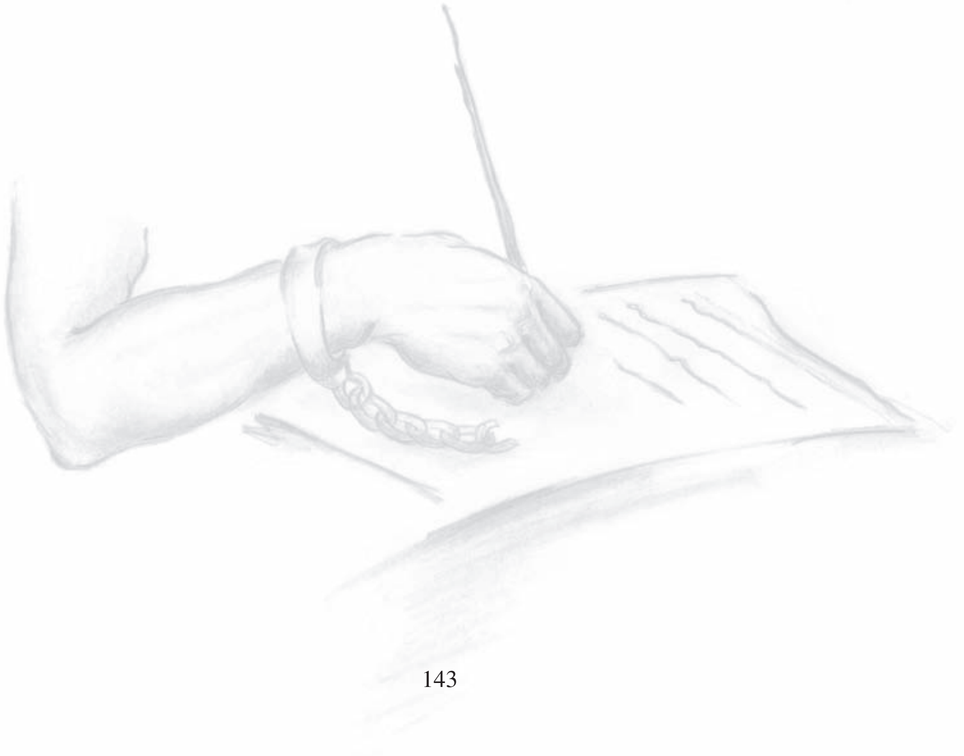
PART III

PROCEEDINGS BEFORE THE COURT



INTERIM MEASURES AND CASE PRIORITY

3.1 Interim Measures (Rule 39 of the Rules of Court)

3.1.1 Summary

3.1.2 Discussion

3.1.3 Application Procedure for Interim Measures

3.2 Case Priority and Urgent Notification of Applications (Rules 40-41)

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3.1 Interim Measures (Rule 39)

3.1.1 Summary

Interim measures are issued by the Court to a respondent Contracting Party indicating that it should refrain from carrying out an act which could be detrimental to the Court's examination of an applicant's case. Interim measures under Rule 39 of the Rules of Court are predominantly granted in expulsion and extradition cases in order to prevent the removal of the applicant to a country where he or she may be subjected to treatment in violation of Articles 2 and/or 3 of the Convention. According to the Court's established case-law, Contracting Parties have a duty to comply with any interim measures indicated to them, failing which, issues will arise under Article 34 as regards the applicant's enjoyment of his or her right to an individual petition.[387]

Interim measures are often sought but rarely granted. For an interim measure to be granted, the applicant must demonstrate an imminent risk of irreparable damage to life or limb.[388]

This section includes practical information for filing interim measure requests. Furthermore, the reader may refer to the sample application for an interim measure and the Practice Direction on Interim Measures in Appendices Nos. 15 and 3, respectively.

3.1.2 Discussion

As pointed out above, Rule 39 of the Rules of Court authorizes interim measures and provides 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. Notice of these measures shall be given to the Committee of Ministers.
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> 3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated".

387 *Mamatkulov and Askarov v. Turkey* [GC], cited above, § 127.
388 *Ibid.,* § 104.

