to ensure that the purpose of the measure is rightly understood and the specific needs of an applicant are met.\textsuperscript{132}

\textsuperscript{126} Philip Leach: \textit{Taking a Case to the European Court of Human Rights}, p. 34.
\textsuperscript{129} ECtHR, Shtukaturov vs. Russia, March 27\textsuperscript{th} 2008 (44009/05), para 33.
\textsuperscript{131} Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights, p. 14.
\textsuperscript{132} Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights, p. 14.
When the Court decides to order Rule 39 interim measures, the defending state is informed of the decision by fax and post.\textsuperscript{133} If there is a pressing need for ordering the interim measures the Court may first inform the parties by phone before sending the decision by fax or post.\textsuperscript{134}

When the Court rejects a Rule 39 request, applicants can still maintain their full application to the Court in line with the Court’s admissibility criteria. In such situations applicants must indicate whether they wish to pursue the full application.\textsuperscript{135} The decision is final and no appeals can be filed against a decision where the Court has rejected Rule 39 requests. Applicants may however submit a new request if new elements arise.

3.4 Time Frame

3.4.1 Request Timing

In its Practice Directions, the Court advises applicants to make requests for interim measures in good time. They should normally be received as soon as possible after the final domestic decision has been taken.\textsuperscript{136} This is very important as this is done to enable the Court and its Registry to have sufficient time to examine the matter in question. In practice the Court will simply be unable to deal with applications if they are made too late.\textsuperscript{137} However, in cases where the final domestic decision is imminent and there is risk of immediate enforcement, applicants should not wait for that final decision but submit at once the request for interim measures under Rule 39, indicating the date on which the decision will be taken and notify that the request is subject to the final domestic decision being negative. By doing this, the Court is more likely to be able to examine the request in a timely and proper manner, especially when it is supported by a large number of documents.\textsuperscript{138}

It should however be noted, that in some cases the interim measures request can not be properly considered by the Court due to the nature of emergency. In asylum cases the applicant may be on her or his way to the airport and almost on the plane to the country where the applicant’s rights are allegedly at risk of being violated.\textsuperscript{139}

\textsuperscript{133} Toolkit on How to Request Interim Measures under Rule 39 of the Rules of the European Court of Human Rights for Persons in Need of International Protection, p. 13.
\textsuperscript{134} Toolkit on How to Request Interim Measures under Rule 39 of the Rules of the European Court of Human Rights for Persons in Need of International Protection, p. 13.
\textsuperscript{136} Practice Directions on Requests for Interim Measures, p. 53.
\textsuperscript{137} Philip Leach: Taking a Case to the European Court of Human Rights, p. 34.
\textsuperscript{138} Toolkit on How to Request Interim Measures under Rule 39 of the Rules of the European Court of Human Rights for Persons in Need of International Protection, p. 12.
\textsuperscript{139} B.M. Zupancic: “Asylum Requests at the ECHR and its Rule 39 Emergency Procedures”, p. 3.
When determining the imminent nature of a risk, the timing element of the expected removal is crucial. Applicants should therefore always indicate the time and date of the expected removal.\textsuperscript{140} Due to the urgency nature of Rule 39 requests, it is advisable to contact the Court’s Registry and warn of the filing of a request or to verify its receipt.\textsuperscript{141}

Time is obviously of essence when requesting for Rule 39 interim measures and complaints brought to the ECtHR can typically take a couple of years to reach final judgment.\textsuperscript{142} In practice, when the Court decides to order a Rule 39 interim measure, it can apply the priority procedure under \textit{Rule 41 of the Rules of Court}.\textsuperscript{143} The Court published the criteria for granting Rule 41 in 2010, which comprised of seven categories. Category I provides for “Urgent applications (in particular risk to life or health of the applicant, other circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue, application of Rule 39 of the Rules of Court).”\textsuperscript{144} The applicants in the relevant case can also ask the Court to apply Rule 41, regardless of the granting or rejection of an interim measure under Rule 39.\textsuperscript{145} The rule provides an additional mechanism for the speedy resolution of the case. This was done in the case \textit{N.A. vs. the United Kingdom}\textsuperscript{146} where an ethnic Tamil was issued with removal directions by the authorities in the United Kingdom. On the same date the President of the Court ordered the authorities not to remove the applicant under Rule 39, the case was also prioritized under Rule 41.\textsuperscript{147} It should however be noted that Rule 41 does not guarantee the examination of the case in a very short time, as the full procedure still has to be respected and the Court still needs a minimum of 18 months to issue a judgment in which Rule 41 is applied.\textsuperscript{148}

The Court may also give notification of the introduction of urgent cases to the respondent government, by any available means under Rule 40.\textsuperscript{149}

\textsuperscript{140} Toolkit on How to Request Interim Measures under Rule 39 of the Rules of the European Court of Human Rights for Persons in Need of International Protection, p. 12.
\textsuperscript{142} Nuala Mole and Catherine Meredith: Human Rights Files, No. 9: Asylum and the European Convention on Human Rights, p. 226.
\textsuperscript{143} Rule 41 on Order of dealing with cases: “In determining the order in which cases are to be dealt with, the Court shall have regard to the importance and urgency of the issues raised on the basis of criteria fixed by it. The Chamber, or its President, may, however, derogate from the criteria so as to give priority to a particular application.”
\textsuperscript{144} The Court’s Priority Policy, p. 2.
\textsuperscript{146} ECHR, NA. vs. the United Kingdom, July 17\textsuperscript{th} 2008 (25904/07).
\textsuperscript{147} ECHR, NA. vs. the United Kingdom, July 17\textsuperscript{th} 2008 (25904/07), para.5.
\textsuperscript{149} Rule 40 on Urgent notification of an application: “In any case of urgency the Registrar, with the authorisation of the President of the Chamber, may, without prejudice to the taking of any other procedural steps and by any
In whole, once a request has been submitted, it will be considered by the Court as speedily as possible. 

3.4.2 Duration of Rule 39 Interim Measures

When the Court orders interim measures under Rule 39, it specifies the period of time during which the measures should apply. Such measures are normally applied for an open-ended period of time, usually until the case is formally concluded before the ECtHR. In some situations, the Court orders interim measures without any specific time frame, just stating until further notice. By this, the Court is indicating that Rule 39 should be applied until the end of the procedure before the Court, unless new circumstances arise that require lifting of the measure.

In practice, the Court however often applies Rule 39 with a time limit, i.e. until a given date which the Court specifies, after which the Court will determine whether the interim measures should be prolonged until another given date. This is often done when the relevant case requires further evidence to be provided, even though the Court is increasingly rejecting incomplete requests under Rule 39.

Since interim measures rely on the continued existence of the risk at question, they will not be renewed if the risk no longer exists. Interim measures may however be lifted at any time by a decision of the Court. In particular, if the application is not maintained the measure may be lifted, since an order under Rule 39 is linked to the proceedings before the Court. This can be done by the individual judge of the Court who took the decision of ordering the interim measures or by the Chamber of the Court. The Court may lift Rule 39 where the Court considers it necessary; e.g. if the applicant is no longer at risk of imminent and irreparable
harm or where the risk of harm is no longer imminent.\textsuperscript{158} Examples of this are asylum seekers who have previously been rejected asylum in a country and are invited to submit a new claim for asylum to the national authorities. This was the situation with more than three hundred Tamil individuals, following the judgment of the Court in the case \textit{NA vs. the United Kingdom}.\textsuperscript{159} The Court may also lift Rule 39 interim measures when the relevant applicant or the state requests for lifting of the measures.\textsuperscript{160}

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\item[\textsuperscript{159}] \textit{ECHR, NA. vs. the United Kingdom, July 17\textsuperscript{th} 2008 (25904/07)}.
\end{itemize}
\end{footnotesize}
4 Rule 39 in Asylum Cases

4.1 Introduction

The majority of Rule 39 interim measures are applied by the Court in cases concerning applicants’ deportation to their country of origin.\textsuperscript{161} In such cases, the applicants are typically facing ill-treatment such as torture or inhuman or degrading treatment under Article 3 of the Convention if the deportation takes place.\textsuperscript{162}

In the context of asylum, the applicants are in many cases refugees or asylum seekers who have been denied asylum in a Contracting state and believe that they will be subjected to treatment in breach of Article 3 of the ECHR upon return to their home country, and thereby that the principle of non-refoulement will be breached.

In this chapter such cases will be looked into, and factors in relation to them will be scrutinized, mainly the principle of non-refoulement and the controversial concept of diplomatic assurances.

4.2 The Principle of Non-Refoulement

The principle of non-refoulement is an indisputable cornerstone of international refugee and asylum law.\textsuperscript{163} The principle contains the prohibition of states to forcibly remove an individual to a country or territory where she or he runs the risk of being subjected to human rights violations.\textsuperscript{164} States are therefore obliged not to return a person to a country where the individual in question is at risk of facing persecution, or other ill-treatment that violates her or his human rights.\textsuperscript{165} That being said, the principle protects individuals from future harm and corresponds with the general obligation on states to ensure effective human rights protection.\textsuperscript{166}

Rule 39 interim measures by the Court are extremely important in safeguarding the principle of non-refoulement.

4.3 The Principle of Non-Refoulement as Customary International Law

State practice coupled with \textit{opinio juris} demonstrates that the principle of non-refoulement is

\begin{footnotesize}
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\item \textsuperscript{161} Robin CA White, Clare Ovey and Francis Jacobs: \textit{The European Convention on Human Rights}, p. 25.
\item \textsuperscript{162} \textit{Factsheet on Interim Measures}, p. 2.
\item \textsuperscript{163} In the present thesis, the term \textit{asylum} refers to an individual’s protection from human rights violations, provided by a state other than the individual’s country of origin or residence.
\item \textsuperscript{164} C.V. Wouters: \textit{International Legal Standards for the Protection from Refoulement}, p. 23.
\item \textsuperscript{165} C.V. Wouters: \textit{International Legal Standards for the Protection from Refoulement}, p. 24–25.
\item \textsuperscript{166} C.V. Wouters: \textit{International Legal Standards for the Protection from Refoulement}, p. 26.
\end{itemize}
\end{footnotesize}
regarded as a norm of customary international law. As such, it is binding upon all states of the international community as custom. The acceptance by both parties and non-parties to the Refugee Convention of the principle powerfully supports the existence of the customary rule.167

Many scholars argue that the principle can be considered as a norm of jus cogens.168 Such norms are “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”169

4.4 The Principle of Non-Refoulement under the 1951 Convention Relating to the Status of Refugees

The fundamental nature of the principle of non-refoulement is confirmed in Article 33 of The Convention Relating to the Status of Refugees which was adopted in Geneva in 1951.170 The article is the principal acknowledgement of the international community of the need of refugees to enter and remain in an asylum state.171 Article 33 (1) provides the following:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.

It should be noted that the principle of non-refoulement does not establish a duty on the part of States to receive all refugees who seek asylum. It only prohibits measures that cause refugees to be sent back to the country of their persecutors.172

4.4.1 The Scope of Article 33 of the Refugee Convention

Article 33 of the Refugee Convention applies to any person who is a refugee under the terms of Article 1A(2) of the convention.173 Anyone can be a refugee, including those who are...
stateless, no limitations exist regarding the person’s nationality or legal status to protect her or him from refoulement.\textsuperscript{174} Article 1A(2) does not define a refugee under the condition that the person has formally been recognized as a refugee.\textsuperscript{175} The principle is therefore applicable to all refugees, without regard to whether they have been authorized arrival in the relevant country or formally recognized as refugees. Accordingly, the principle of non-refoulement under Article 33(1) of the Refugee Convention protects both refugees and asylum seekers.\textsuperscript{176}

The principle of non-refoulement is applicable to any form of forcible removal of a person.\textsuperscript{177} It has sometimes been suggested that the principle does not apply to acts of extradition. However, extradition cases do not fall outside the scope of non-refoulement.\textsuperscript{178} This can be deduced from the clear wording of Article 33(1) of the Refugee Convention, referring to expulsion or return “in any manner whatsoever”. An exclusion of extradition would not be compatible with human rights conventions.\textsuperscript{179}

The content of Article 33(1) Refugee Convention comprises a protection from well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or on account of political opinions. There is no universally accepted definition of what amounts to persecution.\textsuperscript{180} It can however be said that the principle provides, in addition to the aforementioned reasons, protection from a real risk of torture or cruel, inhuman or degrading treatment or punishment as well as a threat to life, physical integrity or liberty.\textsuperscript{181}

\section*{4.5 The Principle of Non-Refoulement and Article 3 of the ECHR}

Even though the European Convention on Human Rights does not contain an explicit provision on the principle of non-refoulement, the Court and the Commission have through

\begin{footnotes}
\footnotetext[174]{C.V. Wouters: \textit{International Legal Standards for the Protection from Refoulement}, p. 47.}
\footnotetext[175]{Elihu Lauterpacht and Daniel Bethlehem: “The Scope and Content of the Principle of Non-Refoulement: Opinion”, p. 116.}
\footnotetext[176]{Elihu Lauterpacht and Daniel Bethlehem: “The Scope and Content of the Principle of Non-Refoulement: Opinion”, p. 118.}
\footnotetext[177]{Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, p. 3.}
\footnotetext[178]{Elihu Lauterpacht and Daniel Bethlehem: “The Scope and Content of the Principle of Non-Refoulement: Opinion”, p. 112.}
\footnotetext[179]{Elihu Lauterpacht and Daniel Bethlehem: “The Scope and Content of the Principle of Non-Refoulement: Opinion”, p. 113.}
\footnotetext[181]{Elihu Lauterpacht and Daniel Bethlehem: “The Scope and Content of the Principle of Non-Refoulement: Opinion”, p. 128.}
\end{footnotes}
case law established a developed prohibition on refoulement under Article 3 of the Convention.\textsuperscript{182}

Article 3 of the ECHR stipulates the following:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

While the ECHR is not an instrument particularly concerned with refugee protection, Article 3 has been interpreted by the Court as providing an effective means of protection against all forms of return to countries where the individual in question is at risk of being subjected to torture, or to inhuman or degrading treatment or punishment.

The protection provided by Article 3 is wider than that provided by the Refugee Convention in many respects.\textsuperscript{183} What mainly distinguishes the scope of protection in a refugee context on the other hand and in the context of human rights on the other is the nature of the risk at issue. As previously mentioned, non-refoulement in the context of refugee law and the Refugee Convention is grounded on a threat of persecution towards the refugee, i.e. where his life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. On the contrary, the essential element of non-refoulement protection in the human rights context is a risk of being subjected to torture or ill-treatment proscribed by Article 3 of the ECHR.\textsuperscript{184} The principle applies to anyone, irrespective of their immigration status, which corresponds with the obligation on Contracting States under Article 1 of the ECHR to secure everyone within their jurisdiction the rights defined in the Convention.\textsuperscript{185}

The extension of the principle under the ECHR underlines the important role it serves as a safeguard for refugees and asylum seekers who have either been wrongly rejected or those who do not meet the criteria under the Refugee Convention but are nonetheless in need of international protection.\textsuperscript{186} Furthermore, interim measures under Rule 39 add to this safeguard, offering an essential remedy to applicants who face a real risk according to Article 3 when there is a pending deportation, expulsion or extradition order towards them.\textsuperscript{187} It should however be noted that the granting of a Rule 39 interim measure does not

\begin{itemize}
\item \textsuperscript{182} C.V. Wouters: \textit{International Legal Standards for the Protection from Refoulement}, p. 187.
\item \textsuperscript{183} \textit{UNHCR Manual on Refugee Protection and the ECHR}, p. 1.
\item \textsuperscript{184} Elihu Lauterpacht and Daniel Bethlehem: “The Scope and Content of the Principle of Non-Refoulement: Opinion”, p. 160.
\item \textsuperscript{185} \textit{UNHCR Manual on Refugee Protection and the ECHR}, p. 3.
\item \textsuperscript{186} \textit{UNHCR Manual on Refugee Protection and the ECHR}, p. 11.
\item \textsuperscript{187} \textit{UNHCR Manual on Refugee Protection and the ECHR}, p. 10.
\end{itemize}
automatically lead to a substantive finding by the Court that the deportation which has been stopped will violate Article 3.\textsuperscript{188}

4.5.1 The Principle of Non-Refoulement Established under the ECHR

The obligation on Contracting States to protect individuals from refoulement was accepted by the Court for the first time in the landmark case of \textit{Soering vs. the United Kingdom},\textsuperscript{189} which was ruled by the Court in 1989. The principle of non-refoulement was thereby established under human rights law.\textsuperscript{190}

The case concerned the extradition of the applicant, a young German national who was charged with murder, from the United Kingdom to the United States. The applicant submitted an application to the Commission, alleging that he would face the death penalty and sent to the death row were he to be extradited to the United States.\textsuperscript{191} The Court held unanimously that if British authorities would extradite the applicant, Article 3 of the ECHR would be breached.\textsuperscript{192} In its decision, the Court stated that “the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.”\textsuperscript{193}

In relation to asylum and Rule 39 interim measures, the principle of non-refoulement was accepted by the Court for the first time in the \textit{Cruz Varas} case\textsuperscript{194} in 1991.\textsuperscript{195} The Court referred to the \textit{Soering judgment} and added that the principle applied to expulsion cases like the present one as well as to extradition cases.\textsuperscript{196}

The Court has established that the Contracting States generally have the right to control the entry, residence and expulsion of aliens, but that such deportation may never entail treatment that is contrary to Article 3 of the Convention. In such cases, Article 3 implies a clear obligation no to deport the individual at issue to that country.\textsuperscript{197}

\textsuperscript{188} Nuala Mole and Catherine Meredith: \textit{Human Rights Files, No. 9: Asylum and the European Convention on Human Rights}, p. 221; ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99); ECtHR, Olaechea Cahuas vs. Spain, August 10th 2006 (24668/03).

