

Strasbourg's Emergency Glass

A Brief Overview of Interim Measures within the Framework of the European Court of Human Rights

THOMAS CILIA

In this article, originally submitted as part of INL3011 'European Court of Human Rights', **Thomas Cilia** tackles the institute of interim measures within the framework of Rule 39 of the Rules of Court. The article seeks to explain what an interim measure is to begin with, whether there are any restrictions in terms of the circumstances in which these can be issued, and whether they are binding on High Contracting Parties.

TAGS: Human Rights; European Court of Human Rights; Interim Measures

Thomas Cilia is currently a third-year student reading for the Bachelor of Laws (Honours) degree and formerly the Għaqda Studenti tal-Liġi's Policy Officer.

1. A Necessary Preamble: Defining ‘Interim Measures’.

Whilst Leach suggests that there exists no, ‘injunctive process as such within the European Convention system’,¹ the European Court of Human Rights retains the ability to issue interim measures, even if the European Convention on Human Rights itself makes no outward pronouncement to this end. The omission appears to be no coincidence, and was rather opted for in light of the reluctance to such a mechanism, which would ultimately impinge on state sovereignty.²

The issuing of interim measures is nevertheless institutionalised through Rule 39 of the Rules of Court. An analysis of this provision necessitates an enquiry as to the definition of an interim measure since the latter is not textually provided.

Interim measures may be defined as measures issued by international adjudicating bodies to protect the applicant from ‘grave and irreparable injury’.³ As such, Rule 39 refers to urgent measures which, according to the practice of the Court, merely apply in situations of ‘*imminent risk and irreparable harm*’.⁴

These are generally issued to a respondent state, providing that the latter should refrain from a particular action which may negatively affect the examination of a case.⁵ As Vajić notes, these ‘postpone the execution of a decision or an act that might prejudice the outcome of proceedings before a final judgment is reached’.⁶

In *Paladi v Moldova*,⁷ it was also held that interim measures enable the protection of the rights of the applicant. In this sense, it is held that they go beyond provisional measures within the realm of domestic law.⁸

One must note that interim measures do not ‘pre-judge’ a decision vis-à-vis its admissibility or the presence of a substantive right violation.⁹ In *Thampibillai*

¹ Philip Leach, *Taking a Case to the European Court of Human Rights* (1st edn, Oxford University Press 2011).

² Yves Haeck and Clara Burbano Herrera, ‘Interim Measures in the Case Law of the European Court of Human Rights’ (2003) 21(4) *Netherlands Quarterly of Human Rights* 625.

³ JM Pasqualucci, ‘Interim measures in international human rights: Evolution and harmonization’ [2005] *Vanderbilt Journal of Transnational Law*, 4.

⁴ ‘Factsheet - Interim Measures’ (European Court of Human Rights, December 2022) <https://www.echr.coe.int/documents/fs_interim_measures_eng.pdf> accessed 26 December 2022.

⁵ Alexander Morawa, Nicole Bürli, Peter Coenen and Laura Ausserladscheider Jonas, *Article 3 of the European Convention of Human rights: A Practitioner’s Handbook* (2nd edn, World Organisation Against Torture (OMCT) 2014).

⁶ Nina Vajić, ‘Interim Measures and the Mamatkulov Judgment of the European Court of Human Rights’ in Lucius Caflisch and Marcelo Kohen, *Promoting Justice, Human Rights and Conflict Resolution through International Law* (Martinus Nijhoff Publishers 2007).

⁷ *Paladi v Moldova* App no 39806/05 (ECtHR, 10 March 2009).

⁸ Haeck and Herrera (n 2) 626.

⁹ Vajić (n 6) 601.

v the Netherlands,¹⁰ the evidence submitted led to the issuing of an interim measure, however it failed to convince the Court that the expulsion of the applicant would give rise to a veritable risk of suffering torture or inhuman or degrading treatment.¹¹

Interim measures may be injunctive or prohibitive;¹² they may prohibit the carrying out of an act which may endanger the rights of an applicant or necessitate the taking of action. *Ilasçu and Others v Moldova and Russia* exemplifies the latter type, as applicants were indicated to conclude their hunger strike.¹³

Rule 39 (1) provides that interim measures may be requested by a party or ‘any other person concerned’.¹⁴ An interesting example in practice concerns a successful application by non-government organisations to prevent an illegal pushback of immigrants from occurring in Malta.¹⁵ Irrespective of the applicant, strict procedural measures must be abided by.¹⁶

Measures are then indicated to either one of the parties.¹⁷ Whilst such are mainly issued to respondent states, applicants may also receive an indication. Such measures usually arise within the context of hunger strikes or suicide attempts. In *Altun v Germany*,¹⁸ the former Commission indicated to the State to suspend the applicant’s extradition, whilst also indicating to the applicant to remain at the disposal of national authorities upon potentially being released. Thus, both respondent state and applicant received an indication. The Court has also occasionally issued more general statements, requesting various governments to refrain from removing a group of persons to a country.¹⁹

An interim measure may last as long as, or less than, court proceedings, however it may be lifted at any moment through a Court decision.²⁰ No appeal lies from a decision pertaining to an interim measure.

