

# ELENA

EUROPEAN LEGAL  
NETWORK ON ASYLUM

## **Research on ECHR Rule 39 Interim Measures**

**April 2012**



**ecre**

European Council  
on Refugees and Exiles

## Foreword

The European Council on Refugees and Exiles (ECRE) is a pan-European network of refugee assisting non-governmental organizations, concerned with the needs of all individuals seeking refuge and protection within Europe. It promotes the protection and integration of refugees based on the values of human dignity, human rights and an ethic of solidarity.

ELENA, the European Legal Network on Asylum, is a forum for legal practitioners who aim to promote the highest human rights standards for the treatment of refugees, asylum seekers and other persons in need of international protection in their daily counselling and advocacy work. The ECRE Secretariat in Brussels coordinates the work of ELENA in continuous and close consultation with the ELENA National Co-ordinators comprising of practising legal advisors from a range of European countries. ELENA draws on the energy, ideas and commitment of an active membership, facilitating networking and exchanging information between lawyers.

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## Acronyms

<b>Art.</b>	➔	Article
<b>CoE</b>	➔	Council of Europe
<b>ECRE</b>	➔	European Council on Refugees and Exiles
<b>ECtHR</b>	➔	European Court of Human Rights
<b>ECHR</b>	➔	European Convention on Human Rights
<b>ELENA</b>	➔	European Legal Network on Asylum
<b>EU</b>	➔	European Union
<b>No.</b>	➔	Number
<b>PACE</b>	➔	Parliamentary Assembly of the Council of Europe
<b>Para.</b>	➔	Paragraph
<b>UNHCR</b>	➔	United Nations High Commissioner for Refugees

## Executive Summary

*"There is a human life behind every legal case and when domestic remedies are not available, the European Court of Human Rights is the only hope. Rule 39 is often the last resort to prevent refoulement or get medical treatment for someone, whose life will otherwise be in danger. The Court's interim measures are sometimes the only way to make national authorities adhere to international standards and respect human rights"*

*Lawyer practising in Ukraine*

Rule 39, as an interim measure, has the power to require a State Party to refrain from removing an applicant to a country where he or she may be at real risk of a violation of his or her fundamental rights. This is of paramount importance in the context of those seeking asylum and fleeing persecution. As the President of the European Court of Human Rights has stated, *"the application of Rule 39 has preserved the physical integrity, the liberty and even the lives of many people who by definition are vulnerable"*, values which lie at the very core of the European Convention on Human Rights.

This report offers qualitative legal research on the current practice surrounding Rule 39 interim measures in the field of asylum and expulsion. It examines the experiences of lawyers in submitting Rule 39 requests and where appropriate, the European Court of Human Rights' response and the compliance of Member States of the Council of Europe to these measures. The rationale behind this research is firstly to explore the fact that an increasing number of Rule 39 requests are being submitted to the Court but only from a certain number of Council of Europe State Parties and secondly to gain a better understanding as to the application of Rule 39 of the Rules of the Court.

ECRE distributed a questionnaire to coordinators of the ELENA network, which was further distributed to lawyers within their national networks across Europe. Qualitative data was collected on lawyers' experiences of using Rule 39 in the following countries: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Norway, Portugal, Russia, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. The information gathered was then analysed to assess the current operation of the Rule 39 mechanism in safeguarding the rights of those in need of international protection. The focus was primarily on the use of Article 39 in expulsion and deportation cases. Despite the fact that the lawyers contacted for this research predominantly represent refugees and asylum seekers, references were also made to extradition cases concerning other migrants.

Where appropriate, recommendations have been made to the organs of the Council of Europe, legal representatives and to Member States to improve the functioning of this essential legal tool and to ensure access to effective legal remedies within Member State parties themselves.

## Key Findings

### The experience of lawyers in requesting Rule 39 measures

Across Europe, the majority of lawyers have limited or no experience in requesting Rule 39 measures from the Court. The reasons for this vary but include the following: the exceptional nature of this procedure, few training opportunities, restrictions on legal aid, limited resources and awareness of this legal tool as well as other national factors such as effective administration of justice at the local level, lack of specialization in the asylum field and even legal tradition.

### Training

There are limited or no training opportunities available on the use of Rule 39 of the Rules of the Court. Those training programmes that are available are predominantly provided by non-governmental organizations including specialized legal organizations and international organisations such as UNHCR.

### The Rule 39 mechanism and its use in asylum and migration cases

The majority of Rule 39 requests are submitted with regard to pending deportation or expulsion to the applicant's country of origin. However, Rule 39 requests are also frequently made on the basis of the application of the Dublin II Regulation against transfers to certain European Union Member States thereby identifying a structural deficiency in the current operation of the Dublin system. Since the Grand Chamber Judgment of *M.S.S. v Belgium & Greece*, Member States need to closely examine their compliance with the legal principles in this judgment in applying the Dublin II Regulation in relation to other Member States as well.

The research also revealed that Rule 39 measures have been used as an interim remedy for other situations such as to prevent a real risk of becoming destitute or homeless and to ensure access to medical treatment whilst in detention in the context of Article 3 European Convention on Human Rights. In exceptional cases, Rule 39 measures have also been granted on the basis of Article 2 and Article 8 European Convention on Human Rights.

### Rule 39 indications to Member States

Rule 39 indications issued by the Court are predominantly to prohibit State Parties from deporting the applicant. However, this research also found that the Court has made specific indications to Member States on the following grounds: to guarantee access to a lawyer, the provision of accommodation or shelter and access to medical treatment.

### Specific categories of cases

On occasions, the Court has been overwhelmed with Rule 39 requests concerning specific categories of applicants, for example challenges to Dublin II Regulation transfer cases to Greece and requests preventing enforced removal to Iraq in late 2010. Under such pressure the Court has had to be innovative in its approach to ensure that those most vulnerable are not put at risk of a violation of their Convention rights. The research reveals that the Court has on a number of instances requested Member States to stop all returns for a certain period of time to particular country for example Iraq in order for it to sufficiently examine the security situation there.

Additionally, when a lead case is being examined, the Court has at times indicated that it will apply Rule 39 to similar cases pending the adoption of that lead judgment, as shown in *M.S.S. v Belgium & Greece* in the context of Dublin II Regulation cases.

### Practical obstacles to submitting Rule 39 requests

It was found that, in the majority of surveyed Member States, there are a number of barriers, which impedes access to the European Court of Human Rights both in practice and in law. The most serious obstacles reported by the participating lawyers include a lack of information on procedural rights for applicants, lawyers not receiving sufficient and timely notification of removal and enforcements actions by the authorities and the automatic removal of applicants at the border or via interception measures at sea. The lack of procedural safeguards such as the availability of interpreters and translation of decisions, as well as non-suspensive effect of national appeal procedures, further exacerbate the issue of access to the Court.

Furthermore, one of the main obstacles was the actual speed of expulsion measures taken at the national level particularly in accelerated asylum procedures. The example of the immediate deportation from Russia of a UNHCR mandated Iraqi refugee, R.R.M, highlights the speed in which expulsion procedures take place rendering any right to submit a Rule 39 measure to the Court illusory in practice. Overall, access to lawyers was the predominate obstacle reported in this research, particularly for those applicants detained pending deportation.

### Why recourse to the European Court of Human Rights is necessary

This report reveals a variety of reasons as to why recourse to the Court is deemed necessary by lawyers. These include the non-suspensive effect of national appeals, inadequate national legal remedies, insufficient legal representation as well as flawed national case-law, inadequate credibility assessments and over-reliance at appeal on the decisions of initial authorities.

Insufficient and ineffective national legal remedies were identified by the majority of participating lawyers as the predominant reason behind the necessity of recourse to the European Court of Human Rights in their jurisdictions. As long as Convention rights are not secured at the national level there will continue to be a need to submit Rule 39 requests and have recourse to the European Court of Human Rights. Member States need to reaffirm their commitment to this system of human rights protection and take more responsibility for implementing the Convention in order to make every effort to secure these rights on the national level.

### State compliance with Rule 39 measures

Participating lawyers from a number of Member States reported incidents where they were aware of non-compliance of Rule 39 measures by their State party. Although the majority of Member States comply with their obligations, the increase in non-compliance is a worrisome phenomenon. Any act of non-compliance undermines the very essence of the human rights the Convention strives to protect. The report reveals both incidents where State authorities blatantly ignored Rule 39 measures and where authorities allege that they were not notified in time of the Rule 39 decision to prevent the expulsion of the applicant concerned. Of extreme concern is the reported practice in Russia, whereby a number of applicants have disappeared from the territory despite interim measures granted by the Court and have subsequently been located in the country of return. However, even if the Court finds a violation of Article 34 ECHR in this context this is of little benefit to the applicant concerned, whose rights may have already been violated.

## Impact of Rule 39 measures at the national level

It appears that Rule 39 measures may have additional political and practical impact on either the respondent Member States' general policy or the individual applicant's case. In some Member States, the judiciary and/or authorities view the granting of Rule 39 measures as a form of 'external supervision' thereby making them more cautious in their decision-making, whilst in other Member States, a Rule 39 decision may lead to the national authorities granting protection status to the applicant concerned. Though these actions by States were not indicated or foreseen by the Court they show the ancillary effects of Rule 39 measures at the national level.

Similarly, with regards to detention and whether any permit of stay is granted to applicants pending proceedings before the European Court of Human Rights the research revealed divergent State practice. In some Member States, applicants remain in detention even if the pending deportation is suspended, but in the majority of Member States, a Rule 39 measure leads to the applicant being released from detention. With regard to the various residence statuses reported, Member States' approach to this issue whilst cases are pending before the Court is unclear. In a number of Member States applicants are left "in limbo", without any specific residence status or entitlements and thus more vulnerable to expulsion pending the examination of the claim by the European Court of Human Rights.

## Conclusion

Overall, this report has provided a snapshot of some of the challenges surrounding the application of Rule 39 measures in asylum, expulsion and extradition cases. It confirms that further work is required in ensuring that basic safeguards are in place in State Parties to guarantee access to European Convention rights at the national level in practice. Further analysis on the operation of Rule 39 is necessary particularly in light of the current debates surrounding the reform of the Court. It is hoped that this report will assist legal representatives, the European Court of Human Rights as well as Council of Europe Member States to ensure that Rule 39 measures are sought, assessed and complied with in a way which respects the rights of refugees and migrants including to protection from *refoulement*.

## I. Methodology

The objective of this research is to provide a general overview of the experience of legal practitioners in the ELENA network in requesting Rule 39 interim measures before the European Court of Human Rights. This research was conducted in order to provide a better understanding of the role and impact of Rule 39 interim measures in CoE Member States in the field of asylum. It brings together for the first time lawyers' experiences of bringing such requests to the Court and endeavours not only to raise awareness of this rule but also help legal practitioners better apply this procedural rule in appropriate cases.

Lawyers and legal advisors participating in the ELENA network or active within ECRE member organisations have provided the information for this study. In order to obtain a synopsis of lawyers' experiences, the researchers consulted the ELENA national coordinators who in turn also consulted lawyers within their own jurisdictions. Information was gathered on the basis of a questionnaire, which was circulated in July 2011. The questions framed were broad in style so as to obtain the general experience of lawyers with the Rule 39 process. Only specialized asylum and immigration lawyers were contacted via the ELENA National Coordinators and therefore this research does not take into account general practice lawyers that occasionally deal with asylum or expulsion cases. Equally, this research does not include within its scope the role of other actors involved in requesting Rule 39 measures including asylum seekers' own experiences in applying to the Court.

As regards terminology for the purposes of this research the term "lawyer" and "legal representative" are used interchangeably and include individual legal practitioners as well as legal officers in NGOs, who provide direct legal representation services to those in need of international protection. Similarly the words 'applicant', 'client' and 'asylum seeker' are used interchangeably to denote those applying to the Court. This report predominantly examines the experience of lawyers and legal practitioners in asylum cases in applying to the Court but also includes data on the use of Rule 39 interim measures in extradition and other expulsion cases.

The following countries are included in the scope of this report: **Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Norway, Portugal, Russia, Slovakia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and Ukraine.** This research was conducted from July 2011 to February 2012.

The primary data obtained from the questionnaires was complemented by the analysis of several secondary resources in the form of published articles, reports and literatures. Therefore, this study adopted a combined quantitative and qualitative approach of research. A number of relevant letters of correspondence between the Court and lawyers are quoted in parts of the report to illustrate findings. Copies of these are available upon request as agreed by the lawyers involved.

The research addresses general questions, focusing mainly on the procedural aspects of Rule 39 applications and the reasons why recourse to this procedural rule and to the European Court of Human Rights may be necessary. It does not include information on how the Court determines what a *prima facie* risk is for granting Rule 39. In addition only anecdotal information can be drawn from the issuing of a new Practice Direction from the Court in July 2011 though it is noted that the number of Rule 39 requests to the Court decreased during this time period.

The PACE Committee Report, "Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights"<sup>1</sup> and its

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<sup>1</sup> Council of Europe PACE Report *Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights*, Doc 12435 (November 2010).

accompanying Resolution 1788(2011) and Recommendation 1956 (2011) were used as reference guides in this research along with the ELENA questionnaire and are therefore frequently referenced in this report.

As the experience of lawyers in submitting Rule 39 requests varies depending on the country concerned (for example only 1 Rule 39 request was received from Portugal for the years 2010 and 2011 in comparison to 1808 requests from the United Kingdom during that same time period) each section of the report indicates which countries responded to the relevant questions in the questionnaire. Only legal practitioners from countries with extensive experience of engaging the Court were able to comprehensively respond to the full questionnaire.

All possible efforts have been made for this research to be up to date and representative of lawyers' experiences within the ELENA network in applying for Rule 39 measures. By these observations, this research is limited in scope and can only provide an indicative depiction of the current situation in the countries that have provided feedback.

Recommendations have been made only with regard to certain research findings, but it should be noted that this report does highlight the need for further analysis of the patterns and trends concerning Rule 39 by all parties concerned leading on to the dissemination of good practices and their subsequent implementation.

The report is divided into three distinct sections. Section 1 explores the lawyers' experience in applying for Rule 39 measures and relevant training opportunities received. In Section 2 some patterns in the Court's response to Rule 39 requests are examined, such as the practice of granting interim measure in asylum cases and other indications the Court has made while granting or reviewing such measures. Finally, Section 3 focuses on the challenges pertaining to State compliance with Rule 39 measures and access to the Court alongside the secondary impact of Rule 39 decisions in national jurisdictions and procedures. Section 3 also aims to address the broader question of why recourse to the European Court of Human Rights is necessary.

## II. Introduction

### 1. The Role of Rule 39

Rule 39 interim measures provide the European Court of Human Rights with an avenue to ensure that applicants will not be subjected to Member State action in possible contravention of their Convention rights before their cases can be heard before the Court. This rule enables the Court to indicate whatever measures it feels are necessary to the Member State at any stage of the proceeding. In asylum and immigration cases, this frequently means preventing return of the asylum seeker to his or her country of origin where return would violate his or her rights under the Convention. The rule generally involves the suspension of removal of an applicant pending the examination of their claim before the Court.

The text of the Rule is as follows:<sup>2</sup>

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.*

At the outset the Rule's scope appears very broad, but the Court's case law has developed such that it is applicable to cases in which "*there is an imminent risk of irreparable damage*"<sup>3</sup> and where there is a *prima facie* argument that the applicant's Convention rights will be violated by whatever action he or she seeks to restrain – in asylum cases, usually deportation. Moreover, while the rule is not limited in application by its own terms, the Court has held that requests for its' application in asylum cases generally concern Articles 2 and 3 ECHR,<sup>4</sup> the right to life and the right not to be subjected to torture or inhuman or degrading treatment, respectively. It should be mentioned that Rule 39 can, however, in exceptional cases, be invoked to protect other rights, such as under Article 4 (prohibition of slavery and forced labour) or Article 8 (right to respect for private and family life).<sup>5</sup>

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<sup>2</sup> ECtHR: Rules of the Court, 1 February 2012. The text of Rule 39(2) was amended in February 2012, however, as the focus of this research was based primarily on lawyers' experiences, this change had no consequence on the information gathered in this report.

<sup>3</sup> ECtHR: *Mamatkulov and Askarov v. Turkey*, (Application No.46827/ 99, Application No. 46951/99), 4 February 2005, para. 128, "*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*".

<sup>4</sup> According to Facts and Figures 2011 of the ECtHR, concerning the subject matter of the Court's violations judgments in 2011, Article 3 cases cover 15-10% of the Court's capacity. For further information, *ECtHR: In Facts and Figures 2011*, January 2012.

<sup>5</sup> ECtHR: *Nunez v Norway* (Application No: 55597/09), 28 June 2011. This case involved an Article 8 claim in an immigration context and outside the context of asylum. Similarly the Court granted Rule 39 measures under Article 8 in the case of *Evans v. the United Kingdom*, (Application No. 6339/05), 10 April 2007.

### *Procedural Aspects of Rule 39*

The Court's criteria for granting an interim measure has evolved with the jurisprudence of the Court as follows: a) there must be a threat of irreparable harm of a serious nature; b) the harm must be imminent; c) *prima facie*, there must be an arguable case that removal will violate the European Convention on Human Rights.<sup>6</sup> Any individual can submit a Rule 39 request at any stage of the Court proceedings. It is important to note that Rule 39 requests are only interim measures and therefore should be accompanied by or followed up with a full application to the Court in accordance with Article 34 EHCR.<sup>7</sup> Applicants should comply with the Court's Practice Direction on requests for interim measures.<sup>8</sup> When a Rule 39 request is submitted to the Court, this is examined with priority as some applications may only arrive shortly before an expulsion is due. Each request is examined individually and even if a Rule 39 request is rejected, applicants can still maintain their full application to the Court in line with the Court's admissibility criteria. Therefore in such situations the legal representative or applicant must still indicate whether they wish to pursue the full application. The application of a Rule 39 measure itself does not indicate how the Court will subsequently rule on the substantive examination of the merits of an application. The Court may often request further information from the parties concerned such as with regard to the personal circumstances of the applicant or his/her location. Applicants or their legal representatives receive a response from the Court on their Rule 39 application by letter via fax and post. The respondent government is also informed by telephone as well as fax or electronically. When indicating measures under Rule 39, in a majority of cases the President of a Court section will also decide to give priority to the application under Rule 41 of the Rules of the Court.<sup>9</sup> Occasionally an application may be considered inadmissible at the same time as a Rule 39 request is refused or the application itself may be communicated at the same time as granting a Rule 39 request.

### *Reasoning in Rule 39 decisions*

The Court is not required to offer its reasoning in applying Rule 39 and frequently does not; arguably offering a reasoned decision employs a different standard of review and slows down a process that by its nature is quite rapid, as a Rule 39 applicant may face imminent and irreparable harm. As part of this research a question was posed to the contributors as to whether they were aware of the Court applying unusual reasoning in its decisions granting Rule 39 measures.<sup>10</sup> However all respondents reported never coming across such motivated decisions. As a measure to alleviate the workload of the Court, on this point the PACE Committee in Resolution 1788 (2011) requested the Court to '*examine whether it is appropriate and possible to provide reasoning as to positive and negative requests, at least in cases where the Court sees a systemic problem.*' The feasibility of such a change to the Rule 39 mechanism should be carefully explored before considering employing it. A number of factors need to be taken into consideration such as the inherent practical difficulties with providing immediate reasons for Rule 39 measures in an emergency situation but also the need for lawyers to know on what basis has the Court evaluated a risk of a violation of the Convention and therefore which legal arguments are the most important to focus upon. The recent practice of the Court of communicating the case at the same time as applying Rule 39 goes some way in providing reasons as the questions in the communication indicate to the parties what are the core issues for the Court in examining the claim.<sup>11</sup>

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<sup>6</sup> For further information see Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights*, Human Rights Files No. 9, Council of Europe Publishing, 2010.

<sup>7</sup> For further information on the use of Rule 39 interim measures in the asylum context see UNHCR 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, February 2012.

<sup>8</sup> This is available on the European Court of Human Rights Court website.

<sup>9</sup> Even if Rule 39 is not applied the Court registrar itself may also apply Rule 40 of the Rules of the Court thereby urgently notifying the State Party concerned in an application of its introduction and a summary of its contents.

<sup>10</sup> For further information see Annex A of this report.

<sup>11</sup> This information was obtained via email correspondence with Mr. Stephen Philips from the Court Registrar in March 2012.

### *Binding Nature of Rule 39*

Over time, the impact of Rule 39 interim measures has changed with the evolving jurisprudence of the European Court of Human Rights. In the beginning, Rule 39 was considered a non-binding request on Member States. The Court in *Cruz Varas and Others v. Sweden* acknowledged the non-binding nature of Rule 39 explicitly.<sup>12</sup> However, in 2005, the Court overturned its *Cruz Varas & Others v Sweden* ruling in *Mamatkulov and Askarov v. Turkey*, reasoning that if a Member State does not comply with Rule 39 measures and expels an applicant before a proper investigation of his or her complaints by the Court, the applicant is thereby hindered in the effective exercise of his or her right to individual petition under Article 34 ECHR.<sup>13</sup> Therefore the binding nature of Rule 39 was found by the Court's jurisprudence. This reasoning was affirmed in *Aoulmi v. France*<sup>14</sup> and expanded in *Olaechea Cahuas v. Spain*,<sup>15</sup> where the Court held that Article 34 ECHR was violated by non-compliance with a Rule 39 indication even when the applicant, following expulsion, did not in practice, experience difficulty pursuing his application with the Court.<sup>16</sup>

More recently, in *Ben Khemais v. Italy*,<sup>17</sup> the Court found that deportation to Tunisia in contravention of Rule 39 measures amounted to a violation not just of Article 34, but also of Article 3, because "serious and reliable international sources" such as Amnesty International had reported that allegations of torture and abuse in Tunisian prisons had not been investigated by Tunisian authorities.<sup>18</sup> Tunisian assurances that the applicant would not be tortured or abused were insufficient in the absence of an effective system to prevent torture.<sup>19</sup>

An applicant's imminent risk of expulsion and their exposure to other underlying dangers, such as those mentioned in the *Ben Khemais v Italy* case, justifies the application of the Rule 39 mechanism as an emergency interim measure.<sup>20</sup> In the field of asylum and migration legal practitioners predominantly invoke in interim measures in urgent cases concerning removals, expulsion and/or deportation. In exceptional cases the Court has also indicated measures under Rule 39 in the context of accessing a lawyer, accessing medical treatment for detainees as well as in order to provide shelter for asylum seekers as demonstrated by the findings in this report.

## **2. Recent Practice concerning Rule 39 Requests**

In recent years, the number of requests for Rule 39 measures has raised to a disproportionately greater amount than that of previous years. In 2006, 112 requests were made; in 2007, this number rose to 883, then to 3185 in 2008, 2402 in 2009, and 4786 in 2010.<sup>21</sup> The Court noted that between 2006 and 2010 the Court saw an increase of over 4000 % in the number of requests it received for interim measures under Rule 39.<sup>22</sup> However, requests under Rule 39 dropped to

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<sup>12</sup> ECtHR: *Cruz Varas and Others v Sweden*, (Application No. 15576/89), 20 March 1991, Para 103, "Where the State decides not to comply with the indication it knowingly assumes the risk of being found in breach of Article 3 (art. 3) following adjudication of the dispute by the Convention organs. In the opinion of the Court where the State has had its attention drawn in this way to the dangers of prejudicing the outcome of the issue then pending before the Commission any subsequent breach of Article 3 (art. 3) found by the Convention organs would have to be seen as aggravated by the failure to comply with the indication."

<sup>13</sup> *Mamatkulov and Askarov v Turkey*, *supra* note 5, para. 125.

<sup>14</sup> ECtHR, *Aoulmi v France*, (Application No. 50278/99), 17 January 2006.

<sup>15</sup> ECtHR: *Olaechea Cahuas v. Spain*, (Application No. 24668/03), 10 August 2006.

<sup>16</sup> *Ibid.*, para. 81.

<sup>17</sup> ECtHR, *Ben Khemais v. Italy*, (Application No. 246/07), 24 February 2009.

<sup>18</sup> *Ibid.*, para. 59.

<sup>19</sup> *Ibid.*

<sup>20</sup> For further information, see the ECtHR Fact Sheet on Expulsions and Extraditions, February 2012.

<sup>21</sup> ECtHR, Statement issued by the President of the European Court of Human Rights concerning requests for interim measures (Rule 39 of the Rules of the Court) issued 11 February 2011. It should be noted that the Court Rule 39 statistics also indicated the following figures (including requests submitted outside the scope, refused and granted Rule 39 requests): 3185 requests in 2008, 2402 requests in 2009, 3775 requests in 2010 and 2778 requests in 2011.

<sup>22</sup> *Ibid.*

approximately 2778 in 2011 due to changes in the Court's administration of interim measures.<sup>23</sup>

The increasing number of requests over the past few years led to concerns on the workload of the European Court of Human Rights and its ability to respond to 'genuine' cases. Both Member States and the European Court of Human Rights itself reacted to this increase. In February 2011 'faced with the alarming rise in the number of requests for interim measures' the President of the Court issued a public statement on Rule 39 interim measures.<sup>24</sup> The President explicitly stated that the 'the Court is not an appeal tribunal from the asylum and immigration tribunals of Europe...the Court should only be required to intervene in truly exceptional cases.'

The President outlined a number of ways in which national governments and applicants and their legal representatives could co-operate to ensure an effective functioning of the Court, including the need for effective remedies at the national level. It is clear from the findings of this report that there is still a lack of effective national remedies in Council of Europe Member States.

Similarly in the context of the Turkish Chairmanship of the Committee of Ministers at the High Level Conference on the Future of the European Court of Human Rights in April 2011 in Izmir, Member States expressed their deep concern over the great increase in applications under Rule 39 of the Court, an increase which further burdened its already heavy workload and reiterated the President's statement that it is in danger of becoming an asylum appeals tribunal or a Court of fourth instance, contrary to its initial role.<sup>25</sup>

However the year 2011 saw a significant drop in the total number of Rule 39 requests submitted, 2778 requests were made in that year, which means 997 applications less than 2010. Out of the Member States included in this research, the countries, which submitted the most Rule 39 applications, remained the same, with the United Kingdom (776 applications) followed by Sweden (566 applications) and the Netherlands (174 applications) submitting the most Rule 39 requests.<sup>26</sup> Applications launched by the same three countries received the majority of granted interim measures.

It is interesting to note that that Spanish lawyers in 2011 submitted 40 applications of which 33 were successful, (in 2010 14 Rule 39 requests were made against Spain all of which were refused by the Court) which amounts to a success rate of 83%. These variations within individual Member States from year to year only raise more questions. For instance, in the first half of 2011, Sweden accounted for 27% of Rule 39 requests throughout the Council of Europe.<sup>27</sup> Anecdotal evidence suggests this was linked to Sweden's practice of trying to enforce returns to Iraq. The report attempts to provide further background information on the reasons behind such variations in submitting Rule 39 requests to the ECtHR.

However, it is not only the overall number of Rule 39 measures submitted that decreased in 2011. Taking into consideration the number of interim measures granted in 2010 for the Member States included in this survey (1289) compared to the number of applications submitted from those States (3236) it appears that successful interim measures' applications amounted to 39.8% of the total number of applications submitted in 2010, whereas the same rate for 2011 equals to approximately

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<sup>23</sup> According to the Preliminary Opinion of the European Court of Human Rights in preparation for the Brighton Conference (adopted by the Plenary Court on 20 February 2012), in 2011 the Court reorganized its internal set-up for dealing with Rule 39 requests, changed its procedures at both the judicial and administrative level and revised its practice direction on Rule 39.

<sup>24</sup> ECtHR, Statement issued by the President of the European Court of Human Rights concerning requests for interim measures (Rule 39 of the Rules of the Court) issued 11 February 2011.

<sup>25</sup> Izmir Declaration, High Level Conference on the Future of the European Court of Human Rights organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe, Follow-up Plan, A.3, 26-27 April 2011

<sup>26</sup> This data was obtained by consulting the Country Profiles of the participating Member States on the Court's website.

<sup>27</sup> ECtHR, Interim measures accepted by respondent State and country of destination from 1 January to 31 December 2011

8% of the total number of requests made that year. This means that effectively, a much larger number of Rule 39 applications were refused or dismissed as out of scope in 2011, than those refused or dismissed in 2010.