\textsuperscript{189} ECtHR, Soering vs. the United Kingdom, July 7th 1989 (14038/88).

\textsuperscript{190} C.V. Wouters: \textit{International Legal Standards for the Protection from Refoulement}, p. 188.

\textsuperscript{191} ECtHR, Soering vs. the United Kingdom, July 7th 1989 (14038/88), para. 11–26.

\textsuperscript{192} ECtHR, Soering vs. the United Kingdom, July 7th 1989 (14038/88), para. 111.

\textsuperscript{193} ECtHR, Soering vs. the United Kingdom, July 7th 1989 (14038/88), para. 91.

\textsuperscript{194} ECtHR, Cruz Varas and Others vs. Sweden, March 20th 1991 (15576/89).

\textsuperscript{195} C.V. Wouters: \textit{International Legal Standards for the Protection from Refoulement}, p. 188.

\textsuperscript{196} ECtHR, Cruz Varas and Others vs. Sweden, March 20th 1991 (15576/89), para. 69–70.

\textsuperscript{197} ECtHR, F.H. vs. Sweden, January 20th 2009 (32621/06/06), para. 89.
4.5.2 The Absolute Character of Article 3 of the ECHR

The torture and ill-treatment proscribed by Article 3 are prohibited in absolute terms. Even though it is not stated explicitly in the provision, Article 3 does not allow for any exceptions under any kind of circumstances.\footnote{C.V. Wouters: \textit{International Legal Standards for the Protection from Refoulement}, p. 309.}

This absolute character of Article 3 with respect to the principle of non-refoulement was acknowledged by the Court in the case of \textit{Chahal vs. the United Kingdom}\footnote{ECtHR, \textit{Chahal vs. the United Kingdom}, November 15th 1996 (22414/93), para. 80.} ruled by the Court in 1996. The absolute character has been re-emphasized by the Court, e.g. in the case of \textit{Saadi vs. Italy},\footnote{ECtHR, \textit{Saadi vs. Italy}, February 28th 2008 (37201/06), para. 141.} where the Court ordered interim measures under Rule 39 until further notice in order to suspend or annul the decision to deport the applicant back to his home country Tunisia.\footnote{ECtHR, \textit{Saadi vs. Italy}, February 28th 2008 (37201/06), para. 138.}

In its judgment, the Court stated: “Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule.”\footnote{ECtHR, \textit{Saadi vs. Italy}, February 28th 2008 (37201/06), para. 138.}

4.5.3 Risk of Being Subjected to Ill-Treatment Proscribed by Article 3

4.5.3.1 The Substantial Grounds Criteria

In cases where the applicant alleges that his deportation to another country will violate his rights under Article 3 of the ECHR because of risk of ill-treatment in the receiving state, \textit{substantial grounds} must be shown for believing that a real risk exists of such treatment.\footnote{Anna Kotzeva, Lucy Murray, and Robin Tam: \textit{Asylum and Human Rights Appeals Handbook}, p. 46.} This is the essence of the standard of proof that needs to be fulfilled, and as such a matter of credibility and evidence.\footnote{C.V. Wouters: \textit{International Legal Standards for the Protection from Refoulement}, p. 266.} The circumstances that the individual will face upon return need to be considered in each case.\footnote{Anna Kotzeva, Lucy Murray and Robin Tam: \textit{Asylum and Human Rights Appeals Handbook}, p. 47; ECtHR, \textit{Mamatkulov and Askarov vs. Turkey}, February 4th 2005 (46827/99 and 46951/99), paras. 72–73.}

A credibility assessment has to take place when deciding on the credibility of a claim for protection from refoulement under Article 3. Quite a few factors determine the credibility such as the details, plausibility and consistency of the evidence in the case. These factors
depend on the personal and general facts presented by the applicant and the state’s investigation on whether they are in line with country of origin information.206

With regard to evidence, all relevant information should be submitted as promptly and orderly as possible. However, asylum seekers and refugees may have agitation towards the state at issue, especially when they have experienced severe torture.207 Such was the case in Cruz Varas, as mentioned earlier in Chapter 4.2.1, and the applicant did not come forward with his allegations on torture during initial police questioning. In the view of the Court, this called considerable doubt upon the applicant’s credibility.208

In further regard to the evidence, it should not be too general but mainly relate to the person concerned.209 Reports that tell of the situation in the country of origin and address the grounds for the alleged risk of ill-treatment directly are substantially important.210 The Court has acknowledged that it might be impossible for the applicant at issue to provide the required documentary evidence, due to the fact that he or she has fled the country where the documentation resides.211 Such were the circumstances in the Shamayev case,212 when the Court accepted that the applicants should not be blamed for not providing enough evidence.

The burden of demonstrating that substantial grounds exist for believing that the applicant in question will face a real risk of being subjected to ill-treatment in breach of Article 3 of the ECHR in the receiving state, is shared between the applicant and the state.213 At first, the burden is on the applicant to present a credible claim and provide initial documentary evidence, but then the state has the responsibility for carrying out the credibility assessment of the claim, including the evidence provided by the applicant and country of origin information in light of the applicant’s story.214

The Court recognizes that because of the situation in which asylum seekers and refugees are typically in, they often need to be given benefit of the doubt when it comes to the credibility assessment of their statements and evidence.215

Regarding the ordering of Rule 39 interim measures, the main practical problem with the substantial grounds criteria is, as was addressed at the Bled Conference in 2011, how to assess

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206 C.V. Wouters: International Legal Standards for the Protection from Refoulement, p. 266.
207 C.V. Wouters: International Legal Standards for the Protection from Refoulement, p. 266.
208 ECtHR, Cruz Varas and Others vs. Sweden, March 20th 1991 (15576/89), para. 78.
209 ECtHR, Shamayev and Others vs. Georgia and Russia, April 12th 2005 (36378/02), para. 350.
210 C.V. Wouters: International Legal Standards for the Protection from Refoulement, p. 270.
211 C.V. Wouters: International Legal Standards for the Protection from Refoulement, p. 270.
212 ECtHR, Shamayev and Others vs. Georgia and Russia, April 12th 2005 (36378/02).
213 C.V. Wouters: International Legal Standards for the Protection from Refoulement, p. 274.
214 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 67; ECtHR, Shamayev and Others vs. Georgia and Russia, April 12th 2005 (36378/02), para. 337.
215 Decision by the ECtHR, Akaziebie vs. Sweden, March 8th 2007 (23944/05).
the risk of future harm that might result if the Contracting state at question rejects the asylum request. The substantial grounds criteria refer to future acts and the probability of whether they happen or not.216

4.5.3.2 Threshold of Severity

In order for ill-treatment to be assessed under the scope of Article 3 of the ECHR, it must attain a minimum level of severity. This is done to decide whether the acts complained of are severe enough to violate Article 3.217 What amounts to this minimum level of severity is relative and depends on all the circumstances of each case, e.g.:

1. Duration of treatment;
2. Physical and mental effects the treatment causes;
3. Sex, age and state of health of the person at issue.218

This is even more relevant in refoulement cases as they involve the assessment of the possibility of ill-treatment in the future.219 Ill-treatment must explicitly either cause bodily injury or intense physical or mental suffering.220

The Commission described the concepts of torture, inhuman or degrading treatment and punishments in the so-called Greek case,221 ruled in 1969. The Commission noted: “The notion of inhuman treatment covers at least such treatment as deliberately causing severe suffering, mental or physical, which, in a particular situation, is unjustifiable. The word “torture” is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confession, or the infliction of punishment, and is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.”222

The Convention does not contain a definition of what the concept of torture comprises, but the Court has however described torture as a “special stigma to deliberate inhuman treatment causing very serious and cruel suffering.”223 It is an aggravated form of inhuman or degrading treatment or punishment.224 The Court lowered the threshold necessary for ill-

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218 ECtHR, Ireland vs. the United Kingdom, January 18th 1978 (5310/71), para. 162.
219 C.V. Wouters: International Legal Standards for the Protection from Refoulement, p. 238.
222 UNHCR Manual on Refugee Protection and the ECHR, p. 3.
223 ECtHR, Ireland vs. the United Kingdom, January 18th 1978 (5310/71), para. 167.
224 ECtHR, Ireland vs. the United Kingdom, January 18th 1978 (5310/71), para. 167.
treatment to amount to torture in the case of *Selmouni vs. France*.

It stated that certain acts classified in the past as inhuman and degrading treatment could be classified differently in the future, adding that the Convention is a living instrument which should be interpreted in light of present day situations.

What mainly distinguishes inhuman or degrading treatment from torture under Article 3, derives from the difference in the intensity of the suffering. More intense suffering is required in the case of torture than of inhuman or degrading treatment. In contrast with torture, inhuman treatment does not need to be intended to cause the suffering at issue. It should however be noted that all forms of ill-treatment within the scope of Article 3 are equally prohibited, regardless of their severity and whether they amount to inhuman or degrading treatment or punishment or to torture. But because of the intensity of the suffering which falls within torture it has been isolated as a specified form of violation.

Treatment is considered inhuman or degrading if, to a seriously harmful extent, it denies human beings of their most basic needs. If the acts, which the applicant is at risk of facing if deported to the respondent state, are meant to arouse in her or him the feeling of fear, anguish and inferiority as well as humiliation they are likely to amount to degrading treatment or punishment under Article 3.

Facing a real risk of being sentenced to death if deported can amount to being subjected to ill-treatment in breach of Article 3. The applicants in the case of *Bader and Kanbor vs. Sweden* were Syrian nationals who applied for asylum upon their arrival in Sweden. They made several asylum requests which were all rejected and the authorities in Sweden ordered their expulsion from the country. One of the applicants was wanted in Syria under a criminal judgment and the applicants argued that he would be executed if deported to Syria, due to unfair trial in his home country, and that his family would therefore be destroyed. The applicants complained to the Court, claiming that the first applicant faced a substantial risk of being executed if the expulsion would take place, and therefore that Articles 2 and 3 would be

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225 *ECtHR, Selmouni vs. France, July 28th 1999 (25803/94).*

226 *ECtHR, Selmouni vs. France, July 28th 1999 (25803/94), para. 101.*

227 *ECtHR, Ireland vs. the United Kingdom, January 18th 1978 (5310/71), para. 167.*


233 *ECtHR, Bader and Kanbor vs. Sweden, November 8th 2005 (13284/04).*

234 *ECtHR, Bader and Kanbor vs. Sweden, November 8th 2005 (13284/04), paras. 9–25.*
violated.\textsuperscript{235} The Court decided to order interim measures under Rule 39 and consequently the migration board granted a stay of the deportation order until further notice.\textsuperscript{236} Regarding the alleged violation of Article 3, the Court stated that the death sentence imposed on the first applicant would inevitable cause the other applicants additional fear and anguish for their future return to Syria, as the country is likely to enforce such executions.\textsuperscript{237} Such significant degree of human anguish and fear brings the treatment under the scope of Article 3 of the Convention.\textsuperscript{238} In light of this, the Court concluded that there were substantial grounds for believing that the first applicant would be executed and accordingly that the deportation of the applicants to Syria would be in violation of Article 3, as well as of Article 2.\textsuperscript{239}

The application of Article 3 is not limited to cases involving imposed ill-treatment. The Court has considered that harsh medical conditions in the receiving country can lead to violation of Article 3.\textsuperscript{240} In such situations, the Court has applied Rule 39 where the applicant’s health would be in jeopardy since the awaiting deportation entails deprivation of satisfactory healthcare.

In the case \textit{D. vs. the United Kingdom}\textsuperscript{241} the Court applied Rule 39 to order the British state not to deport the applicant, a national of Saint Kitts and Nevis, who was suffering from an advanced stage of AIDS, to his home country. If deported, the applicant claimed he would not be able to receive necessary medical treatment as medical facilities in his home country were inadequate for treating his illness.\textsuperscript{242} The applicant had been treated at a London hospital where a doctor had noted that the lack of adequate treatment of AIDS in Saint Kitts would hasten his death.\textsuperscript{243} The Court concluded, after having considered the quality and availability of treatment in Saint Kitts, that “in view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant’s fatal illness, the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment by the respondent state in violation of Article 3.”\textsuperscript{244}

The Court applied Rule 39 in a similar case, \textit{N. vs. the United Kingdom},\textsuperscript{245} ruled by the Court 11 years later. The applicant, a Ugandan woman, entered the United Kingdom in 1998

\textsuperscript{235} \textit{ECtHR, Bader and Kanbor vs. Sweden, November 8th 2005} (13284/04), para. 36.
\textsuperscript{236} \textit{ECtHR, Bader and Kanbor vs. Sweden, November 8th 2005} (13284/04), para. 5 and 27.
\textsuperscript{237} \textit{ECtHR, Bader and Kanbor vs. Sweden, November 8th 2005} (13284/04), para. 47.
\textsuperscript{238} \textit{ECtHR, Bader and Kanbor vs. Sweden, November 8th 2005} (13284/04), para. 42.
\textsuperscript{239} \textit{ECtHR, Bader and Kanbor vs. Sweden, November 8th 2005} (13284/04), para. 48.
\textsuperscript{240} \textit{UNHCR Manual on Refugee Protection and the ECHR}, p. 4.
\textsuperscript{241} \textit{ECtHR, D. vs. the United Kingdom, May 2nd 1997} (30240/96).
\textsuperscript{242} \textit{ECtHR, D. vs. the United Kingdom, May 2nd 1997} (30240/96), para. 16.
\textsuperscript{243} \textit{ECtHR, D. vs. the United Kingdom, May 2nd 1997} (30240/96), para. 20.
\textsuperscript{244} \textit{ECtHR, D. vs. the United Kingdom, May 2nd 1997} (30240/96), para. 53.
\textsuperscript{245} \textit{ECtHR, N. vs. the United Kingdom, May 27th 2008} (26565/05).
and applied for asylum upon her arrival. She was seriously ill and consequently admitted to hospital where she was diagnosed with AIDS. After being treated at the hospital her health condition began to stabilize. When her asylum case was finally examined in 2005, her health had strengthened even more after frequent monitoring at the hospital.\(^{246}\) Her asylum claim was however refused by British authorities.

The applicant lodged an application to the Court, claiming that given her illness and the lack of medical treatment, social support and nursing care in Uganda, her expulsion to the country would cause mental and physical suffering in breach of Article 3 of the ECHR.\(^{247}\) In its assessment, the Court referred to the \textit{D. vs. the United Kingdom} case and compared the situation there with the applicant’s situation in the present case. The Court stated that it should maintain the high threshold set forward in \textit{D. vs. the United Kingdom} and concluded that the present case did not demonstrate “very exceptional circumstances” as were disclosed in the \textit{D. vs. the United Kingdom} case. Therefore, the decision to deport the applicant to Uganda was not seen as giving rise to a breach of Article 3 of the ECHR.\(^{248}\)

After this judgment by the Court, it appears that Rule 39 will no longer be applied in cases concerning the expulsion of applicants with medical problems who face deprivation of healthcare in the receiving state, unless very exceptional circumstances apply.\(^{249}\)

### 4.5.4 Prohibition of Indirect Refoulement

#### 4.5.4.1 Introduction

As previously stated, the majority of Rule 39 interim measures are granted with regard to the awaiting deportation or expulsion to the applicant’s country of origin.\(^{250}\) However, Article 3 of the ECHR also provides protection against indirect return to the applicant’s place of origin.\(^{251}\) Thus, the obligation to protect against refoulement also prohibits removal to a third country where individuals may either face conditions contrary to Article 3\(^{252}\) or be removed to the country in which they face a real risk of ill-treatment delineated in Article 3.\(^{253}\)

\(^{246}\) \textit{ECtHR, N. vs. the United Kingdom}, May 27\(^{th}\) 2008 (26565/05), paras. 8–12.