One of the most noteworthy cases concerning the indication of interim measures is that of *Soering v. the United Kingdom*,[389] which concerned the extradition by the British authorities of a German national to the United States where the authorities wanted to put him on trial for murder. If convicted, the applicant was liable to be sentenced to death. Mr. Soering argued that his surrender to the authorities of the United States of America might, if implemented, give rise to a breach by the United Kingdom of Article 3 of the Convention because he would be exposed to the so-called "death row phenomenon", which he alleged constituted treatment contrary to that Article. His application to the Commission for the interim measure under Rule 36 of the Commission's Rules of Procedure (now Rule 39 of the Rules of Court) was accepted, and the Commission indicated to the United Kingdom Government that it would be advisable not to extradite the applicant to the United States while the proceedings were pending in Strasbourg.[390] The United Kingdom Government complied with the interim measure and the Court subsequently held that the United Kingdom would be in breach of Article 3 if it were to extradite the applicant to the United States because the circumstances of death row would represent treatment prohibited by that Article.[391] Without the interim measure, Mr. Soering might have been extradited before the Convention institutions had had a chance to examine the application, and the risk of ill-treatment as alleged by the applicant might have materialised.

According to the Court, indications of interim measures given by the Court:

> "permit it 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; such indications also subsequently allow the Committee of Ministers to supervise execution of the final judgment. Such measures thus enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention".[392]

The Court approaches Rule 39, therefore, from the perspective of the effective exercise of the right of individual application, which is guaranteed under Article 34 of the Convention. In the case of *Mamatkulov and Askarov v. Turkey*, in which the Turkish Government failed to comply with the Court's indication under Rule 39 and extradited the applicants to Uzbekistan anyway, the Grand Chamber of the Court found that the Turkish Government had not complied with its obligation under Article 34 of the Convention. It held:

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389 *Soering v. the United Kingdom,* cited above.
390 *Ibid.,* § 4.
391 *Ibid.,* § 111. See also Appendix No. 10 below.
392 *Mamatkulov and Askarov v. Turkey* [GC], cited above, § 125.

> "[t]he facts of the case, as set out above, clearly show that the Court was prevented by the applicants' extradition to Uzbekistan from conducting a proper examination of their complaints in accordance with its settled practice in similar cases and ultimately from protecting them, if need be, against potential violations of the Convention as alleged. As a result, the applicants were hindered in the effective exercise of their right of individual application guaranteed by Article 34 of the Convention, which the applicants' extradition rendered nugatory".[393]

The Grand Chamber further held that:

> "The Court reiterates that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34 of the Convention".[394]

The Grand Chamber of the Court has thus established that indications under Rule 39 impose binding obligations on the Contracting Parties.

Most interim measures indicated by the Commission and the Court have been complied with[395] by the Contracting Parties notwithstanding the fact that until the adoption of the judgment in the case of *Mamatkulov and Askarov,* indications under Rule 39 were not regarded by the Court as binding.

The Grand Chamber further set out in *Mamatkulov and Askarov v. Turkey* that:

> "[i]nterim 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. While there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or other rights guaranteed by the Convention. The vast majority of cases in which interim measures have

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393 *Ibid.*, § 127.

394 *Ibid.*, § 128. In this case the Court, while acknowledging that Turkey's failure to comply with the indication given under Rule 39 had prevented it from assessing whether a real risk existed, nevertheless concluded by a majority of 14 to 3 that it was unable to find that substantial grounds existed for believing that the applicants faced a real risk of treatment proscribed by Article 3 (§ 77). See also the partly dissenting opinion of Judges Bratza, Bonello, and Hedigan in which they stated, *inter alia*, the following: "It is unclear to us what further corroborative evidence could reasonably be expected of the applicants, particularly in a case such as the present, where it was Turkey's failure to comply with the interim measures indicated by the Court which has prevented the Court from carrying out a full and effective examination of the application in accordance with its normal procedures. In such a situation, we consider that the Court should be slow to reject a complaint under Article 3 in the absence of compelling evidence to dispel the fears which formed the basis of the application of Rule 39".

395 *Ibid.,* § 105: "…Cases of States failing to comply with indicated measures remain very rare."

> been indicated concern deportation and extradition proceedings".[396]

It follows from this quote that an interim measure under Rule 39 will generally only be granted if the applicant can show that there is an imminent risk of irreparable damage to life or limb.[397] For example, interim measures were applied in the case of *Shamayev and 12 Others v. Georgia and Russia*, which concerned the extradition by Georgia of a number of Chechens to Russia. The Court concluded that in the light of the extremely alarming phenomenon of persecution – in the form of threats, harassment, detention, enforced disappearances, and killings – of persons of Chechen origin who had lodged applications with the Court, the extradition to Russia of the one applicant still remaining in Georgia would constitute a violation of Article 3 of the Convention.[398]

Interim measures were also applied in the case of *D. v. the United Kingdom*, which concerned the removal of a person suffering from AIDS from the United Kingdom. As mentioned earlier, the Court held in that case that the United Kingdom would be in breach of Article 3 of the Convention if it were to proceed with the removal of the applicant.