As to why there are a large number of Rule 39 requests from certain countries, section 3 of this report aims at exploring the reasons why such recourse to the European Court of Human Rights is necessary. It also raises the question as to whether remedies are available in the Contracting Parties to the Convention and if so, if they are effective in practice and in law.

### 3. Member State Compliance

Despite the number of Rule 39 requests before the ECtHR, in general Member States seem to respect their obligation to comply as incidents of non-compliance remain relatively low, occurring in only 32 of 3647 total cases in which requests for interim measures were granted since 1 January 1974<sup>28</sup> (less than 1%), 23 of those cases (72%) occurred after 1 November 1998.<sup>29</sup> However given the gravity of risks of a violation of Article 3 ECHR any instance of non-compliance is unacceptable. Instances of non-compliance are highly concentrated, having occurred in fifteen Member States of the CoE, with the majority (62%) occurring in only four States: Russia, France, Italy, and Turkey.<sup>30</sup>

Violations of the Convention need not always take the form of brazen non-compliance. In some cases, States fail to comply with Rule 39 indications because of an “objective impediment”.<sup>31</sup> If such an objective impediment legitimately exists and the State took all reasonable steps to remove it, no violation of the Convention has taken place because the Member State was objectively incapable of complying with the Rule 39 measures indicated. Such impediments may include lack of time to comply, for instance if the indication is handed down when the applicant is already en route to the airport.<sup>32</sup> However, States frequently use the objective impediment excuse to try to exonerate themselves,<sup>33</sup> and the Court must then scrutinize the case to determine whether the Convention has been violated.<sup>34</sup>

Occasionally respondent governments to Rule 39 measures ask the Court to lift interim measures. The *Ben Khemais v Italy* judgment holding that assurances from the receiving country were not sufficient to insulate the sending Member State from a Convention violation were forcefully reiterated in *Paladi v. Moldova*,<sup>35</sup> where the Court admonished that it was not for the State to determine whether Rule 39 measures were appropriate.<sup>36</sup> In its judgment, the Court held that “a State which considers that it is in possession of materials capable of convincing the Court to annul the interim measure should inform the Court accordingly,”<sup>37</sup> meaning that even if the State feels interim measures were inappropriately applied, the State's only recourse is to make its case in front of the Court, not to “substitute its own judgement for that of the Court”.<sup>38</sup>

Member States may also seek to skirt compliance through bad faith actions, such as rapid

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<sup>28</sup> Yves Haeck, Clara Burbano Herrera and Leo Zwaak, *Strasbourg's interim measures under Fire: Does the Rising Number of State Incompliance with interim measures Pose a Threat to the European Court of Human Rights?*, European Yearbook on Human Rights Vol. 11, 2011, p. 1

<sup>29</sup> *Ibid.*, p. 6.

<sup>30</sup> *Ibid.*, p. 25.

<sup>31</sup> Council of Europe PACE Report *Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights*, Doc 12435 (November 2010).

<sup>32</sup> *Ibid.*, para. 60.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, para. 49.

<sup>35</sup> ECtHR, *Paladi v Moldova* (Application No. 39806/05) 10 March 2009.

<sup>36</sup> *Ibid.*, para. 90.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

expulsion.<sup>39</sup> As noted above, this is one avenue Italy adopted following the *Ben Khemais* decision, where Italy continued to expel Tunisians, often too rapidly for them to apply for Rule 39 measures.<sup>40</sup> In another case, *Sivanathan v. the United Kingdom*,<sup>41</sup> the Court granted a Rule 39 indication to prevent the applicant's deportation to Sri Lanka. As he was on the way to the airport, the removal direction was cancelled, yet he returned to Sri Lanka anyway. Offering no proof, the United Kingdom claimed simply that he had changed his mind and returned of his own volition. The Court accepted this explanation.<sup>42</sup>

At the Izmir High Level Conference on the Future of the ECtHR, Member States themselves acknowledged the issue of non-compliance of Rule 39 measures by some parties.<sup>43</sup> At the conference it was reiterated that although Member States may challenge the imposition of interim measures before the Court, they are obligated to comply with them. Despite this, as recently as the end of March 2012 there are instances of State Party non-compliance of Rule 39 measures for example when the Ukraine ignored a Rule 39 indication from the Court to the detriment of the individual concerned.<sup>44</sup>

## 4. Reform of the Court

This research has come at a time where there is significant debate on the future reform of the Court. As part of this discussion Member States, civil society and the different institutional bodies of the Council of Europe have all raised specific points concerning the role of interim measures as part of the Court's system.

In November 2010 the Parliamentary Assembly Committee on Migration, Refugees and Population issued a report on "Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights"<sup>45</sup> which comprehensively documented the issues surrounding Rule 39 interim measures including the growing number of breaches of these measures. Resolution 1788 (2011) and Recommendation 1956 (2011) were adopted in light of that report and both provide a number of recommendations addressed to the Committee of Ministers, the Court and Member States themselves aimed at improving the use of Rule 39 indications in extradition and expulsion cases. On 23 January 2012, the Committee of Ministers responded to Recommendation 1956 (2011) outlining a number of developments such as the new Practice Directions issued by the Court in July 2011 as well as the CoE Secretary General's proposals in the Framework for Council of Europe action on migration issues which addressed some of the issues raised by the Parliamentary Assembly.<sup>46</sup> However, the Committee did not respond to recommendations addressing the number of instances of non-compliance of interim measures by Member States. This is of concern noting that this research also documents a significant number of instances of non-compliance by Member States.

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<sup>39</sup> *Ibid.*

<sup>40</sup> Council of Europe PACE Report *Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights*, Doc 12435 (2010).para. 42.; ECtHR: *Toumi v Italy* (Application No. 25716/09), 5 April 2011.

<sup>41</sup> ECtHR, *Sivanathan v. the United Kingdom* (Application No. 38108/07), 3 March 2009.

<sup>42</sup> Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights*, Human Rights Files No. 9, Council of Europe Publishing, 2010, pp. 223-4.

<sup>43</sup> Izmir Declaration, High Level Conference on the Future of the European Court of Human Rights organised within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe, 26-27 April 2011

<sup>44</sup> For further information see Section 3.4 below.

<sup>45</sup> Council of Europe PACE Report *Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights*, Doc 12435 (November 2010).

<sup>46</sup> Committee of Ministers reply to Recommendation 1956 (2011) Doc. 12836, 23 January 2012; Framework for Council of Europe Action on Migration Issues 2011-2013 Proposal by Secretary General (SG/Inf(2011)10 rev), 10 June 2011; The Framework includes activities such as training and providing expert legal analysis to Member States on asylum and return procedures.

At the same time there have been significant developments concerning the future of the European Court of Human Rights itself. At Interlaken in 2010 Member States came together and signed a declaration confirming their intention to secure the long-term future of the ECHR which was followed by an action plan.<sup>47</sup> However for the purposes of this report the most significant developments concerning Rule 39 have occurred since the Izmir declaration in 2011. On 26-27 April 2011 the Turkish Chairmanship of the Committee of Ministers hosted a high level conference on the future of the European Court of Human Rights in Izmir. As part of the resulting Izmir Declaration a number of specific points on interim measures as part of the right to individual application were raised such as: ‘underlining that applicants and their legal representatives should fully respect the Practice Direction on requests for interim measures; reiterating the requirement for States to comply with interim measures; inviting the Court to consider, with the State Parties, how best to combine the practice of interim measures with the principle of subsidiarity...’ The declaration also stressed the importance of Member States providing national remedies, where necessary with suspensive effect. This research shows that such national remedies are currently not being implemented by Member States of the Council of Europe in practice.

Following the Izmir Declaration, steps have been taken by the Court in relation to Rule 39 measures both in re-organizing its internal administrative procedure for dealing with these urgent requests and revising its Practice Direction which was re-issued in July 2011.<sup>48</sup> However more changes are needed from within Council of Europe Member States to ensure better implementation of the Convention and its case-law at the national level. As noted by the Court a key element in the reform process is the ‘increased recognition that responsibility for the effective operation of the Convention has to shared.’<sup>49</sup>

On 18-20 April 2012 State representatives from all Council of Europe Contracting Parties will gather in Brighton for the High Level Conference on the Future of the European Court of Human Rights, chaired by the UK Chairmanship of the Committee of Ministers. Though the issue of Rule 39 interim measures is only marginally referred to in the leaked draft Brighton Declaration<sup>50</sup> it is clear that any proposals affecting the remit of the Court and its admissibility criteria will likewise impact upon the application of Rule 39 of the Rules of the Court.

Throughout these discussions on Court reform the principle of subsidiarity has been raised, according to which the primary responsibility for protecting Convention rights lies with the Member States in conjunction with the supervisory jurisdiction of the European Court of Human Rights. However this research demonstrates that Member States of the Council of Europe need to urgently improve their implementation of the Convention and its case-law as well as provide effective legal remedies to remedy violations at the national level.

These developments should also be considered in light of EU accession to the European Convention of Human Rights particularly where the application of certain EU asylum legislation raises issues concerning Convention rights. As an example the current application of the Dublin II Regulation and the growth of Rule 39 interim requests to the Court on the basis of Dublin transfers

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<sup>47</sup> The reform of the Court process started back in 2001 and was subject to a new Protocol, Protocol No. 14 to the Convention. However for the purposes of the study only recent discussions concerning the reform of the Court are raised. Further information is available on the Court’s website.

<sup>48</sup> According to the Preliminary Opinion of the European Court of Human Rights in preparation for the Brighton Conference (adopted by the Plenary Court on 20 February 2012), in 2011 the Court reorganized its internal set-up for dealing with Rule 39 requests, changed its procedures at both the judicial and administrative level and revised its practice direction on Rule 39. The revised Practice Direction issued by the President of the Court in accordance with Rule 32 provides a set of requirements, which individuals or legal practitioners must comply with when submitting a request for interim measures before the Court.

<sup>49</sup> Preliminary opinion of the Court in preparation for the Brighton Conference (adopted by the Plenary Court on 20 February 2012).

<sup>50</sup> Leaked Draft Brighton Declaration presented on 23 February 2012 accessible on the Guardian newspaper website. The draft Declaration states that it “Recalls that the Izmir Conference invited the Committee of Ministers to consider further the question of interim measures under Rule 39 of the Rules of the Court; invites the Committee of Ministers to assess both whether there has been a significant reduction in their numbers and whether applications in which interim measures are applied are now dealt with speedily; and to propose any necessary action.”

to certain EU members raise questions concerning the operation of this system of allocating Member State responsibility for the examination of asylum applications.<sup>51</sup> Since 2007 alone the Court has granted 915 Rule 39 requests on the basis of transfers to particular Member States within the operation of the Dublin system. Such issues will have to be further examined in the context of EU accession to the Convention itself.<sup>52</sup>

With this backdrop in mind, as this process of reform of the Court continues the importance of Rule 39 interim measures should not be forgotten, particularly for those fleeing persecution, for as the President of the Court declared “*the application of Rule 39 has preserved the physical integrity, the liberty and even the lives of many people who by definition are vulnerable*”, values which lie at the very core of the ECHR.<sup>53</sup>

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<sup>51</sup> Other initiatives have taken place, which also have increased our understanding of the important role the Court and interim measures play in enforcing legal standards for the protection of forcibly displaced persons. For example, in 2011 UNHCR and the CoE held a joint colloquium on the role of regional Human Rights Courts in interpreting and enforcing legal standards for the protection of forcibly displaced persons. Amongst other things, the conference provided a unique opportunity to explore the use of Rule 39 interim measures along with other interim measures used in the different regional legal systems throughout the world. UNHCR, *Joint UNHCR / Council of Europe Colloquium on the Role of Regional Human Rights Courts in Interpreting and Enforcing Legal Standards for the Protection of Forcibly Displaced Persons*, December 2011.

<sup>52</sup> For further information on Rule 39 interim measures granted in relation to the application of the Dublin II Regulation see Annex B of this report.

<sup>53</sup> ECtHR, *Annual Report 2011*, Registry of the European Court of Human Rights, Strasbourg 2012.

### III. Research Findings

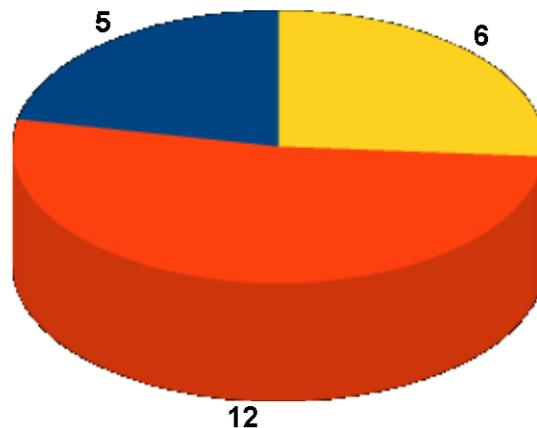
#### Section 1

##### 1.1 Lawyer’s experience of requesting Rule 39 measures

Despite the increase in the number of requests for Rule 39 measures in recent years the majority of these are directed against a small number of the 47 Council of Europe State parties. Although it is difficult to fully assess the reasons why requests are directed against certain Member States a potential factor is that in some States there still exists a lack of awareness amongst individuals, practitioners or even the authorities on this procedural rule and how it may be applicable to expulsion cases. It is clear that the practice of using Rule 39 interim measures among lawyers in certain countries is still an emerging one. This research demonstrates that in a number of the Member States surveyed asylum practitioners have limited experience in using Rule 39. Therefore there is a continuing need to raise awareness about the possibility of using Rule 39 interim measures and improve legal practitioner’s knowledge of the general admissibility criteria before the European Court of Human Rights.

*Do immigration and asylum lawyers in your jurisdiction have a lot of experience in applying for Rule 39 measures?*<sup>54</sup>

**Graph 1: Immigration and Asylum Legal Experience in Rule 39 Application**



- Significant Experience: Belgium, Germany, Finland, the Netherlands and Russia
- Limited Experience: Bulgaria, Cyprus, Greece, Hungary, Ireland, Italy, Lithuania, Norway, Portugal, Sweden, Switzerland and Spain
- No Experience: Austria, Denmark, Slovakia, Turkey, Ukraine and the United Kingdom

The responses to this question indicate that over half of the asylum lawyers who took part in this survey do not have significant experience in applying for Rule 39 measures.

- In **Bulgaria, Cyprus, Greece, Hungary, Ireland, Italy, Lithuania, Norway, Portugal,**

<sup>54</sup> Question 2, Questionnaire of the research in Annex A. Please note that the classification made during the creation of Graph 1 was based on the characterisation of the “amount of experience” as conducted by the participants of this research. Therefore, the results are in this respect limited. In this question responses were received from contributors from all 23 countries included in this research.

**Slovakia, Spain, Sweden and Switzerland** it was found that lawyers had limited to no experience of applying for Rule 39 measures before the ECtHR.

- Lawyers in **Belgium, Germany, Finland, the Netherlands and Russia** responded that they had significant experience whilst lawyers in **Austria, Denmark, Turkey, Ukraine** and the **United Kingdom** noted that the majority of practitioners in their jurisdictions had limited experience in submitting requests to the ECtHR but that there existed a small group of experienced lawyers from their respective jurisdictions.

The following examples provide explanations as to why lawyers in some countries have limited experience in submitting Rule 39 requests to the Court:

- Lawyers in the **Bulgaria, Denmark, and the Netherlands** reported that applying for Rule 39 measures is sometimes perceived as being a very complex, time consuming process and/or a 'daunting' process and national lawyers are therefore deterred from using them, given their extremely heavy workload and limited resources.
- In **Cyprus, Denmark, Greece, Switzerland and Turkey** there are few or no lawyers specialized in the field of immigration and asylum law and therefore their capacities in applying for Rule 39 measures in this context are *de facto* limited. In **Cyprus** a basic lack of knowledge of the use of both national interim measures, (that are considered by lawyers to be ineffective in practice) and Rule 39 interim measures was reported.
- Lawyers in **Cyprus, Hungary, Spain** and the **United Kingdom**, often have limited or no awareness about the possibility and the procedures for submitting interim measures under Rule 39 of the Court. Lawyers in **Bulgaria** and **Italy** found that lack of training on Rule 39 was also a reason for their inexperience.
- **Italian** lawyers also found that the fact that the procedure before the ECtHR is conducted in either English or French prevents some national practitioners from applying for interim measures before the Court.
- Lawyers in **Lithuania** do not have significant experience in applying for Rule 39 measures. This was attributed partially to a lack of training on Rule 39 procedures but also due to the fact that previous applications for Rule 39 measures in the past have been refused for some legal practitioners. This has discouraged legal practitioners launching more applications to the Court in the future. Lawyers in Lithuania are also unsure about what criteria the Court applies in granting interim measures.<sup>55</sup>
- In **Austria** the ECHR and Protocols have the rank of Constitutional law in the national legal framework. Therefore lawyers in proceedings before the Constitutional Court invoke the ECHR at the national level with limited recourse to the Strasbourg court being made. Another factor in the limited experience of Austrian lawyers in applying to the ECtHR is the fact that refusals for asylum at the Asylum court (Asylgerichtshof) in Austria are commonly based on a lack of credibility and thus the facts of the case are in dispute. Practitioners in Austria are advised to preferably take strong cases to the ECtHR and therefore, when there are disputed facts to a case, lawyers are less likely to apply to the ECtHR. This however depends on the lawyer and the individual circumstances of the case. If a lawyer believes that their client has not been given justice on national level, they will still seek recourse before the ECtHR. Over the past few years' Austrian lawyers have gained more experience in submitting Rule 39 requests in relation to challenges to Dublin transfers to Greece. As a result of this experience the number of Rule 39 requests submitted concerning Austria has increased in the field of asylum.
- In **Norway, Sweden and Switzerland** lawyers have found that the fact that there is no or limited legal aid available for submitting Rule 39 applications discourages lawyers from

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<sup>55</sup> The numbers provided by the ECtHR on Lithuanian Rule 39 applications in 2010 and 2011 indeed confirm this to a certain extent. In 2010 no Rule 39 application was submitted by Lithuanian lawyers while in 2011 only 1 application for Rule 39 measures was submitted, which was refused. For further information see Annex A.

using it.<sup>56</sup> In relation to Sweden, though the statistics for Rule 39 requests are high (566 requests in 2011 and 901 requests in 2010) it should be noted that during this time period particularly in relation to stopping enforced removals to Iraq, asylum seekers and their relatives also submitted Rule 39 requests. Therefore the number of Rule 39 requests does not necessarily reflect lawyer's experiences with submitting applications under this Rule of the Court.

- Lawyers in **Portugal** submit few Rule 39 requests due to the low number of asylum applications that the country receives.<sup>57</sup> In addition national asylum appeals have suspensive effect and Portugal has a limited practice of expulsion of rejected asylum seekers. Therefore it is often not necessary to submit applications to the ECtHR.
- In **Slovakia** there are only approximately 20 practicing immigration and asylum lawyers out of whom only 4 lawyers have lodged applications for Rule 39 interim measures before the Court. The reason for such a low number of applications includes the following factors: a lack of proper training and knowledge on how to apply for Rule 39 measures and a heavy workload for lawyers with limited capacity.
- In **Ireland** lawyers do not possess a lot of experience in applying for interim measures before the ECtHR as injunctions, which grant suspensive effect, are usually obtained in appropriate cases from the High Court of Ireland. In fact, Irish lawyers reported that there has only been a single case in their country in 2008 where interim measures were requested and granted in this field.<sup>58</sup> However, Irish lawyers noted that in the future recourse to the Strasbourg Court might become increasingly necessary as recently it is becoming more difficult to secure national injunctions.
- In **Norway**, legal tradition is also a relevant factor as lawyers sometimes refrain from applying for Rule 39 measures due to the tendency to accept their national decisions and trust in their national organs' actions.

Lawyers in several countries reported that there is a small core group of specialized lawyers within their national networks who possess significant experience with requesting Rule 39 interim measures.

- This practice is evident in **Belgium, Denmark and the Netherlands**. Similarly in **Turkey** there is a small number of NGO affiliated lawyers experienced in Rule 39 requests.
- In **Ukraine** there are a few experienced lawyers in Rule 39 requests, but reportedly not enough to cover the needs of asylum seekers in the country where recourse to the European Court of Human Rights is often necessary. Likewise, in **the United Kingdom** there are some experienced lawyers on Rule 39 requests of which other lawyers request their assistance when applying to the European Court of Human Rights.

Regarding those lawyers with experience of submitting Rule 39 requests this appears to be primarily in the context of 'Dublin' cases<sup>59</sup> or concerning countries where violations of the ECHR occur more frequently:

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<sup>56</sup> The ECtHR can provide legal aid upon the granting of permission from the President of the relevant Court chamber. However the fee paid is fixed by the Court registrar and in practice the Court's legal aid scheme does not normally cover the full legal costs of legal representation but is rather to be regarded as a contribution towards such costs. For further information on national legal aid schemes see the ECRE/ELENA *Survey on Legal Aid for Asylum Seekers in Europe*, October 2010.

<sup>57</sup> According to figures published by Eurostat, Portugal received only 95 asylum applications during the first two quarters of 2011.

<sup>58</sup> ECtHR, *Izevbekhai v. Ireland* (Application No. 43408/ 08) related to expulsion. However the Court later deemed this application as manifestly unfounded and therefore inadmissible.

<sup>59</sup> For further information see ECtHR: Fact Sheet on "Dublin Cases", January 2011

- Lawyers in some countries with limited previous experience of applying for Rule 39 measures, such as **Austria** and **Germany**, are now seizing the opportunity to become familiar with the functions of ECtHR and the use of Rule 39 before the Court, due to previous successful cases that gained a lot of visibility with their national media.<sup>60</sup> This is particularly noted in the context of Dublin cases whereby more and more lawyers at the national level are engaged in applying to the ECtHR to prevent transfers to Greece but increasingly also to other countries such as Italy and Malta.<sup>61</sup>
- In **Belgium**, some lawyers gained experience in applying for Rule 39 measures in order to effectively deal with Dublin cases.
- Similarly, in **Finland** some lawyers have gained specific expertise in applying for interim measures, as in recent years approximately 200 applications for Rule 39 measures have been submitted mostly for Dublin cases. It should be noted that most Finnish lawyers do not submit a Rule 39 measure for every case but an examination of the merits of the case is conducted beforehand by the lawyer and only those considered as 'strong' are eventually taken to the ECtHR.
- Some lawyers in **Russia** have extensive experience filing applications for Rule 39 measures, on a regular basis.

The majority of asylum lawyers across Europe within the scope of this research have limited or no experience of applying for Rule 39 interim measures before the ECtHR. The reasons behind this are linked to a number of factors including lack of training, lack of legal aid, resources and limited awareness as well as other national factors such as having an effective judicial system at the national level and even legal tradition. This provides some explanation as to why indications against some Member States are high and against others there are little or none.

Recently the ECtHR has employed more effective communication tools to raise awareness amongst lawyers and applicants themselves. Examples of this include the publication of a video on the admissibility criteria to the Court and the online admissibility checklist and fact sheets on particular topics.<sup>62</sup> As a response to the Interlaken and Izmir declarations the Court also published a detailed admissibility guide available in 12 languages.<sup>63</sup> These tools are beneficial in not only raising awareness but also in assisting lawyers in identifying cases where it may be necessary to apply to the ECtHR and request Rule 39 measures. They are equally important in highlighting to lawyers the admissibility criteria for the Court therefore preventing a large number of unmeritorious applications.

ECRE/ELENA welcomes the new communication tools employed by the CoE on access to the ECtHR. NGOs, legal networks and other members of civil society should also ensure that this information is widely disseminated. Other organizations have also employed methods to increase awareness amongst lawyers including for example ECRE's information note on the use of ECtHR interim measures to stop Dublin transfers to Greece<sup>64</sup> and UNHCR's Rule 39 Toolkit for lawyers requesting interim measures for those in need of international protection.<sup>65</sup> Contributors to this

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<sup>60</sup> Ibid.

<sup>61</sup> Since the Grand Chamber judgment of *M.S.S. v Belgium & Greece*, (Application No. 30696/ 09), 21 January 2011 the majority of Member States have suspended Dublin transfers to Greece therefore Rule 39 requests before the Court now predominantly focus on Dublin transfers to other countries such as Hungary, Italy and Malta.

<sup>62</sup> For the online admissibility checklist please visit: ECtHR: Online Admissibility Checklist on the Court website; See also ECtHR: Practical Guide on the Admissibility Criteria, 2012. For the ECtHR factsheets on various topics, please visit the Court's website; ECtHR: ECHR Video on Admissibility Conditions, January 2012.

<sup>63</sup> According to the Court website the practical guide on admissibility criteria is available in Azeri, Bulgarian, English, French, German, Greek, Italian, Russian, Serbian, Spanish, Turkish and Ukrainian.

<sup>64</sup> See ECRE information note on ECtHR interim measures (Rule 39) to stop Dublin transfers, July 2010.

<sup>65</sup> UNHCR, *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*, February 2012.

research also raised further recommendations to improve lawyers' understanding of Rule 39 including a systematic on-line exchange of information amongst lawyers and NGOs on the practices of Rule 39 measures. In such a network there could be the possibility to provide support to less experienced lawyers as well as providing a forum to exchange information on any patterns emerging from the Court on Rule 39 measures.

Another way of increasing lawyers' knowledge of Rule 39 is to ensure that they have access to the relevant legal instructions in their respective languages. As an example the practical guide on admissibility criteria to the Court is currently available in 12 languages. However, the Practice Direction on Rule 39 measures<sup>66</sup> is available in English and French only, therefore translations of the direction are required to assist lawyers in the formalities and criteria for requesting a Rule 39 measure. It is noted that the Court's working languages are English and French only however it would aid lawyers understanding of the correct application of Rule 39 and prevent unmeritorious applications if lawyers and applicants had access to the Practice Directive in the language of their State Party also.<sup>67</sup>

The specific issue of training will be explored in section 1.2 however it should be noted that any awareness raising measure should not only focus on Rule 39 interim measures but also on the Convention itself and the general admissibility criteria for submitting applications before the Strasbourg Court. Although this research is only focused on Rule 39 interim measures this should not be isolated from the general legal framework of the ECHR.

#### **ECRE/ELENA Recommendations**

The Practice Direction on Rule 39 should be made available in the official languages of all State Parties to the Council of Europe in order to raise awareness among legal practitioners and contribute to a more effective use of this Rule of the Court.

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<sup>66</sup> ECtHR: Practice Direction, Requests for Interim Measures (Rule 39 of the Rules of the Court), 7 July 2011.

<sup>67</sup> The draft Brighton Declaration on the future of the European Court of Human Rights (version of 23 February 2012) contains the following provision encouraging State parties to translate significant judgments of the Court and the Court's Practical Guide on Admissibility Criteria into national languages, where this is necessary for them to be properly taken into account.

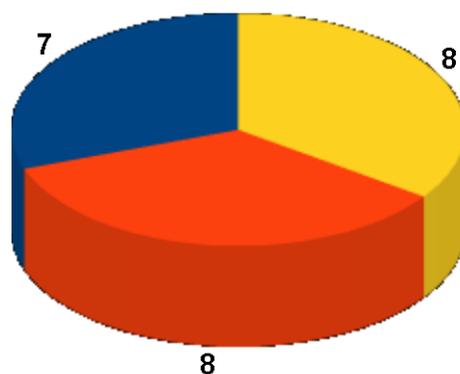
## 1.2 Training on Rule 39

Resolution 1788 (2011) by the CoE Parliamentary Assembly recognizes the need to provide training to judges, domestic authorities and lawyers, using *inter alia*, the good offices of UNHCR as well as the Practice Directions provided by the Court, as one of the essential preconditions to making Rule 39 measures effective in expulsion cases.<sup>68</sup>

The findings of this research confirm that there is a great need for further training on Rule 39. It appears that the current training provided is accessible in only a limited number of countries and to a limited number of practitioners. Obstacles include the high cost of delivering such training as well as lack of resources on behalf of NGOs and individuals in order to attend training offered in Strasbourg or other major European capitals.