\(^{247}\) \textit{ECtHR, N. vs. the United Kingdom}, May 27\(^{th}\) 2008 (26565/05), para. 20.

\(^{248}\) \textit{ECtHR, N. vs. the United Kingdom}, May 27\(^{th}\) 2008 (26565/05), paras. 43 and 51.

\(^{249}\) \textit{Factsheet on Interim Measures}, p. 5.


\(^{251}\) \textit{UNHCR Manual on Refugee Protection and the ECHR}, p. 2.

\(^{252}\) \textit{ECtHR, M.S.S. vs. Belgium and Greece}, January 21\(^{st}\) 2011 (30696/09), para. 367.

\(^{253}\) C.V. Wouters: \textit{International Legal Standards for the Protection from Refoulement}, p. 320.
Moreover, Rule 39 requests are frequently made on the basis of the application of the Dublin Regulation\textsuperscript{254} against transfers to Member States of the Dublin system.\textsuperscript{255} The Court has established that not granting an interim measure request under Rule 39 to an applicant, cannot be justified on the grounds that the receiving third state is “safe”.\textsuperscript{256}

4.5.4.2 Expulsion to a Third Country Under the Dublin Regulation and Rule 39

The Dublin Regulation, also referred to as the Dublin III Regulation, establishes the criteria and mechanism for determining what Contracting state is responsible for examining an asylum application which has been lodged in one of the Contracting States by a third country national.\textsuperscript{257} According to the Dublin Regulation, only one Contracting state is responsible for examining an asylum application for each applicant.\textsuperscript{258}

The Court established in the case \textit{T.I. vs. the United Kingdom}\textsuperscript{259} which was ruled in 2000, that state responsibility could arise by sending an asylum seeker to a third country under the provisions of the Dublin Regulation if the applicant faced a real risk of being sent onwards to a country where he would be subjected to treatment in breach of Article 3.\textsuperscript{260} The case concerned the possible removal of the applicant, who was from Sri Lanka, from Germany to a third country. The Court acknowledged that state responsibility could arise by sending the applicant to a third country, but nevertheless concluded that there was no risk of indirect refoulement under Article 3 in the case as the applicant would be afforded sufficient protection in Germany.\textsuperscript{261}

The Court received in 2008, requests for interim measures under Rule 39 in three cases concerning the removal of the applicants to Greece and from there to the applicants’ countries of origin. In all the cases, two against the Netherlands and one against Belgium, the request for such measures was denied. At that time the Court would not grant interim measures in the

\textsuperscript{255} \textit{ECRE/ELENA Research on ECHR Rule 39 Interim Measures}, p. 8.
\textsuperscript{256} \textit{ECtHR, M.S.S. vs. Belgium and Greece, January 21st 2011 (30696/09), para. 355.}
\textsuperscript{257} Nuala Mole and Catherine Meredith: \textit{Human Rights Files, No. 9: Asylum and the European Convention on Human Rights}, p. 240; Article 1 of the Dublin III Regulation: “This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (“the Member State responsible”).”
\textsuperscript{258} \textit{Factsheet on Interim Measures}, p. 1.
\textsuperscript{259} \textit{Decision by the ECtHR, T.I. vs. the United Kingdom, March 7th 2000 (43844/98).}
\textsuperscript{261} C.V. Wouters: \textit{International Legal Standards for the Protection from Refoulement}, p. 320.
cases, as the applications fell outside the scope of Rule 39.\textsuperscript{262} The Court stated the following in a letter to one of the applicant’s legal advisers: “As your client is returning to a country that adheres to the European Convention on Human Rights, his application falls manifestly outside the scope of rule 39 […]”\textsuperscript{263}

According to this, Rule 39 was not applicable in cases where the applicant was facing a possible removal to a “safe” country. However, more protection was needed and in 2010, in the case of \textit{M.S.S. vs. Belgium and Greece},\textsuperscript{264} when the Court examined the compatibility of the Dublin Regulation with the Convention regarding transfers to Greece, more protection was granted.

\textbf{4.5.4.2.1 The Case of M.S.S. vs. Belgium and Greece}

The applicant in the case was an Afghan asylum seeker who fled Kabul in 2008. He travelled through Greece, having his fingerprints taken for registration, and thereby entered the European Union and a Contracting state of the ECHR. After a short stay in Greece, he travelled to Belgium where he arrived in February 2009 and applied for asylum.\textsuperscript{265} On account of the Dublin Regulation, the Belgian authorities did not grant asylum to the applicant but submitted a request for the Greek authorities to take charge of handling the applicant’s asylum application.\textsuperscript{266} While the case was pending, the UNHCR sent a letter to the Belgian authorities, criticizing i.a. the reception conditions of asylum seekers in Greece and recommending the suspension of deportations to Greece.\textsuperscript{267} The applicant appealed the removal decision to the Aliens Appeals Board in Belgium, arguing that he faced a risk of being detained in Greece under terrible conditions and that he feared being sent back to Afghanistan from Greece without proper examinations of the reasons why he had fled the country. His appeal was rejected and his deportation back to Greece was scheduled on June 15\textsuperscript{th} 2009.\textsuperscript{268}

On June 11\textsuperscript{th} the applicant applied to the Court and requested for interim measures under Rule 39 to be ordered towards the authorities in Belgium to have his transfer back to Greece suspended. He supported his claim with the severe risks he faced in Greece and Afghanistan. However, the Court refused to apply Rule 39, but informed the Greek government that the decision was based on the confidence that Greece would fulfil its obligations under the

\begin{footnotesize}
\begin{enumerate}
\item[264] \textit{ECtHR, M.S.S. vs. Belgium and Greece, January 21\textsuperscript{st} 2011 (30696/09)}.
\item[265] \textit{ECtHR, M.S.S. vs. Belgium and Greece, January 21\textsuperscript{st} 2011 (30696/09)}, paras. 9–11.
\item[266] \textit{ECtHR, M.S.S. vs. Belgium and Greece, January 21\textsuperscript{st} 2011 (30696/09)}, para. 14.
\item[267] \textit{ECtHR, M.S.S. vs. Belgium and Greece, January 21\textsuperscript{st} 2011 (30696/09)}, para. 16.
\item[268] \textit{ECtHR, M.S.S. vs. Belgium and Greece, January 21\textsuperscript{st} 2011 (30696/09)}, paras. 27–28.
\end{enumerate}
\end{footnotesize}
Convention and relevant asylum legislations. Having been rejected the stay of the deportation, the applicant was transferred to Greece.\textsuperscript{269}

Upon arrival in Athens, he was immediately placed in detention where conditions were appalling. He had restricted access to toilet facilities, was given little food, he was beaten and slept on bare floor. When released from detention he was given an asylum seeker’s card but had no other choice but to live on the street with no means of subsistence, since no other option was made available by the Greek authorities.\textsuperscript{270}

Having been informed of the situation, the Court sent a letter to the authorities, asking for information regarding the applicant’s case. The Court stated that if the letter would remain unanswered, the Court would “seriously consider applying Rule 39 against Greece.”\textsuperscript{271}

Subsequently, given no reactions from Greek authorities and the growing severity of the situation in Afghanistan, the Court decided to apply interim measures under Rule 39 and order the Greek government, in the interest of the parties and that of the smooth conduct of the proceedings, not to deport the applicant to Afghanistan pending the outcome of proceedings before the Court.\textsuperscript{272}

Regarding the Court’s decision and the context of Rule 39, the present author will only discuss the complaints alleging violation of Article 3 of the ECHR.

The applicant alleged that conditions during his detention in Greece and the treatment he received there amounted to inhuman and degrading treatment under Article 3.\textsuperscript{273} Furthermore, he alleged that the extreme poverty in which he was forced to live since he arrived in Greece amounted to inhuman and degrading treatment under Article 3.\textsuperscript{274} Finally he alleged that by transferring him to Greece under the Dublin Regulation, in spite of being aware of the deficiencies in the asylum procedure in Greece, the Belgian authorities had violated their obligations under Article 3.\textsuperscript{275} The Court examined the applicant’s complaints against Greece and Belgium, with regard to various reports by international bodies and non-governmental organizations.

In respect of the allegations against Greece, the Court considered that the conditions of the detention experienced by the applicant were unacceptable. The Court stated that the feeling of arbitrariness, inferiority and anxiety which the applicant experienced, as well as the extreme

\textsuperscript{269} ECtHR, M.S.S. vs. Belgium and Greece, January 21\textsuperscript{st} 2011 (30696/09), paras. 31–33.
\textsuperscript{270} ECtHR, M.S.S. vs. Belgium and Greece, January 21\textsuperscript{st} 2011 (30696/09), paras. 35–37.
\textsuperscript{271} ECtHR, M.S.S. vs. Belgium and Greece, January 21\textsuperscript{st} 2011 (30696/09), paras. 38–39.
\textsuperscript{272} ECtHR, M.S.S. vs. Belgium and Greece, January 21\textsuperscript{st} 2011 (30696/09), para. 40.
\textsuperscript{273} ECtHR, M.S.S. vs. Belgium and Greece, January 21\textsuperscript{st} 2011 (30696/09), para. 205.
\textsuperscript{274} ECtHR, M.S.S. vs. Belgium and Greece, January 21\textsuperscript{st} 2011 (30696/09), para. 235.
\textsuperscript{275} ECtHR, M.S.S. vs. Belgium and Greece, January 21st 2011 (30696/09), para. 323.
effects that such conditions of detention have on a person’s dignity, constituted as degrading treatment. Additionally, due to his status as an asylum seeker, the applicant was particularly vulnerable.\(^{276}\) In light of this, the Court found a violation of Article 3. The Court also found that the living conditions the applicant had to endure in Greece attained the level of severity required to fall under Article 3. The authorities had not informed the applicant of any housing possibilities, resulting in him living on the street in extreme poverty for months on end.\(^{277}\)

With regard to the allegations against Belgium, the Court considered that the authorities should have known of the deficiencies of the asylum procedure in Greece, since the UNHCR had alerted the Belgian government of the situation. The initial expulsion order by Belgium was only on the basis of an implied agreement by the Greek authorities. The Court concluded that by transferring the applicant to Greece, the Belgian authorities knowingly exposed him to conditions that amounted to degrading treatment, in violation of Article 3 of the Convention.\(^{278}\)

Following the judgment in the case, the Court has, in order to ensure consistency in its approach when facing systemic problems, ordered that it will grant Rule 39 interim measures made on all Dublin transfers to Greece and accordingly that states should refrain from taking any action to remove applicants to the country.\(^{279}\)

4.5.5 Diplomatic Assurances

In the expulsion context, applicants are facing an increasing use by the Contracting States of so-called diplomatic assurances.\(^{280}\) Such assurances, applied concerning the transfer of an individual from one state to another, are given to the sending state by the receiving state which undertakes that the applicant will be treated in accordance with the conditions set by the sending state or more generally, that the sending state will keep with its human rights obligations under international law.\(^{281}\) Moreover, in the context of asylum law, such assurances establish a promise that the applicant will not be subjected to torture or ill-treatment if expelled to the receiving country.\(^{282}\) Contracting States have tried to use diplomatic assurances as a justification for not complying with interim measures granted by

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\(^{276}\) ECtHR, M.S.S vs. Belgium and Greece, January 21\(^{\text{st}}\) 2011 (30696/09), para. 233.

\(^{277}\) ECtHR, M.S.S vs. Belgium and Greece, January 21\(^{\text{st}}\) 2011 (30696/09), para. 235.

\(^{278}\) ECtHR, M.S.S vs. Belgium and Greece, January 21\(^{\text{st}}\) 2011 (30696/09), paras. 362–368.


\(^{281}\) UNHCR Manual on Refugee Protection and the ECHR, p. 2.

the Court, by referring to the receiving state’s assurance that the applicant will not be harmed upon return.\textsuperscript{283} In the \textit{M.S.S. vs. Belgium and Greece} case already discussed, the Belgian government tried to justify its deportation of the applicant to Greece, by pointing out that the removal had been issued on the basis of a diplomatic assurance that the Greek state would honor its obligations under the Convention and comply with legislations on asylum.\textsuperscript{284} In its conclusion, the Court however stated that these diplomatic assurances given by the Belgian authorities did not amount to a sufficient guarantee.\textsuperscript{285} It follows that the use of diplomatic assurances has, while becoming increasingly common, also become controversial.\textsuperscript{286} While offering diplomatic assurances began as an earnest offer by governments to protect the most fundamental of human right rights, the right to life,\textsuperscript{287} today it raises questions as to whether it is a sufficient safety measure in deportation cases or if it rather undermines the significant principle of non-refoulement.

Diplomatic assurances are provided on an individual basis with regard to the individual at issue whom the sending state intends to deport. However, such assurances in the form of general clauses regarding the treatment of those being deported have been included in agreements between states governing the deportation.\textsuperscript{288} In recent years, there has been an increase in the practice of making such assurances between governments, where the individual facing deportation is being transferred to a country which does not offer any procedural safeguards to ensure that individuals will not be subjected to torture or ill-treatment.\textsuperscript{289} Such was the case in \textit{Shamayev and Others vs. Georgia and Russia}\textsuperscript{290}, where the matter of diplomatic assurances was a notable factor. The applicants in the case were thirteen Chechen nationals who had illegally crossed the border of Georgia which resulted in the Georgian authorities detaining them in Tbilisi. The authorities in Russia requested for the applicants’ extradition to Russia. Upon request by the representatives of the applicants, the Court decided to order interim measures to the Georgian authorities under Rule 39, and require that the extradition be stayed until the Chamber had had the chance to properly examine the application.\textsuperscript{291} In spite of the Court’s application of Rule 39, authorities

\textsuperscript{284} \textit{ECtHR, M.S.S. vs. Belgium and Greece}, January 21\textsuperscript{st} 2011 (30696/09), para. 328.
\textsuperscript{285} \textit{ECtHR, M.S.S. vs. Belgium and Greece}, January 21\textsuperscript{st} 2011 (30696/09), para. 354.
\textsuperscript{286} Ugur Erdal and Hasan Bakirci: \textit{Article 3 of the European Convention on Human Rights: A Practitioner’s Handbook}, p. 121.
\textsuperscript{287} Julia Hall: “Mind the Gap: Diplomatic Assurances and the Erosion of the Global Ban on Torture”, p. 3.
\textsuperscript{288} \textit{UNHCR Note on Diplomatic Assurances and International Refugee Protection}, p. 3.
\textsuperscript{289} \textit{UNHCR Note on Diplomatic Assurances and International Refugee Protection}, p. 2.
\textsuperscript{290} \textit{ECtHR, Shamayev and Others vs. Georgia and Russia}, April 12\textsuperscript{th} 2005 (36378/02).
\textsuperscript{291} \textit{ECtHR, Shamayev and Others vs. Georgia and Russia}, April 12\textsuperscript{th} 2005 (36378/02), para. 6.
in Georgia extradited five of the applicants to Russia. Concerning the eight applicants still detained in Georgia, the Court extended the interim measures order.292

Subsequently, the Russian government offered diplomatic assurances to the Court applying too all the applicants. The authorities promised that should the applicants be extradited to Russia, their safe and health would be protected with access to medical treatment. The authorities also assured the Court that the applicants would be guaranteed unhindered access to legal assistance and to the Court. In addition, it was promised that the Court would have unhindered access to the applicants which would allow for a fact-finding mission to be organized.293 Based on these assurances, the Georgian government requested that the interim measures would be lifted. In light of the diplomatic assurances given by the Russian authorities, the Court decided to lift the interim measures and cancel the stay of the applicants’ extradition to Russia.294 However, when the Court decided to send a fact-finding mission to visit the applicants in Georgia and Russia, the Russian government denied the Court access to the applicants, as criminal proceedings against them were pending before the regional court within whose jurisdiction the applicants were detained.295 In the following months, the Court made numerous attempts to persuade Russian authorities to agree to the Court’s fact-finding visit to Russia, all of which proved unsuccessful.296 Thus, the Russian government did not comply with their given assurances as promised. The Court responded to this lack of compliance by stressing the issue of access to applicants as a matter of international law, in particular the ECHR. The Court added that as the Convention takes precedence over domestic law in Russia, the issue of access to applicants should solely be decided by the Court.297 The unacceptable behavior of the Russian authorities in this case shows that when Contracting States give such assurances, it cannot be considered guaranteed that they will comply with the assurances or their obligations under the ECHR.298

The circumstances in which diplomatic assurances have been applied often concern the protection of national security against terrorism, for example.299 However, as has been mentioned, human rights law prohibits without any derogations the deportation of an individual to a place where she or he is at risk of torture. No exceptions are permitted, even

292 ECtHR, Shamayev and Others vs. Georgia and Russia, April 12th 2005 (36378/02), paras. 12–16.
293 ECtHR, Shamayev and Others vs. Georgia and Russia, April 12th 2005 (36378/02), para. 18.
294 ECtHR, Shamayev and Others vs. Georgia and Russia, April 12th 2005 (36378/02), paras. 20–21.
295 ECtHR, Shamayev and Others vs. Georgia and Russia, April 12th 2005 (36378/02), para. 29.
296 ECtHR, Shamayev and Others vs. Georgia and Russia, April 12th 2005 (36378/02), paras. 29–49.
298 C.V. Wouters: International Legal Standards for the Protection from Refoulement, p. 296.
when the individual at issue poses a threat to national security. Nevertheless, the law is silent about no-torture assurances between states as a means of meeting the obligation of non-refoulement. In fact, no European legal instrument mentions the reliance on diplomatic assurances as a safeguard against torture or ill-treatment in this context. This also applies to the ECHR, where diplomatic assurances are not explicitly mentioned in the Convention but have however been implicated in Article 3 as states seeking to deport individuals have used assurances to demonstrate their compliance with the non-refoulement principle.