In an application for an interim measure which concerned somewhat more extraordinary circumstances, the Court rejected Saddam Hussein's request:

> "to permanently prohibit the United Kingdom from facilitating, allowing for, acquiescing in, or in any other form whatsoever effectively participating, through an act or omission, in the transfer of the applicant to the custody of the Iraqi Interim Government unless and until the Iraqi Interim Government has provided adequate assurances that the applicant will not be subject to the death penalty".[399]

Interim measures, by their nature, will usually be indicated to a Contracting Party, but there have been exceptions. In the case of *Ilaşcu and Others v. Moldova and Russia*, for instance, the President of the Grand Chamber decided on 12 January 2004 to invite the respondent Governments, under Rule 39, to take all necessary steps to ensure that one of the applicants who had been on hunger strike since 28 December 2003 "was detained in conditions which were consistent with respect for his rights under the Convention".[400] An interim measure to that effect was thus indicated to the Contracting Parties concerned. In addition, however, the President decided on 15 January 2004 to urge the applicant himself, under Rule 39, to call off his hunger strike, a

396 *Ibid.*, § 104.
397 See also Leach, p. 38 *et seq.*
398 *Shamayev and 12 Others v. Georgia and Russia*, no. 36378/02, 12 April 2005.
399 See the press release of 30 June 2004 at http://www.echr.coe.int/Eng/Press/2004/June/RequestforInterimmeasure-SaddamHussein.htm
400 *Ilaşcu and Others v. Moldova and Russia*, cited above, § 10.

request which the applicant complied with on the same day.[401]

Perhaps the most far-reaching interim measure indicated by the Court was the one issued in the case of *Öcalan v. Turkey*, which concerned the arrest and subsequent trial, by a State Security Court, of the leader of the PKK (Kurdistan Workers' Party) for offences that were punishable by death under the Turkish legislation in force at the time. The Court requested the Turkish Government to take:

> "interim measures within the meaning of Rule 39 of the Rules of Court, notably to ensure that the requirements of Article 6 were complied with in proceedings which had been instituted against the applicant in the State Security Court and that the applicant was able to exercise his right of individual application to the Court effectively through lawyers of his own choosing".[402]

The Government, which was subsequently invited to clarify specific points concerning the measures that had been taken pursuant to Rule 39 to ensure that the applicant had a fair trial, informed the Court that it was "not prepared to reply to the Court's questions, as they went far beyond the scope of interim measures within the meaning of Rule 39".[403] However, the Government did comply with another interim measure indicated by the Court pursuant to which it was asked "to take all necessary steps to ensure that the death penalty is not carried out so as to enable the Court to proceed effectively with the examination of the admissibility and merits of the applicant's complaints under the Convention".[404]

Providing the Court with adequate evidence, showing that there is a real risk of irreparable harm to life or limb, may lead the Court to grant an interim measure but it does not necessarily mean that the same evidence is sufficient for the Court subsequently to find a violation of Articles 2 or 3. For example, although the evidence submitted by the applicant in the case of *Thampibillai v. the Netherlands* was sufficient for the Court to indicate to the respondent Government "that it was desirable in the interests of the parties and the proper conduct of the proceedings that the applicant should not be expelled to Sri Lanka pending the Court's decision", it was not sufficient for the Court to conclude in its judgment that substantial grounds had been established "for believing that the applicant, if expelled, would be exposed to a real risk of being subjected to torture or inhuman or degrading treatment within the meaning of Article 3 of the Convention".[405]

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401 *Ibid.,* § 11.
402 *Öcalan v. Turkey* [GC], cited above, § 5.
403 *Ibid.*
404 *Ibid.*
405 *Thampibillai v. the Netherlands*, no. 61350/00, 17 February 2004, § 68.

Conversely, a rejection by the Court of a request for an interim measure does not prevent the applicant from pursuing the application, provided obviously that he or she is able to do so. For example, in *Mamatkulov and Askarov v. Turkey* the Court continued its examination of the application despite the fact that the lawyers representing the applicants had been unable to contact them following their extradition to Uzbekistan by the Turkish authorities in violation of the interim measure indicated under Rule 39.[406]

The Court will be much less inclined to issue an interim measure if the country of destination in an expulsion case is another Contracting Party. This is because there is a presumption that the receiving State will comply with its Convention obligations and also because of the fact that the Court will be able to scrutinise any alleged failures by that state to uphold its Convention obligations.[407] Nevertheless, and as was shown in the case of *Shamayev and 12 Others v. Georgia and Russia*,[408] the fact that the receiving country is a Contracting Party will not necessarily prevent the Court from indicating interim measures if it perceives that the risk to an applicant is serious.