*Have lawyers in your jurisdiction received training on how to apply for Rule 39 interim measures before the Court? Please provide any further information.*<sup>69</sup>

**Graph 2: Training on Rule 39**



- Training received: Belgium, Finland, Germany, Russia, Slovakia, the Netherlands and the United Kingdom
- No Training received: Austria, Denmark, Greece, Ireland, Italy, Ukraine, Sweden and Turkey
- Limited Training Available: Bulgaria, Cyprus, Hungary, Lithuania, Norway, Portugal, Spain and Switzerland

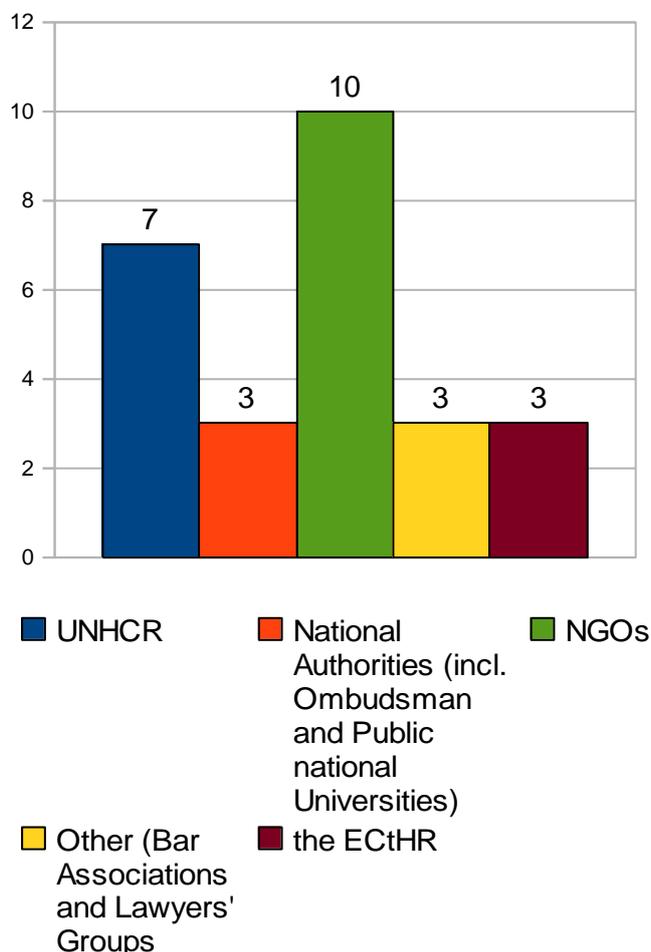
Lawyers in **Belgium, Finland, Germany, Russia, Slovakia, the Netherlands** and the **United Kingdom** reported that there is training available on Rule 39 in their jurisdictions. Limited training opportunities were noted in **Austria, Denmark, Greece, Ireland, Italy, Ukraine, Sweden and Turkey** whilst no training opportunities appeared to be available for lawyers in **Bulgaria, Cyprus, Hungary, Lithuania, Norway, Portugal, Spain and Switzerland**.

<sup>68</sup> Council of Europe PACE Report *Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights*, Doc 12435 (November 2010), Section 5.5 p. 19.

<sup>69</sup> Question 3, Questionnaire of the research in Annex A. In this question responses were received from all 23 countries included in the scope of this research. Of these countries, lawyers in 7 countries, namely, Belgium, Germany, Finland, Russia, Slovakia, the Netherlands and the United Kingdom have reported that there is sufficient training on Rule 39 in their jurisdictions. Lawyers in 8 countries, namely, Austria, Denmark, Greece, Ireland, Italy, Sweden, Turkey and Ukraine replied that there have been some limited training opportunities in their jurisdictions while lawyers in 8 countries, namely, Bulgaria, Cyprus, Hungary, Lithuania, Norway, Portugal, Spain and Switzerland stated not to have training opportunities for Rule 39 interim measures in their jurisdictions.

The results provided by the contributors as to which organizations provide training on Rule 39 in their respective jurisdictions have been classified as follows: <sup>70</sup>

**Graph 3: Most common Rule 39 training providers**



The most common training providers for lawyers are NGOs including specialized organizations such as the AIRE Centre followed by UNHCR. There appears to be a link between the countries that do not often apply for interim measures before the ECtHR and the countries in which training on Rule 39 is either limited or unavailable.

It is recommended that training and other capacity building exercises should be made available to legal practitioners to assist them in identifying appropriate cases to submit to the Court. Where feasible, training should be delivered in the relevant language of the legal practitioners and not only in English and/or French in order to ensure that the Court's criteria is fully understood'. The content of the training material should involve a step-by-step approach to submitting a request to the Court including a study of real cases. As noted in Section 1.1 training on Rule 39 measures should not be

<sup>70</sup> In response to this question the following 7 countries responded that training was provided by UNHCR: Belgium, Denmark, Greece, Slovakia, Turkey, Russia and Ukraine. In 10 countries, namely, Belgium, Denmark, Finland, Ireland, Russia, Slovakia, Turkey, the Netherlands, the United Kingdom and Ukraine training was provided by NGO's. The following 3 countries' lawyers mentioned training provided by national authorities: Austria, Greece and Norway. The ECtHR was mentioned to have provided training to lawyers in 3 countries: Austria, Sweden and Ukraine. Legal practitioners in 3 countries mentioned other Rule 39 training providers, namely, Belgium, Germany and Italy.

conducted in isolation from the general ECHR framework.

Schemes such as a common training curriculum, online e-learning training, professional development and ‘train-the-trainer’ programmes could be explored by the CoE in consultation with other relevant actors such as UNHCR, NGOs and national authorities. ECRE/ELENA welcomes the setting up of a training unit within the European Court of Human Rights supported by the Human Rights Trust Fund.<sup>71</sup> Such initiatives for the delivery of high-quality training on the Convention will deepen lawyers’ and national authorities’ knowledge of the Court and its case-law.

There should be a thorough needs assessment exercise undertaken in advance to identify where there are specific gaps in information on Rule 39 and the European Convention on Human Rights. Grants and/or Bursaries for selected lawyers to attend training on the European Convention on Human Rights should also be considered in relation to certain countries where a specific need for Rule 39 is identified. Similarly lawyers with extensive experience on Rule 39 could be invited to targeted seminars in co-operation with their national networks or in other countries in order to provide guidance/training to other practitioners in their countries.

Although many stakeholders have already provided training on the European Convention of Human Rights, there still appears to be a significant need for more training on the procedural aspects of Rule 39. New trainings delivered in this area should be conducted with a follow-up evaluation as to how the training impacted upon the work of lawyers in practice. In light of these findings ECRE/ELENA recommends that the Council of Europe institutions develop a training strategy in consultation with other relevant stakeholders.<sup>72</sup>

#### **ECRE/ELENA Recommendation**

The Council of Europe should develop a comprehensive strategy and action plan on Rule 39 training with the consultation of UNHCR, NGOs and other relevant stakeholders. Such training should also incorporate the general Convention legal framework and the admissibility criteria for applications before the Court.

<sup>71</sup> The Human Rights Trust Fund has provided funding for a training unit within the Court. The project concerns Albania, Armenia, Azerbaijan, Georgia, Republic of Moldova, Montenegro, Serbia and Ukraine and aims to provide training to both magistrates and lawyers on Convention law. Further information is available on the Courts website.

<sup>72</sup> The Council of Europe Secretary General has proposed within the framework for Council of Europe work on migration issues 2011-2013 that awareness-raising activities including training and other capacity building assistance should be developed in the following areas: a) Integration of migrants: fighting xenophobia, intolerance and discrimination; respect for diversity; b) Human rights dimension of asylum and irregular migration; Internally displaced Persons.

## Section 2

### 2.1 Rule 39 in asylum and migration cases

#### 2.1.1 The Rule 39 mechanism and its use in asylum and migration cases

*In what types of asylum cases are Rule 39 interim measures typically requested in your country? Please explain the context.*<sup>73</sup>

Although the practice of requesting Rule 39 measures varies over time and according to external events and factors both within the Council of Europe Member State and the country of return or origin, information was obtained on the general types of cases where legal practitioners requested Rule 39 in their respective countries. Responses indicate that in some countries there are a variety of different types of cases where a Rule 39 request to the Court may be necessary. The categorization of cases mentioned below has been based on the terminology used by the contributors although some overlap may occur in practice including for example in deportation or removal to country of origin cases.

##### *Removal to Country of Origin Cases*

Lawyers from **Denmark, Finland, Russia, Sweden, the Netherlands** and the **United Kingdom** reported that Rule 39 interim measures are typically requested in their country, amongst others, in cases relating to removal to the country of origin of an asylum seeker. More specifically Russian lawyers reported applying for interim measures regarding removals to Turkmenistan, Kazakhstan, Uzbekistan and Tajikistan, whilst Finnish lawyers reported having applied for interim measures in cases of expulsions to countries of origin such as the Democratic Republic of Congo, Sri Lanka, China and Belarus. Dutch and Swedish lawyers requested Rule 39 in cases of returns to Iraq, whereas Danish lawyers requested Rule 39 in cases concerning returns to Iraq and Sri Lanka.

##### *Deportation/ Expulsion Cases*

Lawyers from **Belgium, Bulgaria, Cyprus, Denmark, Ireland, Italy, Lithuania, Norway, Slovakia, Spain, Turkey, Ukraine** and the **United Kingdom** reported that Rule 39 interim measures are typically requested for cases concerning the deportation or the expulsion of the applicant. For example Spanish lawyers have applied for interim measures before the ECtHR in order to stop the expulsion of 34 Saharawi people who fled from the occupied territories after dismantling of the camp in El Aiun and for two applicants from Colombia. Belgian lawyers have also applied for interim measures in order to stop expulsions to Sri Lanka of nationals of Tamil origin, Iran and Afghanistan. Italian lawyers applied for interim measures in order to stop the expulsion of Tunisians citizens suspected of terrorism for e.g. in *Saadi v Italy*, *Ben Khemais v Italy*, *Toumi v Italy*.<sup>74</sup>

##### *Extradition Cases*

Lawyers in **Hungary, Portugal, Slovakia** and **Ukraine** reported having applied typically for Rule 39 interim measures in extradition cases. In particular, lawyers from Ukraine noted that cases under this category pertained to extraditions to Belarus, Russia, Kazakhstan and Turkmenistan. Portuguese lawyers mentioned that in the case of *Abu Salem v. Portugal* interim measures were granted but the case was found overall to be inadmissible and was therefore dismissed.<sup>75</sup> The

<sup>73</sup> Question 4, Questionnaire of the research in Annex A. In this question responses were received from the following countries: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Norway, Portugal, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine and the United Kingdom.

<sup>74</sup> ECtHR: *Saadi v. Italy* ( Application No. 37201/06), 28 February 2008; ECtHR, *Ben Khemais v. Italy*, (Application No. 246/07), 24 February 2009; ECtHR, *Toumi v. Italy*, (Application No. 25716/09), 5 April 2011.

<sup>75</sup> ECtHR: *Abu Salem v. Portugal*, (Application No. 26844/04), 9 May 2006, declared inadmissible by the Fourth Section

following extradition cases were mentioned concerning Slovakia: *Labsi v Slovakia*<sup>76</sup> and *Chentiev & Ibragimov v Slovakia*.<sup>77</sup> Hungarian lawyers mentioned a Rule 39 request launched in 2000 concerning the extradition of a Chinese national. The interim measure in this case was granted on the basis of risk of violation of Art. 2 and Art. 3 ECHR since the applicant alleged to be in danger of execution in China upon his extradition. This case was later struck out by the ECtHR.

#### *Detention Cases*

In **Greece** and **Turkey** lawyers have also requested interim measures for cases related to detention. In Turkey lawyers sometimes have to submit Rule 39 requests to prevent the expulsion of irregular migrants who submit asylum claims whilst in detention. In such cases, the Turkish officials usually initiate the procedure for deportation of irregular migrants without taking into consideration the fact that the applicant has requested asylum. Therefore, recourse to the European Court of Human Rights is considered necessary for an emergency request under Rule to prevent deportation of the applicant concerned.

#### *Border Cases*

In **Belgium, Greece, Italy** and the **United Kingdom** lawyers reported that they have requested Rule 39 measures for cases pertaining to asylum applications launched at their country's borders. Italian lawyers reported that Rule 39 measures would be useful in preventing the national authorities from undertaking push-back operations at the sea border for e.g. in Sicily, Lampedusa and other coasts.<sup>78</sup> However, in practice in such cases it is difficult for asylum seekers and migrants to have access to lawyers. Belgian lawyers reported that at the border Rule 39 requests have been connected to procedural rights, such as the right to introduce a subsequent application.

#### *Dublin II Regulation transfers*

Lawyers reported rule 39 requests being submitted in the context of Dublin II Regulation transfers in the following countries **Austria, Belgium, Denmark, Finland, Germany, Norway, the Netherlands** and the **United Kingdom**. Prior to the *M.S.S. v Belgium & Greece* Grand Chamber judgment lawyers submitted Rule 39 requests to prevent asylum seekers being transferred to Greece under the Dublin II Regulation. However in the context of the Dublin II Regulation lawyers have also submitted Rule 39 requests concerning transfers to other countries such as Italy and Poland.

#### *Other cases*

Lawyers in **Hungary, Sweden, Turkey, the Netherlands** and the **United Kingdom** mentioned other cases where Rule 39 requests were submitted to the Courts. In the United Kingdom these cases pertained to the use of accelerated asylum procedures, whilst in Hungary and Sweden these cases related to vulnerable categories of asylum seekers, such as minors or persons suffering from serious illnesses. Turkish lawyers reported that in some Rule 39 applications submitted, the applications pertained to already recognized refugees by UNHCR in Turkey.<sup>79</sup>

### **2.1.2 Rule 39 measures indicated for reasons other than preventing expulsion**

As Rule 39 indications are not required to be motivated by the Court it is difficult to ascertain on what grounds the Court reached a decision to grant or refuse relief under this procedural rule. The

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of the Court.

<sup>76</sup> ECtHR: *Labsi v Slovakia*, (Application No. 33809/09), communicated to the Slovak government on 8 June 2010. The applicant was expelled to Algeria despite a Rule 39 interim measure being granted by the Court.

<sup>77</sup> ECtHR: *Chentiev and Ibragimov v Slovakia* (Application No. 65916/10), communicated case.

<sup>78</sup> On 23 February 2012, the Court's Grand Chamber in the case of *Hirsi v Italy* (Application No. 27765/09) 23 February 2012 examined the Italian practice of collective expulsions and found Italy in violation of Article 4 of Protocol No. 4 (prohibition of collective expulsions) as well as two violations of Article 3 and a violation of Article 13 taken in conjunction with Article 3 and with Article 4 of Protocol No. 4.

<sup>79</sup> Two examples of such cases are ECtHR: *M.B. and Others v. Turkey*, (Application No. 36009/08), 15 June 2010 and ECtHR: *Ranjbar and Others v. Turkey*, (Application No. 37040/07), 13 April 2010.

ECtHR, in its judgment in *Mamatkulov v. Turkey* case noted that '[t]he vast majority of cases in which interim measures have been indicated concern deportation and extradition proceedings'.<sup>80</sup> However when questioned, contributors were able to identify cases from their own practice whereby it appeared that the applications had been decided on grounds other than deportation or extradition. The Court will only issue an interim measure against a Member State where, having reviewed all the relevant information, it considers that the applicant faces a real risk of serious, irreversible harm. In the vast majority of cases the above-mentioned risk falls into the scope of a potential violation of Art. 3 ECHR. This section of the research examines in what other situations under Art. 3 ECHR the Court has granted a Rule 39 interim measure.

*Do you know of any cases where Rule 39 interim measures were granted on the basis of a potential Article 3 violation, on grounds other than expulsion, such as mistreatment related to detention, living conditions, access to medical treatment, etc.? If so, please provide further information.*<sup>81</sup>

Lawyers from **Belgium, Finland, Germany, Hungary, the Netherlands** and **Ukraine** responded that they were aware of cases where Rule 39 interim measures were granted on the basis of a potential Article 3 violation on grounds other than expulsion.

- In **Belgium** lawyers referred to a specific case concerning the detention of an Albanian family in a deportation centre. The parents were on hunger strike and their lawyer had also initiated a criminal action for ill-treatment by the authorities of the detained child. On 26 March 2008 the ECtHR indicated interim measures to the Belgian Government, requesting, in the interests of the parties and the good conduct of the procedures, not to deport the applicants back to Albania before 26 April 2008 to allow for a Court-mandated doctor to examine them in order to identify whether they were in a position to be deported. Further, the ECtHR indicated that the Belgian Government should allow for a psychologist specialized in children appointed by the Judge in charge of the criminal claim, to examine the child and define how the latter was affected psychologically by the hunger strike of the parents and their state of health. The Court also noted that any failure of the Belgian State to comply with these indications is in violation of Art. 34 ECHR.<sup>82</sup>
- Lawyers in **Finland** considered that in the cases where the ECtHR granted interim measures concerning Dublin returns to Greece, Italy and Malta, this has been done on the basis of potential breach of Art. 3 ECHR due to the treatment of asylum seekers in detention, their living conditions and the lack of access to health care in these respective countries.
- **German** lawyers affirmed that in Dublin cases regarding transfers to Greece and in some cases concerning transfers to Italy, interim measures were not only issued because of the reception and living conditions in these countries but also due to the lack of fair asylum procedure including the lack of qualified interpreters in Italy.
- Lawyers from **Hungary** reported a case (dated 26 February 2010) of a seriously ill Afghan unaccompanied minor whose Dublin transfer was foreseen from Hungary to Greece. Interim measures in this case were granted on the basis that the conditions in Greece were unacceptable and would not allow the minor to benefit from the necessary treatment

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<sup>80</sup> ECtHR: *Mamatkulov v. Turkey*, (Application No. 46827/1999), 4 February 2005.

<sup>81</sup> Question 6, Questionnaire of the research in Annex A. In this question responses were received by lawyers in the following countries: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom.

<sup>82</sup> This letter dated 26 March 2008 is available upon request.

required. The minor in this case was suffering from Hepatitis-B, for which he did not receive any medical treatment whilst previously in Greece, since he was either detained or homeless, living in the streets. The lawyers argued that, if the applicant were returned to Greece, he would not get appropriate treatment for this medical condition and would be left homeless and destitute. The Court in granting Rule 39 took into account the real risk of destitution for young asylum seekers in Greece.

- Although not a Rule 39 case, **Russian** lawyers mentioned a very interesting priority case under Rule 41 of the Court related to the detention of a stateless person pending expulsion. This case was communicated within 4 months of the submission of the application on the grounds that the detention conditions were arguably in violation of Art. 3 and 5(f) ECHR.
- As regards **the Netherlands**, lawyers mentioned a case,<sup>83</sup> in which the Court appeared to base its decision on factors other than *stricto sensu* Art. 3 ECHR on the basis of expulsion but also took into account the potential risk of homelessness of the applicants: *“As regards that part of your request in which you once more allege a real risk of treatment contrary to Article 3 of the Convention, I should inform you that in the absence of any relevant new elements, it will not be submitted to the President of the Section for a fresh decision. As regards that part of your request in which, you allege that in the given circumstances of the applicants, including their children, run a real risk of being put out on the street in the Netherlands and left to their own devices, on 18 May 2010 the President of the Chamber to which the case has been allocated decided, in the interests of the parties and the proper conduct of the proceedings before the Court, to indicate to the Government of the Netherlands, under Rule 39 of the Rules of the Court, that applicants should not be expelled to Burundi until 9 June 2010”*.
- In the case of *D.B. v Turkey*<sup>84</sup> the President of the Court requested the Turkish government under Rule 39 to allow the applicant’s representative (or another advocate) in the case to have access to the applicant in the Kırklareli Foreigners’ Admission and Accommodation Centre with a view to obtaining a power of attorney and information concerning the alleged risks that the applicant would face in Iran. Lawyers in Turkey also reported that even though the main basis for Rule 39 requests is expulsion, in many of the cases, as the ECtHR moved into the substantive examination of the case post admissibility, it found violations of Art. 3 ECHR on grounds such as mistreatment of asylum seekers by the authorities, poor living conditions and access to medical treatment whilst in detention. In the case of *Tehrani and Others v. Turkey*<sup>85</sup> the Court issued an interim measure in order to stop the deportation of the applicant. After the full examination of the case, the Court found that living conditions in Tunca Yabancılar Misafirhanesi (Tunca Guesthouse for Foreigners - former name for a detention centre for foreigners in Turkey) amounted to a violation of Art. 3 ECHR. Similarly in the case of *Charahili v. Turkey*, an interim measure was issued in order to stop the deportation of the applicant to Tunisia.<sup>86</sup> In the examination of the case, the Court found that there was an Art. 3 ECHR violation due to the detention of the applicant in the Fatih Police Centre, in Istanbul for 20 months under inhumane conditions.
- As regards **Ukraine** lawyers mentioned the *Yakovenko v Ukraine*,<sup>87</sup> the *Okhrimenko v*

<sup>83</sup> ECtHR (Application No. 15112/10) 21 May 2010.

<sup>84</sup> ECtHR, *D.B. v Turkey*, (Application No. 33526/08) 13 July 2010. For further information on this case see section 3.4 below where the ECtHR found that the Turkish government had violated Article 34 ECHR for not granting access to the applicant in detention with due diligence.

<sup>85</sup> ECtHR: *Tehrani and Others v. Turkey*, (Application No. 32940/08), 13 April 2010

<sup>86</sup> ECtHR: *Charahili v. Turkey*, (Application No. 46605/07), 13 April 2010.

<sup>87</sup> ECtHR: *Yakovenko v. Ukraine*, (Application No. 15825/06), 25 October 2007. This reference does not concern an asylum-related case. See paragraphs 1-3 of the judgment: *“In June 2003 the applicant, who at that time was on probation after receiving a sentence for burglary, was arrested and placed in police custody on suspicion of another*

*Ukraine*,<sup>88</sup> the *Temchenko v Ukraine*<sup>89</sup> and other cases relating to Rule 39 measures being granted to ensure access to medical treatment for asylum seekers.<sup>90</sup> The Registrar of the Court also recently published a press release announcing that the ECtHR indicated Rule 39 interim measures to the Ukrainian government to ensure that the former Ukrainian Prime Minister Yuliya Tymoshenko received adequate medical treatment in an appropriate institution.<sup>91</sup>

Arising from these findings it can be concluded that in certain cases the Court has granted Rule 39 interim measures not only in relation to expulsion but also to prevent a violation of a Convention right on other grounds. Examples include interim measures being granted to prevent a real risk of destitute and homelessness, to prevent the examination of an asylum claim in a poor quality procedure and ensuring access to medical treatment particularly for applicants in detention.

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*count of burglary. (...) On 28 April 2006 the President of the Chamber decided to indicate to the Government, under Rule 39 of the Rules of Court, that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court to ensure that the applicant was transferred immediately to a hospital or other medical institution where he could receive the appropriate treatment for his medical condition."*

<sup>88</sup> ECtHR: *Okhrimenko v. Ukraine*, (Application No. 53896/070, 15 October 2009. This reference does not concern an asylum-related case. See paragraphs 5, 3 and 43 respectively: "The applicant, currently detained in Kharkiv pre-trial detention centre, was arrested on suspicion of theft and inflicting grievous bodily harm causing the death of Mrs S. (...) The applicant alleged, in particular, that he had not received adequate medical treatment in the pre-trial detention centre, that he had been handcuffed in the hospital and that the conditions in which he was transported to the court hearings amounted to torture. (...) On 11 December 2007, following the applicant's request for Rule 39 of the Rules of Court to be applied, the President of the Fifth Section of the Court decided that the Government of Ukraine should ensure that the applicant was transferred to a hospital or other medical institution where he could receive the appropriate treatment. On 20 November 2008 the President of the Fifth Section reconsidered the present application and decided to lift the interim measure previously indicated on 11 December 2007 under Rule 39 of the Rules of Court."

<sup>89</sup> ECtHR: *Temchenko v. Ukraine*, (Application No. 30579/10), Communicated Cases, 21 May 2010. This reference does not concern an asylum-related case. The applicant, who was detained in the SIZO Prisons on the basis of alleged bribery, claimed not to have received appropriate medical assistance during his detention, leading to a deterioration of his health. See Complaints paragraph 1: "In particular, the assistance has been erratic and lacked the supervision of a medical practitioner, or ceased to be provided in the SIZO Prisons following his requests of 16 June and 2 July 2010 lodged with the Court under Rule 39 of the Rules of Court. He was not hospitalised when the need arose. The SIZO did not have special staff and/or equipment to treat his diabetes. The decision of 24 March 2010 to start insulin therapy was taken without any of the required examinations. Despite the negative outcome of the therapy, the dosage was increased without the applicant being seen by a physician. Even so, nothing was done to determine the cause of the deterioration of his health. After the interim measure was indicated by the Court, his hospitalisation was delayed and did not comply with the panels' recommendations, whereas his treatment in the cardiology hospital was terminated prematurely and the applicant was neither observed by specialised physicians nor were required medical tests carried out."

<sup>90</sup> The cases referred to concerning access to medical care were reported by Ukrainian lawyers to be rather old cases in which interim measures were requested but the circumstances of the applicants changed before the interim measure was granted and therefore were not treated accordingly.

<sup>91</sup> For further information see ECtHR: Press Release, *European Court asks Ukrainian authorities to provide adequate medical treatment to former Ukrainian Prime Minister Tymoshenko*, 16 March 2012.

## 2.2 Indications by the Court to Member States

By its very nature in granting a Rule 39 measure the Court will indicate to the State Party concerned specific measures that it needs to comply with or when the State Party needs to take positive action on behalf of the applicant. In most cases this is predominantly to refrain from taking removal actions against the applicant but the Court can also indicate to governments to take positive action so as to ensure access to a lawyer for example for an applicant in detention or for other reasons.

*Do you know of any cases in which the Court requested specific indications from the State apart from preventing removal in expulsion cases when granting Rule 39 interim measures in the asylum context, for instance, ensuring lawyers' access to asylum seekers in detention? If so please provide further information, including whether the request was made at the Court's own discretion or at the instigation of the applicant.*<sup>92</sup>

Lawyers in **Belgium, Cyprus, Finland, Russia, the Netherlands, Turkey** and **Ukraine** reported that they were aware of such cases and provided specific examples from their own experience.

- In **Belgium** lawyers stated that in addition to the case mentioned in Section 2.1.1 in which the Court requested that a doctor and a psychiatrist examine the applicants, in 2011 there was a Dublin transfer case from Belgium to Italy in which the Belgian administration was indicated to proceed with psychiatric and clinical examinations of the asylum seeker concerned and then to inform the Court of the possibility to transfer the applicant to Italy. Furthermore, in 2010 in the context of transfers to Greece, there were a number of cases in which the Court indicated to the Belgian government to guarantee the continuity of accommodation for families. In this respect the ECtHR has a broader approach to the assessment of 'imminent risk' than the national administrative Court in Belgium. The Council of Alien's Litigation concludes that in cases where the applicant is not detained, an emergency request to suspend a deportation act is not admissible, as the national Court considers that the risk of the applicant being deported is not imminent. As families with children are not detained pending expulsion but are required to leave accommodation centres it is necessary to submit Rule 39 requests to the Court to access shelter for them.
- In **Cyprus** the contributors to this survey referred to a 2010 case involving 44 Syrian Kurds. In this case the ECtHR before granting interim measures requested that the applicants provide supporting documentation and answer a questionnaire. However the lawyer was denied access to the relevant documentation by the Cypriot government and the applicants also were detained in different centres across Cyprus and not in a position to respond to a questionnaire prior to their expected deportation to Syria. In view of the collective nature of the deportation, the Court granted interim measures and in June 2010 requested that the government submit to the Court the requested documents, which were subsequently forwarded by the Court to the lawyers involved.<sup>93</sup>

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<sup>92</sup> Question 7, Questionnaire of the research in Annex A. In this question responses were received by lawyers in the following countries: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom. Lawyers in Austria, Bulgaria, Denmark, Germany, Greece, Hungary, Ireland, Italy, Norway, Slovakia, Spain, Sweden, and the United Kingdom reported that they were not aware of cases where the Court indicated Member States to undertake certain actions or measures apart from stopping removals in expulsion cases.