4.5.5.1 The ECtHR’s Current Approach on Diplomatic Assurances

The Court established its guiding principles for its current approach on diplomatic assurances in the case of Saadi vs. Italy, ruled in Strasbourg in 2008. The applicant in the case was a Tunisian national whom the Italian authorities sought to deport from Italy back to his home country, where a military court had sentenced him to imprisonment for membership in a terrorist organization. Since the applicant had been accused of international terrorism and was awaiting conviction in Tunisia, the Court considered that there were substantial grounds for believing that should he be deported to Tunisia, a real risk existed that he would be subjected to ill-treatment in breach of Article 3 of the Convention.

In the proceedings of the case, the Italian embassy requested diplomatic assurances from the Tunisian authorities, ensuring that if the applicant would be deported to Tunisia, he would not be subjected to ill-treatment or torture in breach of Article 3 of the ECHR and furthermore that he would not suffer a flagrant denial of justice. The Tunisian authorities did not provide such assurances to the Italian government. They only stated that they would accept the deportation to Tunisia of nationals detained abroad and that Tunisia respected the relevant international conventions and treaties concerning prisoners’ rights. The Court stated that the existence of domestic law and accession to international human rights treaties would not be sufficient to ensure adequate protection against the risk of ill-treatment. Moreover, the Court identified that even if the Tunisian authorities had provided the requested diplomatic

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300 Julia Hall: “Mind the Gap Diplomatic Assurances and the Erosion of the Global Ban on Torture”, p. 3.
301 Julia Hall: “Mind the Gap Diplomatic Assurances and the Erosion of the Global Ban on Torture”, p. 3.
303 Alice Izumo: “Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence”, p. 255.
304 ECtHR, Saadi vs. Italy, February 28th 2008 (37201/06).
305 Alice Izumo: “Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence”, p. 255.
306 ECtHR, Saadi vs. Italy, February 28th 2008 (37201/06), para. 143–149.
307 ECtHR, Saadi vs. Italy, February 28th 2008 (37201/06), para. 51.
308 ECtHR, Saadi vs. Italy, February 28th 2008 (37201/06), para. 147.
309 ECtHR, Saadi vs. Italy, February 28th 2008 (37201/06), para. 147.
assurances, “that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention.”

The Court added that the weight given to such assurances from the receiving state depended on the circumstances prevailing at the material time in each case.

The Court’s judgment established that the receipt of diplomatic assurances alone does not allow a sending state to claim compliance with Article 3 of the Convention, regardless of whether the receiving state is a party to international human rights treaties.

The Court applied these principles in the case of *Toumi vs. Italy*, ruled in 2011, where it stated that the diplomatic assurances that had been negotiated between the Italian state and the receiving state Tunisia, were not sufficient to eliminate the risk of torture and ill-treatment that the applicant was facing. The Court has established in subsequent case law that diplomatic assurances can never be considered as a sufficient guarantee for respecting the prohibition of torture and the non-refoulement principle *per se*.

4.5.5.2 Criticism and Concerns regarding Diplomatic Assurances

A growing number of international authorities have rejected the use of diplomatic assurances. The Council of Europe Commissioner for Human Rights, the United Nations Special Rapporteur on Torture and the United Nations High Commissioner for Human Rights have expressed their concerns regarding the use of such assurances.

The then Special Rapporteur on Torture noted in a report from 2004 that diplomatic assurances should fulfil numerous necessary requirements in terms of protection from torture or ill-treatment in order to make them sufficient, meaningful and solid. Also, that a system of effective monitoring which includes private interviews and is prompt and regular should be present. However, more recently the Rapporteur has expressed the view that post-return mechanisms do little to reduce the risk of torture or ill-treatment and have in fact proven

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310 ECHR, Saadi vs. Italy, February 28th 2008 (37201/06), para. 148.
311 ECHR, Saadi vs. Italy, February 28th 2008 (37201/06), para. 148.
312 Alice Izumo: “Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence”, p. 258.
313 ECHR, Toumi vs. Italy, April 5th 2011 (25716/09).
316 The Special Rapporteur of the Commission on Human Rights on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
317 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, p. 10.
ineffective both as a mechanism of accountability and as a safeguard against torture and ill-treatment.\textsuperscript{318}

Indeed, diplomatic assurances normally do not constitute legally binding undertakings and generally there is no mechanism for their enforcement since there is no legal remedy for the sending state or the individual in question if the receiving state does not comply with the agreement once the individual has been deported.\textsuperscript{319} The UN High Commissioner for Human Rights has expressed her opinion on diplomatic assurances, stating that they should not be used. She noted that even though some post-return monitoring would be present, the fact that political legally non-binding agreements between some governments on a matter that is fundamental of several legally binding instruments “threatens to empty international human rights law of its content.”\textsuperscript{320} These concerns reflect those of many human rights experts around the world.\textsuperscript{321}

In the majority of cases where states seek diplomatic assurances, the receiving states are countries where torture is systematic and routinely practiced under certain circumstances but yet denied by the respondent states. In the case of Ismoilov and Others \textit{vs. Russia},\textsuperscript{322} the Court was not persuaded that the diplomatic assurances from authorities in Uzbekistan provided a reliable guarantee against risk of ill-treatment, on the grounds that “the practice of torture in Uzbekistan is described by reputable international experts as systematic.”\textsuperscript{323} Such widespread or systematic use of torture in many of the receiving countries against those who have been deported, supports that diplomatic assurances are inadequate safeguards against torture and ill-treatment proscribed by Article 3 of the Convention. Relying on assurances from states which repeatedly deny torture that nevertheless exists cannot be considered sufficiently safe.\textsuperscript{324} Furthermore, in regard to fact-finding visits as the Russian government had promised in the Shamayev case\textsuperscript{325} mentioned earlier, it is highly unlikely that such visits will reveal evidence of torture, as the state in question is likely to do everything in its power to hide any indication thereof.\textsuperscript{326}

\begin{itemize}
  \item \textsuperscript{318} UNHCR Note on Diplomatic Assurances and International Refugee Protection, p. 12.
  \item \textsuperscript{319} UNHCR Note on Diplomatic Assurances and International Refugee Protection, p. 3.
  \item \textsuperscript{320} Statement on Terrorists and Torturers by UN High Commissioner for Human Rights Louise Arbour, http://www.ohchr.org.
  \item \textsuperscript{321} Julia Hall: “Mind the Gap Diplomatic Assurances and the Erosion of the Global Ban on Torture”, p. 2.
  \item \textsuperscript{322} ECHR, Ismoilov and Others \textit{vs. Russia}, April 24\textsuperscript{th} 2008 (2947/06).
  \item \textsuperscript{323} ECHR, Ismoilov and Others \textit{vs. Russia}, April 24\textsuperscript{th} 2008 (2947/06), para. 127.
  \item \textsuperscript{324} “Empty Promises”: Diplomatic Assurances No Safeguard against Torture, p. 4.
  \item \textsuperscript{325} ECHR, Shamayev and Others \textit{vs. Georgia and Russia}, April 12\textsuperscript{th} 2005 (36378/02).
  \item \textsuperscript{326} C.V. Wouters: International Legal Standards for the Protection from Refoulement, p. 299.
\end{itemize}
Moreover, the obvious weakness in the practice of diplomatic assurances is the fact that where there is evident need for such assurances, that need clearly entails an acknowledged risk of torture and ill-treatment.327

In deportation cases, interim measures under Rule 39 play a very important role. Applying such measures may prevent that deportation occurs before the Court is satisfied that the awaited deportation will not cause an irreparable and serious violation of the applicant’s human rights under Article 3.328 It may be deduced from the foregoing that putting non-legal political agreements, such as diplomatic assurances, before legally binding international agreements and principles, has to be considered hazardous when deciding on the deportation of individuals who find themselves in vulnerable situations.

In the view of this, states can not overlook the potential of violation of human rights. Neglecting Rule 39 and using diplomatic assurances as a flawed replacement is not leading states towards more safety measures in deportation cases, but rather undermining the absolute prohibition of torture and the principle of non-refoulement.329

5 The Binding Character of Rule 39

5.1 Introduction

The development of interim measures under the ECHR, described in Chapter 2.3 above, has resulted in a long debate and controversy on the binding character of such interim measures, since it is not based on any explicit provision in the Convention. The binding character of Rule 39 was up for debate before the Commission and the Court in 1991\textsuperscript{330} and before the Court in Strasbourg in 2002.\textsuperscript{331} In both these cases, the Court concluded that the interim measures that had been ordered, did not generate any legal obligation on the part of the state parties in the cases to comply with the measures.

The Court then drastically changed its point of view in 2005, when the Chamber of the Court held for the first time in the case of \textit{Mamatkulov and Askarov vs. Turkey}\textsuperscript{332} that interim measures under Rule 39 are legally binding on the state to which they are addressed.\textsuperscript{333} Today the Court has firmly established that non-compliance by Contracting States with Rule 39 interim measures leads automatically to a violation of Article 34 of the ECHR.\textsuperscript{334}

The Court’s motives and reasoning for this establishment of the binding nature of interim measures under Rule 39 will be examined in this chapter.

5.2 The Case of Cruz Varas and Others vs. Sweden

The enforceability of an interim measures request was considered by the Court in the case \textit{Cruz Varas and Others vs. Sweden},\textsuperscript{335} ruled by the Court in 1991, where the Swedish government did not comply with the request of the European Commission not to expel the applicants to Chile, their home country. The reasoning in the case gives good insight into the Court’s earlier position in cases of non-compliance of interim measures.

5.2.1 The Facts

The applicants in the case, Hector Cruz Varas (the applicant)\textsuperscript{336} his wife and their two-year-old child, were Chilean citizens, who arrived in Sweden in January 1987. Following their arrival they applied for political asylum in the country. During the initial interrogation by the Swedish police authorities the applicant said that he had been involved in various political

\textsuperscript{330} \textit{ECtHR, Cruz Varas and Others vs. Sweden, March 20\textsuperscript{th} 1991 (15576/89).}
\textsuperscript{331} \textit{ECtHR, Conka vs. Belgium, February 5\textsuperscript{th} 2002 (51564/99), para. 129.}
\textsuperscript{332} \textit{ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99),}
\textsuperscript{333} \textit{ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99).}
\textsuperscript{334} \textit{ECtHR, Olaechea Cahua vs. Spain, August 10\textsuperscript{th} 2006 (24668/03), para. 80.}
\textsuperscript{335} \textit{ECtHR, Cruz Varas and Others vs. Sweden, March 20\textsuperscript{th} 1991 (15576/89).}
\textsuperscript{336} Herafter referred to as the applicant.
activities in Chile, all of which were in opposition to the Pinochet regime. The applicant claimed to have been arrested and detained in Chile, but did not make any allegations of torture. The Swedish Immigration Board decided subsequently to expel the applicant and his family from Sweden, as the applicant had not established a sufficient basis on which to be considered a refugee under national or international law. He appealed against the decision to the Government but was rejected. The Swedish authorities decided to enforce the expulsion order but failed to do so when the applicant and his family did not arrive at the airport for their flight.

When questioned again, the applicant came forward with fresh allegations of having been severely tortured by Chilean authorities and that he feared repetition of torture if sent back to his home country. He claimed that he had not disclosed this information earlier as he did not know if he could trust the Swedish police authorities and because he had found the experience of torture very difficult to talk about. Moreover, medical examinations supported the applicant’s new allegations of torture. Despite this new information, the Swedish government decided to expel the applicant, who was subsequently taken into custody by Swedish police authorities.

5.2.2 The Interim Measures Order by the Commission

On October 5th in 1989, one day after being taken into custody, the applicant and his family lodged their application before the Commission. On the morning of October 6th, the Commission ordered under Rule 36 of the Rules of Procedure that the Swedish government should not expel the applicants, and that “it was desirable in the interest of the Parties and the proper conduct of the proceedings before the Commission not to deport the applicants to Chile until the Commission had had an opportunity to examine the application during its forthcoming session from 6 to 10 November 1989.”

Even though the Swedish authorities were informed immediately of the interim measures order, they decided not to comply with it and to pursue the enforcement of the expulsion. Accordingly, the applicant was deported to Chile on October 6th 1989. His wife and son remained in hiding in Sweden. Upon his return to Chile, the applicant was supposedly threatened and his brothers-in-law were mistreated and asked questions about the applicant, who subsequently fled to Argentina.

The applicant alleged a violation of Article 3 of the ECHR on the grounds that he would be subjected to persecution and risk when turning to his country of origin. He also alleged a

337 *ECHR, Cruz Varas and Others vs. Sweden, March 20th 1991 (15576/89), para. 56.*
violation of Article 8 on the grounds that he had been separated from the rest of his family after being expelled from Sweden. As regards Article 3 of the ECHR, the Commission and the Court held that substantial grounds had not been shown for believing that the expulsion of the applicant would result in a real risk of being subjected to inhuman or degrading treatment upon his return to Chile. Therefore, it was concluded that there had been no violation of Article 3 nor Article 8 of the Convention.

Furthermore, the applicant alleged that the failure of the Swedish authorities to comply with the Commission’s indication on interim measures under Rule 36 of the Rules of Procedure amounted to a violation of Article 25 (1) of the ECHR on the right to individual petition. By doing so, the applicant alleged that non-compliance of interim measures indicated by the Commission under Rule 36 of the Rules of Procedure would result in a violation of the Convention and thereby, that interim measures were binding. The Commission and the Court did not agree on the outcome regarding this claim.

5.2.3 The Opinion of the Commission

The Commission held that there had been a breach of the state’s obligation under Article 25(1) of the ECHR by hindering the effective exercise of the applicants right to individual petition. The Commission’s view was that in some cases, especially cases concerning extraditions and expulsions, interim measures indicated by the Commission needed to be considered as binding in order to make the protection against torture and inhuman treatment practical and effective. The Commission however declined to consider whether Rule 36 interim measures were binding in any general sense. Rather, it concentrated on the question whether the non-compliance of the Swedish authorities in the circumstances at hand constituted a breach of Article 25(1). In this way, the Commission found that in this specific case the applicant’s right to individual petition was breached. According to the Commission, the expulsion of the applicant in spite of the Rule 36 indications was both “contrary to the spirit of the Convention” and “incompatible with the effective exercise of the right to petition” guaranteed by Article 25 (1) of the Convention.