In expulsion cases, respondent Governments are increasingly seeking to counter applicants' claims by proffering so called "diplomatic assurances," which the country of destination provides the expelling respondent Government and in which the country of destination promises that the applicant will not be subjected to the treatment he or she complains of. However, in the ill-treatment context, it must be stressed that the Court will approach diplomatic assurances with caution if it perceives that there is a real risk of ill-treatment in the receiving country. For example, in its judgment in the case of *Chahal v. the United Kingdom* the Court observed that the British authorities had sought and received assurances from the Indian authorities to the effect that the applicant, if returned to India, would not be subjected to ill-treatment. The Court, while not doubting the good faith of the Indian Government in providing the assurances, observed that despite the efforts of that Government, the Indian National Human Rights Commission, and the Indian courts to bring about reform, the violation of human rights by members of the security forces in Punjab and elsewhere in India was a recalcitrant and enduring problem. Against this background, the Court was not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.[409] For more on diplomatic assurances, see Section 2.6.2(b).

406 See, by contrast, *Nehru v. the Netherlands* (dec.), no. 52676/99, 27 August 2002, examined in Section 8.2 below.
407 See *A.G. v. Sweden*, no. 27776/95, Commission decision of 26 October 1995. See also Leach at p. 39.
408 *Shamayev and 12 Others v. Georgia and Russia*, cited above.
409 See *Chahal v. the United Kingdom*, cited above, §§ 92 and 105.

On the other hand, in the extradition context, if the applicant has complained about conditions on "death row" the Court may reject the request of an interim measure if the Contracting Party has received an assurance from the concerned government that the applicant will not be subject to the death penalty. Thus, in the case of *Einhorn v. France*,[410] where the applicant was wanted for the murder of his former girlfriend, the Court concluded that the assurances obtained by the French Government from the United States authorities were such as to remove the danger of the applicant's being sentenced to death in Pennsylvania. Consequently, there was no risk of him being put on death row.[411]

3.1.3 Application Procedure for Interim Measures

Requests for interim measures should comply with the requirements set out in the Practice Direction issued by the President of the Court on 5 March 2003.[412] It states in relevant part that:

> "[s]uch requests should normally be received as soon as possible after the final domestic decision has been taken to enable the Court and its Registry to have sufficient time to examine the matter. However, in extradition or deportation cases, where immediate steps may be taken to enforce removal soon after the final domestic decision has been given, it is advisable to make submissions and submit any relevant material concerning the request before the final decision is given".[413]

Thus, to enable the Court to examine such requests in good time, they should in so far as possible be submitted during working hours and by a swift means of communication such as facsimile, e-mail, or courier. In cases where time is of the essence, it is important that the communication be clearly marked "Urgent" and that it be written in English or French. Furthermore, it is advisable to contact the Court by telephone and inform its Registry that the request is being made. Indeed, many requests for interim measures are made only hours before the scheduled departure. During holiday periods (i.e. around Christmas and the New Year) the Court's Registry maintains a skeletal staff to deal with any urgent requests for application of Rule 39.

Where it is expected that the final deportation order or a negative outcome of a final domestic remedy will be very swiftly followed by the removal of the person concerned, without there being time to contact the Court or for a

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410 *Einhorn v. France* (dec.), no. 71555/01, 16 October 2001.
411 See *Soering v. the United Kingdom*, cited above, § 111.
412 See Appendix No. 3.
413 *Ibid.*

request for an interim measure to be examined, a potential applicant or his or her representative may consider lodging a "provisional" request for an interim measure. The Court can then beforehand be provided with the relevant documents – apart from the very last domestic decision – and, should the removal be approved at the domestic level, be informed by telephone or fax that the request for an interim measure has now become "definite".

A request for an interim measure should normally be accompanied by a completed application form, but in circumstances where time does not permit the preparation of that form, as much information as possible should be provided in the communication in which the request is made. Such information should include the steps taken by the applicant to exhaust domestic remedies and copies of relevant decisions. In any event, a request should, to the greatest extent possible, be supported by adequate and relevant evidence to show the extent of the risk involved in the country of destination.[414]

If the request for an interim measure is accepted, the Court will inform the respondent Government and the Committee of Ministers and will generally grant priority to the application over other pending cases.