<sup>93</sup> A copy of the Court correspondence and request for information from the applicants and the Cypriot government is available upon request. Further facts of the case: in late May 2010, approximately 250 Syrian Kurd protesters camped outside the Representation of the European Commission ("EU House") in Nicosia to protest against the authorities' rejection of their asylum claims and to demand international protection. On 11 June, 143 of the protesters, including children, were reportedly arrested during an early morning police operation. Several of them were released immediately but, according to reports, 23 were forcibly removed to Syria that day. On 14 June 2010, the ECtHR

- In **Finland** lawyers reported that there have not been such specific indications at the time of the Court granting interim measures. However, Finnish lawyers reported that there has been at least one case of interest in which Rule 39 measures were applied concerning a minor applicant who had been registered as an adult in Italy. The ECtHR later requested information concerning the way in which the age assessment of the applicant had been conducted by Finland and in particular whether forensic age assessment had been conducted.<sup>94</sup> This request by the ECtHR was made after Italy communicated with the Court in relation to this matter. Finnish lawyers further mentioned another case concerning a Dublin II Regulation return from Finland to Italy where the applicant was a victim of human trafficking. Rule 39 measures were not indicated in this case but the ECtHR requested that Finland notified the Italian authorities of the fact that the transferee was a victim of human trafficking.
- In **Russia**, in some Rule 39 measures the Court specifically indicated to the national authorities to provide the applicants with access to medical treatment.
- Lawyers in **the Netherlands** reported one case<sup>95</sup> in which the Court indicated to the Dutch government to provide adequate accommodation to a Somali woman and her child pending their effective return from the Netherlands to their country of origin. This indication arose following the applicant's request. However, at a later stage this case was declared inadmissible. A similar example is the case of a Somali woman, who submitted a subsequent asylum application, also on behalf of her children. She had to leave the reception facility in which she was living in order to apply for asylum. After the national authorities had rejected her asylum application she lost the right to stay in that and other reception facilities in the Netherlands. The legal representative requested an interim measure indicating the Netherlands not to expel the applicant and her children and to ensure that adequate accommodation was made available to them. The Court registrar stated that “ *On 17 October 2008, the President of the Chamber to which the case has been allocated decided, in the interests of the parties and the proper conduct of the proceedings before it, and without prejudice to the merits of the applicant's complaint concerning her expulsion, to indicate to the Government that they should ensure that applicant and her children are provided with adequate accommodation pending the enforcement of her expulsion.*”<sup>96</sup>
- In **Turkey** lawyers noted the case of *D.B. v. Turkey*,<sup>97</sup> in which the Court granted interim measures on 17 July 2008 for a limited amount of time. However, after the applicant's representative informed the Court that a lawyer had attempted to visit the applicant in Edirne Foreigner's Admission and Accommodation Centre but had been prevented from doing so by the Centre's Administration, the Court indicated to the Turkish government to provide the lawyer with access to the applicant in the Foreigner's Admission and Accommodation Centre. The Turkish Government only complied with the interim measure 18 days after the deadline, Therefore the Court found a violation of Art. 34 ECHR.
- **Ukrainian** lawyers referenced a number of cases in which the ECtHR requested the State to provide guarantees with regards to access to judicial remedies with suspensive effect. Also, the ECtHR decided on 15 March 2012 to indicate to the Ukrainian Government, under Rule 39, to ensure that former Ukrainian Prime Minister Yuliya Tymoshenko receive adequate medical

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issued interim measures requesting that Cyprus suspend the removal of the 44 who were still in detention. 7 of these were then released, either because they had pending asylum applications or were stateless. According to reports, of those remaining, 32 were forcibly removed to Syria after the ECtHR lifted the interim measures in their cases in September 2010. The remaining 5 continued to be detained in Cyprus. 17 of those forcibly removed were reportedly arrested and detained upon or after their arrival in Syria.

<sup>94</sup> This is an assessment of the applicant's age based on the status of his/her teeth and bones. This assessment is conducted by Finnish doctors, upon instruction by the competent national authorities.

<sup>95</sup> ECtHR (Application no. 60915/09) 19 November 2009.

<sup>96</sup> ECtHR (Application No. 21741/07) 17 October 2008, application still pending before the Court. A copy of this letter is available upon request.

<sup>97</sup> ECtHR: *D.B. v. Turkey* (Application No. 33526/08), 13 July 2010.

treatment in an appropriate institution.<sup>98</sup>

It was beyond the scope of this survey to examine how often the Court issues such specific indications under Rule 39 to Member States. However this provides a snapshot of some of the indications the Court has made to Member States in individual cases. Access to a lawyer, the availability of effective national remedies, guarantees related to accommodation and medical treatment are examples of the types of specific indications other than the suspension of removal that the ECtHR has made in the context of individual Rule 39 interim measures.

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<sup>98</sup> *Tymoshenko v Ukraine*, (Application No. 49872/1) lodged on 10 August 2011.

## 2.3 Rule 39 Measures granted on the basis of other ECHR Articles

Generally in asylum cases Rule 39 measures are applied to prevent expulsion in the context of a risk of violation of Art. 3 ECHR. This was confirmed in the ECtHR judgment of *Mamatkulov v. Turkey*, in which 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. 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.”*<sup>99</sup>

It is possible, in some cases for interim measures to be granted for violations of Convention rights other than Art. 3 ECHR. The PACE Committee Report underlines that

*“the possibility is not excluded of a Rule 39 indication being made to prevent harm within the scope of Articles 5, 6 and 8 to 11 of the ECHR. However, the application of Rule 39 in such cases would be exceptional and require a “flagrant” violation of the right in question. More recently, indications have been made to suspend removal where the individual fears being subjected to forced labour, sexual exploitation or trafficking under Article 4 of the ECHR.”*<sup>100</sup>

Bearing this in mind, this question sought to explore the contributors’ experience with other Convention articles being applied in the context of Rule 39 measures.<sup>101</sup>

### Other ECHR Articles mentioned as a basis for the granting of a Rule 39 interim measure:

- Article 2 (right to life)
- Article 8 (right to respect for private and family life)

### Article 2 ECHR

**Spanish** lawyers referred to a case concerning 2 applicants who faced persecution by paramilitary groups in Colombia. The ECtHR granted interim measures due to the risk of murder by those paramilitary groups upon return to Colombia indicating that the Court also considered an Art. 2 ECHR violation. Lawyers in **Bulgaria** and **Hungary** stated to also be aware of cases in which interim measures have been granted on the basis of Art.2 ECHR.

<sup>99</sup> ECtHR: *Mamatkulov v. Turkey*, (Application No. 46827/1999), 4 February 2005, para. 104.

<sup>100</sup> Council of Europe PACE Report *Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights*, Doc 12435 (November 2010).

<sup>101</sup> Question 8, *Has the Court ever granted Rule 39 interim measures for Convention articles other than Article 3 in your jurisdiction? If so, on what grounds and in what context?* In this question responses were received by lawyers in the following countries: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Russia, Slovakia, Spain, Sweden, the Netherlands, Norway, Turkey, Ukraine and the United Kingdom. Of these countries’ lawyers, only lawyers in Bulgaria, Denmark, Hungary, Norway and Spain reported to be aware of cases of interim measures granted on a basis of violation of an ECHR Article other than Article 3, while lawyers in Austria, Belgium, Cyprus, Finland, Germany, Greece, Ireland, Italy, Russia, Slovakia, Sweden, the Netherlands, Turkey, Ukraine and the United Kingdom reported not to be aware of such cases.

### Article 8 ECHR

In **Norway** lawyers reported specifically the case of *Nunez v. Norway*<sup>102</sup> in which Rule 39 interim measures were granted on the basis of Art. 8 ECHR. A similar case of a Rule 39 indication on the basis of Art. 8 ECHR was also mentioned by lawyers in **Denmark**. Rule 39 interim measures in the case of *Neulinger and Shuruk v. Switzerland*, were granted not only on the basis of irreparable damage by the act of deporting the applicant but also on the grounds of a potential violation of Art. 8 ECHR taking into account the best interests of the child.<sup>103</sup>

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<sup>102</sup> ECtHR: *Nunez v. Norway*, (Application No. 55597/09), 28 June 2011.

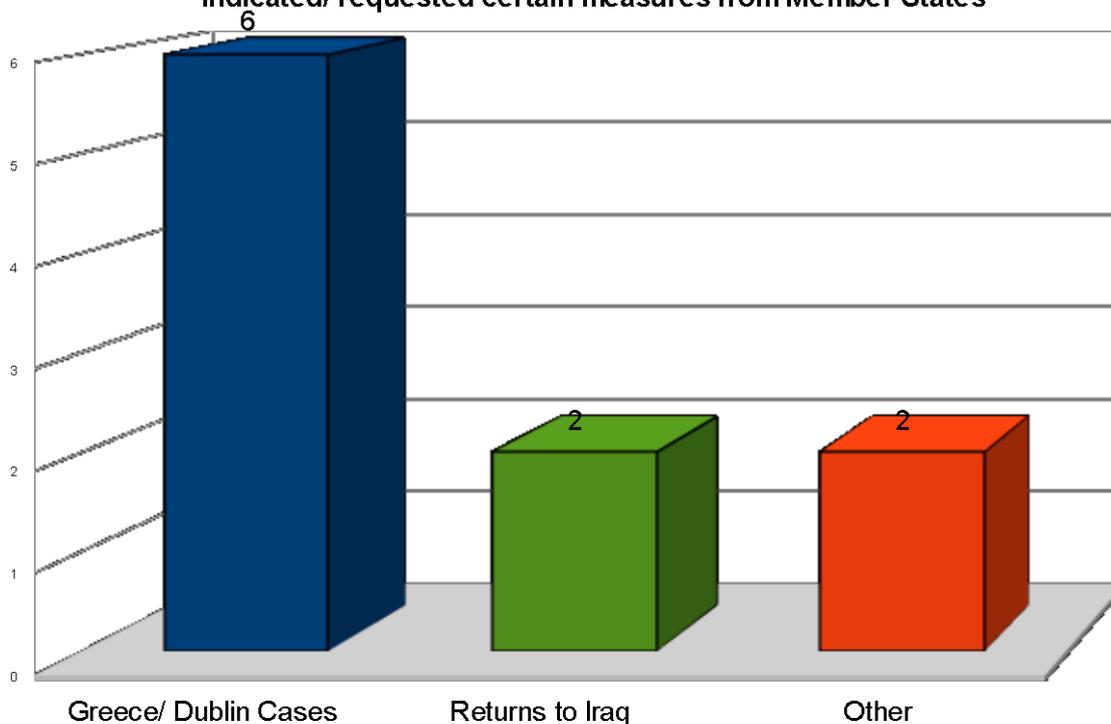
<sup>103</sup> ECtHR: *Neulinger and Shuruk v. Switzerland*, (Application No. 41615/ 2007), 6 July 2010.

## 2.4 Rule 39 interim measures and specific categories of cases

The increasing number of Rule 39 requests to the Court and the resulting pressure on the Court registrar’s workload has led, in some occasions, to the ECtHR communicating to Member States specific requests to refrain from removal action or expulsions of specific categories of applicants. As Rule 39 is an individual application measure, the Court has, at times, to ensure consistency in its approach when faced with systemic problems, indicated to States that it will grant Rule 39 requests for certain categories of cases and therefore that States should refrain from taking any action to remove such applicants. The most notable example of this practice is the Court’s response to Rule 39 requests made on the basis of Dublin transfers to Greece pending the Grand Chamber judgment of *M.S.S. v Belgium & Greece*.<sup>104</sup>

*Do you have information on whether the Court has written to your government indicating that it will impose interim measures for certain groups of applicants for a certain period of time? What reasons did the Court provide for these indications?*<sup>105</sup>

**Graph 4: Overview of feedback: Common types of cases where ECtHR indicated/ requested certain measures from Member States**



<sup>104</sup> ECtHR: *M.S.S v. Belgium and Greece*, (Application No. 30696/09), 21 January 2011.

<sup>105</sup> Question 9, Questionnaire of the research in Annex A. This question received responses from lawyers in Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom. Lawyers in Austria, Belgium, Cyprus, Denmark, Finland, Sweden, Norway, the Netherlands, and the United Kingdom could provide further feedback as to the types of cases the Court had contacted their Governments whilst lawyers in Bulgaria, Germany, Greece, Hungary, Ireland, Italy, Russia, Slovakia, Spain, Turkey and Ukraine responded that they were not aware of such correspondence with the Court. Graph 4 indicates the frequency of communication with regards to cases pertaining to Greece/Dublin, Returns to Iraq and other, based on the feedback provided under this question. This graph has been created only based on the countries’ feedback reporting to be aware of cases in which the Court communicated with their Government to indicating that it will impose interim measures for certain groups of applicants for a certain period of time.

■ **Austria, Belgium Denmark, Finland, Norway and the Netherlands**, it was noted that the Court submitted certain requests to the respondent authorities on the basis of Dublin II Regulation transfers to Greece. The ECtHR indicated that it would apply Rule 39 in any case where an asylum seeker in another contracting State party challenges his or her return to Greece. This was prior to the Grand Chamber judgment of *M.S.S. v Belgium & Greece*.

■ Regarding returns to Iraq, the contributors in **the Netherlands** and **Sweden** reported that the Court requested their respondent States to refrain from enforcing removals to Baghdad until the Court had time to reflect on the security situation there.

■ Other types of cases were reported in **the United Kingdom** and **Cyprus**. In **Cyprus** lawyers also reported the application of Rule 39 measures by the Court in relation to a group of Syrian Kurds. Also reference was made to the Court's statement to the British authorities in relation to Sri Lanka where it indicated that it would apply Rule 39 measures to all Tamil cases where the United Kingdom planned to remove them until the lead judgment of *NA v United Kingdom*<sup>106</sup> was decided upon by the Court.

- In **Austria** a letter was sent to the Austrian Government on 27 October 2010 regarding Dublin transfers to Greece indicating that the Court would, pending the adoption of the leading judgment *M.S.S. v Belgium & Greece*, apply Rule 39 of the Rules of the Court '*in any case where an asylum seeker in another Contracting State challenges his or her return to Greece*'.<sup>107</sup>

- Before the publication of the *M.S.S v Belgium and Greece* judgment<sup>108</sup> the ECtHR sent to the Belgian authorities, a letter requesting **Belgium** to stop transfers to Greece pending the decision in the above-mentioned case. This letter, which has not been made public by the Belgian Authorities, was nevertheless referred to in a Rule 39 measure issued on 7 July 2010 concerning the case Application no. 57379/10 where the Court stated "*It is noted that the Grand Chamber is currently considering in the context of M.S.S. v Belgium & Greece case the compatibility with the Convention of returns to Greece under the Dublin Regulation. The Belgian Government has been informed that, pending the adoption of its judgment in that case, Rule 39 of the Rules of the Court will in future be applied in any case where an asylum seeker in another Contracting State challenges his or her return to Greece. They have also been invited to assist the Court by refraining for the time being from issuing removal directions in respect of asylum seekers who claim that their return to Greece might expose them to the risk of treatment in violation of the Convention.*" At a later stage this case was jointly struck out in ECtHR decision on *Omid et Zohre Sheykhzade v. Belgium*.<sup>109</sup>

- In Cyprus in the case of the 44 Syrian Kurds the ECtHR indicated to the government that interim measures were imposed for the interest of the parties and the proper conduct of the proceedings before the Court. It should be noted that the Cypriot Government in their replies insisted that interim measures were not necessary as their asylum applications were examined and rejected and that it was a sovereign right of the Cypriot State to deport the rejected asylum seekers. The ECtHR repeatedly indicated to the Cypriot government that deporting the applicants despite the imposition of a Rule 39 measure would be in breach of Art. 34 ECHR. Initially the period of time the Court imposed the interim measures was until the Court received and examined all the documents pertaining to applicants' claim. Approximately 3 months after the imposition of the interim measures and after the Court received all the questionnaires and documents in relation to the applicants' as well as their main application, the Court lifted the interim measures for 38 of the applicants. The Court maintained interim measures only for 5 of them, who still had asylum

<sup>106</sup> ECtHR, *NA v United Kingdom* (Application No.25904/07) 17 July 2008.

<sup>107</sup> *Ibid*, supra note 95.

<sup>108</sup> *Ibid*, supra note 95.

<sup>109</sup> ECtHR *Omid et Zohre Sheykhzade v. Belgium*, (Application No. 15605/09), 15 November 2011.

cases pending before the Cypriot Supreme Court (one of them was released from detention in the meantime as he was also a member of the family of an EU national). The interim measure for one of the 5 applicants was lifted after he was recognized as a refugee as he therefore had protection. For the remaining 4 applicants the interim measure was maintained and the Court made it clear that this would be maintained for as long as procedures before the ECtHR were in process.<sup>110</sup>

- Regarding **Denmark** lawyers from the Danish Refugee Council reported that in the summer of 2010 when they started requesting Rule 39 interim measures to prevent asylum seekers from being removed to Greece under the Dublin II Regulation, the Court asked for further information regarding the specific reasons the applicants had for applying for asylum. Until September 2010, the Court only granted interim measures to stop removals to Greece when they concluded a *prima facie* risk of persecution in the country of origin. The legal submissions to the Court under Rule 39 regarding the poor living conditions in Greece was not accepted as the sole basis for the granting of a Rule 39 request. However, the Court changed this practice in September 2010 stating that it would apply Rule 39 in any case where an asylum seeker challenged a transfer to Greece pending the lead Grand Chamber judgment of *M.S.S. v Belgium & Greece*. Before September 2010 the Danish Refugee Council had applied for interim measures in approximately 20 cases, half of which were rejected. The cases that were denied concerned Kurdish applicants from Syria and Iran and Afghans from Kabul, whereas the applicants who were granted interim measures were of Somali, Sudanese and Afghan (though not from Kabul) origin.<sup>111</sup>

- In November 2010 the ECtHR informed the government of **Finland** that it would grant interim measures to all Dublin cases concerning returns to Greece while the *M.S.S v. Belgium and Greece* case was pending.<sup>112</sup>

- Regarding **the Netherlands** the ECtHR has provided a common response to cases concerning transfers to Greece under the Dublin II Regulation and also requested a stay on all removals to Iraq pending further examination of the risk upon return there by the Court.

In its letter dated 22 October 2010, the Court communicated to the Dutch authorities that it would grant interim measures in all cases in which the applicant was challenging forced removal to Baghdad, Iraq. The decision was taken in view of the increasing number of Rule 39 requests by applicants seeking to prevent their return to Baghdad on single or joint charter flights from European countries as well as the reported deterioration in the security situation in Baghdad and other governorates in Iraq. Specific reference was made to the UNHCR's continuing concern as to the safety of returning Iraqi citizens to Baghdad and certain other governorates of Iraq. An exceptional indication was provided in a letter dated 3 November 2010 to the Dutch authorities in that the President of the Court stated that '*no expulsions of rejected asylum seekers should take place to Baghdad until 24 November 2010*'. The letter went on to state that '*The President has further instructed me to assure your Government that it remains the Court's general practice to issue interim measures only in individual cases where a request for such measures has been made to the Court*'. Furthermore the Court noted that it '*wished to have some time to reflect on the question whether that security situation [in Iraq] imposed a different assessment of Rule 39 requests in respect of returns to Baghdad and other governorates, and to that end requested to be provided with relevant information from your Government, as well as other Governments and also UNHCR.*'<sup>113</sup> The ECtHR needed more time to examine the potential risk upon return to Iraq and therefore requested that governments in a number of countries refrained from enforcing removals to Iraq during that time period.

<sup>110</sup> This case is still pending before the ECtHR and therefore further data is not available. Publicly available references on the case can be found in the following sources: Amnesty International, Annual Report: Cyprus 2011 and the Greek-Cypriot article of 12/10/2010 in the newspaper "I Simerini" (only available in Greek), *Turbulence by deportations of Kurds to Syria*.

<sup>111</sup> Ibid, supra note 95.

<sup>112</sup> Ibid, supra note 95.

<sup>113</sup> A copy of this letter from the Court's third section registrar is available upon request.

Regarding Dublin cases, in its letter dated 3 June 2010 the ECtHR provided a motivated interim measure in a case concerning Somali asylum seekers, who were to be sent back to Greece. In reaching its decision the President of the third section of the Court took the following factors into account: “- *the applicant’s assertion that they might be returned (directly or indirectly) to Somalia without a rigorous scrutiny having been conducted by the Greek authorities of their claim that such a return would expose them to treatment prohibited by Article 3 of the Convention; - the alleged risk of expulsion from Greece without the applicants having a proper opportunity to request the Court to intervene; - the current security situation in South and Central Somalia; and – the fact that the Court is currently considering in a number of cases the compatibility of Article 3 of the Convention of the transfer to Greece pursuant to Council Regulation (EC) No. 343/2003 of 18 February 2003 (“the Dublin Regulation”) of persons who claim they originate from South or Central Somalia.*” In response to this case and others pending before the ECtHR the Dutch government wrote to the Court on 11 June 2010 stating that the Minister of Justice decided that, until further notice, applicants from South and Central Somalia would not be transferred to Greece pursuant to the Dublin Regulation. This did not however mean that, at the time, the Netherlands examined the asylum applications itself. The suspension of the transfer was only considered as a temporary measure by the Dutch government.

Also with regard to the Dublin II Regulation in its letter of 30 September 2010 the Court, which had just granted interim measures in an individual Dublin case, requested the Government to assist the Court by refraining for the time being to remove to Greece any asylum seekers who claim that their return there would expose them to the risk of treatments in violation of ECHR articles.<sup>114</sup> The Court stated: “*Your Government would assist the Court by refraining for the time being from removing asylum seekers who claim that their return to Greece might expose them to the risk of treatment in violation of the Convention.*”

- In October 2010 the Court contacted the Norwegian Government concerning Dublin transfers to Greece requesting **Norway** to refrain from removing asylum seekers to Greece pending the lead judgment of *M.S.S. v Belgium and Greece*.<sup>115</sup>
- Regarding **Sweden** the ECtHR sent a letter dated 22 October 2010 to the Swedish Ministry of Foreign Affairs, stating that the Court found it appropriate to apply Rule 39 in respect to any Iraqi who challenges their return from Sweden to Iraq. This was because of the increasing number of Rule 39 requests made by applicants seeking to prevent their return to Baghdad; as well as the reported deterioration in the security situation in Baghdad and other governorates. In the letter the President of the Third Section of the Court stated “*following consultations with the Presidents of other Sections of the Court, (...) the President considers that it is appropriate to apply Rule 39 in respect of any Iraqi who challenges his or her return from Sweden to Baghdad.*”<sup>116</sup> The Court also requested the Swedish government to assist the Court by providing any relevant objective information that they had on the safety of return to Iraq by the 29 October 2010.

Towards the end of 2010 the Court was overwhelmed with requests for Rule 39 measures from individual Iraqi applicants themselves trying to prevent being removed to Baghdad. In one week alone in November 2010 there were over 400 requests submitted against Sweden for Rule 39 measures. The President of the Court noted that between October 2010 and January 2011 there were 1,930 Rule 39 requests made against Sweden overburdening the Court and noted that the ‘*The vast majority of these applications were incomplete, with insufficient information and documentation to permit the Court to make any proper assessment as to the risks attendant on return*’.<sup>117</sup>

<sup>114</sup> A copy of this letter from the Court is available upon request.

<sup>115</sup> Ibid, supra note 95.

<sup>116</sup> This was indicated in a letter from the third section of the Court on 22 October 2010, a copy of which is available upon request.

<sup>117</sup> ECtHR: Statement issued by the President of the European Court of Human Rights concerning requests for Interim Measures (Rule 39 of the Rules of Court), 11 February 2011.

- During litigation of the *NA v. the United Kingdom*<sup>118</sup> case the ECtHR wrote to the British government requesting **the United Kingdom** to stop issuing removal directions to Sri Lanka because they would grant interim measures to all Tamil cases, until the lead case of *NA v. the United Kingdom* was decided. From late October 2007 until the lead case of *N.A. v United Kingdom* was decided the Court granted Rule 39 applications in all cases involving the forced return of ethnic Tamils given the security situation in Sri Lanka. The letter stated:

*“The Acting President [of the Section] has consulted the Judges of the Section about his concerns including as regards the strain which the processing of numerous Rule 39 applications places on judicial time and resources. The Court has concluded that, pending the adoption of a lead judgment in one or more of the applications already communicated, Rule 39 should continue to be applied in any case brought by a Tamil seeking to prevent his removal. The Section has also expressed the hope that, rather than the Acting President being required to apply Rule 39 in each individual case, your Government will assist the Court by refraining for the time being from issuing removal directions in respect of Tamils who claim that their return to Sri Lanka might expose them to the risk of treatment in violation of the Convention...”*<sup>119</sup> However, the government's response was that they would carry on trying to remove such applicants although they would comply with any Rule 39 measures anyone could actually manage to get before removal. Regarding returns to Iraq the Court also received a similar letter as the Netherlands and Sweden requesting a halt to all returns to Baghdad until further notice.

Given the large number of Rule 39 requests made before the ECtHR, in particular concerning recurring issues such as the compatibility of the application of the Dublin II Regulation with the Convention the Court has had to be innovative in its approach in order to ensure that those most vulnerable are not put at risk of a violation of Art. 3 ECHR.<sup>120</sup> This has been acknowledged as a necessary response in Resolution 1788 (2011) whereby the Parliamentary Assembly of the CoE stated that it *“recognises that innovative methods need to be adopted to deal with ever-growing numbers of requests for interim measures and notes in this respect the usefulness of Court indications, notwithstanding the non-binding nature of these, to Member States where recurrent problems exist, such as has been the case in relation to Dublin II Regulation returns.”*

Rule 39 has frequently been invoked by legal practitioners representing asylum seekers who are subject to the Dublin II Regulation both within EU Member States and in associate States. According to Court figures, from 2007 until now, there have been 919 Rule 39 interim measures granted to prevent transfers to certain State Parties under the Dublin II Regulation.<sup>121</sup>

Prior to the Grand Chamber judgment of *M.S.S. v Belgium and Greece* in January 2011, in 2010

<sup>118</sup> ECtHR: *NA v. the United Kingdom*, (Application No.25904/07), 17 July 2008.

<sup>119</sup> ECtHR: *NA v. the United Kingdom*, (Application No.25904/07), 17 July 2008 para 21.

<sup>120</sup> For further information: ECtHR: Factsheet “Dublin cases”. The factsheet mentions *“there are currently about 960 cases pending before the Court concerning the application of the “Dublin” Community law system to asylum seekers. They are mostly applications lodged against the Netherlands, Finland, Belgium, the United Kingdom and France. In a majority of these cases the applicants have requested interim measures (Rule 39 of the Rules of Court).”* Information provided in this document was last updated in January 2011. Also please note the following figures concerning ECHR Rule 39 requests in the context of Dublin transfers to Greece from the updated UNHCR *Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece*, 31 January 2011: In 2009, there were approximately 500 Rule 39 requests from Member States concerning Dublin transfers to Greece and approximately 65 per cent of them were granted. In 2010, some 850 requests were made of which about 82 per cent were granted. More significantly, since 1 October 2010, the Court has received some 190 requests, of which only four were rejected, meaning that almost 98 per cent were granted. Similarly according to the Court's statistics for 2011 interim measures were granted in 47 cases to prevent expulsion to Greece. It is not clear if these were all cases related to the application of the Dublin II Regulation. However it should be noted that this was the highest number of interim measures granted in 2011 to prevent expulsion to a particular country, a Contracting State Party, Greece.

<sup>121</sup> For further information on the number of Rule 39 interim measures granted pursuant to the Dublin II Regulation see Annex B of this report.

alone there were 404 Rule 39 interim measures granted predominately on the basis of transfers to Greece. The amount of Rule 39 requests granted highlights a fundamental flaw in how the current Dublin II Regulation is applied by Member States and raises concerns as to its compatibility with the rights of asylum seekers.<sup>122</sup>

It should be noted that when lawyers first started requesting Rule 39 measures challenging transfers to Greece under the Dublin II Regulation the different sections of the ECtHR were sometimes contradictory in their approach. Similar cases were refused or granted depending on which Court section an applicant's country was listed in. In order to improve consistency across the different Court sections, the Presidents of each section consulted one another on common approaches to take prior to requesting Member States to refrain from undertaking certain actions in relation to certain categories of applicants. Such combined approaches if complied with by Member States also help to alleviate the pressure caused by the large number of Rule 39 applications on the ECtHR system.