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338 The right to individual petition is now under Article 34 of the ECHR.
The Decision of the Court

The Court, on the other hand, reversed the Commission and determined with a narrow majority of votes that there had been no breach of Article 25(1) of the Convention. Thereby the Court established that the interim measures under Rule 36 of the Rule of Procedure had no binding effect on Member States.\(^{342}\)

It should be observed that the Court did acknowledge the Commission’s attempts to give some force to the interim measures. The Court agreed with the Commission on the special character of the Convention and that the safeguards of it must be read in a way that makes them practical and effective.\(^{343}\) By doing so the Court seems to have recognized some kind of need for binding powers to ensure the protection of certain rights under the Convention. However, the Court was unable to find a legal basis for the interim measures upon which they could be considered as binding. It stated: “While this approach argues in favour of a power of the Commission and Court to order interim measures to preserve the rights of parties in pending proceedings, the Court cannot but note that unlike other international treaties or instruments the Convention does not contain a specific provision with regard to such measures (see, inter alia, Article 41 of the Statute of the International Court of Justice; Article 63 of the 1969 American Convention on Human Rights; Articles 185 and 186 of the 1957 Treaty establishing the European Economic Community).”\(^{344}\)

The Court also went briefly through the history of interim measures with regard to the ECHR, and pointed out that in the drafting and amendments of the Convention a provision for interim measures was included, which however never was adopted.\(^{345}\) From the Court’s short history briefing, it seems to have drawn the conclusion that although states should normally comply with interim measures indications by the Commission, there was a shared feeling that such indications were non-binding.\(^{346}\)

The main question that the Court had to answer was whether competences to order interim measures could be derived from Article 25 (1) of the Convention, in the light of the absence of a specific provision in the Convention.\(^{347}\) The majority of the Court, observing that Rule 36 only had the status of a rule of procedure, stated: “In the absence of a provision in the

\(^{342}\) ECtHR, Cruz Varas and Others vs. Sweden, March 20\(^{th}\) 1991 (15576/89), para. 102.

\(^{343}\) ECtHR, Cruz Varas and Others vs. Sweden, March 20\(^{th}\) 1991 (15576/89), para. 94.

\(^{344}\) R. St. J. Macdonald: “Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights”, p. 713.

\(^{345}\) ECtHR, Cruz Varas and Others vs. Sweden, March 20\(^{th}\) 1991 (15576/89), paras. 95–96.

\(^{346}\) ECtHR, Cruz Varas and Others vs. Sweden, March 20\(^{th}\) 1991 (15576/89), para. 97.
Convention for interim measures an indication given under Rule 36 cannot be considered to
give rise to a binding obligation on Contracting Parties.”

The question of state practice was also discussed, and the fact that Rule 36 interim
measures had generally been complied with by Contracting States until this case. The Court
however stated that the previous practice could be taken as establishing the agreement of
Contracting States regarding the interpretation of a provision in the Convention. The Court
added that such practice could not serve “to create new rights and obligations which were not
included in the Convention” and that the state practice “cannot have been based on a belief
that these indications gave rise to a binding obligation.” The Court held that it would strain
the language of Article 25 to include an obligation to comply with a Commission indication
under Rule 36.

It should be added that the majority of the Court found that the relatively mild wording of
Rule 36, which allowed the Commission to “indicate” measures that it considered “desirable”,
reinforced the conclusion of the non-binding nature of interim measures.

5.3 Turnaround – The Binding Character of Rule 39 Established

5.3.1 The Case of Mamatkulov and Askarov vs. Turkey

After upholding its view on the non-binding nature of interim measures in subsequent cases
the Court changed its point of view drastically in the landmark case Mamatkulov and Askarov
vs. Turkey, which was ruled in Strasbourg by the Grand Chamber in 2005. There, the Court
considered for the first time in a final judgment that a refusal by a state party to comply with
interim measures, ordered by the Court on the basis of Rule 39 of the Rules of Court,
constitutes a violation of Article 34 of the Convention, and thereby, that such measures are
binding on Member States.

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348 ECtHR, Cruz Varas and Others vs. Sweden, March 20th 1991 (15576/89), para. 98.
349 ECtHR, Cruz Varas and Others vs. Sweden, March 20th 1991 (15576/89), para. 100.
350 ECtHR, Cruz Varas and Others vs. Sweden, March 20th 1991 (15576/89), para. 100.
351 ECtHR, Cruz Varas and Others vs. Sweden, March 20th 1991 (15576/89), para. 99.
352 ECtHR, Cruz Varas and Others vs. Sweden, March 20th 1991 (15576/89), para. 98.
353 ECtHR, Conka vs. Belgium, February 5th 2002 (51564/99).
355 Olivier De Schutter: “The Binding Character of the Provisional Measures Adopted by the European Court of
Human Rights”, p. 16.
5.3.1.1 The Facts

The applicants in the case were two Uzbek nationals, who were both members of an opposition party in Uzbekistan. In March 1999 the first applicant arrived in Istanbul on a tourist visa, and the second applicant entered Turkey in December 1998 on a false passport. They both were arrested upon arrival under an international arrest warrant on suspicion of homicide; they were thought to have caused injuries to civilians in a bombing raid and to have made an attempt on the life of Uzbekistan's president. After their arrest in Turkey, the authorities in Uzbekistan requested their extradition in accordance with a bilateral extradition treaty. They were both detained pending their extradition.

5.3.1.2 The Order of Interim Measures by the ECtHR

Facing a threat of being extradited to Uzbekistan, the applicants lodged an application with the European Court of Human Rights. Subsequently the President of the relevant Chamber of the Court decided to apply interim measures on the Turkish Government, under Rule 39 of the Rules of Court. The Court held “that it was desirable in the interest of the parties and of the smooth progress of the proceedings before the Court not to extradite the applicants to Uzbekistan prior to the meeting of the competent Chamber.” The ordering of interim measures, the applicants were extradited and handed over to the Uzbek authorities a few days later.

The applicants claimed, among other things, that Article 2 of the ECHR and Article 3 of the ECHR had been violated when they were sent back to Uzbekistan, as their lives were at risk and as they were in danger of being subjected to torture in Uzbekistan. Regarding alleged violation of Article 3, the Court was not able to conclude that substantial grounds existed on the date of the extradition for believing that the applicants faced a real risk of treatment included in Article 3. Consequently, no violation of Article 3 was found. The Court found that it was not necessary to examine the applicants’ allegations under Article 2, after having considered possible violation of Article 3. The applicants also complained that they had not had a fair hearing before the national courts and therefore they alleged a violation of Article 6 of the ECHR. However, there was not sufficient evidence to show that

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357 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 27.
358 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 56.
359 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 77.
360 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 78.
any possible irregularities in the trial were liable to constitute a flagrant denial of justice and as a consequence, no violation of Article 6 could be found.\footnote{ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99), para. 91.}

Furthermore, the applicants held that by extraditing them to Uzbekistan, despite the interim measures which had been ordered by the Court under Rule 39 of the Rules of Court, Turkey had failed to comply with its obligations under \textit{Article 34 of the Convention}.\footnote{ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99), para. 92.}

\subsection*{5.3.1.3 The Alleged Violation of Article 34}

The applicants’ representatives held that they had been unable to contact the applicants following their extradition. The applicants had therefore been deprived of the possibility of having further inquiries made and thus the extradition had proven to be a real obstacle to the effective presentation of their application to the Court.\footnote{ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99), para. 94.}

The Government on the other hand referred to the \textit{Cruz Varas} case,\footnote{ECtHR, Cruz Varas and Others vs. Sweden, March 20\textsuperscript{th} 1991 (15576/89).} stating that Member States had no legal obligation to comply with interim measures. The Government pointed out that international courts operated within the scope of the powers that are granted to them by international treaties, and that if the treaty did not grant them power to order binding interim measures, consequently such power did not exist.\footnote{ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99), para. 97.}

\subsection*{5.3.1.4 The Decision of the Court}

In its assessment, the Court started by reinforcing the importance of the right to individual application under Article 34 and its role as one of “the fundamental guarantees of the effectiveness of the Convention system of human rights protection.”\footnote{ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99), para. 98.} The Court stressed later in the decision that the right to individual application had over the years become of high importance and now served as a key component of the machinery for protecting the rights set out in the Convention.\footnote{ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99), para. 101.} The Court then reiterated that the object and purpose of the ECHR as an instrument for the protection of individuals requires that its provisions be interpreted and applied in such a way that its safeguards turn out to be practical and effective, as part of the system of individual applications.\footnote{ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99), para. 102.} It also referred to the interpretive principle in connection to the Vienna Convention on the Law of Treaties that provides that treaties must be interpreted in light of their object and purpose and in accordance with the principle of
effectiveness. The Court added that any interpretation of the rights guaranteed in the Convention had to be consistent with “the general spirit of the Convention, as an instrument designed to maintain and promote the ideals and values of a democratic society.” The Court also pointed out that the right to communicate freely with the Court, without being subjected to any form of pressure, also involved not having to tolerate improper indirect acts or contacts designed to prevent the applicants from pursuing a Convention remedy.

Next, the Court stated that in cases like the present one, where the applicant’s core rights under the Convention were at stake, the object was to maintain the status quo pending the Court’s determination of the justification of the measure. The interim measures went to the substance of the Convention complaint and were granted by the Court in order to facilitate the “effective exercise” of the right of individual application. Because of the extradition to Uzbekistan, the level of protection was irreversibly reduced and the Court was prevented from properly assessing whether the applicants were exposed to a real risk of ill-treatment.

The Court examined thoroughly all relevant international law instruments and case law on interim measures, such as the United Nations organs, the Inter-American Court and Commission and the International Court of Justice. This was done in the context of interpreting the Convention in light of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which states that account must be taken of “any relevant rules of international law applicable in relations between the parties”. In this context it appears that the case of LaGrand, ruled by the ICJ in 2001, had great impact on the final decision of the Court. In the LaGrand case, the ICJ ruled that provisional measures were legally binding by i.e. referring to Article 31 of the Vienna Convention on the Law of Treaties.

Furthermore, the Court noted that it is not formally bound by its previous judgments but still that it should not depart from its own precedents without good reasons. Nevertheless, the Court underlined its role as a living instrument which must be interpreted in the light of present-day conditions.

Moreover, the Court emphasized the vital role of interim measures in avoiding irreversible situations that would prevent the Court from properly examining the application. The Court

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369 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 123.
373 Hereafter referred to as the ICJ.
375 ICJ, LaGrand (Germany vs. the United States of America), June 27th 2001.
376 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 117.
377 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 121.
then stated that “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.”

The Court found that the applicants were hindered in the effective exercise of the right to individual application under Article 34 of the ECHR, “which the applicants’ extradition rendered nugatory.”

Finally, the Court concluded that by failing to comply with the interim measures which had been ordered by the Court under Rule 39 of the Rules of Court, Turkey violated its obligations under Article 34 of the Convention.

5.3.2 Automatic Finding of Violation of Article 34 in Subsequent Case Law

The violation of Article 34 that the Court found in the Mamatkulov and Askarov case did not seem to be a mechanical or automatic consequence of the finding of the incompliance with the interim measure. When finding a violation of Article 34 in its reasoning, the Court depended on the evaluation whether the non-compliance with the interim measures had in that particular case interfered with the core of the right of application. In cases that came after the Mamatkulov and Askarov case the Court had to decide on the binding aspect on a case-by-case basis.

In January 2006, the Court used the term binding directly for the first time, to refer to the legal force of interim measures.

The Court emphasized the establishment of the binding force of interim measures in the case Olaechea Cahuas vs. Spain that was ruled by the Court in July 2006 and concerned the extradition by Spanish authorities of a Peruvian national who was wanted in his home country for supporting terrorist activities. Until this case, the situation in the previous cases

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380 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 129.
381 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99).
384 ECtHR, Aoulmi vs. France, January 17th 2006 (50278/99), para. 111; ECtHR, Olaechea Cahuas vs. Spain, August 10th 2006 (24668/03), para. 74.
385 ECtHR, Olaechea Cahuas vs. Spain, August 10th 2006 (24668/03).
386 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99); ECtHR, Aoulmi vs. France, January 17th 2006 (50278/99); ECtHR, Shamayev and Others vs. Georgia and Russia, April 12th 2005 (36378/02).
where the Court had found a violation of Article 34 due to non-compliance with interim measures, was such that the individuals’ right of application after their deportation had effectively been hindered as they were deprived of all contact with their legal representatives. The applicant in the Olaechea Cahuas case was not in such a position, since he was always in contact with his legal counselor. The Court could therefore not conclude that the applicant’s right to individual application was hindered in the same way as in the previous cases.\textsuperscript{387} That being the case, the Court put forward the question still remaining unanswered, i.e.: “should a Contracting state’s obligation to comply with interim measures be linked with a subsequent finding that the effective exercise of the right of individual application has been hindered?\textsuperscript{388}

When answering this question, the Court pointed out the provisional nature of interim measures and noted that the need for such measures is evaluated at a given moment because of the existence of a risk that might hinder the right of individual application. Then the Court concluded: “If the Contracting Party complies with the decision to apply the interim measure, the risk is avoided and any potential hindrance of the right of application is eliminated. If, on the other hand, the Contracting Party does not comply with the interim measure, the risk of hindrance of the effective exercise of the right of individual application remains, and it is what happens after the decision of the Court and the government’s failure to apply the measure that determines whether the risk materialises or not. Even in such cases, however, the interim measure must be considered to have binding force.”\textsuperscript{389}

Thereby, it was firmly established that non-compliance by a respondent state with interim measures ordered by the Court under Rule 39 leads automatically to a violation of Article 34 of the ECHR, regardless of the existence of a hindrance of the effective exercise of the right of individual application. Hence, that interim measures ordered under Rule 39 of the Rules of Court must always have binding force. The Court came to this conclusion unanimously without any issuing of a concurring or dissenting opinion.

\textsuperscript{387} \textit{ECtHR, Olaechea Cahuas vs. Spain, August 10th 2006 (24668/03), para. 79.}

\textsuperscript{388} \textit{ECtHR, Olaechea Cahuas vs. Spain, August 10th 2006 (24668/03), para. 75.}

\textsuperscript{389} \textit{ECtHR, Olaechea Cahuas vs. Spain, August 10th 2006 (24668/03), para. 80.}
5.4 Compliance of Rule 39 Interim Measures

5.4.1 Current Concern of Non-Compliance by Member States

In late 2010, the Council of Europe issued a report on Rule 39 indications by the Court in the context of preventing harm to refugees and migrants in extradition and expulsion cases. At that time, the cases of non-compliance with interim measures ordered by the Court were still relatively rare. The rapidly growing number of Rule 39 breaches was however of grave concern according to the report, given the harm to the individuals concerned as well as the impact on the integrity of the Convention system as a whole. It was stressed that states could not act with impunity. It was emphasized in the report that the burden to demonstrate that Member States have complied with the interim measures lies with the states. The Council of Europe strongly recommended states to respect interim measures when imposed upon them and highlighted that interim measures are binding on the state to which they are imposed, both in letter and in spirit. Attempts by states in trying to put pressure on applicants, who are in situations of vulnerability, into withdrawing their cases they have lodged before the Court, have been found to violate the effective exercise of the right to individual application. A firm position on the absolute importance for Member States to comply with interim measures was also expressed by the Member States themselves in the Izmir Declaration in 2011.

At the beginning of 2014, the Council of Europe issued another report on the urgent need to deal with new failures to co-operate with the Court. In the report, instances of the non-compliance of several Member States to the ECHR of Rule 39 interim measures is strongly condemned.

It is noted in the report that since 2005, when the Court declared interim measures as legally binding in the Mamatkulov and Askarov case, there have been around 20 cases in which the Court has found a breach of Article 34 of the ECHR linked with a non-compliance of interim measures under Rule 39. Most of these cases concerned non-compliance of

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390 Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights, p. 1–3.
391 Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights, p. 2.
392 Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights, p. 13.
393 ECtHR, Shamayev and Others vs. Georgia and Russia, April 12th 2005 (36378/02).
394 Izmir Declaration at the High Level Conference on the Future of the European Court of Human Rights, p. 3.
395 Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights.
396 Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights, p. 1.
397 Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights, p. 10.
interim measures which had been ordered to stay the extradition or expulsion of applicants, who were facing a risk of being subjected to ill-treatment in breach of Article 3 of the ECHR in the receiving country.\textsuperscript{398} Several cases concerned the applicants’ medical treatment, where the Court had granted Rule 39 interim measures to ensure the applicants’ continued medical treatment\textsuperscript{399} or the transfer of the applicant from prison to hospital for treatment.\textsuperscript{400} One case concerned the applicant’s right to see his legal advisor.\textsuperscript{401} Since the report, even more incidents of states’ non-compliance have emerged,\textsuperscript{402} which illustrates that non-compliance is still a growing problem.