¹⁰ *Thampibillai v the Netherlands* App no 61350/00 (ECtHR, 17 February 2004).

¹¹ *ibid* para 68.

¹² *Vajić* (n 6) 602.

¹³ *Ilasçu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004).

¹⁴ Rule 39 of the Rules of Court.

¹⁵ Michael Camilleri, *A narrative of struggle and hope*.

¹⁶ ‘Questions and Answers for Lawyers’ (European Court of Human Rights, 2020) <https://echr.coe.int/Documents/Q_A_Lawyers_Guide_ECHR_ENG.pdf> accessed 26 December 2022.

¹⁷ ‘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’ (UNHCR) <<https://www.refworld.org/pdfid/4f8e8f982.pdf>> accessed 26 December 2022.

¹⁸ *Altun v Germany* App no 10308/83 (ECtHR, 3 May 1983).

¹⁹ ‘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’ (n 17) 6.

²⁰ ‘Factsheet - Interim Measures’ (n 4) 2.

2. Under what Circumstances are Interim Measures Issued? Are there any Limitations?

Rule 39 provides no substantive limitation as to the situations wherein interim measures are issued.²¹ What is required is merely that the measures are necessary ‘in the interests of the parties or the proper conduct of proceedings’.²²

An analysis of these circumstances consequently depends on an analysis of the jurisprudence of the Court.²³ From the outset, one notes that the Court has exhibited an element of self-restraint in invoking Rule 39, clarifying that interim measures, which have been granted in ‘*limited spheres*’, may only be issued in situations posing an ‘*imminent risk of irreparable damage*’.²⁴ This position appears to conform with the principles of international procedural law.²⁵ Nonetheless, recent case law suggests an extension of the scope of interim measures to areas previously unconsidered.²⁶ Numerous factors, such as the broad wording of the rule, may appear to be causes of this reality.

The majority of the above-mentioned cases pertain to expulsion and extradition situations; such usually consist of a suspension of the removal of the applicant, who, in the main, would cite a fear for his life in terms of Article 2 of the Convention, or ill-treatment proscribed by the following Article.²⁷ In *M.A. v Switzerland*,²⁸ for example, an interim measure was indicated owing to the applicant’s plea that he would be placed in a real and grave risk of arrest and torture, and thus ill-treatment, upon expulsion to Iran.²⁹ Furthermore, in *M.E. v Sweden*,³⁰ an interim measure vis-à-vis deportation was issued in light of the risk of ill-treatment potentially suffered by an applicant due to his sexual orientation.

The Rule has also been applied considering Articles 5 and 6 of the Convention, under circumstances of a threat of a ‘*flagrant denial of justice*’ in the event of expulsion or extradition.³¹ Thus, in *Othman (Abu Qatada) v the United Kingdom*,³² the Court noted that evidence obtained by torture was very likely to be used in the trial of the applicant upon deportation. An interim measure to stay expulsion was issued.

²¹ Andrea Saccucci, ‘Interim Measures at the European Court of Human Rights: Current Practice and Future Challenges’ in Fulvio Maria Palombino, Roberto Virzo, Giovanni Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (TMC Asser Press 2021).

²² Rule 39 (n 14).

²³ ‘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’ (n 17) 7.

²⁴ Saccucci (n 21) 218.

²⁵ *ibid.*

²⁶ *ibid* 219.

²⁷ ‘Factsheet - Interim Measures’ (n 4) 2.

²⁸ *M.A. v Switzerland* App no 52589/13 (ECtHR, 18 November 2014).

²⁹ ‘Factsheet - Interim Measures’ (n 4) 4.

³⁰ *M.E. v Sweden* App no 71398/12 (ECtHR, 8 April 2015).

³¹ ‘Factsheet - Interim Measures’ (n 4) 7.

³² *Othman (Abu Qatada) v the United Kingdom* App no 8139/09 (ECtHR, 17 January 2012).

Risks of irreparable harm to the life and physical persons have been contemplated in situations unrelated to the above, with detention being an important example.³³ The measures issued considering these risks have been various. In *Ilasçu and Others v Moldova and Russia*³⁴ and *Rodic and Others v Bosnia Herzegovina*,³⁵ such measures concerned the termination of hunger strikes by applicants. In *Paladi*,³⁶ an interim measure sought to ensure the continued treatment *pendente lite* of an applicant suffering from various illnesses in a specialised hospital.