Although the actual implementation by Member States of these requests by the Court was not within the full scope of this survey, anecdotal information does seem to suggest that they generally complied with these requests for suspension of removals in relation to Dublin transfers to Greece.

A distinction can be made between the Court's response to returns to Iraq and Greece in that the Court in relation to Iraq just requested more time to reflect on the reported deterioration of the security situation in Baghdad and other governorates. Therefore the Court requested Member States to refrain from enforcing removals and to provide objective information on their analysis on safety upon return to Iraq. The Court also specifically asked UNHCR to provide its current position on the matter of forced returns to Iraq as part of that evaluation.<sup>123</sup> As regards Dublin cases the Court specifically requested Member States to stop transfers to Greece under the Dublin Regulation pending the Court's assessment in the lead judgment of *M.S.S. v Belgium & Greece*.<sup>124</sup>

Another recommendation to deal with a large amount of applications pending before the Court on similar issues was raised by the President of the ECtHR in which he stated that both applicants and governments must co-operate fully with the Court and that, amongst other proposals, Member States should suspend removals to a particular country "*Where a lead case concerning the safety of return to a particular country of origin is pending before the national courts or the Court of Human Rights.*"<sup>125</sup> Pending the examination of a lead case by the Court, Member States could declare a moratorium on returns to that particular country of origin.

These findings also lead to a potential question of whether the Court could implement 'blanket' Rule 39 interim measures in situations where there are systemic problems overloading the ECtHR and putting applicants at risk of *refoulement* and other potential violations of the Convention. Overall this approach by the Court should be analyzed further in order to identify good practices to follow.

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<sup>122</sup> For further information on ECRE's work on the Dublin II Regulation see [www.ecre.org](http://www.ecre.org)

<sup>123</sup> In a letter dated 9 November 2010 UNHCR responded to the Court recommending that States refrain from forcibly returning Iraqis who originate from the five Central Governorates or who belong to the specific groups which have been identified in UNHCR's guidelines to be at risk and who originate from the Southern Governorates and Al-Anbar. The letter went on to state "*UNHCR recommends against such forced returns until such time as there is substantial improvement in the security and human rights situation in the country.*"

<sup>124</sup> Ibid, supra note 95.

<sup>125</sup> ECtHR Statement issued by the President of the European Court of Human Rights concerning requests for interim measures (Rule 39 of the Rules of Court), 11 February 2011.

**ECRE/ELENA Recommendation**

Where a lead case concerning the safety of return to a particular country is pending before the European Court of Human Rights, Member States should suspend removals to that country.

## 2.5 Information Requests by the Court

### 2.5.1 Country Information Requests by the Court

In order to clarify whether there is a risk of immediate expulsion or a *prima facie* risk of a violation of Art. 3 ECHR the Court registrar may sometimes request general or specific information from either the applicant or the respondent government authorities pending a Rule 39 interim measure decision. This question is usually specifically focused on information concerning the situation in the country of return and the individual circumstances of the applicant's case and is not only applicable in relation to the granting of a Rule 39 measure but may also form part of the general admissibility criteria before the Court under Rule 49§ 3(a) of the Rules of the Court or under the examination of the claim under Rule 54§ 2(a) of the Court.

*Are you aware of any cases where the Court has requested further objective information on the country of return from the State and/or legal representatives/ UNHCR?*<sup>126</sup>

- In **Austria**, lawyers noted that of the 11 Rule 39 cases brought before the Court by contributing lawyers to this survey in 2010, in 2 instances the ECtHR requested general information on the country of return. In both cases the information requested concerned Chechnya.
- In **Belgium**, lawyers have reported that in some cases the applicant is required to specify the nature of the risk they are facing if returned to the country of origin. In Dublin II Regulation cases, further information may be requested by the Court both in relation to the applicant's country of origin and the country of transfer. An example of the Court's request in the context of Dublin transfers to Greece is as follows *"In regard to Article 3 of the Convention and in light of the recent reports of the Council of Europe Commissioner for Human Rights, Mr. Hammarberg, of 4 February 2009 and the report of November 2008 of Human Rights Watch, the question arises as to what guarantees your Government has that the applicants will have access to the asylum procedure in Greece and will not have to fear being kept in circumstances that can be described as inhuman or degrading? [unofficial translation from French letter]."*
- Lawyers in **Cyprus** noted that there was sometimes a problem with the communication with the Court in interim measures requests, because, according to their opinion *"one does not know what exactly the Court requests from the government"*. In particular, the Court does not always copy the representing lawyer in the letters sent to the government requesting information. In the case of the Syrian Kurds mentioned under section 2.4 of this research, the instructed lawyer sent objective information on Syria to the Court. In the absence of any other documentation relating to the applicant, it was deemed necessary that the lawyer sent both objective information on the treatment of stateless Kurds, as well as politically active Syrian Kurds from the Syrian authorities.
- In **Italy**, lawyers reported that in general, the Court requests further objective information when initial information provided by both parties is either incomplete or contradictory.

<sup>126</sup> Question 10, Questionnaire of the research in Annex A. This question received responses from lawyers in the following countries: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom. Of these answers, lawyers in Austria, Belgium, Cyprus, Italy, Sweden, the Netherlands and the United Kingdom reported to be aware of cases where the Court requested further objective information on the country of return from the State and/or legal representative/ UNHCR, whereas lawyers in Bulgaria, Denmark, Finland, Germany, Greece, Hungary, Ireland, Norway, Russia, Slovakia, Spain, Turkey and Ukraine reported that that they were unaware of such cases.

- In **Sweden** lawyers highlighted the following case as an example under this question: On 22 October 2010 in the context of returns to Iraq there was a request by the ECtHR to the Swedish government to assist by providing any relevant information that they had on their assessment of safety upon return to Iraq, in view of the increasing number of Rule 39 requests made by applicants seeking to prevent their return to Baghdad on single or joint charter flights from European countries and the reported recent deterioration in the security situation in Baghdad and other governorates. As there were a number of States preparing to remove applicants to Iraq other governments such as **the Netherlands** were also requested to submit relevant objective information to the Court as well as a specific request to UNHCR by the Court to clarify its position on forced returns to Iraq (see section 2.4 above).
- Regarding a Dublin transfer to Italy, in September 2011, the Government of the **Netherlands** was requested to provide information on the reception conditions in Italy. A Rule 39 measure was already applied in this case but in subsequent correspondence with the Court on the admissibility of the claim the Court requested further information from both the Netherlands and Italy. The President of that section of the Court also indicated that they would request the following information from the Italian government in the context of the case:

*“1. When and on what basis (asylum, subsidiary protection or other) has the applicant been admitted to Italy and granted a residence permit?; 2. Has the applicant and her son been required to leave the asylum seekers centre where they were staying after the granting of that residence permit?; 4. What, if any, concrete, practical and effective steps have been taken by the Italian authorities to ensure that the applicant was provided with shelter, subsistence and medical care after she had to leave the asylum seekers’ centre? 4. What, if any, concrete, practical and effective steps are taken by the Italian authorities to ensure that aliens returned to Italy under the terms of the Dublin II Regulation, like the applicant and her young child, are provided with shelter, subsistence and medical care upon arrival in Italy?”*

In another case concerning an applicant from Afghanistan the Dutch government was requested by the Court to respond to the following question *“In light of the applicant's claims, the documents which have been submitted and UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum Seekers of December 2007, would he face a real risk of being subject to treatment in breach of Art. 3 of the Convention if he were expelled to Afghanistan?”* In its answer, the Government was requested to distinguish between any risk of treatment contrary to Art. 3 ECHR by either the current power holders in Afghanistan or the general population in Afghanistan (non-State agents, Mujahedeen, Taliban). As regards the latter, the Government was also requested to address, if and where necessary, the issue of whether the Afghan Government can be said to be able to provide adequate protection against any such treatment. Additionally the Court asked the Dutch government to address the issue of whether the applicant would require and, if so, be able to enjoy protection through family, tribal or political ties.

- In the **United Kingdom** lawyers highlighted the specific admissibility decision of *KRS v. the United Kingdom*<sup>127</sup> where the Court section registrar requested the government on two occasions for further objective information on Greece but without formally communicating with anyone else including the applicant’s representatives. In this case neither the applicant nor UNHCR were aware or notified of this communication between the government and the Court at that time regarding the situation in Greece and thereby deprived them of the opportunity to respond to the United Kingdom government’s submission on this matter. It should be noted that the Rule 39 decision in *KRS v. the United Kingdom* was on the basis of the UNHCR report of 15 April 2008 and specifically on UNHCR’s advice that

<sup>127</sup> ECtHR: *KRS v. the United Kingdom*, (Application No. 32733/08), Admissibility Decision, 02 December 2008.

governments refrain from returning asylum seekers to Greece under the Dublin Regulation until further notice.

### 2.5.2 Cases in which the ECtHR requested further information before granting or reviewing an interim measure

As mentioned above, the Court may at the admissibility stage use Rule 49 §3 (a) to request further information from relevant parties to a case or equally under the examination of the claim under Rule 54§ 2(a) of the Court. Often the Court may ask for more general and specific information pertaining to the case before taking a decision on the Rule 39 request. Sometimes the Court will also ask the respondent government for specific information such as when a removal is planned to take place or the current national proceedings of the applicant's case.

*Do you know of any cases where the Court requested further information before granting or when reviewing the nature of a Rule 39 Interim Measure? Please elaborate.*<sup>128</sup>

Lawyers in the following countries provided specific feedback in response to this question: **Austria, Belgium, Cyprus, Denmark, Finland, Russia, Slovakia, Turkey, the Netherlands and Ukraine.** Examples were also provided on the type of information the Court requests when granting or reviewing the application of Rule 39 measures.

- In **Austria**, lawyers mentioned that in several cases regarding Dublin transfers to Greece (2 applications to the Court concerning persons from Chechnya and 1 from Afghanistan) and one Dublin transfer case concerning Poland, the Court requested further information at the time of the Rule 39 request. In the latter case, the Rule 39 measure was provisionally granted for two weeks and was not extended after the submission of the requested information.
- Lawyers in **Belgium** reported that it is very common in their jurisdiction for the ECtHR to ask for supporting information. Requests from the Court for further information were received regarding Dublin transfers to Cyprus, Italy and to Greece. The Dublin transfer case to Cyprus has been communicated<sup>129</sup> and it is specifically mentioned in that communication that the Belgian government responded to the Court that they had no obligation under the Dublin II Regulation to check if Cyprus fulfils its obligations under EU asylum law.<sup>130</sup> Additionally the parties had to provide all the documents regarding the asylum claim lodged in Cyprus. In general, when the Court requests information under Art. 54 §2 (a),<sup>131</sup> a specified deadline is given to the applicant to respond by. When this answer is provided, the interim measure is either lifted or ordered until further

<sup>128</sup> Question 12, Questionnaire of the research in Annex A. This question received answer by lawyers in the following countries: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom. Lawyers in Austria, Belgium, Cyprus, Denmark, Finland, Hungary, Russia, Slovakia, Spain, Turkey, the Netherlands and Ukraine responded to be aware of cases in which the ECtHR requested further information before granting or reviewing a Rule 39 decision, while lawyers in Bulgaria, Germany, Greece, Ireland, Italy, Norway, Sweden and the United Kingdom reported not to be aware of such cases.

<sup>129</sup> ECtHR: Communicated Cases: S.A. v. Belgium, (Application No.21437/11), introduced 05 April 2011

<sup>130</sup> ECtHR: Communicated Cases: S.A. v. Belgium, Application No. 21437/11, introduced 05 April 2011, direct quote from the Communication on this point: *“Dans un courrier du 2 mai 2011, la réponse du Gouvernement belge parvint à la Cour et peut se résumer comme suit : les autorités belges ne disposent d’aucun document relatif à la demande d’asile introduite par le requérant à Chypre car le règlement Dublin ne l’exige pas ; en tout état de cause, ce n’est pas à l’Etat belge de s’assurer que Chypre s’acquitte de ses obligations communautaires en matière d’asile mais à la Commission européenne et à l’Agence des droits fondamentaux.”* This response from the Belgian government is not in line with the Grand Chamber judgment of M.S.S v Belgium and Greece.

<sup>131</sup> ECtHR, Rules of the Court, Rule 54 §2 (a), *“request the parties to submit any factual information, documents or other material considered by the Chamber or its President to be relevant;”* February 2012.

notice. Furthermore, it sometimes occurs that an interim measure is connected to a specific procedure. For instance in a border case, it can indicate the suspension of the deportation awaiting the answer of the Belgian Council of State on the admissibility of the appeal or awaiting the answer of the Council of Alien's Litigation on the admissibility of a subsequent asylum application. In Belgium it was also noted that in age-disputed cases the Court often requests information on the methods employed by the Belgian authorities in order to determine the age of the applicant.

- In **Cyprus**, in the case of the Syrian Kurds mentioned under section 2.4 of this research, the ECtHR requested that all applicants fill in a Court questionnaire and requested also all the relevant national decisions such as the applicant's asylum claims decisions and deportation orders. In the case of an Egyptian asylum seeker, the ECtHR requested via telephone communication more information and clarifications as to the actual legal situation of the applicant at the time of the request, in terms of procedures pending before the Supreme Court but the ECtHR then rejected the application without providing any reasoning. In a recent case of a Syrian asylum seeker, the Court requested through a telephone communication that more information should be provided in relation to the situation of access to asylum procedures in Cyprus and how asylum applications may be submitted in law and in practice. The Court subsequently requested the Government for more information in accordance with Rule 54 §2(a), which had the effect of suspending the deportation as it implicitly led the Cypriot authorities to facilitate the applicant's access to the asylum procedure in Cyprus.
- Lawyers in **Denmark**, reported that, as mentioned under section 2.4 of this research, in mid- 2010 when they started requesting Rule 39 interim measures to prevent asylum seekers from being removed to Greece, the Court requested further information regarding the specific reasons the applicants were applying for asylum over and beyond their fears of return to Greece under the Dublin II Regulation.
- Lawyers in **Finland** reported being requested to provide further information by the ECtHR before granting or reviewing the nature of a Rule 39 interim measure.
- In **Russia**, lawyers mentioned that the Court has in the past requested additional information in cases where the applicant was refused refugee status and/or subsidiary protection and applied for interim measures against *refoulement* (in cases where the expulsion decision has not yet been taken or presented). In such cases, the Court usually requests evidence that the person will or is likely to be returned to their country of origin. The information requested usually consists of relevant legislation and the applicant's national case file. The Russian lawyers also reported the case of *Dobriyeva and Others v. Russia*,<sup>132</sup> which is not an asylum case. In this case, the applicants had disappeared and could not be located by the ECtHR. The latter requested to the Russian government, under Rule 54§2(a) to provide information as to the whereabouts of the applicants, the reasons and legal grounds for their arrest and detention, the conditions of their detention, the arrangements that have been made to ensure their access to legal assistance and whether their condition required medical aid (and if so, whether this was provided to them). However, as the government alleged that the applicants were not detained and that the government did not have any information as to their whereabouts, the Court first applied, but subsequently lifted the Rule 39 interim measure.
- Regarding **Spain**, in the case of *Gasayev v. Spain*<sup>133</sup> Rule 39 was applied by the third section of the Court to suspend the Chechen applicant's extradition to Russia, where he

<sup>132</sup> ECtHR *Dobriyeva and Others v Russia* (Application No. 18407/10) communicated on 30 May 2011.

<sup>133</sup> ECtHR: *Gasayev v. Spain*, (Application No. 48514/06), Admissibility Decision, 17 February 2009.

faced criminal charges. That measure was lifted following the receipt of assurances by the Russian Government that the applicant would not be condemned to the death penalty or to an irreducible life sentence, or detained in conditions which were contrary to Art. 3 ECHR. There was also an assurance that monitoring of compliance with that guarantee was to be ensured through the Spanish diplomatic representation in Russia. The Court later declared this application inadmissible in February 2009.

- In a case concerning an Iranian applicant in **Slovakia** on deciding whether to grant a Rule 39 decision the Court stated the following in a letter to the legal representative *“The Government has been requested to inform the Court on the outcome of the challenge to the refusal by the Migration office of the applicant’s second asylum request. They have been further requested to notify the Court, and provide a copy (i) of any decision of the Nitra Regional Court in the proceedings concerning the applicant’s deportation; (ii) and of any decision of the Constitutional Court, in the event that the applicant lodges a Constitutional Court complaint in respect of any relevant decision relating to his deportation. Similarly, you are also requested to inform the Court, on behalf of the applicant, of further developments of the case.”*
- Lawyers in **the Netherlands** reported a case in which the ECtHR, under Rule 49§(3) of the Rules of the Court, requested the Dutch government to carry out a language analysis of the applicant's speech in order to see *“whether any conclusions can be reached as to the question whether the applicant hails from Mogadishu, South or Central Somalia or elsewhere.”* The government was further asked to submit a report based on this language analysis by a certain date specified by the Court. In another case<sup>134</sup> in September 2010 the Court asked the applicant originating from Iraq to provide evidence of his brother’s alleged kidnapping, as well as evidence related to the threats made to the applicant’s family to the effect that the applicant should report himself to militia members and that the applicant's brother was murdered in June 2010. In this case the Court requested that documentary evidence (such as certified copies of the reports to the police of the kidnapping and the threats, as well as a certified copy of the death certificate of the applicant's brother) should accompany the responses of the applicant to the above questions to the Court. In the context of the Dublin II Regulation in a case against both the Netherlands and Greece<sup>135</sup> a number of detailed questions were submitted to both the Dutch and Greek governments on the application of the Dublin II Regulation and the asylum procedure in Greece for example the following questions were raised *“Having regard to (i) the reports referred to by the applicant, relating to the way in which asylum applications are processed in Greece and asylum seekers treated, and (ii) the applicant’s claim that, if transferred to Greece, she runs a real risk of being (indirectly) returned to her country of origin without the Greek authorities having established through a rigorous scrutiny that she will not run a real risk of being subjected to treatment in breach of Article 3 in that country, is it compatible with Article 3 and/or Article 13 of the Convention for the Netherlands authorities to: a) apply the Dublin Regulation without sufficiently examining the claim, supported by the submitted reports, that Greece cannot be considered a safe third country and/or without ascertaining that Greece will actually submit the applicant’s asylum application to a rigorous scrutiny; b) apply the Dublin Regulation without examining the merits of the applicant’s claims?”*
- In **Turkey** lawyers have reported that after the submission of a Rule 39 request, the Court usually contacts the applicant's lawyers or representatives for further information. The Court requests detailed information on the conditions of applicant(s) as well as the reliability of the information submitted to the Court and the possible risks if they are

<sup>134</sup> ECtHR: (Application No. 50925/10), case not yet communicated.

<sup>135</sup> ECtHR: (Application No. 26494/09), November 2009.

deported to a particular country.

- Lawyers in **Ukraine** stated that communication from the Court usually concerns supporting documents, for example judgments or personal information pertaining to the applicant. Sometimes the Court requests information from the government authorities before ordering interim measures. In situations where the State asks for interim measures not to be applied then the Court informs the applicant about this and asks for their responses to this request. Only after receiving the applicant's comments on the governmental authority's request, is the final decision on the application of interim measures made.

There appears to be varied practice by the Court in requesting general or specific information when reviewing or issuing individual decisions under Rule 39. This is inherent, due to the individual nature of this interim measure. However in the context of Dublin transfers to Greece it appears that there was an inconsistent practice across the sections of the Court on returns to Greece for some time depending on the nationality of the applicant and their reason for claiming asylum. The case of *KRS v. the United Kingdom* also is a worrying example whereby the Court did not inform the legal representative or other relevant parties such as UNHCR of the Court's further requests for information from the government.<sup>136</sup> It is important to ensure that any correspondence carried out with one party notably the respondent government in this case, under Rule 54(2)(a) of the Rules of the Court, which is any event is of public character<sup>137</sup>, is forwarded in a timely manner to the other party to the case. In line with the principle of equality of arms both parties, the legal representative and/or applicant and the respondent government should be informed of additional requests for information from the Court. Additionally the applicant and/or their legal representative should have the opportunity to respond to the government's submissions on points of information.

The specific examples provided under section 2.5.2 above indicate the type of information that the Court requires when assessing the applicability of Rule 39 of the Rules of the Court. Depending on the case, general or specific information may be requested concerning the national legal proceedings of the applicants' case, their fear upon return to the country of origin and any other relevant information available. In order to enable the Court to examine a Rule 39 request properly legal representatives also have a duty to ensure that requests be accompanied by all necessary supporting documents, in particular relevant domestic court, tribunal or other decisions together with any other material, which is considered to substantiate the applicant's allegations. When Rule 39 requests are submitted in cases concerning extradition or deportation, details should be provided of the expected date and time of the removal, the applicant's address or place of detention and his or her official national case-reference number where possible. If it is not possible to provide all the relevant information legal representatives should provide clear reasoning to the Court as to this difficulty.

The President of the Court in his statement concerning requests for interim measures requested that applicants and their representatives co-operate with the Court by respecting the practice direction and noted in particular that "*requests for interim measures should be individuated, fully reasoned, be sent with all relevant documentation including the decisions of the national authorities and courts, and be sent in good time before the expected date of removal.*"

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<sup>136</sup> ECtHR: *KRS v. the United Kingdom*, (Application No. 32733/08), Admissibility Decision, 02 December 2008.

<sup>137</sup> Rule 33 of the ECtHR Rules of the Court

### ECRE/ELENA Recommendation

The European Court of Human Rights should ensure that the applicant's legal representatives are informed of all requests for information to the respondent government concerning their application. The legal representatives should also be given the opportunity to respond to government's submissions to the Court in relation to their application.

Legal representatives submitting Rule 39 requests to the Court should ensure that such requests are accompanied by all necessary supporting documents, in particular relevant domestic Court, Tribunal or other decisions together with any other relevant material for the examination of the applicant's case where available.

## 2.6 Time frame of the interim measure

Generally, the majority of Rule 39 interim measures are open-ended and indicated for the duration of the proceedings before the Court. However sometimes Rule 39 decisions are issued for a limited specified period of time.

*Are you aware of any cases in which the Court has granted interim measures for an indefinite term? Please provide any details you have.*<sup>138</sup>

Lawyers in **Belgium, Bulgaria, Denmark, Finland, Italy, Norway, Russia, Slovakia, the Netherlands, Turkey, Ukraine** and **the United Kingdom** reported to be aware of cases in which the Court indicated interim measures for an indefinite period of time. In general, the contributors to this research reported that usually the Court grants interim measures until the case is formally concluded before the ECtHR. However in some situations the Court grants interim measures without a specified time frame just stating '*until further notice*'.

- Lawyers in **Belgium** provided further information concerning the status of duration of interim measures in their country. Although interim measures are usually granted until further notice, it is noted that when the Court is asking for complementary information under Art. 54 §2 (a),<sup>139</sup> a fixed time period is given to the applicant in which to respond to the request. When the answer is provided then the Rule 39 is either lifted or granted until further notice depending on the answer received. In the context of Greece, only one case is known where the Rule 39 interim measure has been lifted until this time.<sup>140</sup>

<sup>138</sup> Question 11, Questionnaire of the research in Annex A. The term "indefinite" in this question implies interim measures granted for an indefinite period of time. This question received answer by lawyers in the following countries: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom. Lawyers in Belgium, Bulgaria, Denmark, Finland, Italy, Norway, Russia, Slovakia, the Netherlands, Turkey, Ukraine, the United Kingdom reported to be aware of cases in which the Court indicated interim measures for an indefinite period of time, whereas contributors in Austria, Cyprus, Ireland, Germany, Greece, Hungary, Spain and Sweden claimed not to be aware of such cases.

<sup>139</sup> ECtHR, Rules of the Court, Para. 54§2 (a), "2. *Alternatively, the Chamber or its President may decide to (a) request the parties to submit any factual information, documents or other material considered by the Chamber or its President to be relevant.*" February 2012.

<sup>140</sup> It was reported that in this case, interim measures were lifted due to lack of communication between the lawyer and the Court concerning questions that the Court had posed. This case concerned a Dublin II Regulation transfer to Poland.

- In **Bulgaria**, the Court granted interim measures until further notice in the case of *M. and others v. Bulgaria*.<sup>141</sup>
- Lawyers in **Denmark** reported the same observation that interim measures are usually granted 'until further notice' or 'for the duration of the proceedings before the Court'.
- Lawyers in **Finland** reported that usually the Court grants interim measures for an indefinite term. However, a practice of the Court concerning Dublin returns was noticed when the Court received a lot of Rule 39 applications against Dublin returns to Greece. In these cases the Court applied interim measures until 10 days from the final domestic decision, which is issued from the Supreme Administrative Court. Finnish lawyers provided two cases serving as examples to this practice: the case of *M.A.A v. Finland*<sup>142</sup> and the case of *H.G. v. Finland*.<sup>143</sup> In the case of *M.A.A. v. Finland* the Court requested that “the applicant should not be removed to Italy until the Administrative Court has had the opportunity to examine the applicant’s appeal concerning the decision given by the Finnish Immigration Service” while in the case of *H.G. v. Finland* the Court indicated “the applicant should not be removed to Greece until the period of ten days has elapsed from the decision of the Administrative Court”.<sup>144</sup>
- Similarly, the lawyers in **Italy** mentioned the cases of *Saadi v. Italy*,<sup>145</sup> *Ben Khemais v. Italy*<sup>146</sup> and *Toumi v. Italy*<sup>147</sup> in which the ECtHR granted interim measures for an indefinite period of time.
- Lawyers in **Norway** noted two indicative cases where the Court granted interim measures until further notice, namely in the *Nunez v. Norway*<sup>148</sup> case and in the *Agalar v. Norway*<sup>149</sup> case.
- Lawyers in **Russia** reported that usually the ECtHR grants interim measures for an indefinite period of time.
- Concerning **Slovakia** the partial admissibility decision of the ECtHR in the case of *Ibragimov and Chentiev v Slovakia*<sup>150</sup> included the following information concerning the time period issued under Rule 39 for the applicants concerned “In view of additional information submitted by the applicants’ newly appointed representatives on 15 November 2010, the President of the Fourth Section decided to indicate to the respondent Government, under Rule 39 of the Rules of Court, that the applicants should not be extradited to Russia in the context of the present application until 23 November 2010. On the last-mentioned date a Chamber of the Fourth Section extended the interim measure by indicating to the Government of the Slovak Republic that the applicants should not be extradited until further notice. It was considered appropriate that they should have the possibility of having their cases reviewed at domestic level with the benefit of the new material, and that they should not be extradited pending such review.”
- **Dutch** lawyers mentioned that in many Dublin cases concerning transfers to Greece the Court granted interim measures for the duration of the proceedings before the Court. In

<sup>141</sup> ECtHR: *M and Others v Bulgaria* (Application No. 41416/08), 26 July 2011.

<sup>142</sup> ECtHR: *M.A.A. v Finland* (Application No. 31344/09) not communicated.

<sup>143</sup> ECtHR: *H.G. v Finland* (Application No. 55222/09) not communicated.

<sup>144</sup> These two cases have not been communicated yet.

<sup>145</sup> ECtHR: *Saadi v. Italy* (Application No. 37201/06) 28 February 2008.

<sup>146</sup> ECtHR: *Ben Khemais v. Italy* (Application No. 246/07), 28 February 2009.

<sup>147</sup> ECtHR: *Toumi v. Italy* (Application No. 25716/09), 05 April 2011.

<sup>148</sup> ECtHR: *Nunez v. Norway*, (Application No. 55597/09), 28 June 2011.

<sup>149</sup> ECtHR: Decision: *Agalar v. Norway* (Application No. 55120/09), 8 November 2011.

<sup>150</sup> ECtHR: *Chentiev and Ibragimov v Slovakia* (Application No. 65916/10), communicated case.

other similar cases, the interim measure was granted until further notice.