A new phenomenon concerning non-compliance of interim measures has especially been worrying the Court, as is pointed out in the report from 2014. Cases have emerged where applicants, who are protected by interim measures after previously being subjected to removal, “disappear” temporarily under suspect circumstances and are sent back to countries where they face a serious risk of torture or ill-treatment. Subsequently they either reappear in the country which had requested their deportation or never reappear at all.\textsuperscript{403} This practice resembles the practice of “extraordinary renditions”, which has been condemned time and again by the Parliamentary Assembly.\textsuperscript{404} Such disappearance cases in the context of applicants who enjoy protection of interim measures have mostly regarded undercover transfer of persons from the Russian Federation to e.g. Tajikistan and Uzbekistan, which are both countries outside the scope of the ECHR.\textsuperscript{405}

An example of a recent judgment by the Court, which falls into this category of cases, is \textit{Savriddin Dzhurayev vs. Russia},\textsuperscript{406} where the applicant was forcibly abducted from Moscow after having received a temporary asylum certificate. According to the applicant he was kept in a mini-van overnight and tortured. The next day, he was sent to Tajikistan in an operation where Russian state officials were involved. This occurred in spite of the interim measure protection that the Court had earlier granted to the applicant.\textsuperscript{407} Upon arrival in Tajikistan the applicant was detained in a police station where he was continuously tortured while being

\textsuperscript{398} Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights, p. 10.
\textsuperscript{399} ECHR, Paladi vs. Moldova, March 10\textsuperscript{th} 2009 (39806/05).
\textsuperscript{400} ECHR, Grori vs. Albania, July 7\textsuperscript{th} 2009 (25336/04); ECHR, Aleksanyan vs. Russia, December 22\textsuperscript{nd} 2008 (46468/06).
\textsuperscript{401} ECHR, Shtukaturov vs. Russia, March 27\textsuperscript{th} 2008 (44009/05).
\textsuperscript{402} ECHR, Ermakov vs. Russia, November 7\textsuperscript{th} 2013 (43165/10); ECHR, Kasymakhunov vs. Russia, November 14\textsuperscript{th} 2013 (29604/12); ECHR, Trabelsi vs. Belgium, September 4\textsuperscript{th} 2014 (140/10).
\textsuperscript{403} Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights, p. 1 and 6.
\textsuperscript{404} ECHR, Savriddin Dzhurayev vs. Russia, April 25\textsuperscript{th} 2013 (71386/10), para. 204.
\textsuperscript{405} Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights, p. 10.
\textsuperscript{406} ECHR, Savriddin Dzhurayev vs. Russia, April 25\textsuperscript{th} 2013 (71386/10).
\textsuperscript{407} ECHR, Savriddin Dzhurayev vs. Russia, April 25\textsuperscript{th} 2013 (71386/10), paras. 38–41.
interrogated and consequently he was convicted and sentenced to 26 years’ imprisonment.\textsuperscript{408} The authorities in Russia did not conduct an effective investigation after the abduction, as is required by Article 3 of the ECHR. The Court emphasized that such an investigation must take place and be both prompt and thorough and that the authorities must make serious attempts to find out what happened.\textsuperscript{409} In its decision, the Court emphasized the special importance of interim measures in the Convention system. Then the Court noted that the purpose of interim measures is “not only to carry out an effective examination of the application but also to ensure that the protection afforded to the applicant by the Convention is effective”,\textsuperscript{410} adding even more significance to the binding nature of Rule 39. By disregarding the Court’s interim measures under Rule 39 in such a grave manner, the Court concluded that the Russian state had violated Article 34.\textsuperscript{411}

In an even more recent case, the applicant was forcibly transferred from Russia to Uzbekistan, despite enjoying interim measure protection under Rule 39.\textsuperscript{412} The Court acknowledged the repeated incidents of such forced repatriation of applicants and reiterated that if authorities of a Contracting state fail to take all steps that could reasonably have been taken to comply with interim measures ordered under Rule 39, Article 34 will be breached.\textsuperscript{413} Consequently the Court concluded that Russia failed to comply with Rule 39 and therefore breached its obligations under Article 34 of the ECHR.\textsuperscript{414}

5.4.2 Effects of Non-Compliance by Member States

5.4.2.1 Clear Non-Compliance

As regards cases of non-compliance, the most obvious ones are those where the respondent state shows clear non-compliance by simply having ignored the interim measures ordered by the Court.\textsuperscript{415} Such clear non-compliance would result in a substantive breach of the Convention itself under Article 34 of the ECHR, as has been shown in this research. In the

\textsuperscript{408} ECtHR, Savriddin Dzhurayev vs. Russia, April 25\textsuperscript{th} 2013 (71386/10), para. 69.

\textsuperscript{409} ECtHR, Savriddin Dzhurayev vs. Russia, April 25\textsuperscript{th} 2013 (71386/10), para. 187.

\textsuperscript{410} ECtHR, Savriddin Dzhurayev vs. Russia, April 25\textsuperscript{th} 2013 (71386/10), para. 212.

\textsuperscript{411} ECtHR, Savriddin Dzhurayev vs. Russia, April 25\textsuperscript{th} 2013 (71386/10), para. 219. In addition to violating Article 34, the Court also concluded that the Russian state had violated Articles 3, 4 and 5 of the ECHR.

\textsuperscript{412} ECtHR, Ermakov vs. Russia, November 7\textsuperscript{th} 2013 (43165/10).

\textsuperscript{413} ECtHR, Ermakov vs. Russia, November 7\textsuperscript{th} 2013 (43165/10), para. 281.

\textsuperscript{414} ECtHR, Ermakov vs. Russia, November 7\textsuperscript{th} 2013 (43165/10), para. 286.

\textsuperscript{415} Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights, p. 13.
context of expulsion and extradition cases breaches of Rule 39 interim measures may also violate Article 3 as well as the international core principle of non-refoulement.416

5.4.2.2 Objective Impediments

However, there are cases of less obvious non-compliance, where there have been objective impediments to prevent compliance of interim measures. This could include lack of notice given before removal or late compliance. The Court has developed a jurisprudence of such practice, which establishes that under certain circumstances a failure to comply with an interim measure will not always amount to a violation of Article 34. If the respondent state has demonstrated that an objective impediment prevented the state’s obligation to comply with Rule 39 and that it took all reasonable steps to remove the impediment, and informed the Court about the situation, the Court might conclude no violation of Article 34.417

The Court has accepted non-compliance resulting from an insufficient period of time between the Court’s ordering of the measure and the actual removal of the applicant, as well as on account of lack of information to the state regarding the interim measures orders.418 In the case of Muminov vs. Russia419 the Court concluded that it could not consider that the respondent state was properly informed that a request under Rule 39 had been made. The Court stated that there was “an insufficient factual basis for it to conclude that the respondent state deliberately prevented the Court from taking its decision on the applicant’s Rule 39 request or notifying it of that decision in a timely manner, in breach of its obligation to co-operate with the Court in good faith. Consequently, there has been no violation of Article 34 of the Convention.”420

The Court came to another conclusion in the case of Paladi vs. Moldova421 where it had to decide whether there were objective impediments to compliance with the interim measure which had been ordered. The state held that due to lack of necessary time to put the interim measures into place, it had not complied with them. The Court on the other hand concluded that the late compliance by the state of the ordered interim measures amounted to a breach of Article 34 of the ECHR.422 From the judgment it can be deduced as a general rule, that a late...
compliance will result in a violation of the Convention, unless the following criteria are fulfilled:

(1) Objective obstacles for the state’s compliance existed
(2) the state has taken all reasonable steps to remove these obstacles
(3) the state kept the Court informed of this.\footnote{Clara Burbano Herrera and Yves Haeck: “Letting States off the Hook? The Paradox of the Legal Consequences Following State Non-Compliance with Provisional Measures in the Inter-American and European Human Rights Systems”, p. 353.}

It is therefore of worry when states have sought to use objective impediments as an excuse for their non-compliance of interim measures, e.g. by claiming that compliance was impossible due to lack of staff, lack of time or on the basis that relevant officials on the ground never received the information of interim measures. Such tactics demonstrate the same lack of respect for the Convention system as cases of clear non-compliance.\footnote{Preventing Harm to Refugees and Migrants in Extradition and Expulsion Cases: Rule 39 Indications by the European Court of Human Rights, p. 15.}

5.4.2.3 Positive Measures against Non-Compliances

The Court has now begun indicating positive measures and follow-up requirements in order to ensure the effective protection of the rights of applicants that have been granted Rule 39 interim measures.\footnote{Resolution 1571 (2007) Council of Europe Member States’ Duty to Co-Operate with the European Court of Human Rights, para. 18.1.} In its resolution, the Assembly has invited the ECtHR to co-operation with the Member States to: “take[ing] appropriate interim measures, including new types thereof, such as ordering police protection or relocation of threatened individuals and their families.”\footnote{Resolution 1571 (2007) Council of Europe Member States’ Duty to Co-Operate with the European Court of Human Rights, para. 20.}

National parliaments are also encouraged to collaborate with the Court in their aim of supervising the compliance of authorities with obligations under the Convention, and to hold whomever accountable who has violated the Court’s orders.\footnote{Article 41 on Just Satisfaction: “If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”}

The Assembly has also encouraged the Court to explore the possibility of ordering damages on the basis of Article 41 of the ECHR\footnote{Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights, p. 3.} in cases of violations of Rule 39 interim measures.\footnote{ECtHR, Savriddin Dzhurayev vs. Russia, April 25th 2013 (71386/10).}

In the case of Savriddin Dzhurayev vs. Russia,\footnote{ECtHR, Savriddin Dzhurayev vs. Russia, April 25th 2013 (71386/10).} mentioned earlier, the Court required for the first time, as a general measure under Article 46 of the ECHR,\footnote{Resolution 1571 (2007) Council of Europe Member States’ Duty to Co-Operate with the European Court of Human Rights, para. 18.1.} the authorities in Russia...
to take positive measures after being found in violation of Article 34 of the Convention. The Court held that applicants in respect of whom the Court has ordered interim measures “must be granted effective protection by the state not only in law, but also in practice.” The Court then noted that states should apply an appropriate mechanism, fit to ensure that applicants benefit from immediate and effective protection against illegitimate abductions. The Court added that applicants should be allowed easy access to the state officers to be able to inform them of any emergency and seek acute protection if needed. In addition, competent law enforcement officers should be capable of intervening at short notice to prevent any unexpected breach of interim measures that may occur.

By doing this, the Court took a step forward in requesting authorities to take positive measures in order to prevent instances of non-compliance.

431 Article 46 on Binding Force and Execution of Judgments: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise the execution.”

432 ECtHR, Savriddin Dzhuraye vs. Russia, April 25th, 2013 (71386/10), para. 262.

433 ECtHR, Savriddin Dzhuraye vs. Russia, April 25th, 2013 (71386/10), para. 262.
6 Legitimacy of the Binding Character of Rule 39

6.1 Introduction

In spite of the Court’s finding on the binding nature of interim measures under Rule 39, the rule is still not explicitly included in the text of the Convention. Today the Court, with an evolutive interpretation, derives the binding nature from Article 34 of the ECHR. Even though the Court has firmly established through case law that such measures are binding, non-compliance by certain Contracting States has increased in the last few years, as demonstrated in Chapter 5.4. This leads to questions about the legitimacy of the Court’s finding on the binding character of Rule 39. Furthermore, questions arise as to whether the binding nature of Rule 39 is an unwarranted limitation of the Contracting States’ sovereignty, or whether this should rather be seen as a logical step in promoting the protection of human rights. On this controversial topic, there are two perspectives regarding interpretation. One favours state sovereignty and the other one favours the effective protection of human rights by interpreting the ECHR with an evolutive interpretation.

Moreover, the growing number of non-compliance instances raises questions as to whether additional measures for ensuring states’ respect for interim measures, need to be implemented more efficiently in terms of an explicit legal basis in the Convention, which would prevent the undermining of the Court’s legitimacy for ordering binding interim measures. These questions will be dealt with in the following chapter.

6.2 The ECHR as a Living Instrument

When the the binding nature of Rule 39 was established in Mamatkulov and Askarov vs. Turkey, the Court reasoned its conclusion i.a. with the so-called living instrument doctrine. The use of the living instrument approach is consistent with the Court’s general legal interpretation approach, i.e. an evolutive or dynamic interpretation of the Convention. The effect of the living instrument approach is clearly demonstrated when the Court changes its position in a certain issue, as the Court did in the Mamatkulov and Askarov case. The binding nature of Rule 39 thus derives from an evolutive interpretation of Article 34 of the Convention. Such interpretation of the Convention keeps the meaning of the individuals’

435 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 121.
437 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), paras. 121–129.
rights contemporary and effective, as well as providing the Court with necessary flexibility to ensure the rights of the individuals.\textsuperscript{438} In this context, it should be reminded that the Convention was adopted as a protective instrument for the rights and interests of individuals, rather than to protect the state parties to the Convention. Accordingly, the ECHR manifests obligations on the Contracting States to protect human beings. The Court has interpreted the Convention in line with this special nature through its appropriate method of evolutive interpretation, rather than using a restrictive one.\textsuperscript{439}

The notion that the Convention is a living instrument which should be interpreted according to present-day conditions has followed the Court’s case law from very early on. The Court first acknowledged in its judgment of \textit{Tyrer vs. the United Kingdom}\textsuperscript{440} which was ruled in 1978. In the case, the Court had to decide whether judicial corporal punishment of juveniles amounted to degrading punishment under Article 3 of the Convention. The Court stated in its judgment: “The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field.”\textsuperscript{441}

It should be noted that this evolutive interpretation of the Convention has been criticized, e.g. by scholars who believe that under these circumstances the Court exceeds its scope, i.e. by interpreting and applying the Convention in each case rather than by forming its content or increase the protection laid down in the Convention.\textsuperscript{442} The Dutch professor Tom Zwart has stated that the evolutive interpretation of the ECHR has been used as a justification for finding new rights in the Convention. He also mentioned, that the extensions of the Convention which go beyond what the states signed up to, make the Court vulnerable.\textsuperscript{443} The British former judge Leonard Hoffmann, has argued that it does not entitle a Court to introduce wholly new concepts into an international treaty if the treaty does not mention them at all, even though it would be more in accordance with the spirit of the times.\textsuperscript{444} Views of

\begin{itemize}
  \item \textsuperscript{438} Kanstantsin Dzehtsiarou: “European Consensus and the Evolutive Interpretation of the European Convention on Human Rights”, p. 1731.
  \item \textsuperscript{439} Alexander Orakhelashvili: “Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights”, p. 529.
  \item \textsuperscript{440} \textit{ECtHR, Tyrer vs. the United Kingdom}, April 25\textsuperscript{th} 1978 (5856/72).
  \item \textsuperscript{441} \textit{ECtHR, Tyrer vs. the United Kingdom}, April 25\textsuperscript{th} 1978 (5856/72), para. 31.
  \item \textsuperscript{442} Davíð Pör Björgvínsson: \textit{Lögskýringar}, p. 297.
  \item \textsuperscript{443} Tom Zwart: “More Human Rights than Court. Why the Legitimacy of the European Court of Human Rights is in Need of Repair and How It can be Done”, p. 88.
  \item \textsuperscript{444} Kanstantsin Dzehtsiarou: “European Consensus and the Evolutive Interpretation of the European Convention on Human Rights”, p. 1734.
\end{itemize}
this kind were presented by the Court in the case of *Johnston and Others vs. Ireland*, where the Court stated that the living instrument approach should not serve as a justification for creating new rights, particularly not rights that are consciously left out of the Convention.

Nevertheless, the Court’s use of evolutive interpretation and the idea of the Convention as a living instrument cannot be avoided if effectiveness is to be maintained. When it comes to human rights protection, the landscape that Europe represents today is very different from what it was when the Convention was established. In order to avoid stagnation, it is crucial for the Convention and the Court to be an instrument of both development and improvement.

### 6.3 Commitment-Based Legitimacy of the Binding Character of Rule 39

When discussing the legitimacy of the binding nature of interim measures, it is in order to note that by freely submitting themselves to the jurisdiction of the ECtHR, states devote themselves to certain obligations. The Contracting States of the Convention have made a voluntary undertaking to be bound by the Convention and the morality of such an undertaking can be summarized within the principle of *pacta sunt servanda* since states are, in the manner of individuals, treated as agents whose will and commitment matters in the context of the obligations they have.

The consent of states is of great importance when discussing the binding nature of interim measures, since states, when joining a convention with a binding enforcement mechanism like the ECHR, do not only commit themselves to respect the convention but also the judgment of supranational institutions like the Strasbourg Court. Scholars have pointed out that this obligation does not depend on whether following the Court’s judgments is favourable for states in each case. The Contracting States have given the Court the mandate to provide protection for individual human rights regardless of what human rights national authorities think is beneficial for them.