Recently, situations disassociated from detention and removal have been considered by the Court.³⁷ Thus, in *Lambert*,³⁸ the French Government were indicated to stay a decision of the French *Conseil D'état* authorising the termination of the provision of artificial nourishment and hydration to a tetraplegic patient.

Interim measures extend beyond Articles 2 and 3 of the Convention. In exceptional circumstances, the Court has applied Rule 39 in cases involving Article 8, concerning potentially irreparable risks to private and family life.³⁹ In *de Melo*,⁴⁰ the applicant was granted visiting rights to her children *pendente lite* through an interim measure.

Since most implementations of Rule 39 concern the life, physical integrity, and well-being of the applicant, the issuing of an interim measure in *Sedletska*,⁴¹ which pertained to freedom of expression as enshrined in Article 10 of the Convention is surprising;⁴² could a further extension of the scope of Rule 39 be on the horizon?

Ultimately, jurisprudence confirms that the Court is gradually interpreting the notion of 'irreparable damage' more broadly, even to situations extending beyond actual or potential damage to the life or physical integrity of the applicants.

³³ Saccucci (n 21) 223.

³⁴ *Ilasçu and Others* (n 13).

³⁵ *Rodic and Others v Bosnia Herzegovina* App no 22893/05 (ECtHR, 27 May 2008).

³⁶ *Paladi v Moldova* App no 39806/05 (ECtHR, 10 March 2009).

³⁷ *ibid* 226.

³⁸ *Lambert and Others v France* App no 10048/10 (ECtHR, 5 June 2015).

³⁹ 'Factsheet - Interim Measures' (n 4) 8.

⁴⁰ *Soares de Melo v Portugal* App no 72850/14 (ECtHR, 16 February 2016).

⁴¹ *Sedletska v Ukraine* App no 42634/18 (ECtHR, 15 November 2018).

⁴² Philip Leach, 'Urgency at the European Court of Human Rights: New Directions and Future Prospects for the Interim Measures Mechanism?' in Eva Rieter, Karin Zwaan (eds), *Urgency and Human Rights: The Protective Potential and Legitimacy of Interim Measures* (TMC Asser Press 2021).

3. ‘Procedural’ Interim Measures

Rule 39 has been invoked to ensure the proper conduct of proceedings. Thus, interim measures may also take on a procedural profile, unrelated to any irreparable risk of substantive human rights violations.⁴³

These measures ensure the observance by Parties of their procedural undertakings enshrined in the Convention. A pertinent example in this context relates to *X v Croatia*,⁴⁴ wherein the Croatian government was indicated to appoint a lawyer to represent the applicant, who, in terms of domestic legislation, was incapable of selecting such herself.

These measures have been the subject of proliferation in recent case law.

4. Areas wherein Rule 39 is Inapplicable

Jurisprudence demonstrates the areas to which the Rule does not apply. The limited nature of Rule 39 results in the vastness of such cases.

Rule 39, hence, does not appear to apply vis-à-vis the enforcement of an obligation to perform military service or bankruptcy.⁴⁵ In *Sezer v Turkey*,⁴⁶ this non-applicability was further confirmed in respect to the prevention of the dissolution of a political party, or the right to freedom of association. The right to property also falls outside the ambit of interim measures.⁴⁷

These situations were not considered, therefore, to pose an imminent risk of irreparable harm as contemplated previously. Clearly, the violations of such rights and the effects thereof, must have been considered as reparable, perhaps by way of restitution or monetary compensation.⁴⁸

5. Are Interim Measures Binding on the High Contracting Parties?

Vajić comments that international tribunals utilise powers assigned to them by an instrument.⁴⁹ Should this instrument be a treaty, or a convention expressly providing for such interim measures, no issues arise as to their binding nature.⁵⁰ However, should such provisions be absent or framed in ambiguous terms,

⁴³ Saccucci (n 21) 229.

⁴⁴ *X v Croatia* App no 11223/04 (ECtHR, 17 July 2008).

⁴⁵ ‘Factsheet - Interim Measures’ (n 4) 3.

⁴⁶ *Sezer v Turkey* App no 35119/08 (ECtHR, 25 July 2008).

⁴⁷ Saccucci (n 21) 219.

⁴⁸ *ibid.*

⁴⁹ Vajić (n 6) 602.

⁵⁰ *ibid.*

controversy as to their binding nature is but a natural corollary.⁵¹ This observation is valid in light of Rule 39; whilst the Court may unequivocally issue interim measures, the binding nature thereof has been the subject of controversy and development.

This issue initially arose in *Cruz Varas and Others v Sweden*.⁵² Summarily, the plea raised by the applicants was that Articles 3 and 8 would be violated through their deportation to Chile. It was further claimed that deportation during the pendency of proceedings would render such proceedings before the then Commission meaningless.⁵³

An interim measure was consequently indicated by the Commission to the Swedish Government, indicating the desirability of the staying of such a deportation.⁵⁴ This was nonetheless ignored in terms of the father who was deported.