- In **Turkey** lawyers noted that in a few cases the Court granted interim measures for a limited period of time but then extended the period until further notice. In the case of *Charahili v. Turkey*<sup>151</sup> the Court ruled that the applicant should not be deported to Tunisia until further notice.
- Lawyers in **Ukraine** also made the distinction between the usual practice of the ECtHR towards Ukraine (interim measures granted until further notice) and in the cases where information is specifically requested by the Court from the parties (interim measures granted until the piece of information requested is submitted to the Court). In addition to the above, Ukrainian lawyers mentioned that before the extradition procedure was amended by the Ukrainian Criminal Procedure Code,<sup>152</sup> the granting of interim measures for an indefinite term was the usual ECtHR practice. Nevertheless, after the said amendments came into force, the Court almost stopped granting interim measures in extradition cases. This happened because the Court relies on the new procedural guarantees related to extradition introduced by the amendments to the Criminal Procedure Code in 2010. However, according to Ukrainian lawyers, these guarantees lack clarity and are not always implemented by the national authorities.
- Lawyers in the **United Kingdom** reported that usually the Court grants interim measures for the duration of the proceedings before the ECtHR.

The findings in this section reflect the acknowledged Court practice that most Rule 39 measures are open-ended until the Court proceedings are finished. Though not dealt with as part of this research the related question of the application of prioritization under Rule 41<sup>153</sup> of the Court should also be taken into consideration in further research on this matter. Given the fact that Rule 39 requests often occur in situations of great urgency and importance the Court should and often does grant priority to applications where a Rule 39 interim measure is in place.<sup>154</sup>

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<sup>151</sup> ECtHR: *Charahili v. Turkey*, (Application No. 46605/07), 13 April 2010.

<sup>152</sup> Amendments to the Criminal Procedure Code of Ukraine related to the extradition of persons (available at <http://zakon1.rada.gov.ua/laws/show/1003-05/page6>) improved the extradition procedures in Ukraine by introducing, among other, appeal procedures against the decision on extradition; a maximum length of detention pending extradition as well as the possibility for monthly review of the detention by the court. The amendments envisaged an obligation to refuse an extradition of a recognised refugee or when extradition would violate the international agreements of Ukraine. However, certain concerns related to protection of persons in need of international protection, including asylum-seekers, within the context of extradition procedures still remain.

<sup>153</sup> ECtHR: Rules of Court, Rule 41, *"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 these criteria so as to give priority to a particular application."* February 2012.

<sup>154</sup> This was a specific recommendation under CoE, Parliamentary Assembly, Resolution 1788/ 2011: Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights.

## Section 3

### 3.1 National Rule 39 Statistics

Statistical and other qualitative data on the number and nature of Rule 39 requests as well as State compliance with such requests is limited. However in recent years the Court has published statistics by year and by country on its website.<sup>155</sup> Resolution 1788 (2011) urges Member States of the Council of Europe *‘to publish up to date information and statistics on Rule 39 and asylum determination procedures and practice’* and in relation to the content of the statistics to *‘publish regular statistics on Rule 39 Requests-granted or rejected- and their status, as well as the number of persons deported in cases where a Rule 39 has been granted (including those where it has been subsequently lifted) and the number of cases in which a substantive violation was subsequently found.’*<sup>156</sup> Similarly in Recommendation 1956 (2011) the Parliamentary Assembly invited the Committee of Ministers to *‘co-operate with the Court and other relevant actors in order to publish up-to-date Rule 39 statistics as well as information on the extent of compliance by contract parties’*.<sup>157</sup> Other factors such as age and gender disaggregated statistics could also be considered taking into account the special needs of vulnerable applicants such as separated children and women facing gender specific persecution. Such statistical data will help to identify whether there are any underlying problems at the national level, which require further consideration by the Court and the Committee of Ministers. Equally the publication of statistics will raise awareness at the national level on Rule 39 practice.<sup>158</sup>

*Does your country collect detailed statistical information on Rule 39 interim measures? If so, could you please provide these statistics?*<sup>159</sup>

The collection of answers to this question reveals that the vast majority of participating Member States are currently not collecting detailed statistical information on Rule 39 interim measures. What is also noteworthy is that statistical information in the countries that have answered positively to this question is currently not available for public access and consultation (**Finland, Turkey**).

- In **Finland** lawyers reported that the Department of Human Rights of the Ministry of Foreign Affairs is collecting such statistical information, but this is not available to the public yet.
- Similarly in **Turkey** lawyers have reported that in 2011 the NGO Association for Solidarity with Refugees made an official request under a freedom of information request in order to obtain statistical data on the cases brought before the ECtHR in 2011. In the official answer they received, the Ministry of Interior reported 48 cases in the period 2009-2010 in which the ECtHR granted interim measures. According to that national data there was only one application for Rule 39 interim measures rejected during that time period.

<sup>155</sup> For further information please see ECtHR, Rule 39 Requests: interim Measures and interim Measures by respondent State and country of destination updated January 2012.

<sup>156</sup> Council of Europe PACE Report *Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights*, Doc 12435 (November 2010).

<sup>157</sup> Ibid.

<sup>158</sup> Further information on the number of Rule 39 requests is included in Annex A of this report which contains data obtained from the ECtHR press unit country profile fact sheets on the numbers of Rule 39 applications requested per Member State surveyed as well as the numbers of Rule 39 measures granted and refused included in 2 tables for the years 2010 and 2011.

<sup>159</sup> Question 5, Questionnaire of the research in Annex A. This question received replies by contributors in the following countries: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom. Only lawyers in Finland and Turkey declared that their country collects national statistical information on Rule 39 applications whereas lawyers in Austria, Belgium, Bulgaria, Cyprus, Denmark, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Ukraine, the United Kingdom replied in negative to the question posed.

**ECRE/ELENA Recommendation**

In line with Resolution 1788 (2011) of the PACE Committee, detailed statistical information on Rule 39 interim measures should be collected by Member States and made publicly available.

### 3.2 Practical obstacles to submitting Rule 39 Requests

The obstacles faced at the national level by refugees and migrants limiting their opportunity to submit Rule 39 requests is comprehensively illustrated in Resolution 1788 (2011) *“It is currently impossible for many of those seeking international protection, and others, to request interim measures from the Court as they often lack access to lawyers and free legal aid, they are not informed of their rights or the procedures available or applicable to them, in a language which they understand, and they do not have access to a telephone or to the outside world. Furthermore, some of those in need of international protection are effectively denied the time and/or opportunity to request Rule 39 measures. Particular problems in this respect occur when persons are detained, or due to the rapidity of their expulsion.”*

Art. 34 ECHR requires Member States not to hinder in any manner whatsoever the effective exercise of the right of individual application. This part of the research seeks to provide a general overview of the problems that legal representatives face in submitting requests to the Court on behalf of applicants. However more research and analysis is required on behalf of those migrants and refugees who are not legally represented and therefore more likely to be at risk of expulsion.<sup>160</sup>

*Are there any practical obstacles, such as accelerated procedures, to applying for Rule 39 interim measures on behalf of asylum seekers in your country? If so please provide further information.*<sup>161</sup>

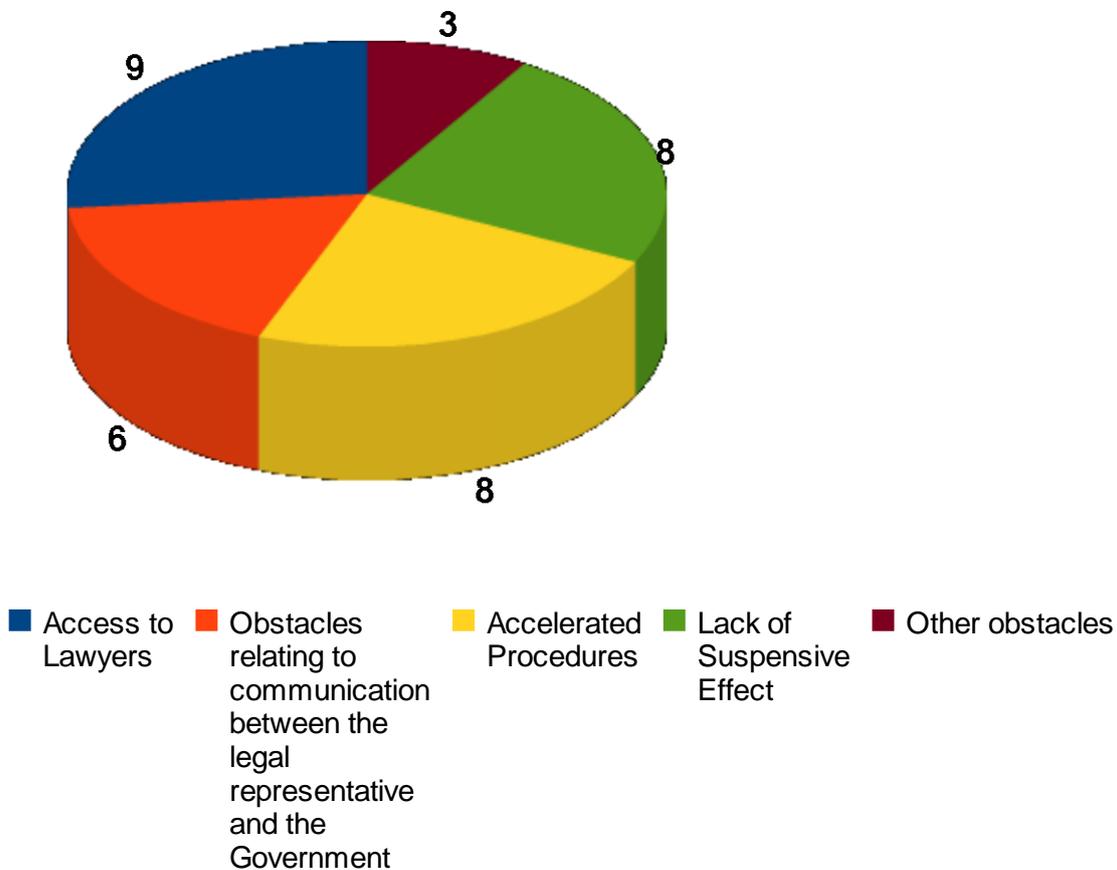
The answers to this question show that the vast majority of the lawyers participating in this research state that there are practical obstacles in their country thereby limiting the opportunity to submit Rule 39 requests to the Court. The main obstacles reported include difficulties experienced by asylum seekers with regard to accessing lawyers; accelerated procedures and non-suspensive effect of appeals in national legal remedies.

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<sup>160</sup> This section of the report should be read in conjunction with the ECRE/ELENA Survey on Legal Aid for Asylum Seekers in Europe, October 2010, specifically section 3.5 of that survey.

<sup>161</sup> Question 15, Questionnaire of the research in Annex A. This question includes feedback provided by lawyers in the Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom. Lawyers in Austria, Belgium, Bulgaria, Cyprus, Finland, Germany, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom reported and provided further feedback as to the obstacles faced in their jurisdiction in applying for Rule 39 measures, while lawyers in Denmark, Greece and Hungary declared not to be aware of such obstacles.

**Graph 5: Practical Obstacles to applying for Rule 39**



- Austria, Belgium, Cyprus, Finland, Slovakia, Sweden, the Netherlands, Ukraine and the United Kingdom
- Belgium, Finland, Cyprus, the Netherlands, Ukraine and the United Kingdom
- Austria, Bulgaria, Finland, Germany, Ireland, Spain, Sweden and the Netherlands.
- Austria, Finland, Germany, Norway, Slovakia, Sweden, Turkey and Russia
- Cyprus, Italy and Russia

- **Access to Lawyers**

Many applicants in detention pending deportation or extradition face difficulties in accessing legal practitioners, which in turn affects their ability to be informed of their rights, to submit appeals at the national level where available and to submit Rule 39 requests and applications to the ECtHR where necessary. This problem of accessing lawyers is reported in: **Austria, Belgium, Cyprus, Finland, Slovakia, Sweden and the Netherlands, Ukraine and the United Kingdom.** In **Austria**

such obstacles for detained applicants has led in some cases to individual asylum seekers being deported to their country of origin without having exhausted the available national legal remedies. In **Sweden**, detained applicants whose deportation is imminent have very limited contact with lawyers and even less opportunities to apply for Rule 39 interim measures. In **Slovakia**, the difficulty of accessing lawyers is noted in border cases where persons are apprehended by police at the border (e.g. Slovak-Ukrainian border) and subjected to re-admission. In such situations there is no effective access to a lawyer prior to return in practice. In **Finland** it was reported that sometimes lawyers are not timely informed about the detention of their clients, an omission which can have serious repercussions with respect to them accessing available legal remedies. Additionally, in Finland, asylum seekers can be detained in police custody. Asylum seekers who are temporarily in police custody are in practice treated under the Coercive Measures Act which means that they do not have the same rights as those asylum seekers detained in an Aliens' detention centre. As a consequence, asylum seekers in police detention in **Finland** face more difficulties in accessing lawyers and interpreters.

- **Communication between the Legal Representative and Government**

Contributors to this research reported difficulties regarding both the lack of effective communication and information between the legal representative and the respondent government and/or obstacles faced by lawyers in accessing relevant documentation and files concerning their clients. This was noted in **Belgium, Cyprus, Finland, the Netherlands, Ukraine** and the **United Kingdom**. In **Ukraine** lawyers reported problems in accessing relevant documentation concerning their clients in general and also specifically information withheld from the government itself. Short timeframes for implementation of expulsion decisions and limited communication between the government and the applicant creates problems for lawyers in representing their clients in **the Netherlands**. Therefore legal representatives there try to prevent this problem by requesting that the relevant governmental department keeps them notified of the expected expulsion date. However in reality the timing of enforcement action leaves very little opportunity for lawyers to submit Rule 39 requests. When the enforcement date is communicated this is frequently done less than three days before the planned expulsion.

Similarly lawyers in **Belgium** and **Cyprus** have experienced this same issue of a lack of information about the actual schedule of deportation flights concerning their clients. Lawyers in the **United Kingdom** mentioned a previous practice whereby if the applicant was found to be at suicide risk they would not be given notice of the removal and the practice of the ECtHR in British cases was not to consider Rule 39 measures unless the removal directions had been set. However the ECtHR made an exception for these cases concerning admissibility. It was further noted that in 2011 the British Court of Appeal upheld a judgment quashing the UKBA policy on summary removals, which applied to vulnerable groups.<sup>162</sup> In general, suicide risks applicants must be notified of any removal decision concerning them. Nevertheless it remains unclear if lawyers must be notified, a question which is really important, especially when the applicant is unrepresented.<sup>163</sup>

Sometimes the lack of communication between government and legal representative is not only concerned with enforcement action being undertaken but also in relation to the detention of the applicant. In **Finland** lawyers reported that sometimes they are not duly informed about the detention of their clients as noted above.

- **Accelerated Asylum Procedures**

The majority of contributors to this survey found that the use of accelerated procedures for expulsion is a central barrier to lawyers submitting Rule 39 requests on behalf of migrants and refugees. The use of detention and/or the non-suspensive effect of appeals within these

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<sup>162</sup> UKBA is the acronym for the United Kingdom Border Agency.

<sup>163</sup> For a relevant judgment on this issue see *The Queen on the application of Medical Justice v. the Secretary of State for the Home Department*, [2011] EWCA Civ 269, 16 March 2011

procedures often exacerbate the problem. This issue was reported in **Austria, Bulgaria, Finland, Germany, Ireland, Spain, Sweden and the Netherlands.**

In **Spain**, it is standard procedure that following the refusal of an asylum application, the applicant is placed in an accelerated expulsion process. In a specific case concerning a Columbian applicant, CEAR (Comisión Española de Ayuda al Refugiado), a non-governmental organisation was late in submitting a request to the Court due to limited time to prepare the grounds for appeal and as a consequence the ECtHR was not in the position to respond to the Rule 39 request before the applicant's expulsion.<sup>164</sup>

In **Norway** there is a 48 hour accelerated procedure for certain types of asylum claims. Such accelerated procedures do not have suspensive effect; therefore applicants must request this within 3 hours of the notification of the UDI decision to accelerate the case.<sup>165</sup> The speed of the procedure has the potential to limit Rule 39 requests to the Court. However, in practice in Norway deportations are often delayed and therefore accelerated procedures overall do not present a significant obstacle overall to submitting Rule 39 requests to the Court.

In **Sweden**, accelerated procedures (even though this term is not used as such in Sweden) impacts upon the substantive examination of asylum claims, as no legal assistance is available for applicants in such procedures and there is no suspensive effect for appeals, in cases considered to be manifestly unfounded or related to the application of the Dublin II Regulation. When subsequent asylum applications are submitted because of new circumstances, there is a fast process in which the applicant has no right to legal assistance and there is no suspensive effect for appeals. Without legal assistance the applicants have difficulties exhausting national legal remedies and submitting applications to the ECtHR where necessary. Even with legal aid, the short timeframes for these procedures can render it illusory in practice. Similarly in **Finland** there is limited time available for legal representatives to consult their clients and then effectively apply to the Court. Irish lawyers noted that there are expedited time-frames for judicial review in the area of asylum, whereby applicants have just 14 days to apply to the High Court for review of a decision in their case. This time frame creates a barrier, which could have a knock-on effect in relevant cases in **Ireland.**

In **Germany** the majority of requests for Rule 39 interim measures by lawyers concern cases, which have arisen during or pending accelerated procedures before the German Courts. Requests are sent to the ECtHR despite pending procedures at the national level due to the legal regime in place for such cases at the national level. The German Administrative Courts do not have the power to grant suspensive effect for the cases before them because the national legislation under section 34(a) of the German Asylum Procedural Law (Asylverfahrensgesetz) excludes this possibility explicitly. Some national courts have challenged the legality of Section 34(a) itself. The Administrative Court of Frankfurt was the first Court to find, in relation to Dublin transfers to Greece that the above-mentioned section is not in accordance with German Constitutional Law and specifically Art. 19 (4) of the German Constitution.<sup>166</sup> In practice, if an appeal is pending and the asylum seeker's lawyer applies to the ECtHR, the relevant German Administrative Court or the Aliens' Authorities do not take any further steps/ actions on that case until the Rule 39 application has been decided by the ECtHR.

- **Non-Suspensive Effect of Appeals**

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<sup>164</sup> It should be noted that Part III (f) the Rule 39 Practice Direction indicates that where there is a risk of immediate enforcement of an expulsion decision applicants and their representatives should submit the request for interim measures without waiting for a final domestic decision.

<sup>165</sup> UDI is the acronym used for the Norwegian Directorate of Immigration.

<sup>166</sup> Article 19(4) of the German Constitution states that there must be legal remedies and procedural guarantees before the Court for any decision exercised on the grounds of public power. This legal controversy has caused an on-going dispute whereby some Administrative Courts follow the approach of the Frankfurt Court whilst some others apply Section 34(a) of the German Asylum Procedural Law.

The accelerated procedures are often exacerbated by the non-suspensive effect of appeals as noted for example in **Austria, Finland, Germany, Norway, Slovakia, Sweden** and **Turkey**. In **Austria**, appeals to the Constitutional Court do not have suspensive effect, which can only be granted on a case- by-case basis. As a long time may pass before an appeal decision is reached the immigration authorities sometimes start the deportation procedures before the Constitutional Court has made a decision on whether it will grant or not suspensive effect to the appeal. In **Finland** an appeal against the negative decision of the domestic court also does not have a suspensive effect. In **Turkey**, appeals against deportation orders to the domestic administrative courts do not have an automatic suspensive effect and in practice are regarded by lawyers as “meaningless”. For this reason, since the case *Jabari v. Turkey*<sup>167</sup> the ECtHR accepts applications from **Turkey** even if the applicant has not exhausted the domestic legal remedies. Unfortunately, Turkish lawyers reported that the *Jabari v Turkey* judgment did not result in any change in national practice until now. Under the new Turkish national law on international protection, which is currently being drafted, appeals against deportation orders to the domestic courts will have an automatic suspensive effect. However, presently, as mentioned above, appeals to the domestic courts do not have an automatic suspensive effect.

Similarly in **Russia** appeals against removal do not have suspensive effect and the person can be removed to a country of origin before the domestic court judgment is delivered. This was illustrated in the case of an Iraqi citizen, R.R.M., a recognised refugee by UNHCR who was deported to Iraq in December 2011, even though his lawyer was appealing against his deportation in the national legal procedure. Usually, the deportation order is carried out immediately after the expulsion decision and *de facto* the person cannot appeal against the deportation order, issued by the Federal Migration Service. Therefore, in the absence of legal aid a person cannot request a Rule 39 measure before deportation putting them at risk of *refoulement*. In **Slovakia**, if the asylum application is declared to be ‘manifestly unfounded’ or rejected as inadmissible due to the Dublin II Regulation, the appeal against this decision does not have suspensive effect unless if provided by the national court. In such a scenario the deportation may take place before a lawyer has sufficient time to respond and submit a Rule 39 request.

- **Other Obstacles**

Other practical obstacles hinder asylum seekers from accessing the ECtHR such as the absence of legal aid as well as Member States’ actions such as push-back operations. The practice of interception at sea, and other ‘push-back’ operations such as implemented in 2009 by **Italy** deprives migrants and potential asylum seekers of the opportunity to initiate any kind of appeal procedure, including Rule 39 requests.<sup>168</sup> They have no contact with lawyers in such situations and no legal remedies are available. This specific issue was recently examined by the ECtHR in the case of *Hirsi v Italy* whereby Italy was found in violation of Article 3, 13 and Article 4 of Protocol No. 4 of the Convention for conducting such operations in the Mediterranean Sea.<sup>169</sup>

In **Russia** the legislation does not provide for legal aid for rejected asylum seekers, detained pending removal. A refusal decision of refugee status or temporary asylum can be appealed within 1 month. A removal order itself can be appealed within 10 days. In practice rejected asylum seekers tend to miss these deadlines since they are not familiar with the appeals’ procedures, have no information on their rights and lack funds to instruct a legal representative. In addition to the lack of legal aid other practical barriers contribute to making it difficult for asylum seekers to access their rights. Rejected asylum seekers are not provided with a motivated rejection letter in a language they understand, as the Russian law does not require this. It is often the case that applicants are also not provided with the translation of the removal order and detention order pending removal, issued by the national Court. Due to the absence of legal aid, lack of interpretation and translation and the applicant’s own lack of knowledge on the appeals’

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<sup>167</sup> ECtHR: *Jabari v. Turkey*, (Application No. 40035/98), 11 July 2000.

<sup>168</sup> For further information see ECtHR: *Hirsi Jamaa and Others v. Italy* (Application No. 27765/09), 23 February 2012.

<sup>169</sup> *Ibid.*

procedures, the person is not able to appeal the refusal of refugee status or temporary asylum or to challenge any removal and/or detention order before the Court.

Sometimes a requirement to submit the necessary supporting documentation with Rule 39 requests can also hinder access to the Court itself. Reasoning as to a *prima facie* risk of an Article 3 violation must be presented with the Rule 39 request. Depending on the circumstances of the case, demonstrating this with the evidence and facts can be a challenging exercise for lawyers when applicants are in an emergency situation. The **Cypriot** contributor provided the following example “*in the cases of the group of Syrian Kurds,<sup>170</sup> the Court lifted the Rule 39 interim measures for 38 of them, after receiving from the Cypriot authorities the decisions on their asylum claims. All decisions concluded that the applicants were not credible in their claims. However, Cypriot lawyers find that the asylum procedures in Cyprus are neither fair nor efficient, as 95% of asylum seekers are found not to be credible in their claims.*” In these cases the national authorities had undertaken a flawed credibility assessment and therefore the Rule 39 measures should have remained in place for those 38 applicants as well. The Cypriot lawyers involved in the case would have benefited from being aware in advance what the focus of the Court’s assessment would be on, namely on the credibility issues in order to respond to this in submitting the Rule 39 requests for these applicants rather than primarily on the risk upon return.

Overall, it is clear there are a number of obstacles both in practice and in law, which frustrate applicants and legal representatives’ efforts to submit applications including Rule 39 requests to the Court. As evidenced from this research, the main barriers are a lack of legal aid or assistance; the speed of accelerated asylum procedures, non-suspensive effect of national appeals and the removal of applicants at the border or on the High Seas via interception measures. Similarly, the absence of other procedural safeguards adds to this problem such as a lack of information on the rights of applicants; interpretation or translation of refusal and/or expulsion decisions and inadequate communication between lawyers and the national authorities concerning enforcement actions.

These findings highlight not only the practical difficulties in submitting Rule 39 requests to the Court but also the deficiencies inherent in the national procedures themselves, which also demonstrates why recourse to the ECtHR is necessary. Therefore these findings are equally relevant for section 3.3 below. Improvements need to be made at the national level to improve access to the Court but also to secure the Convention rights at the national level including the right to a legal remedy with suspensive effect in accordance with the case-law of the Court. Changes in the practice at the ECtHR may also facilitate the lodging of Rule 39 requests where required such as the possibility of making electronic applications online instead of filing via fax or post, which could be useful to address tight deadlines pending removal of an individual.<sup>171</sup> In addition the Court Registrar could also consider applying extended working hours and therefore receive and assess Rule 39 requests submitted in the early evening for example prior to a morning deportation flight.<sup>172</sup>

It is recommended that Rule 39 requests are submitted in good time to enable the Court to sufficiently examine the requests received. Where this is not possible, for example where there is a risk of immediate enforcement of deportation order, the Court’s Practice Direction explicitly states that ‘*applicants and their representatives should submit the request for interim measures without waiting for that decision [final domestic decision], indicating clearly the date on which it will be taken and that the request is subject to the final domestic decision being negative*’. This does not

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<sup>170</sup> This case is also referred to under section 2.4 of this report.

<sup>171</sup> The ECtHR has recently launched a new service on a trial basis to enable applicants to submit applications online on the Courts website. Initially the service will only be available for applicants using Swedish or Dutch application forms. Depending on the outcome of the trial, it may subsequently be extended to the other official languages of the member States of the Council of Europe.

<sup>172</sup> It should be noted that during the holiday period, the Registrar of the Court maintains a stand-by system to deal with any urgent Rule 39 requests.

take into account however the issue demonstrated in **Belgium, Cyprus and the Netherlands** of inadequate notification to the legal representative of the expected expulsion date. All of the barriers at the national level need to be addressed in order to equally limit the need for recourse to the ECtHR as well. If such procedural safeguards such as legal aid, information, interpretation and suspensive effect of appeals are in place then the need for applying to the ECtHR will be reduced.

The importance of access to effective legal remedies has been demonstrated in a number of landmark judgments by the Court including *Hirsi v. Italy*,<sup>173</sup> *M.S.S v. Belgium and Greece*<sup>174</sup> and *I.M. v. France*.<sup>175</sup> In the latter, the ECtHR observed, with regard to the effectiveness of the domestic legal arrangements in France, that while the remedies of which the applicant had made use had been available in theory, their accessibility in practice had been limited by the automatic registration of his application under the fast-track accelerated procedure, the short deadlines imposed and the practical and procedural difficulties in producing evidence, given that he had been in detention and was applying for asylum for the first time. Therefore not only is it necessary to examine the legislation available in law but also the practice in order to ensure that applicants have effective access to remedies at the national level.

In light of the above, the Council of Europe should closely monitor the countries where there are no or few applications made to its Court so as to discover the reasons behind this. Equally where there appears to be a high number of Rule 39 requests against certain Member States the Council of Europe should also monitor any structural deficiencies and the implementation of effective remedies at the national level in those State Parties.

Member States have an obligation to ensure that all individuals have real access and opportunity to use interim measures. Rule 39 requests to the Court must not be obstructed or hindered or interfered with by Member States in any manner whatsoever in accordance with the exercise of the right to individual petition to the Court under Art. 34 ECHR. Member States should in this respect on one hand ensure that effective national remedies are in place and available for everyone, and on the other refrain from creating or tolerating obstacles preventing access to legal remedies in practice. This would contribute to making recourse to the ECtHR, also under the Rule 39 procedure, less necessary. In the particular context of accelerated asylum procedures Member States must also take into account Resolution 1471(2005) from the Parliamentary Assembly of the CoE on the use of accelerated asylum procedures as well as the Committee of Ministers' Guidelines on human rights protection in the context of accelerated asylum procedures.<sup>176</sup> Accelerated procedures must not operate in such a way as to deprive an applicant of a fair and effective examination of their claim and an effective remedy must be guaranteed under all circumstances.

Member State should therefore provide at least the following minimum safeguards at the national level:

- guarantee the principle of *non-refoulement* under the 1951 Refugee Convention and its 1967 Protocol as well as the ECtHR's caselaw under Article 3 ECHR;
- provide free legal aid and assistance for applicants in expulsion cases including in accelerated asylum procedures;
- ensure the right to information is guaranteed in practice as well as access to

<sup>173</sup> ECtHR: *Hirsi Jamaa and Others v. Italy* (Application No. 27765/09), 23 February 2012.