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445 *ECtHR, Johnston and Others vs. Ireland*, December 18\(^{th}\) 1986 (9697/82).
446 *ECtHR, Johnston and Others vs. Ireland*, December 18\(^{th}\) 1986 (9697/82), para. 53.
the Brighton Conference in 2012 introduced important objectives and procedural changes, i.a. the duty of Contracting States to implement the Court’s judgments as well as complying with final decisions by the Court. In this context, Article 46 of the ECHR which conditions the Contracting States to abide by the Court’s final judgment in any case which they are parties, should be mentioned. Even though this provision only binds the respondent state in each case at a time to abide by the judgment at issue, it could however be looked at as a precedent for other states to respect interim measures as the Court has repeatedly held that such measures are binding and should be complied with by Member States.

The Contracting States are aware of the fact that they are not only legally bound by the obligations that come with the Convention but also by the determinations made by the Court when these obligations have been violated.

To counter such commitment-based arguments, scholars have pointed out that international courts are not part of a single constitutional order. Also, some argue that the persistent refusal to include an explicit provision on interim measures in the ECHR undermines the binding nature that has been established by the Court. In this context, though, it should be addressed that the Court has established through its case law that the traditional sovereign power of states has to be exercised in harmony with the rights of individuals under the Convention. Treaty obligations should thus in principle and in case of doubt not be interpreted in favour of state sovereignty.

Ultimately, the Court’s judgments are not non-binding recommendations in the form of soft law, but legally binding decisions that should be obeyed. In light of this, the Contracting States must be ready to accept in advance solutions which the Court may give to certain terms that are not described explicitly in the Convention.

Moreover, it has to be acknowledged that the majority of the Rule 39 requests which are submitted to the Court concern the risk of treatment contrary to Article 3 of the Convention

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458 Speech to Inner Temple by the President of the European Court of Human Rights on Immigration and Human Rights in the Case Law of the ECHR, p. 2.
462 Factsheet on Interim Measures, p. 2.
which has, as stated in Chapter 4.5.2, no exceptions and is non-derogable under any circumstances.\textsuperscript{463} In that context, adjudicators have agreed that even if a treaty does not explicitly provide for interim measures, the duty to protect against ill-treatment such as torture requires states to refrain from action or even take positive measures to protect individuals. The prohibition of torture and ill-treatment proscribed under Article 3 clearly demonstrates the necessity of binding interim measures.\textsuperscript{464}

It has to be understood that the interpretation of the Convention should be in the direction of providing the Court with the necessary authority to ensure effectiveness of protecting the rights that it shall safeguard. Non-compliance is likely to affect the entire system of protection and the core human rights included in the Convention.\textsuperscript{465} In light of these observations, one can deduce that an international human rights system is only securely effective if the relevant adjudicator, the ECtHR in the present context, has the power to order interim measures that are legally binding on the Contracting States.\textsuperscript{466}

6.4 The Right to Individual Application under Article 34 of the ECHR

When discussing the legitimacy of the binding nature of Rule 39, it is of great importance to address the crucial provision of the individual’s right to apply to the Court, enshrined in Article 34 of the Convention. The provision stipulates the following:

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

The primary purpose of the provision is to give individuals a genuine right to take legal action at international level.\textsuperscript{467} As previously stressed in Chapter 5.3.1.4, the Court reinforced in the Mamatkulov and Askarov case the importance of the right to individual application under the provision and stated that it serves as a key component of the machinery for protecting the rights set out in the Convention.\textsuperscript{468} It described the right as one of the

\textsuperscript{463} C.V. Wouters: *International Legal Standards for the Protection from Refoulement*, p. 309.
\textsuperscript{467} *Practical Guide on Admissibility Criteria*, p. 8.
\textsuperscript{468} ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99), para. 91.
“fundamental guarantees of the effectiveness of the Convention system of human rights protection.”

The right to individual application to the Court is an absolute right which contains a substantive obligation on states not to hinder its effective exercise. Thus, domestic authorities of the Contracting States must abstain from putting any form of pressure on individuals to modify or withdraw their complaints. In this context, when the Court has applied Rule 39 and ordered interim measures, the relevant state must take all steps which could reasonably be taken in order not to hinder the applicant’s right under Article 34 of the ECHR.

The right enshrined in Article 34 is particularly important for individuals who have been deprived of their liberty and no obstacles may be put in the way of them applying to the Court. When not complying with interim measures that have been ordered by the Court, states are usually actively hindering applicants from making any further inquiries. Thus, the non-compliance proves to be a real obstacle to the effective presentation of their application to the Court. In the aforementioned Mamatkulov and Askarov case, the applicants were deprived of the right to individual application. Having been extradited to their home country, their level of protection was irreversibly reduced and the Court was prevented from properly assessing whether the applicants were exposed to a real risk of ill-treatment.

The Court reaffirmed in the Olaechea Cahuas case that an interim measure is provisional by nature and its need is assessed when a risk that might hinder an individual’s right to application under Article 34 occurs. The Court stated: “Failure to comply with an interim measure indicated by the Court because of the existence of a risk is in itself alone a serious hindrance, at that particular time, of the effective exercise of the right of individual application.”

Furthermore, the right to individual application has been stressed by the Committee of Ministers in a resolution adopted in 2010. The Committee emphasized that the individual’s right to apply to the Court is a central element of the whole Convention system and should

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469 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 100.
471 Practical Guide on Admissibility Criteria, p. 11.
472 Factsheet XV on the Right to Individual Application to the European Court of Human Rights (Article 34).
473 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 94.
474 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 108.
475 ECtHR, Olaechea Cahuas vs. Spain, August 10th 2006 (24668/03).
476 ECtHR, Olaechea Cahuas vs. Spain, August 10th 2006 (24668/03), para. 81.
thus be respected and protected at all levels. In the context of Article 34, the obligation for Contracting States to comply with interim measures made under Rule 39 was recalled in the resolution. 

From this it can be gathered that by acceding to Article 34 of the ECHR and thereby undertaking not to hinder in any way the effective exercise of the right enshrined in the provision, the Contracting States have accepted to comply with obligations and measures that ensure the individual application. Hence, the legitimacy of the binding nature of Rule 39 interim measures is clearly supported by the essential right under Article 34 of the Convention.

6.5 The Vienna Convention on the Law of Treaties

The ECHR does not include a special provision on how to interpret the Convention, even though Article 32 (1) requires the Court to interpret and apply the Convention. It is therefore useful, when further looking into the legitimacy of the binding nature of Rule 39, to discuss the role of the Vienna Convention on the Law of Treaties of 1969 in interpreting the Convention. The ECHR is an international human rights treaty and thus it is subject to the rules of interpretation of treaties set out in Articles 31–33 of the VCLT. Only states are party to the VCLT but it is recognized as demonstrating customary international law and applicable to international human rights bodies as confirmed by the ECtHR.

Human rights treaties, such as the ECHR, are often said to have a special nature. The Court stated in the Mamatkulov and Askarov judgment that when being interpreted in the light of the rules set out in the VCLT, the Court must do so, “taking into account the special nature of the Convention as an instrument of human rights protection.” As shown by the reference in the case, the Court based this statement on what it had previously stated in the landmark

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481 Article 32 (1) on the Jurisdiction of the Court: “The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.”
482 Hereafter referred to as VCLT.
483 Article 1 of the VCLT on the Scope of the Convention: “The present Convention applies to treaties between States.”
485 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para 111.
case of *Golder vs. the United Kingdom*, which contained the Court’s first extensive discussion on the VCLT and the rules of interpretation.

### 6.5.1 The Core Purpose of the ECHR and Interim Measures

Article 31 (1) of the VCLT reads as follows:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

When ascertaining the content of a human rights treaty, the object and purpose of the treaty have to be kept in mind as well as the parties’ acting in good faith. Good faith requires the relevant parties to act honestly, reasonably and abstain from taking any unfair advantage. Since the object and purpose of human rights treaties like the ECHR are different from other kinds of treaties, the same applies to interpretation of human rights treaties, i.e. they are interpreted differently than other kinds of treaties. As regards interpreting human rights treaties, a stronger emphasis must be placed on the object and purpose than otherwise.

When searching for the object and purpose of a treaty, looking particularly at the treaty’s preamble has proved to be important. In principle, all the means of the available interpretation can contribute to the object and purpose of the treaty in question. Hence, the entire text of the treaty needs to be explored. The aim, nature and end of each treaty are terms in the text that should be looked into when establishing the object and purpose of it. Together with good faith, the considerations of a treaty’s object and purpose will ensure the effectiveness of its terms.

Looking at the purpose of the ECHR, it is clear that the intention of the drafters was to protect the individuals of the Contracting States from threats of the future, as well as those of the past. The drafters of the Convention intended to promote and safeguard human rights in Europe and their intention was to protect a list of fundamental freedoms of the Contracting States.

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486 *ECHR, Golder vs. the United Kingdom, February 21*" 1975 (4451/70), para. 29.
487 Eirik Bjørge: *The Evolutionary Interpretation of Treaties*, p. 31–32.
490 Eirik Bjørge: *The Evolutionary Interpretation of Treaties*, p. 35.
491 ECHR, Golder vs. the United Kingdom, February 21" 1975 (4451/70), para. 34.
492 Eirik Bjørge: *The Evolutionary Interpretation of Treaties*, p. 113.
States’ individuals.\textsuperscript{495} The Court has underlined in several cases, e.g. in the \textit{Mamatkulov and Askarov} case, the following: “The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective, as part of the system of individual applications.”\textsuperscript{496} In addition to this, any interpretation of the rights and freedoms guaranteed has to be consistent with “the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society.”\textsuperscript{497}

It can be concluded that the overall core purpose of the Convention is the important role of protecting the rights of human beings. The primary role and purpose of Rule 39 interim measures is, as previously mentioned, to prevent irreparable harm and enable the Court in taking necessary actions to deal with very urgent and often vulnerable situations, which is consistent with the core purpose of the Convention. Such measures are taken only when core rights are to be protected.\textsuperscript{498} When interpreting Article 34 in the \textit{Mamatkulov and Askarov} case, the Court acknowledged the special character of the Convention as a treaty for the enforcement of human rights and fundamental freedoms.\textsuperscript{499}

6.5.2 \textit{Relevant Rules of International Law}

Article 31 (3)((c)) of the VCLT stipulates the following:

There shall be taken into account, together with the context: Any relevant rules of international law applicable in the relations between the parties.

According to this, the ECtHR should take account of any relevant rules and principles of other international treaties than the Convention as well as of international law applicable in the relations between the parties.\textsuperscript{500} The rules that should be considered may be general, regional or local customary rules and in addition they should be in force when the relevant treaty is interpreted. Moreover, the rules do not need to have any special relationship with the Convention but should concern the subject matter of the term in question.\textsuperscript{501} The Court stated in 2008 that it does not consider the provisions of the Convention as the “sole framework of

\textsuperscript{495} Eirik Bjørge: \textit{The Evolutionary Interpretation of Treaties}, p. 62.
\textsuperscript{496} ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99), para 101.
\textsuperscript{497} ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99), para 101; ECtHR, Soering vs. the United Kingdom, July 7\textsuperscript{th} 1989 (14038/88), para. 87; ECtHR, Klass and Others vs. Germany, September 6\textsuperscript{th} 1978 (5029/71), para. 34.
\textsuperscript{499} ECtHR, Mamatkulov and Askarov vs. Turkey, February 4\textsuperscript{th} 2005 (46827/99 and 46951/99), para. 100.
\textsuperscript{500} Magnus Killander: “Interpreting Regional Human Rights Treaties”, p. 149.
reference for the interpretation of the rights and freedoms therein” 502 and that when the meaning of terms in the text of the ECHR is defined, the Court “can and must take into account elements of international law other than the Convention.” 503

When the Court concluded on the binding nature of interim measures in the Mamatkulov and Askarov case and established that non-compliance of such measures should result in a violation of Article 34 of the ECHR, the reasoning did not only refer to the object and purpose of interim measures under the ECHR, but also to the object and purpose of other international treaties. 504 In other words, the Court considered general principles of international law, treaties and international case law when defining the bindingness of interim measures. 505 It referred to the fact that in numerous decisions and orders “international courts and institutions have stressed the importance and purpose of interim measures and pointed out that compliance with such measures was necessary to ensure the effectiveness of their decisions.” 506 The Court also particularly referred to the landmark judgment by the International Court of Justice in the case of LaGrand 507 where the ICJ concluded that its own interim measures were legally binding following the object and purpose of the Statute of the International Court of Justice. 508

The Court’s referral to these international treaties and obligations strengthens the binding nature of interim measures under Rule 39 of the Rules of Court.

6.5.3 State Practice on Interim Measures

Article 31 (3)(b) of the VCLT prescribes the following:

There shall be taken into account, together with the context: Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

Within the context of the ECHR, and its very important provision on the right of individual application in Article 34 of the ECHR, it can be stated that until recently the state practice of the Court has demonstrated a clear will by the Contracting States to comply with

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502 ECtHR, Demir and Baykara vs. Turkey, November 12th 2008 (34503/97), para. 67.
503 ECtHR, Demir and Baykara vs. Turkey, November 12th 2008 (34503/97), para. 85.
507 ICJ, LaGrand (Germany vs. the United States of America), June 27th 2001.
508 ECtHR, Mamatkulov and Askarov vs. Turkey, February 4th 2005 (46827/99 and 46951/99), para. 117.
interim measures.\textsuperscript{509} Most governments concerned are willing to co-operate fully with the Court and to respect and comply with Rule 39 orders.\textsuperscript{510} This has helped to clarify the interpretation of Article 34 to the effect that the right of individual application can require states to refrain from taking certain action that has been ordered by the Court.\textsuperscript{511}

The cases of non-compliance have mostly derived from a few of the 47 Contracting States, that is, statistics show that non-compliance can mainly be attributed to Russia, Turkey and Italy.\textsuperscript{512} Many of these cases are those where applicants who are protected by interim measures “disappear” under suspect circumstances and the authorities are alleged to be involved in the disappearance, as was discussed in \textit{Chapter 5.4.1} in the present thesis. Such cases are very severe and underline the need for binding interim measures. Moreover, this underlines the need for states to fully comply with such measures.

The number of interim measures which have not been complied with by states is relatively low compared to the reported number of measures that have been issued since the first time the European Commission decided to start issuing interim measures.\textsuperscript{513} Statistics show that out of the almost two thousand cases in which the Court granted interim measures between the years 2010–2013,\textsuperscript{514} there were thirteen cases of non-compliance.\textsuperscript{515} In other words, the previous practice has shown a general consent of the Contracting States to comply with interim measure orders by the Court. Some states even explicitly confirm their compliance with interim measures.\textsuperscript{516}

Based on the aforementioned, one might say that these factors put strength to the legitimacy of the binding character of interim measures. But in fact, the reality of increasing non-compliance by certain Contracting States remains, even though it is clear that such measures are binding and should be complied with; failing that, Article 34 of the Convention will be violated. This development, as discussed in \textit{Chapter 5.4}, results in less clear state practice in the context of state compliance.

\textsuperscript{509} R. St. J. Macdonald: “Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights”, p. 733.
\textsuperscript{510} Nuala Mole and Catherine Meredith: \textit{Human Rights Files, No. 9: Asylum and the European Convention on Human Rights}, p. 221.
\textsuperscript{511} R. St. J. Macdonald: “Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights”, p. 733.
\textsuperscript{512} \textit{Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights}, p. 15–16.
\textsuperscript{513} Yves Haeck, Clara Burbano Herrera and Leo Zwaak: “Strasbourg’s Interim Measures under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?”, p. 380.
\textsuperscript{515} \textit{Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights}, p. 15–16.
While cases of non-compliance have predominantly derived from few of the Contracting States, other Member States, such as Belgium, France and the UK, have also refused to comply with interim measures or delayed their compliance in the recent years. These states are old Member States that have been referred to as the founding fathers by the Council of Europe. This cannot be condoned. Moreover, although the overall compliance rate is high as earlier mentioned, most of the cases of non-compliance have arisen in the years after 2005, when the Court established that interim measures were binding, and that states’ non-compliance was in violation of Article 34.