The Commission contended that a violation of Article 25§1⁵⁵ had occurred through this non-compliance, although no violation of the substantive rights took place. The Court, however, disagreed, arguing firstly, that Rule 36⁵⁶ was merely a procedural rule that could not be ‘*considered to give rise to a binding obligation on Contracting Parties*’.⁵⁷ It was held to be clear from the terminology of both Rule 36 and the interim measure indicated to the Swedish government,⁵⁸ with the phrases ‘*may indicate*’ and ‘*would be desirable*’ certainly lacking in authority.

In order for Commission interim measures to be binding, the Court held that a provision to this end must be located within the Convention; such was clearly absent.⁵⁹ The compliance of the Contracting Parties with such measures was also insufficient in convincing the Court that an obligation of compliance existed.⁶⁰

This interpretation, although long followed, was turned on its head in *Mamatkulov and Askarov v Turkey*.⁶¹ Essentially, an interim measure was indicated to halt the extradition of applicants. Nevertheless, the Court found that a lack of compliance with this measure, in turn, constituted a breach of the obligations enshrined in Article 34 of the Convention.⁶²

The Court held that whilst the finding in *Cruz Varas* was that Article 25§1

⁵¹ *ibid.*

⁵² *Cruz Varas and Others v Sweden* App no 15576/89 (ECtHR, 20 March 1991).

⁵³ *ibid* para 91.

⁵⁴ *ibid* para 56.

⁵⁵ European Convention on Human Rights (ECHR), Article 34.

⁵⁶ Presently, Rule 39 of the Rules of Court.

⁵⁷ *Cruz Varas and Others* (n 52) para 98.

⁵⁸ *ibid.*

⁵⁹ *ibid* para 99.

⁶⁰ *ibid* para 100.

⁶¹ *Mamatkulov and Askarov v Turkey* App no 46827/99 (ECtHR, 4 February 2005).

⁶² ‘Factsheet - Interim Measures’ (n 4) 14.

provided no competence to indicate binding interim measures, this only concerned the previously operative European Commission of Human Rights, which was at that time responsible for issuing interim measures.⁶³ An analysis of the Commission's ability was made, but not that of the court.

The role played by interim measures, in that they avoid irreversible situations as aforesaid, was also considered.⁶⁴ Ultimately, straying away from interim measures, in turn hinders the efficacy of the right of individual application considered by Article 34. The responsibility of protecting the rights and freedoms set out in the Convention, contemplated in Article 1, would furthermore also be endangered.⁶⁵

In view of the above, the Court found that Article 34 of the Convention was indeed breached through this failure.⁶⁶

Subsequent jurisprudence has served to reaffirm and strengthen the binding nature of interim measures. In *Mostafa v Turkey*,⁶⁷ it was held that interim measures are to be complied with, although the principal complaints of the applicant are later declared to be manifestly ill-founded. The Court has also emphasised that the breach of Article 34 is independent of the impairment of effective exercise of individual petition in the specific case.⁶⁸ This was confirmed in *Olaechea Cahuas*.⁶⁹ Crucially, Saccucci notes that the Court has also reiterated that a state cannot exculpate itself of this obligation at hand through a claim of difficulty owing to administrative or legal technicalities.⁷⁰ It is only when there is an 'objective impediment' preventing compliance that can lead to an absolving of liability, and this only when the Government has taken all the necessary action to remove the impediment whilst keeping the Court updated.⁷¹

Whilst various issues, such as the legal basis of such a binding nature, continue to persist, it may safely be affirmed that interim measures are indeed binding.

⁶³ *Mamatkulov and Askarov v Turkey* (n 61) para 118.

⁶⁴ 'Factsheet - Interim Measures' (n 4) 14.

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ *Mostafa and Others v Turkey* App no 16348/05 (ECtHR, 15 January 2008).

⁶⁸ Saccucci (n 21) 244.

⁶⁹ *Olaechea Cahuas v Spain* App no 24668/03 (ECtHR, 10 August 2006).

⁷⁰ Saccucci (n 21) 246.

⁷¹ *ibid.*

6. Conclusion

Interim measures are fundamental in the protection of core human rights and the proper conduct of proceedings. Perhaps the clearest notion emanating from this analysis pertains to the fact that these measures have served as a testament to the level of influence jurisprudence retains within this context. Apart from widening the sphere of application of interim measures, case law has served to decide contested issues such as the binding nature of interim measures discussed previously. All this, as initially mentioned, demonstrates the living nature of the Convention.



OLJ

GHSI ONLINE LAW JOURNAL