<sup>174</sup> ECtHR: *M.S.S v. Belgium and Greece* (Application No. 30696/09), 21 January 2011.

<sup>175</sup> ECtHR: *I.M. v. France*, (Application No. 9152/09), 02 February 2012.

<sup>176</sup> Parliamentary Assembly Resolution 1471 (2005) *Accelerated Asylum Procedures in Council of Europe Member States* 7 October 2005; CoE Committee of Ministers, *Guidelines on Human Rights Protection in the context of Accelerated Asylum Procedures*, 1 July 2009.

- quality interpretation and translation where appropriate;
- provide safeguards against arbitrary detention and ensure access to a lawyer for detainees
- ensure that lawyers and/or legal representatives are informed in a timely manner of any enforcement or removal action being taken against their clients
- guarantee access to national legal remedies with suspensive effect which also allow for sufficient time to examine the case in a fair and efficient manner in accordance with the ECtHR's caselaw on Article 13 ECHR.

This requirement to take steps at the national level to reduce the need for interim measures is echoed in the statement of the President of the European Court of Human Rights in 2011 calling upon Member States to co-operate fully with the Court by providing '*national remedies with suspensive effect which operate effectively and fairly, in accordance with the Court's case-law and provide a proper and timely examination of the issue of risk*'.<sup>177</sup>

### ECRE/ELENA Recommendations

In line with Resolution 1788 (2011) CoE Member States must guarantee both in law and in practice the right of individual petition to the Court under Article 34 including the right to submit Rule 39 requests where necessary.

Member States should ensure that legal representatives receive sufficient and timely notification of any enforcement or removal action being undertaken by the authorities concerning their clients.

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<sup>177</sup> ECtHR, Statement issued by the President of the European Court of Human Rights concerning requests for interim measures (Rule 39 of the Rules of the Court) issued 11 February 2011.

### 3.3 The necessity of recourse to the European Court of Human Rights

This section of the report addresses the reasons why, according to the contributors, recourse to the European Court of Human Rights is necessary to ensure respect of the Convention rights most notably in expulsion cases and in relation to the prohibition of torture, inhuman, degrading treatment under Article 3 ECHR. It also examines the availability of remedies at the national level in observing the reasons why lawyers must seek remedies before the ECtHR.

*If your country is one in which lawyers request a lot of Rule 39 interim measures, can you provide any information on why recourse to the European Court of Human Rights is necessary? Are there effective national remedies available or does your country lack proper procedures and safeguards?*<sup>178</sup>

- In **Austria** effective national remedies are available in theory for all cases. The ECHR and its Protocols have the rank of Constitutional law within the national framework. However the national remedies available depend on the type of appeal for example appeals in Dublin cases are less effective at the national level. Therefore Austrian lawyers pending the judgment of *M.S.S. v Belgium and Greece* sought interim measures from the ECtHR in Dublin cases concerning Greece.<sup>179</sup> After the aforementioned judgment, Austria complied with the Court's ruling and no further Rule 39 requests were submitted on the issue of transfers to Greece.
- The use of Rule 39 in **Belgium** is often linked to the lack of effectiveness of the Council of Alien's Litigation. This problem was underlined in the *M.S.S. v. Belgium and Greece* judgment where the Grand Chamber of the ECtHR noted that the appeal offered by the Council in deportation cases did not fulfill the guarantees required in Art. 13 ECHR.<sup>180</sup> As an appeal body within the asylum procedure, the Council faces a lot of criticism both on its legal framework and on its functioning that shows too much reliance on the instructions given by the first instance body, at least in the Dutch Chambers.<sup>181</sup>
- In **Cyprus**, lawyers reported that in practice there are no national effective remedies within the meaning of the case law of the ECtHR. Recourse to the Supreme Court against a refusal decision of the Refugee Reviewing Authority does not have automatic suspensive effect. Following a refusal by the Refugee Reviewing Authority, although under the law<sup>182</sup> asylum seekers retain their status as such and they have the right to challenge that decision before the Supreme Court, they do not have the right to remain in the country and are subject to deportation, irrespective of whether they have filed an appeal to the Supreme Court or not.<sup>183</sup> Suspensive effect against a deportation order

<sup>178</sup> Question 16, Questionnaire of the research in Annex A. This question was responded to by lawyers in the Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom. Lawyers in Austria, Belgium, Cyprus, Denmark, Finland, Germany, Italy, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom reported and provided further details as to the existence of effective national remedies in their jurisdictions and the reasons why recourse to the ECtHR is necessary. The question presented was aimed specifically at those countries where lawyers request a significant number of Rule 39 measures however some contributors from other countries with less experience also provided reasoning as to why in specific cases a remedy must be sought from the ECtHR.

<sup>179</sup> ECtHR: *M.S.S v. Belgium and Greece*, (Application No. 30696/09), 21 January 2011.

<sup>180</sup> Ibid.

<sup>181</sup> For further information see the UNHCR/CBAR paper, Audition du Haut Commissariat des Nations Unies pour les réfugiés par la Commission de l'Intérieur et des Affaires administratives du Sénat de Belgique au sujet de l'évaluation de la nouvelle procédure d'asile, 24 March 2009.

<sup>182</sup> Article 2 of the Refugee Law provides that an asylum seeker retains that status until a final decision is taken, which is that of the Supreme Court on appeal.

<sup>183</sup> This practice has been found to violate the right to an effective remedy under Article 39 of Council Directive 2005/85/EC by the Supreme Court (Case 493/10 Leonie Marlyse Yombia Ngassam) but continues to be implemented

may be applied for on the basis of the Rules of Procedure of the Supreme Court. However the practical implementation of this rule (Rule 13) involves many obstacles.<sup>184</sup> All of these factors show that recourse to the Strasbourg Court is often necessary to protect those at risk of *refoulement*.

- Rule 39 requests were considered necessary in the context of Dublin transfers to Greece from **Denmark** due to national legal remedies not being considered effective in practice.
- In **Finland** recourse to the ECtHR is sometimes necessary as there is no suspensive effect of appeals before the Supreme Administrative Court. The proceedings before the Supreme Administrative Court can take up to 12-18 months and therefore there is a possibility that the applicant could be deported prior to an examination of the case by the Court.
- In **Germany**, recourse to the ECtHR is sometimes required depending on the available national legal remedy. German asylum law under section 34 (a) of the German Asylum Procedural Law (Asylverfahrgesetz) excludes any effective remedy in national law, if a refugee entered Germany through a safe third country (for instance, Dublin cases). Any appeal under this ground if implemented strictly on the basis of the national legislation would be without suspensive effect. However some German Administrative Courts (including the Frankfurt Court) have ruled that this application of the law is not in line with the German Constitution.<sup>185</sup>
- Regarding **Italy**, though the relevant rules on asylum appeals have been amended to provide for suspensive effect as a general rule. It is to be noted that there are a large number of exceptions with the risk that the suspensive effect will be deprived of most of its substance. It is admittedly possible for an asylum seeker coming under one of these statutory exceptions to request a Court to grant a stay of execution regarding the deportation order. However, the relevant provisions are complex and lack clear implementing rules, making it difficult to exercise an effective right of appeal. Moreover, while court proceedings offer important procedural safeguards, according to civil society the Courts do not always rule on cases within the statutory time-limits. Consequently, there is a danger that asylum seekers will be deported to a country where they will face the real risk of suffering treatment in breach of Art. 3 ECHR.<sup>186</sup>
- In **Russia**, lawyers report that there are no adequate procedures and guarantees at the national level. For example, deportation decisions are taken by the Federal Migration Service and are immediately implemented. Even though a person has the right to appeal against such “*speedy*” decisions, usually they are deported before having any opportunity to exercise their right to appeal. An example of this practice is highlighted in the case of an Iraqi citizen, who on 10 December 2011 was deported from Russia, even

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by the Cypriot authorities.

<sup>184</sup> Rule 13, allows for an *ex parte* application to be submitted after or at the same time recourse under Article 146 of the Constitution is submitted. Submission of the *ex parte* application does not automatically suspend deportation. *Ex parte* applications are submitted together with an affidavit statement of the applicant, which, if in a different language, has to be translated into Greek. No legal aid is provided in such procedures and often asylum seekers at that stage cannot fund their cases before the court. The Court may set the examination of the application for suspensive effect sometimes on the same day or in one week’s time or even more. During this period there is no protection and the asylum seeker is liable for deportation. In order for the national interim measures to be granted the asylum seeker needs to prove either blatant illegality or irreparable damage if deported. In the cases of asylum seekers however eventually national Courts grant the suspension of the deportation order but not the suspension of detention resulting in long detention periods of asylum seekers.

<sup>185</sup> For further details please see the feedback provided by the German lawyers under section 3.2 of this report.

<sup>186</sup> Further information is available in the European Commission against Racism and Intolerance Report on Italy, 12 February 2012.

though he was a UNHCR mandated refugee and was in the resettlement process for a place in the United States of America. The Iraqi citizen did not manage to appeal against the rejection of his application for refugee status in Russia, as he was deported immediately after the authorities decision.

- In **Slovakia** in cases where applicants are subject to detention pending deportation, the appeal against the decision on administrative expulsion does not have suspensive effect as the issuing authority denies it, so that detention can be applied. As a result, such expulsion decisions are enforceable before become final.<sup>187</sup> Therefore in such cases, where the deportation of the applicant is likely, an application to the ECtHR and a Rule 39 request is the only way to seek protection and prevent the removal of the applicant. Sometimes there are also problems regarding the effectiveness of national remedies in the context of appeals to national Courts challenging administrative decisions. For example, an administrative expulsion decision is issued by the Department of Alien's Police or the Department of Border Police and is subject to an appeal to the supervisory authority i.e. the Directorate of the Alien and Border Police. This appeal does have suspensive effect unless it is denied in certain cases<sup>188</sup> by the issuing authority. In case that appeal is unsuccessful the expulsion decision becomes valid and can only be challenged by the applicant submitting an appeal to the regional Courts. However such an appeal does not have suspensive effect unless the Court orders that. In practice, the decision on granting of suspensive effect in such cases takes weeks or months. Therefore pending that national Court decision the applicant is liable to be removed and it is necessary to submit a Rule 39 request.
- In **Spain** the availability of an effective national legal remedy depends on where the asylum seeker submits their asylum application i.e. at the border or within the Spanish territory. Asylum applications submitted at the border are examined in an accelerated procedure (maximum of 8 days including re-examination) that often results in the expulsion of the applicant. There is a very low recognition rate at the border and first decisions must be made within 72 hours. Lawyers are only permitted to attend a 're-examination' of an initial refusal decision of the border which must be submitted within 2 days. The authorities must then issue a decision on that 're-examination' request within 2 days.

As regards asylum applications submitted within the territory of Spain, the initial decision-making body, OAR's (Oficina de Asilo y Refugio) practice is restrictive in the following ways: often it declares that applicants have provided insufficient evidence, its decisions do not contain any assessment of country of origin information, it never follows UNHCR guidelines or provides reasons for its departure from UNHCR's guidance etc

When it comes to appeals the only possibility is to appeal to Audiencia Nacional once, there is no further appeal possible. If an applicant is refused at the border the only possibility is to submit an urgent application to the Audiencia Nacional to stop the expulsion (*medida cautelarísima*). The periods of time to prepare and submit this emergency measure are extremely short and the decisions of the Audiencia Nacional reflects its over-reliance on the initial decision making authorities' decision. The recognition rate is extremely low and the Court rarely takes into account UNHCR's

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<sup>187</sup> According to Slovak law if there is no possibility to appeal the expulsion decision, or if the appeal against the decision lacks suspensive effect, the decision is enforceable before it becomes final. So in the case that the decision on expulsion states that any appeal will lack the suspensive effect, such decision is enforceable by its delivery to applicant concerned even though he/she appeals it. So immediately after the delivery, the decision on detention can be issued and the applicant can be detained.

<sup>188</sup> The suspensive effect can be denied by the issuing authority in the case of acute public interest or in the case of a risk that the delay of the enforcement of the decision would cause the irreparable damage.

position in individual cases. An example highlighting this is that during 2011 and 2012, CEAR have submitted 38 Rule 39 requests to the ECtHR, including UNHCR's support. In these cases, the Audiencia Nacional rejected all appeals; appeals which were also supported by UNHCR. In 34 of these cases, the ECtHR stopped the expulsion in accordance with Rule 39.

- In **Sweden** national remedies are sometimes ineffective due to the existence of a provision in the Aliens Law (Chapter 12 paragraph 19), which is arguably not completely in accordance with Art. 3 ECHR. Application of this provision in subsequent asylum applications means that unless a reasonable explanation is provided for the late submission of new facts or circumstances in a case, the application will be refused by the Migration Court, regardless of whether a deportation would result in a violation of Art. 3 ECHR or not. An example demonstrating the problem this practice of the Court has caused so far is the recent case concerning a bisexual man from Afghanistan whose application was rejected by the Swedish Authorities on the basis of "lack of a valid excuse" as he presented his gender-related claim at a late stage in the procedure. The UN Human Rights Committee considered in November 2011<sup>189</sup> that Sweden's expulsion of this man constituted a violation of Art. 6 and 7 of the International Covenant of Civil and Political Rights. An additional reason why lawyers must submit claims to the ECtHR is that when a subsequent application is rejected by the Migration Board any further appeal does not have suspensive effect.
- In **the Netherlands**, lawyers consider the issue of credibility assessment as a central reason in having to seek interim measures before the ECtHR. It is reported that the Courts in the Netherlands apply a marginal scrutiny when it comes to credibility assessments of the applicant's claim, whereas the ECtHR makes its own assessment of the facts of the case. Many times, the ECtHR has concluded that the applicant is credible even though the Dutch authorities have come to the opposite conclusion. As regards why Rule 39 interim measures are requested the Administrative division of the Council of State only grants a provisional measure when the date of expulsion is known. The ECtHR however indicates Rule 39 when the date of expulsion is still unclear. Due to the fact that the date of expulsion is not always communicated and when it is communicated it is done less than three days before expulsion, recourse to the ECtHR is necessary. Furthermore, any further appeal before the Council of State in the Netherlands does not have automatic suspensive effect. In addition to this, it was also noted that a request for suspensive effect will always be denied when no actual date of forced return is known and thus Dutch lawyers in these cases have to resort to the ECtHR.
- **Turkish** lawyers seek interim measures before the ECtHR because there is no concrete legal infrastructure on asylum and international protection at the national level. Only a Directive, issued by the Turkish Ministry of Interior in 1994, currently regulates this whole area of law as well as few circulars issued by the Ministry of Interior. It should be mentioned that this Directive has legal binding force.<sup>190</sup> However, since there is no national codified asylum legislation, there is no specifically designated Court or similar jurisdictional mechanism for asylum and migration related cases. Turkish lawyers consider that only if Turkey continues to be found in violation of the ECHR will the national authorities and Courts start to deal with asylum applications more seriously on a national level.
- The issue of poor legal representation and inadequate domestic legal remedies was

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<sup>189</sup> For the full text of the UN Human Rights Committee on the case please see: LIFOS: [Migrationsverket](#).

<sup>190</sup> For the full text of the Turkish Directive please see [Turkish Ministry of Interior](#). This Directive is still valid, as updated and revised in 2006, and constitutes the main legal instrument on asylum issues in Turkey.

reported in **Ukraine**. Often, asylum seekers cannot access legal aid or interpretation in order to effectively appeal against negative decisions in Ukraine. Further, the Ukrainian lawyers commented that the chances of being granted interim measures in the extradition related cases are significantly limited. The Court relies on the new procedural guarantees related to extradition introduced by the amendments to the Criminal Procedure Code in 2010. However, these guarantees lack clarity and are not always implemented by the national authorities, which is why recourse to ECtHR is still needed.

- In the **United Kingdom** people need the protection of Rule 39 in the United Kingdom either because the initial decision by the asylum authorities has just been wrong and the Courts have failed to correct it, or often, because they have been very poorly represented at the national level.

Several reasons as to why lawyers need to turn to the ECtHR to preserve the rights of those in need of international protection are reported here such as the non-suspensive effect of national legal remedies, poor legal representation as well as flawed national case-law, inadequate assessments of credibility as well as over-reliance on the decisions of initial authorities by appellate authorities.

As long as Convention rights are not secured at the national level and remedies for such violations cannot be accessed there, there will continue to be a need to have recourse to the ECtHR. Member States need to reaffirm their commitment to this system of human rights protection in order to make every effort to secure these rights on the local level. Therefore any deliberations on the reform of the ECtHR and the Convention system need to take into consideration the findings of this section on why recourse to the Court is necessary.

The long-term effectiveness of the Convention is at stake unless there is better implementation at the national level. The issue of repetitive cases raised before the Court should also be further explored as these can assist with the identification of structural problems, which need to be addressed by Member States. The pilot judgment procedure by the Court goes some way in addressing this issue of recurrent cases.

ECRE urges Member States fully implement the European Court's case-law on the right to an effective remedy in accordance with Art. 13 ECHR to strengthen the procedural safeguards for those seeking international protection.<sup>191</sup>

In order to be effective national legal remedies must have the following features:

- a) the remedy must be available in practice as well as in law
- b) the reviewing judicial authority must be able to undertake an independent and rigorous scrutiny of a claim that there exists substantial grounds for fearing a real risk of treatment contrary to Art. 3 ECHR
- c) the remedy must have automatic suspensive effect.<sup>192</sup>

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<sup>191</sup> Member States should also take into account the Council of Europe Recommendation Rec (2004) 6 of the Committee of Ministers to Member States on the improvement of domestic remedies, 12 May 2004.

<sup>192</sup> ECtHR: *Conka v. Belgium*, (Application No. 51564/99), 05 February 2002; ECtHR: *M.S.S v. Belgium and Greece*, (Application No. 30696/09), 21 January 2011; and ECtHR: *Gebremedhin v. France*, (Application No. 25389/05), 26 April 2007; *Abdolkhani and Karimnia v Turkey* (Application No. 30471/08), 22 September 2009. It should be noted that State Parties also have a commitment under Article 46 ECHR to abide by the judgments against them.

**ECRE/ELENA Recommendations**

Member States must ensure that the right to an effective remedy under Article 13 of the European Convention on Human Rights is respected both in law and in practice.

### 3.4 State Compliance with Rule 39 interim measures

Interim measures are binding on the State to which they are indicated. Non-compliance of such measures would result in a substantive breach of the Convention itself under Art. 34 ECHR and in the context of asylum cases breaches of Rule 39 measures may also result in the breach of the international legal obligation of *non-refoulement* as well as Art. 3 ECHR. The effectiveness of Rule 39 measures lies in the compliance of Member States with the measures indicated by the Court. As the PACE report states ‘*The point of departure for verifying whether or not the respondent state has complied with the measure is the formulation of the interim measure itself. The Court will therefore examine whether the respondent state complied with the “letter and the spirit” of the interim measure indicated to it.*’<sup>193</sup> Similarly the Parliamentary Assembly in Resolution 1788 (2011) outlined State obligations in complying with Rule 39 measures in an unequivocal manner “*the burden is on States to demonstrate that they have complied with the interim measures in question, or in an exceptional case that there has been an objective impediment which prevented compliance and that they took all reasonable steps to remove the impediment and keep the Court informed about the situation. States should refrain from using the argument of ‘objective impediments’ as a means of circumventing their obligations.*”

The PACE Report indicates a number of countries, including **Italy** and **Russia**, who have repeatedly failed to comply with interim measures. The **United Kingdom** does not have a clean record either and nor does the **Slovak Republic**. Further cases of non-compliance pending before the Court have been publicized by Council of Europe bodies, including the Parliamentary Assembly, the Committee of Ministers and the Commissioner for Human Rights.<sup>194</sup> The Parliamentary Assembly in both Resolution 1788 (2011) and Recommendation 1956 (2011) condemns the, relatively rare, but growing number of breaches to Rule 39, which is found to be of grave concern to the integrity of the ECHR as a whole.

*Do you know if and in what instances your State has ignored the Court's Rule 39 order for interim measures?*<sup>195</sup>

Lawyers in **Bulgaria, Cyprus, Denmark, Germany, Greece, Hungary, Ireland, the Netherlands, Norway** and **Sweden** replied that as far as they are aware their country has so far complied with Rule 39 interim measures of the Court. Lawyers in **Austria, Belgium, Finland, Italy, Russia, Slovakia, Spain, Turkey, Ukraine** and the **United Kingdom** reported some known incidents of non-compliance of their country to Rule 39 measures.

- Some lawyers in **Austria** reported that in 2010, in a Dublin transfer to Greece, an Afghan national had agreed to “voluntary return” to Afghanistan, although the individual had previously mandated an asylum lawyer to represent him in the procedure and a Rule 39 measure preventing their deportation had already been issued. Since the asylum seeker was held in detention, the consent to returning to Afghanistan, according to the lawyers, is arguably a result of the lack of access to legal consultation in detention. This case is currently pending before the ECtHR and the Austrian Government has recently been asked to deliver an opinion. Though this is not a clear-cut case of non-compliance by the Court, the question of the voluntariness of the applicant’s return to Afghanistan needs to be examined carefully.

<sup>193</sup> Council of Europe PACE Report *Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights*, Doc 12435 (November 2010).

<sup>194</sup> *Ibid.*

<sup>195</sup> Question 14, Questionnaire of the research in Annex A. This question includes feedback provided by lawyers in the Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom.

- **Belgian** lawyers noted that, except for the notorious *Conka v Belgium* case,<sup>196</sup> which dates back to 1999, the Belgian authorities have complied with all Rule 39 measures requested since then.
- **Finnish** lawyers reported several incidents where the Court had granted interim measures but the national Police initiated an expulsion procedure for the applicants anyhow and in some cases the applicants were actually transferred to a receiving State or were in transit. However, it is noted that in these situations the police have brought the applicants back to Finland as soon as information that a rule 39 measure has been granted reached the competent authority. One possible explanation is that these incidents are most likely the result of a failure to notify the police in time of the granting of a Rule 39 request or where the police have not double-checked the status of the applicant before they proceeded with the expulsion rather than blatant non-compliance of the Court's measure.
- The **Italian** lawyers reported a case of non-compliance in *Toumi v. Italy* where an applicant was expelled to Tunisia despite a Rule 39 indication by the ECtHR.<sup>197</sup> *"It is totally unacceptable to ignore binding interim measures ordered by the European Court of Human Rights (ECHR). It is disgraceful, for a mature democracy like Italy, to have send Ali Toumi back to Tunisia last Sunday, a case in which there exists an imminent risk of irreparable damage to the applicant"*, said Herta Däubler-Gmelin (Germany, SOC) and Christos Pourgourides (Cyprus, EPP/CD), respectively the Chair of the PACE Legal Affairs Committee and the rapporteur on the implementation of Strasbourg Court judgments in relation to the deportation to Tunisia of Mr. Toumi. *"Such action is in blatant contravention of the Strasbourg Court's clearly established case-law. This is the fourth case in which, since 2005, the Italian authorities have taken measures in flagrant disregard of the Court's orders"*, they added.<sup>198</sup> Further cases in which Italy did not abide by Rule 39 ECtHR indications are noted in the PACE Committee Report where it is mentioned that *"[f]ollowing the judgment in Ben Khemais v Italy, Italy has expelled more Tunisians in breach of Rule 39 (see Hamidovic v. Italy, Trabelsi v. Italy and Toumi v. Italy)"*.<sup>199</sup>
- **Russian** lawyers reported that in the case of *Muminov v. Russia*<sup>200</sup> the applicant was removed despite a Rule 39 measure. In this particular case the Court did not find a violation of Art. 34 ECHR however in it's judgment the Court noted that it *"does not exclude the possibility that a respondent State's failure to make practical arrangements for receiving and processing information from the Court regarding the examination of a Rule 39 request or the Court's decision to apply it in a given case may raise an issue under Article 34 of the Convention"* (Para 136). Lawyers in Russia reported another issue of extreme concern in that a number of persons with applications pending before the ECtHR have been reportedly abducted and sent back to countries where they face a serious risk of torture or ill-treatment. Despite interim measures indicated by the Court under Rule 39 the following cases involve applicants who disappeared on Russian territory and were subsequently

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<sup>196</sup> ECtHR: *Conka v. Belgium* (Application No. 51564/99), 05 February 2002.

<sup>197</sup> ECtHR: *Toumi v. Italy* (Application No. 25716/09), 05 April 2011.

<sup>198</sup> CoE, Press Release, *Herta Daubler-Gmelin and Christos Pourgourides: blatant disregard yet again, by Italy of binding interim measures ordered by the ECHR*, 6 August 2009.

<sup>199</sup> Council of Europe PACE Report *Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights*, Doc 12435 (November 2010), Explanatory Memorandum by Mr. Darchiashvili, Rapporteur, para. 42.

<sup>200</sup> ECtHR: *Muminov v. Russia* (Application No. 42502/06), 11 December 2008.

found in detention facilities in Tajikistan and Uzbekistan: *Savridan Dzhurayev v Russia*,<sup>201</sup> *Abdulkhakov v Russia*<sup>202</sup>, *Koziyev v Russia*<sup>203</sup> and *Zokhidov v Russia*.<sup>204</sup> In response to one of these cases the President of the Court expressed that he was deeply disturbed at these developments and concerned of the “possible continuation of such unacceptable incidents in cases of other applicants to whom the interim measures still apply on account of the imminent risk of violation of their rights under Articles 2 and 3 of the Convention in the countries of destination”.<sup>205</sup> Despite this, on 29 March 2012 yet another applicant with a case pending before the ECtHR disappeared in the Moscow region and was subsequently located on 7 April 2012 in a detention facility of the national security service of Tajikistan.<sup>206</sup> In light of these developments and Russia’s non-compliance with Rule 39 indications from the Court a group of organisations and lawyers wrote to the Council of Europe expressing their concerns on the 17 April 2012.<sup>207</sup> Annex B 3 of this Report also contains a charter documenting the abduction of ECHR applicants in Russia in 2011- 2012.

- In the case of *Labsi v Slovakia*<sup>208</sup> in April 2010 the Slovakian government extradited Mr. Labsi to Algeria in direct violation of a Rule 39 indication by the Court to suspend deportation. According to news reports two members of the Council of Europe Parliamentary Assembly condemned the actions of the Slovak authorities in expelling the applicant. “This is a case in which there exists an imminent risk of irreparable damage to the applicant,” said Christos Pourgourides, chair of PACE’s Committee on Legal Affairs and Human Rights, and John Greenway, chair of the Committee on Migration, Refugees and Population. “Such action directly undermines the authority of the Strasbourg Court at a time when all member states have just reiterated their attachment to the Court,” they added, describing the deportation as “an unacceptable disregard of European Convention on Human Rights requirements”.<sup>209</sup> In a public statement of 28 April 2010 Amnesty International condemned the actions of the Slovak authorities in forcibly returning the applicant from Slovakia to Algeria despite an interim measure from the European Court of Human Rights and the ruling of the Constitutional Court of June 2008.<sup>210</sup> On 28 April 2010 the Registrar of the Court sent the following letter to the Government which provides a detailed response of the Court’s reaction to the Slovak’s authorities decision to expel the applicant in spite of Rule 39 measures indicated by the Court and is quoted here:

*“The President of the Court ... has instructed me to express on his behalf his profound regret at the decision taken by your authorities to extradite Mr Mustapha Labsi to Algeria in disrespect of the Court's interim measure adopted under Rule 39 of the Rules of Court.*

*The President has noted in this connection that on 16 April 2010 your authorities were reminded in clear terms by the Registrar of Section IV of the Court that the Rule 39 measure, first applied on 13 August 2008, continued to remain in force. Nevertheless, the Government extradited the applicant to Algeria on 19 April.*

*The President is deeply disturbed at this development and is particularly concerned about its implications for the authority of the Court and the unfortunate message which it sends both to other Contracting States faced with a Rule 39 measure and to applicants and potential applicants liable to extradition or expulsion to countries where they may be*

<sup>201</sup> ECtHR, *Savridan Dzhurayev v Russia*, (Application No. 71386/10), communicated case.

<sup>202</sup> ECtHR, *Abdulkhakov v Russia*, (Application No. 14743/11), communicated case.