Three academics raised this issue in their contribution to the European Yearbook on Human Rights in 2011. They pointed out, by examining the characteristics of non-compliance cases, that the absolute majority of such cases are expulsion and extradition cases. This is not surprising since interim measures under Rule 39 are mostly applied in such cases. According to their research, states have mostly been reluctant to comply with interim measures in “conflict-related” cases due to the vulnerability at the domestic political level. States tend to try and justify their non-compliance by arguing that their domestic legislation or lack thereof does not permit them to follow interim measures applied by the Court. Such arguments have been rejected by the Court as states can not use their own lack of proper legislation as an excuse for violating their international obligations which they have bound themselves to abide by in accordance with the Convention.

Although it can be stated that the binding character of interim measures is legitimate and necessary in order to protect core human rights, the Court cannot turn a blind eye to the

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517 Yves Haeck, Clara Burbano Herrera and Leo Zwaak: “Strasbourg’s Interim Measures under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?”, p. 381.
518 Yves Haeck, Clara Burbano Herrera and Leo Zwaak: “Strasbourg’s Interim Measures under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?”, p. 402.
520 Yves Haeck, Clara Burbano Herrera and Leo Zwaak: “Strasbourg’s Interim Measures under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?”.
521 Yves Haeck, Clara Burbano Herrera and Leo Zwaak: “Strasbourg’s Interim Measures under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?”, p. 400.
continual rising of non-compliance by the Contracting States. Such practice, if it were to prevail, might in time undermine the legitimacy of the binding nature of interim measures.\textsuperscript{522}

Fortunately, given the importance of interim measures where human rights are at stake, this troubling development of non-compliance has been confronted by the Council of Europe, as was mentioned in \textit{Chapter 5.4.2.3}. The Council proclaimed in its 2014 report\textsuperscript{523} that action needs to be taken in order to reduce the practice of non-compliance.\textsuperscript{524} With regard to possible responses to this development, scholars have pointed out that even more co-ordinated and persuasive follow-up mechanisms by the Council of Europe’s organs is crucial in order to address instances of non-compliance.\textsuperscript{525} A coherent follow-up system might be the key tool to improve future respect by the Contracting States for interim measures.\textsuperscript{526}

The lack of legal reasoning when the Court orders interim measures might also have a negative influence on the compliance rate by certain Contracting States.\textsuperscript{527} As stated earlier in \textit{Chapter 3.3}, the Court has remained reluctant to provide detailed reasoning since such practice would delay the urgent matter of applying interim measures. It would, however, be interesting to know if further reasoning by the Court would make all the Constracting States take the binding nature of ordered interim measures more seriously.

In light of all the aforementioned and in order to give more strength to the legitimacy of the binding nature of Rule 39, it might be advisable and even necessary to take more drastic steps towards ensuring compliance with interim measures and to give such measures further legal basis in addition to Article 34 of the ECHR, where binding interim measures would be phrased explicitly in a new provision of the Convention through an amending protocol.\textsuperscript{528} By doing this, no excuses regarding doubt as to the legally binding character of interim measures and the legal implications of non-compliance could be proffered by the Contracting States.

\textsuperscript{522} Yves Haeck, Clara Burbano Herrera and Leo Zwaak: “Strasbourg’s Interim Measures under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?”, p. 402.

\textsuperscript{523} \textit{Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights.}

\textsuperscript{524} \textit{Urgent Need to Deal with New Failures to Co-Operate with the European Court of Human Rights}, p. 13–14.


\textsuperscript{527} Yves Haeck, Clara Burbano Herrera and Leo Zwaak: “Strasbourg’s Interim Measures under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?”, p. 401.

\textsuperscript{528} Yves Haeck, Clara Burbano Herrera and Leo Zwaak: “Strasbourg’s Interim Measures under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?”, p. 403.
7 Summary and Conclusions

The main objective of the present thesis, as put forward in Chapter 1.1, was to study interim measures of the European Court of Human Rights, according to Rule 39 of the Rules of Court. The study aimed at examining the research questions, set forth in Chapter 1.2, regarding the legitimacy of the binding character of interim measures. It focused on the Court’s establishment of the binding nature of such measures even though there is no provision in the Convention which explicitly prescribes for them. Furthermore, the thesis has focused on as to whether the binding character of Rule 39 is an unwarranted limitation of the Contracting States’ sovereignty or whether it should rather be seen as a logical step in successfully promoting the protection of human rights. Increasing non-compliance by Contracting States was explored, a topic of current interest and importance. The Court’s case law regarding the subject was examined, with the study mainly limited to asylum cases in relation to deportation of refugees and Article 3 of the Convention. Other types of cases and provisions were looked into as appropriate.

In order to meet its objectives, the thesis delved into various aspects of interim measures and Rule 39 of the Rules of Court in Chapters 2–6.

It can be gathered from Chapter 2 that the primary role of Rule 39 interim measures is to enable the Court in taking necessary measures to deal with urgent situations. The purpose of such measures is to preserve the substance of the rights of applicants who are awaiting final judgment in their respective cases. Thus, such measures aim at maintaining the status quo. When looking into the history of interim measures under the Court, the most striking factor to be addressed relates to the fact that no provision has ever been included in the Convention explicitly allowing for such measures. The reason for this situation can i.a. be explained by the reluctance of the state parties, when signing the Convention, to establish a control machinery that might challenge their own sovereignty. The continual lack of a direct interim measures provision through the years seems to be due to the fact that it was thought to be unnecessary, as previous state practice demonstrated that states already complied with interim measures orders. This state practice on compliance has, however, changed in recent years with non-compliance as a growing problem for the Court. Recent developments, concerning the worrying rise in the number of Rule 39 requests, can nevertheless be commended, as requests have significantly dropped following the Court’s revised practice direction and its establishment of centralized procedures.
The Court has developed in such a way that Rule 39 is only applicable to cases in which there is an imminent risk of irreparable damage, as Chapter 3 outlines. Such measures are only indicated in limited spheres and if necessary urgency is not demonstrated, the Court refuses to order interim measures. When deciding if an interim measure should be granted to an applicant, the applicant’s credibility and relevant evidence is important. The Court will primarily rely on the current and future situation of the applicant when determining the existence of risk. When lodging a Rule 39 application to the Court, the applicant must specify the grounds on which her or his particular fears are based. The majority of cases relate to expulsion measures and rights under Article 2 and Article 3 of the Convention, but the Court does, however, not limit its application to these grounds. Interim measures have also been ordered in cases involving alleged violations of Article 4, 5, 6 and 8 of the Convention. It can be inferred from Chapters 3.3 and 3.4 on the procedure and time frame of Rule 39 applications, that any individual who intends to submit an application before the Court under Article 34 of the ECHR, can submit a Rule 39 request at any stage of the Court proceedings. Furthermore, time is of essence when requesting such measures due to the nature of their emergency. Therefore, it is advisable for the applicant to ask the Court to apply priority procedure under Rule 41 of the ECHR as well as putting forward all available information as promptly as possible.

The majority of Rule 39 interim measures are applied by the Court in cases concerning applicants’ deportation to a place where the individuals in question are facing ill-treatment under Article 3 of the Convention. In such asylum cases, Rule 39 interim measures are extremely important in safeguarding the essential principle of non-refoulement, as is demonstrated in Chapter 4. When looking into the principle, it can be deduced that it is regarded as a norm of customary international law and by some scholars it is even regarded as a norm of jus cogens. The principle protects both refugees and asylum seekers, as it applies to individuals without regard to whether they have been formally recognized as refugees. In the context of the ECHR, the Court and the Commission have through case law established a developed prohibition on refoulement under Article 3 of the Convention. In this context, Rule 39 offers an essential remedy to applicants who face a real risk according to Article 3 when there is a pending deportation order against them. The granting of Rule 39 does, however, not automatically lead to a substantive finding by the Court that the deportation which has been stopped will breach Article 3. In cases where the applicant alleges risk of ill-treatment if her or his deportation to another country occurs, substantial grounds must be shown for believing that a real risk exists of such treatment. The burden of demonstrating such grounds is shared
between the applicant and the state. In addition, the ill-treatment that the applicant in question is at risk of facing must attain a minimum level of severity in order to be assessed under the scope of Article 3 of the Convention.

The application of Article 3 is not limited to cases involving imposed treatment, as stated in Chapter 4.5.3.2. The Court has ruled that harsh medical conditions in the receiving country can lead to violation of Article 3, as was shown in the case D. vs. the United Kingdom, where the Court applied Rule 39 to order the British state not to deport an AIDS-suffering applicant to his home country. After the Court’s judgment in N. vs. the United Kingdom, it however appears that Rule 39 will only be applied in such cases if very exceptional circumstances exist.

Regarding Rule 39 requests on the basis of the application of the Dublin Regulation, it was shown in Chapter 4.5.4 that not granting an interim measure request to an applicant, cannot be justified on the grounds that the receiving third state is “safe”. Following the judgment in the landmark case M.S.S. vs. Belgium and Greece, the Court has ordered that it will grant Rule 39 interim measures made on all Dublin transfers to Greece and accordingly that states should refrain from taking any action to remove applicants to the country.

The controversial topic of the increasing use by the Contracting States of diplomatic assurances in expulsion cases is worrying to various international organs, as demonstrated in Chapter 4.5.5. Some states have practiced the use of such assurances as a justification for not complying with interim measures granted by the Court, by referring to the receiving state’s assurance that the applicant will not be harmed upon return. The Court has established that diplomatic assurances can never be considered a sufficient guarantee for respecting the prohibition of torture and for upholding the principle of non-refoulement. It can be concluded from the discussion in Chapter 4.5.5.2 that the use of diplomatic assurances as a replacement for applying Rule 39 when needed, is not leading states towards more safety measures in deportation cases, but rather undermining the absolute prohibition of torture under Article 3 of the ECHR and the principle of non-refoulement.

After concluding that due to the absence of a provision in the ECHR for interim measures, such measures could not generate any legal obligations towards states, the Court drastically changed its point of view in the landmark case Mamakulov and Askarov vs. Turkey as was examined in Chapter 5. Today, it has been firmly established that non-compliance by a

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529 ECHR, D. vs. the United Kingdom, May 2nd 1997 (30240/96).
530 ECHR, N. vs. the United Kingdom, May 27th 2008 (26565/05).
531 ECHR, M.S.S. vs. Belgium and Greece, January 21st 2011 (30696/09).
Contracting state with interim measures under Rule 39 leads automatically to a violation of Article 34 of the ECHR on the right to individual application. Hence, interim measures ordered by the Court under Rule 39 must always have binding force. Despite this, the rapidly growing number of Rule 39 breaches by several Member States to the Convention is of grave concern and has been strongly condemned by the Council of Europe as stated in Chapter 5.4.1. A new phenomenon concerning non-compliance instances has particularly been worrying the Court, namely that applicants who are protected by interim measures temporarily “disappear” under suspect circumstances and are, despite the interim measure order, sent back to countries where they face a risk of ill-treatment contrary to the Convention.

The result of a clear non-compliance is a substantive breach of the ECHR itself under Article 34 as said in Chapter 5.4.2. In the context of expulsion and extradition cases, breaches of Rule 39 may also violate Article 3 as well as the international core principle of non-refoulement. Regarding cases of less obvious non-compliance, the Court has established that under certain circumstances, a failure to comply with interim measures will not amount to a violation of Article 34; i.e. if the respondent state has demonstrated that an objective impediment prevented the state’s obligation to comply with Rule 39 and that it took all reasonable steps to remove the impediment and informed the Court about the situation. However, it is of worry when states have sought to use objective impediments as an excuse for their non-compliance. Such tactics demonstrate the same lack of respect for the Convention system as cases of clear non-compliance. In order to ensure the effective protection of the rights of applicants that have been granted Rule 39, the Court has now begun indicating positive measures and follow-up requirements as displayed in Chapter 5.4.2.3. With its judgment in the case Savriddin Dzhurayev vs. Russia533 the Court required for the first time, as a general measure under Article 46 of the ECHR, that Russian authorities should take positive measures after being found not to have complied with Rule 39 and thereby in violation of Article 34 of the Convention. From this, it can be seen that the Court is taking steps forward in requesting authorities to take positive measures in order to prevent instances of non-compliance.

The research questions earlier established were dealt with in Chapter 6. The binding nature of Rule 39 derives from an evolutive interpretation of Article 34 of the Convention, which is in accordance with the Court’s use of the living instrument approach where the

533 ECHR, Savriddin Dzhurayev vs. Russia, April 25th 2013 (71386/10).
Convention is interpreted according to present-day conditions. It transpires from Chapter 6.2 that despite disapproval of such evolutive interpretation by some scholars, the idea of the ECHR as a living instrument is necessary if effectiveness is to be maintained. In order to avoid stagnation, it is crucial for the Convention and the Court to be an instrument of development and improvement.

In the context of a commitment-based legitimacy of the binding nature of Rule 39, the Contracting States must be ready to accept in advance solutions which the Court may give to certain terms that are not explicitly included in the Convention, as discussed in Chapter 6.3. Even though Article 46 of the ECHR only binds the respondent state in each case at a time to abide by the judgment at issue, the provision could however be looked at as a precedent for other states to respect interim measures as the Court has repeatedly held that such measures are binding. To meet the counter-arguments of commitment-based legitimacy arguing for states’ sovereignty in this regard, the Court has held that treaty obligations should in principle and in case of doubt not be interpreted in favour of state sovereignty. Furthermore, the absolute non-derogable character of Article 3 demonstrates the necessity of binding interim measures. It is understood from Chapter 6.3 that an international human rights system is only effective if the relevant adjudicator, the ECtHR in the present context, has the power to order legally binding interim measures on the Contracting States.

Regarding the right to individual application, it can be gathered from Chapter 6.4 that by acceding to Article 34 of the ECHR and thereby undertaking not to hinder in any way the effective exercise of the right enshrined in the provision, the Contracting States have accepted to comply with obligations and measures that ensure the individual application. Hence, the legitimacy of the binding nature of Rule 39 is clearly supported by the essential right under Article 34 of the Convention.

Being an international human rights treaty, the ECHR is subject to the rules of interpretation of treaties set out in the VCLT as stated in Chapter 6.5. With regard to Article 31(1) of the VCLT it can be concluded that the primary role and purpose of Rule 39 interim measures is consistent with the core purpose of the ECHR, i.e. to protect the rights of human beings. The Court’s referral to international treaties and obligations according to Article 31 (3)((c)) of the VCLT, when establishing the binding character of Rule 39, further strengthens the legitimacy of the binding nature of such measures. It can be deduced from the examination in Chapters 6.1–6.5.2 that the binding character of interim measures under Rule 39 of the Rules of Court is legitimate and necessary in order to protect core human rights.
Furthermore, it should be seen as not only a logical step in promoting the protection of human rights, but also a necessary one.

As substantiated in Chapter 6.5.3 the previous state practice concerning interim measures, taken into account according to Article 31(3)((b)) of the VCLT, shows that states have generally complied with interim measures through the years until recently. It is clear to the Member States that such measures are binding and should be complied with if Article 34 is not to be violated. However, the reality remains of increasing non-compliance with interim measures, particularly after the Court established their binding nature in 2005. Such practice is of grave concern as it might in time undermine the legitimacy of the binding nature of interim measures.

Fortunately, the Council of Europe has met this troubling development to a certain extent, as discussed in Chapter 5.4.2.3, but further measures are clearly needed. The lack of legal reasoning is likely to have negative influence on the Contracting States’ compliance rate. Further reasoning seems however unrealistic as such practice would delay the urgent application of interim measures.

The recent increase in non-compliance certainly gives reason to rethink the perception of an explicit legal basis of binding interim measures in the Convention itself. Drastic steps towards ensuring compliance with interim measures in the form of a further legal basis in addition to Article 34 of the ECHR, might be advisable and even necessary. Should this be implemented, binding interim measures would be phrased explicitly in a new provision of the Convention through an amending protocol. Such clear legal basis in the Convention would decrease excuses regarding doubt as to the legally binding nature of interim measures. It is nevertheless not certain if such amendments in the system would suffice in ensuring compliance by Member States that seem to disregard human rights deliberately, as the recent phenomenon of applicants’ “disappearances” shows, discussed in Chapter 5.4.1. Even so, such explicit legal basis in the Convention would surely be likely to heighten the Court’s respect among Contracting States and improve compliance with interim measures.

It has been demonstrated in the present thesis that the importance of interim measures is immense. Moreover, the legitimacy of the legally binding nature of such measures has been manifested. They serve an extremely important role in cases of great urgency, where lives of individuals are in many instances at stake. In light of this, the Court and the Contracting States should do everything in their power to stop further cases of non-compliance and take action to make states respect and comply with interim measures.
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