3.2 Case Priority and Urgent Notification of Applications (Rules 40-41)

Where possible, the Court deals with applications in the order they are submitted, that is, chronologically. Because of its very heavy workload, proceedings before the Court frequently last for some years. However, in urgent circumstances, the Chamber or its President may decide at any stage of the proceedings to give priority to the examination of a particular application pursuant to Rule 41 of the Rules of Court. Furthermore, pursuant to Rule 40, the Registrar of the Court, with the authorisation of the President of the Chamber, may, in any case of urgency, inform the Contracting Party concerned of the introduction of the application and provide a summary of its contents. If it rejects a request for an interim measure under Rule 39, the Court may still resort to this "urgent notification" procedure under Rule 40 and inform the expelling Contracting Party of the application lodged with the Court. Although it is by no means obliged to do so, the Contracting Party may then decide to postpone the removal of the applicant from its territory until the Court has had an opportunity to examine the application.

414 See Section 11 below. See also Leach p. 40 *et seq.*

The Court may thus expedite its examination of a case of its own motion, but it may also be requested to do so by an applicant. Requests for a case to be granted priority must be duly reasoned. In particular, such reasons must be capable of leading the Court to depart from its practice of examining the case in chronological order. The cases referred to below illustrating the wide range of reasons may be taken as a starting point. The Court has discretion to decide whether to accept such requests and it will do so only in exceptional cases. Thus, the Court may grant case priority to a case if delays would render the examination of the merits of that case more difficult. For example, the Court granted priority to the case of *Sıddık Aslan and Others v. Turkey*,[415] which concerned the alleged killing of the applicants' relatives by members of the security forces, in view of the risk that important evidence would otherwise be destroyed with the passage of time due to the decomposition of the bodies.

The Court may also grant priority to cases in which the issue at stake needs to be resolved urgently because, for example, the applicant is seriously ill or old. In the case of *Pretty v. the United Kingdom*, for instance, which concerned the claim made by the terminally ill applicant to a right to assisted suicide,[416] priority was granted and a judgment was adopted in the record time of less than four months after the case was lodged. Similarly, in *Mouisel v. France*, which concerned the detention in prison of the applicant – a cancer sufferer – allegedly in violation of Article 3 of the Convention, the Court granted the case priority and it was concluded by a judgment in just over two years.[417] Priority was also granted to the case of *Lebedev v. Russia* in which the seriously ill applicant argued that his detention subjected him to inhuman and degrading treatment within the meaning of Article 3 of the Convention.[418] In the case of *Poltorachenko v. Ukraine*, concerning the applicant's right to a fair trial and the protection of his property, priority was granted on account of his advanced age.[419]

Priority has on occasion also been granted to cases concerning the right to respect for family life within the meaning of Article 8 of the Convention. For example, in *Tuquabo-Tekle and Others v. the Netherlands*, which concerned the refusal of the Netherlands authorities to grant permission to the applicants' (step-)daughter and (step-)sister – who were living in Eritrea – to join the rest of the family in the Netherlands.[420]

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415 *Sıddık Aslan and Others v. Turkey*, no. 75307/01, 18 October 2005.
416 *Pretty v. the United Kingdom*, no. 2346/02, 29 April 2002.
417 *Mouisel v. France*, no. 67263/01, 14 November 2002.
418 *Lebedev v. Russia* (dec.), no. 4493/04, 25 November 2004.
419 *Poltorachenko v. Ukraine*, no. 77317/01, 18 January 2005, § 3.
420 *Tuquabo-Tekle and Others v. the Netherlands* (dec.), no. 60665/00, 19 October 2004.

Other than the cases referred to above, applications which have been granted priority under Rule 41 include the following: *Luluyev and Others v. Russia*, concerning the alleged killing by federal forces of the applicant's relative, whose body was found in a mass grave;[421] *Jørgensen v. Denmark*, concerning the Danish authorities' refusal to issue the applicant's wife of Philippine nationality with a residence permit in Denmark;[422] *I.I.N. v. the Netherlands*, concerning the intended expulsion of the applicant to Iran where, he claimed, he risked being subjected to treatment in breach of Article 3 of the Convention on account of his homosexuality;[423] and *Ilaşcu and Others v. Moldova and Russia*, concerning, *inter alia*, the lawfulness and the conditions of the applicants' detention.[424]

421 *Luluyev and Others v. Russia* (dec.), no. 69480/01, 30 June 2005.
422 *Jørgensen v. Denmark* (dec.), no. 31260/03, 9 June 2005.
423 *I.I.N. v. the Netherlands* (dec.), no. 2035/04, 9 December 2004.
424 *Ilaşcu and Others v. Moldova and Russia* (dec.), no. 48787/99, 4 July 2001