<sup>203</sup> ECtHR, *Koziyev v Russia* (Application No. 58221/10), communicated case.

<sup>204</sup> ECtHR *Zokhidov v Russia* (Application No. 67286/10), communicated case.

<sup>205</sup> For further information see Annex B of this report.

<sup>206</sup> ECtHR, *N. Dzhurayev* (Application No. 31890/11), communicated case.

<sup>207</sup> A copy of this correspondence with the Court is available in Annex C of this report.

<sup>208</sup> ECtHR, *Labsi v Slovakia* (Application No. 33809/08) Communicated case on 8 June 2010.

<sup>209</sup> The Slovak Spectator, *Slovakia ignores Court, deports Labsi to Algeria*, 3 May 2010.

<sup>210</sup> Amnesty International, *Slovakia: Expulsion of Mustapha Labsi violated International Law*, 28 April 2010, AI Index EUR 72/001/2010

*exposed to the risk of violation of their rights under Articles 2 and 3 of the Convention. As an indication of the seriousness with which he views this turn of events, the President has asked that the Chairman of the Committee of Ministers, the President of the Parliamentary Assembly and the Secretary General of the Council of Europe be informed immediately.*

*The President also notes that notwithstanding the Court's request of 22 April 2010 for clarification of the circumstances surrounding Mr Labsi's extradition, your letter of 26 April failed to explain why the Rule 39 measure was not complied with. The President expects your authorities to provide an explanation. He would in particular request your authorities to confirm or deny reports that the spokesperson of the Ministry of the Interior declared that his authorities were prepared to run the risk of being found to be in breach of the Convention and that other States which had failed to comply with a Rule 39 measure only had to pay 'a few thousand euros'".*

- **Spanish** lawyers highlighted the case of *Olaechea v. Spain*,<sup>211</sup> in which Rule 39 measures were granted to a Peruvian national at 7 pm in the afternoon, however the applicant was put on a plane and was returned to Peru, directly from the prison hospital. In the examination of the merits of the case, the ECtHR found a violation of Art. 34 in this case.
- **Turkish** lawyers stated that governmental officials in their country allege a lack of timely communication and notification to the authorities regarding the granted interim measure as the reason behind cases of non-compliance. However, Turkish lawyers believe this not to be entirely true. In some cases the Rule 39 orders were communicated on time but the officials still proceeded to carry out the deportation of the applicants in violation of the Courts orders. Furthermore, Turkish lawyers reported that in the case of *M.B. and others v. Turkey*, where interim measures were granted by the ECtHR to prevent deportation of the applicants, the Turkish government proceeded to their deportation disregarding the Court's order. This case concerned recognized refugees by UNHCR Turkey who were deported to Iran.<sup>212</sup> In *M.B. and others v Turkey* the Court did not find a violation of Art. 34 ECHR however, as the deportation to Iran took place only 13 minutes after the government was informed of the application of the Rule 39 measure by the Court. Therefore it had not been established that the government failed to demonstrate the necessary diligence in complying with the interim measure.

In the case of *D.B. v Turkey*, the government failed to provide access for a lawyer to an applicant in detention with due diligence by only allowing access 18 days after the deadline therefore the Court held that there was a violation of Art. 34 ECHR. The seminal judgment of *Mamatkulov and Askarov v Turkey* clarified the legally binding nature of Rule 39 measures "*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*".<sup>213</sup>

- **Ukrainian** lawyers referred to some cases where the State Border Guards Service of Ukraine and the Ministry of Internal Affairs when deporting asylum-seekers ignored Rule 39 orders by the Court. As recently as the end of March 2012 the Ukrainian authorities ignored a Rule 39 indication by the Court to suspend the expulsion until further notice of a Kyrgyz

<sup>211</sup> ECtHR: *Olaechea v. Spain*, (Application No. 24668/ 2003), 10 August 2006. The AIRE Centre represented the applicant in this case.

<sup>212</sup> ECtHR: *M.B. and Others v. Turkey*, (Application No. 36009/08), 15 June 2010

<sup>213</sup> ECtHR, *Mamatkulov and Askarov v Turkey* (Application No. 46827/99) Para 128.

national who feared return to the Kyrgyz Republic or to Kazakhstan on the basis of her political activities. In response UNHCR published a press release condemning the actions of the Ukrainian authorities in violation of international law and the decision of the ECtHR.<sup>214</sup> Despite the Rule 39 measure the Ukrainian authorities proceeded with the applicant's removal in violation of Art. 34 ECHR.

- Regarding the **United Kingdom** reference was made to the case of *Sivanathan v. the United Kingdom*,<sup>215</sup> concerning a Sri Lankan asylum seeker of Tamil origin who had applied for a Rule 39 measure without a legal representative and was successful. According to the British authorities the applicant, upon information of the success of his Rule 39 application, allegedly declared that he wished to leave his wife and children and go back to Sri Lanka voluntarily. Strangely, the applicant had not informed his wife and children of his intentions as such, nor was there a written record of his agreement to return to Sri Lanka. An agent of the British government wrote to the Court stating that *"The Government apologizes to the Court that they are not in a position to provide a copy of the original document signed by the applicant in this case for the reasons set out above. However the Government assure the Court that Mr Sivanathan did sign a document expressing his wish to leave the United Kingdom and return to Sri Lanka and that his consent was both voluntary and informed."* The ECtHR believed the UK Border Agency and subsequently struck the case out. Though this is not a clear-cut case of non-compliance by the Court, the question of the voluntariness of the applicant's return to Sri Lanka needs to be examined carefully.

Although the majority of CoE Member States are complying with their obligations under Rule 39 measures the growth of non-compliance is a worrisome phenomenon. Any act of non-compliance undermines the very essence of the human rights the Convention strives to protect. States must not try to circumvent their obligations by raising issues such as lack of notification of the Rule 39 measure prior to expulsion or other 'objective impediment' reasoning. In view of the potentially irreversible harm cause by expulsion those involved in such procedures should specifically check the status of any Rule 39 measures submitted on behalf of the applicant. It is also recommended that as an additional measure the Court apply Rule 40 thereby ensuring urgent notification of the submission of an application including a Rule 39 measure to the Respondent Government thus ensuring that no removal action is taken. In addition Rapporteur Darchiashvili in the PACE report on Rule 39 measures recommends open and transparent expulsion procedures and record keeping to prevent situations such as the one that occurred in *Sivanathan v the United Kingdom* as highlighted above.<sup>216</sup>

Commissioner Hammarberg's comments in this respect are noteworthy *"The interim measures ordered by the Court should always be strictly respected by member states. Failure to follow the Court's measures sends a regrettable message to other states and seriously jeopardises the effectiveness of the European system of human rights protection. Rule 39 exists to protect people's lives."*<sup>217</sup>

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<sup>214</sup> UNHCR Press Release, *The UN Refugee Agency condemns denial of access to territory for 2 nationals of Kyrgyzstan in Kyiv Boryspil in violation of the international law and decision of the European Court of Human Rights*, 1 April 2012.

<sup>215</sup> ECtHR: *Sivanathan v. the United Kingdom* (Application No. 38108/2007), 3 February 2009 *"The Court notes that the Government are unable to provide a copy of the document signed by the applicant but accepts that such a document was signed. It further accepts that the applicant's return to Sri Lanka was entirely voluntary and that he gave written informed consent to that effect."*

<sup>216</sup> Council of Europe PACE Report *Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights*, Doc 12435 (November 2010). p. 14

<sup>217</sup> Commissioner Hammarberg blog post *"European states must respect Strasbourg Court's orders to halt deportations"* posted on 25 June 2010.

It is essential that States abide by their obligations under the ECHR at all times and in respect to all persons within their jurisdiction including in cases where the State exercises its jurisdiction outside its borders.<sup>218</sup> The ECtHR itself should take all necessary steps in order to ensure maximum compliance with its orders and investigate incidents of non-compliance. To this end, the Court should conduct rigorous scrutiny of the explanations provided by the States in cases of non-compliance. Furthermore, the Committee of Ministers should produce yearly reports providing information on instances of Rule 39 non-compliance by the States. Finally, in cases of clear non-compliance the Court can determine a clear violation of Art. 34 ECHR and investigate such cases including any follow-up measures by national authorities to ensure that it does not happen again.

### **ECRE/ELENA Recommendations**

Member States must comply with the letter and spirit of interim measures indicated by the Court under Rule 39. In line with Recommendation 1956 (2011) the Committee of Ministers should establish a mechanism for follow-up and investigation in cases of non-compliance. Statistical information on non-compliance should also be published.

The Committee of Ministers in cooperation with the European Court of Human Rights should closely monitor the extent of Member State compliance with Rule 39 measures. Individual practitioners and NGOS should facilitate this process by reporting incidences of non-compliance and/or publish statements in this respect, as soon as such action is known.

Member States should establish coherent and streamlined follow-up mechanisms for Rule 39 interim measures to ensure all relevant authorities take cognisance of such Court decisions.

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<sup>218</sup> On State's obligations under the ECHR applying extra-territorially see ECtHR: *Hirsi Jamaa and Others v. Italy*, (Application No. 27765/09), 23 February 2012.

### 3.5 Impact of Rule 39 measures on the national procedure

Sometimes the impact of a Rule 39 interim measure may not only suspend an expulsion decision in a particular case pending examination before the ECtHR but it may also have an impact either directly as a specific indication by the Court or indirectly through the national authorities' response to the Rule 39 interim measure. This section is divided into two parts (3.5.1. and 3.5.2) on the basis of questions 17 and 18 in the Questionnaire.

#### 3.5.1 The effect of Rule 39 measures at the national level

Question 17 refers quite broadly to the potential 'influence' of Rule 39 grants but where possible the contributors have tried to specify in what way the Rule 39 measure has either implicitly or explicitly affected the national procedure including the examination of the claim if it is still pending.<sup>219</sup> The responses here are distinguished from specific indications in the Rule 39 measure and therefore the issue of compliance. Impact on an individual case or a general impact when a country receives a number of Rule 39 requests against it for example for certain group of applicants is addressed here. This section illustrates the secondary effects of Rule 39 measures.

*If the Court imposes Rule 39 interim measures, does this influence local procedure when the case is reviewed?*<sup>220</sup>

The majority of lawyers from the Member States within the scope of this research replied that when the Court imposes Rule 39 interim measures, this influences the national procedure concerning that application when the case is reviewed.

Contributors in **Austria, Belgium, Bulgaria, Cyprus, Denmark, Germany, Italy, Russia, Slovakia, Spain, Sweden, Turkey** and **Ukraine** reported instances where the granting of Rule 39 interim measures did have an impact in the local procedure when a case was reviewed. Contrary to this, lawyers in **Finland, Greece, Norway** and **the Netherlands**, reported that granting of Rule 39 measures does not have any impact on the case when it is reviewed on local level,

- **Austrian** lawyers stated that as for Rule 39 measures granted in Dublin cases, the Austrian Courts have generally suspended deportations of the applicants concerned. However, apart from Dublin cases concerning particularly vulnerable persons, Austrian authorities have so far made limited use of the "sovereignty clause" of the Dublin II Regulation after the *M.S.S v. Belgium and Greece* judgment. Therefore the granting of Rule 39 measures has not had an ancillary effect in the context of general Dublin cases.
- Some lawyers reported a general positive effect of Rule 39 interim measures on the local procedure. In **Belgium**, the granting of interim measures sometimes results in the national authorities becoming more cautious in their approach when reviewing a case. Belgian lawyers also noted that the ECtHR practice of asking lawyers for further information in the context of their Rule 39 application helps to develop a more concrete and positive approach of the arguability of the claim in many of the cases in question. Belgian lawyers consider that this practice should further positively influence the national Administrative Courts that

<sup>219</sup> It should be noted under the general admissibility criteria to the ECtHR that applicants can only apply there upon the exhaustion of domestic legal remedies. However if it can be demonstrated that the national remedies are in-effective in practice then the applicant can submit a request to the ECtHR.

<sup>220</sup> Question 17, Questionnaire of the research in Annex A. This question includes feedback provided by lawyers in the Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom. Lawyers in Ireland, Hungary and the United Kingdom replied not to be aware of the impact of granted Rule 39 measures on the local procedure when the case is reviewed.

tend to stick to a mere control of legality as regards deportation orders without further questioning the parties. The Council of Aliens' Litigation allegedly has a very formalistic approach and proceeds with an examination of the legality at decision time whereas the ECtHR enters into a more concrete evaluation of the risk under Art. 3 ECHR. Therefore, Belgian lawyers aspire that in the future, an indication of Rule 39 measures will have a positive impact on Administrative Foreigner Law at the national level.

- In **Bulgaria**, lawyers reported that in the case of *M. and Others v. Bulgaria*<sup>221</sup>, the granting of interim measures by the ECtHR caused the detention order concerning the applicant to be revoked.
- In **Cyprus**, the granting of interim measures against the government is viewed in a political way because this is regarded as a form of "external supervision". Cypriot lawyers provided the example of one of the cases of Syrian Kurds in which the interim measure is still in force, whereby the national judge appears to be more careful and more aware that his decision will be eventually be scrutinised in the context of ECtHR procedures. On the other hand, it may be that occasionally Cypriot judges feel that their jurisdiction and their powers have been ignored if a lawyer goes directly to the ECtHR requesting interim measures.
- **Danish** lawyers reported that in case of Rule 39 interim measures granted when the applicant is in the preliminary (Dublin II Regulation) phase of the asylum procedure, before the case of *M.S.S. v. Belgium and Greece* they would remain in this phase but the forced return would not be pursued. After the judgment in *M.S.S v Belgium and Greece*, Denmark started to examine the asylum applications for Dublin transfers to Greece cases when removal was prevented by Rule 39 interim measures.<sup>222</sup> However, in previous years when there were a number of Rule 39 interim measures granted for persons being returned to Sri Lanka, re-opening of the asylum cases was requested by lawyers in Denmark but the Refugee Appeals Board at that time denied to re-open them.
- In **Germany**, a specific consequence of the great number of Rule 39 interim measures granted in Dublin cases in January 2011 was that the German Government decided that Art. 3(2) (sovereignty clause) of the Dublin II Regulation was applicable to all asylum seekers who enter Germany through Greece for a certain period of time. The Federal Office of Asylum and Migration has also stopped transfers in individual cases (especially concerning Somali applicants) to other southern Mediterranean/ European countries, such as Italy.
- Regarding **Italy**, lawyers reported that sometimes the granting of interim measures influences the national authorities' examination of the claim when the case is reviewed.
- The **Russian** lawyers reported the case of *K. v. Russia*.<sup>223</sup> When the ECtHR granted interim measures to the Afghan citizen involved in the case, he was also granted refugee status in Russia even though his initial application for refugee status had been rejected.
- In **Slovakia** the impact at the national level of a Rule 39 decision depends on the individual circumstances of the case. For example in a pending case before the ECtHR the impact of

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<sup>221</sup> ECtHR: *M. and Others v. Bulgaria* (Application No.41416/08), 26 July 2011.

<sup>222</sup> ECtHR: *M.S.S v. Belgium and Greece* (Application No. 30696/09), 21 January 2011.

<sup>223</sup> This case was submitted by Civic Assistance (Memorial's branch in Moscow); however it has not yet been communicated and therefore is not publicly available. The Court has already applied Rule 39 in this case. For further information contact the ELENA National Coordinator for Russia.

Rule 39 has led to the Slovak authorities canceling the decision on administrative expulsion. However in the cases of extradition of suspected terrorists to Algeria or Russian Federation it does not have a direct effect on their extradition or asylum procedure.

- The **Spanish** lawyers mentioned 36 cases in which the Spanish Court changed its initial decision to expel the asylum seekers and authorized their stay in Spain on the basis of Rule 39 interim measures being granted by the ECtHR.
- Lawyers in **Sweden** stated that despite the fact that a granted interim measure does not have any automatic substantive effect on the examination of the claim, in a few cases the Swedish Migration Board, of its own motion, has taken a positive decision and decided to grant a permanent residence permit to the individual concerned.
- In **Turkey**, the fact that an interim measure has been granted has generally a positive influence on both the Courts and the authorities. Though the Turkish authorities do not like such decisions, the interim measures have the effect of stopping deportations and the authorities take the individual applicant's claims more seriously thereafter.
- **Ukrainian** lawyers reported the opposite effect of Rule 39 measures, having limited impact on the local procedure. Even though Rule 39 indications are valid under Ukrainian law, faxed letters especially in a language that is not Ukrainian are not accepted as evidence during the hearings. For example, national judges have in the past rejected ECtHR letters with Rule 39 indications provided by lawyers in proceedings. Nevertheless, in the majority of cases, the State Prosecutor's Office, which is responsible for extradition, has suspended extradition for as long as the case was pending before the ECtHR.
- In **the Netherlands**, the fact that interim measures were granted in a specific case caused a dispute while the case was reviewed by the national Council of State (Administrative Law Section), regarding whether a granted interim measure suspends the transfer period under the Dublin II Regulation. The Court stated in particular that [unofficial translation] *"[i]n accordance with art. 20, paragraph 1 under Dublin Regulation, the transfer should be carried out in accordance with national law of the requesting Member State and at the latest within six months of acceptance of the request by the other Member State. Art. 20 (1)(e) provides that national legislation should allow courts or competent bodies to decide that a decision may suspend the implementation of the transfer. However, national legislation does not provide that an interim measure suspends the transfer period. In a previous case (25 May 2004, no. 200400863/1), the Council of State ruled that an asylum seeker in respect of whom an interim measure has been issued, enjoys lawful residence in the Netherlands. It follows from another case (11 November 2011, no. 201007173/1/V4), that an interim measure should be regarded as a factual barrier relating to the postponement of the moment of transfer – in this case to Italy. This means that the interim measure affects the national legal system. Now that the asylum seeker enjoys lawful residence in the Netherlands and may therefore not be expelled, national legislation must be considered to meet the possibility that an interim measure suspends the time limit of transfer to the responsible Member State."*<sup>224</sup> This specifically raises the issue of whether Rule 39 interim measures have suspensive effect on the calculation of the time period for transfer of applicants in accordance with the Dublin II Regulation.

These examples reveal that the impact of a granted Rule 39 measure on Member States can have an effect similar to that of an indirect control mechanism, in the sense that Member States become more cautious in their decision making once an interim measure has been granted. This implicit

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<sup>224</sup> The case no. before the Dutch Council of State is Nr. 201105103/1/V4. For further information contact the ELENA coordinator for the Netherlands.

effect gives the State Party in question the impression of “external supervision”. In some Member States, the granting of a Rule 39 measure can further constitute the basis for the State Party itself to recognize the protection needs of the applicants concerned and therefore grant them status thereby depending on the circumstances of the case making it inadmissible before the ECtHR. Granted interim measures can, under certain circumstances, fuel national policy changes. An example of this is the case of Germany, which, after a series of Rule 39 measures being granted for applicants about to be returned to Greece in January 2011 in relation to the Dublin II Regulation, decided to formally suspend transfers there for a fixed period of time.

### 3.5.2 The impact of the Rule 39 measures on the detention of applicants and their permission to stay

This section focuses on the impact of the granting of a Rule 39 measure for the individual concerned on his/her detention or his/her permission to stay in the respondent Member State. Two questions are dealt with:

*If deportation is suspended by Rule 39 interim measures, what are the consequences on detention pending deportation?*

*What kind of stay permit is given when the case is pending at the Court?*<sup>225</sup>

It should be noted that there is no obligation on Member States to grant a residence permit pending a procedure before the ECtHR. However, persons should not be left without any documentation with regard to their right to remain on the territory and therefore at risk of deportation before the examination of their claim at the ECtHR. This should also be considered in light of the fact that the proceedings before the ECtHR can be very long in practice.

Lawyers in **Austria, Belgium, Bulgaria, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands** and the **United Kingdom** reported that as a result of Rule 39 interim measures, which suspend deportation, the asylum seeker is usually released from detention. Only in **Cyprus, Lithuania, Turkey** and **Ukraine** did lawyers report incidents of prolonged detention when the ECtHR issued a Rule 39 indication.

No type of residence permit is granted for applicants subject to a Rule 39 indication by the Court in the following countries: **Belgium, Bulgaria, Denmark, Finland, Spain** and **Sweden**. In **Germany** and the **Netherlands** respectively a special paper or card is issued showing that the applicant is legally residing in that country pending proceedings before the ECtHR. However these documents do not have the legal basis of residence permits.

- In **Austria**, when a Rule 39 request is granted the applicant is released from detention as their deportation is not imminent and therefore the deprivation of their liberty is not justifiable under Austrian law. In two instances in which the release of applicants was delayed despite the granting of a Rule 39 measure for no specific reason, complaints at the national level were filed successfully and compensation was granted to the individuals concerned for their time spent in detention. With regard to Rule 39’s impact on residence status, Austrian lawyers mentioned that asylum seekers in Dublin-Greece cases, who were granted a Rule 39 measure, were mostly admitted to the national asylum procedure, which

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<sup>225</sup> Question 18, Questionnaire of the research in Annex A. This question includes feedback provided by lawyers in the Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Norway, Russia, Slovakia, Spain, Sweden, the Netherlands, Turkey, Ukraine, the United Kingdom. Only contributors from the following countries responded to the question concerning a stay permit: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Italy, Lithuania, Russia, Slovakia, the Netherlands and Turkey.

provides for a temporary residence permit.

- **Belgian** lawyers stated that when the interim measure is granted ‘until further notice’ there is no standard time at which the asylum seeker is released from detention. The asylum seeker could be released either when the legal detention period has elapsed or sometimes sooner, depending on the discretion of the detention authorities. In the case of *S.P. v. Belgium* decision, a release 11 days after the measure had been granted was not found to be unreasonable.<sup>226</sup> In the case of *Yoh-Ekale Mwanje v. Belgium*, the Rule 39 was indicated on 22 February and the applicant remained detained until 9 April. After testing this detention time frame against the principle of proportionality, the ECtHR found in this case a violation of Art. 5 ECHR.<sup>227</sup> As regards the impact of Rule 39 on residence status of the applicant, it was noted that there is no type of permit attached to granting of a Rule 39 interim measure. When an applicant’s asylum claim has been rejected, they do not receive any type of residence permit but can still invoke the “*force majeure*” principle in order to extend the validity of the right to accommodation.
- **Bulgarian** lawyers noted that in the case of *M. and Others v. Bulgaria* the granting of interim measures by the ECtHR led to the revocation of the detention order.<sup>228</sup> However, it was underlined that Bulgaria does not issue any type of permit on the basis of Rule 39 measures. Therefore the applicant remains undocumented and only receives a written order according to which he or she is obliged to report to the Police on a daily basis.
- **Cypriot** lawyers reported that the granting of a Rule 39 measure does not suspend the detention of the applicants. It is a matter of taking the necessary legal action at national level for detention i.e. recourse or *habeas corpus* application depending on the circumstances of the case and if the available remedies are exhausted perhaps the detention itself may become also another reason to appeal to the ECtHR. As to the applicant’s residence status, the Minister of Interior may release the applicant with orders that he/she makes all the necessary arrangements to issue a 6 months temporary working permit, which may be renewed, provided the Ministry of Labour approves their employment by an employer permitted to employ third country nationals. In practice, this means that the applicant has to initiate procedures in order to arrange his/her residence, which is in the majority of the cases hopeless and leads to an undocumented situation in the country once again. Although the issuing authority of the residence permit is the Migration Department of the Ministry of Interior, in fact the deciding authority of whether a residence permit may be eventually granted is the Ministry of Labour which rarely grants approval for employment of third country nationals in any kind of employment in Cyprus particularly now, in the context of the economic crisis. As a result, the applicant is still vulnerable to detention and in a ‘limbo’ situation. For detained applicants, the fact that there is a Rule 39 measure preventing removal may lead to lengthier time in detention as the limited practice with Rule 39 interim measures shows that the authorities have a “punitive” approach against persons who have used this remedy.
- In **Denmark**, lawyers mentioned that the applicant is released and the return of the applicant is suspended. However, no stay permit is granted to the applicant, who remains in a “limbo” situation. During this “limbo” situation the person remains in a reception centre and receives necessary support. The applicant’s status as well as the rights connected to that remains unchanged. However, the applicant is not in danger of removal during this time, as the obligation to leave the country is suspended.
- In **Finland**, lawyers reported that the detention order issued while the deportation was

<sup>226</sup> ECtHR: *S.P. v. Belgium*, Decision (Application No. 12572/2008), 12 June 2011.

<sup>227</sup> ECtHR: *Yoh-Ekale Mwanje v Belgium* (Application No. 10486/10), 20 December 2011.

<sup>228</sup> ECtHR: *M. and Others v. Bulgaria* ( Application No. 41416/2008), 26 July 2011.

pending is cancelled after granting of Rule 39 interim measures. Nevertheless, no specific permit is issued for the applicant while the case is pending before the ECtHR.

- In **Germany**, if a Rule 39 interim measure is granted and an application is pending before the ECtHR the German authorities will issue a special paper stating that they are aware that the person is still staying in Germany due to a pending case before the Strasbourg Court. This paper should be sufficient in order to enable the applicant to receive social benefits and for identity checks. Some authorities may issue stays of ‘tolerance’ or prolong the asylum application stay permit.
- **Greek** lawyers mentioned that upon granting of Rule 39 interim measures the applicant is released from detention and may be granted a residence permit for asylum seekers, if they had previously applied for asylum.
- **Irish** lawyers highlighted that detention in the context of deportation can only occur in order to effect deportation. It is likely that if a person were detained that they would be granted a conditional release pending a full decision in the same manner as if the person had secured an injunction in the High Court.
- In **Italy**, lawyers reported that it is possible, if the maximum detention period has not been completed, despite the application of Rule 39 measures that the applicant remains in detention. As to their residency status, Italian lawyers mentioned that there is no specific type of permit that is given on the basis of a Rule 39 measure, as there is no obligation under the Italian law, that the State provides the ECtHR applicant with a residence permit. The applicant’s status is decided based on the facts of the case and the previous residency status of the applicant. For example, if the applicant had a previous permit, this can either be extended or not. In the latter case, his permission to remain in the country would be tolerated. When deportation orders are pending against the applicant it is possible that the applicant with their legal representative can go to the local office of the Ministry of Home Affairs (Questura della Polizia di Stato), present the order of the ECtHR and request the Italian authorities to suspend the deportation orders against them. However, it is possible that the Italian authorities decide not to comply with the interim measures. In this case, the applicant is still at risk of deportation.
- In **Lithuania**, lawyers provided an example not directly related to Rule 39 but actually to prioritization under Rule 41 of the Court. In an Art. 3 ECHR claim of a rejected asylum seeker in Lithuania, even though the ECtHR did not grant an interim measure but gave priority to the application and communicated quickly with the Lithuanian government, the Government decided to suspend deportation. However, the Lithuanian Courts decided that the suspended deportation constituted a valid ground to continue detention of the applicant.<sup>229</sup> In general it was reported that in Lithuania, after the maximum detention period of the applicant elapses (which according to EU legislation is 6 months) the Lithuanian authorities no longer have the right to hold the applicant in detention. However, this is not applied in practice in all cases, and the issue of detention of asylum seekers is not resolved. Concerning the applicant’s residence status, it was reported that when the Lithuanian Government adopts legislation transposing the maximum periods of detention according to the Return Directive, some status of tolerance will be provided to interim measures beneficiaries.
- **Dutch** lawyers reported that when Rule 39 measures are granted detention orders are lifted, according to Aliens Circular C22/5.4. No residence permit is provided on the basis of

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<sup>229</sup> Subsequently another application to the ECtHR was submitted, alleging a violation of Art. 5 ECHR, which was declared inadmissible (for further information on this see ECtHR: *Batalov v. Lithuania*, (Application No. 30789/04), Decision issued on 15 November 2005).

a Rule 39 decision. Only a card is provided showing that the applicants are legally residing in the Netherlands. This is not a residence permit.

- In **Norway**, lawyers reported that the applicant is released when a Rule 39 measure is granted, as there is a legal restriction on detention duration when deportation is not imminent.
- **Russian** lawyers reported that if the applicant is in detention, they are released only after the maximum detention period has expired (usually this is a one year term): see *Ergashev v. Russia*<sup>230</sup> and *Elmuratov v. Russia*.<sup>231</sup> As regards the applicant's residence status under these circumstances, it was stated that in a number of extradition cases following a Rule 39 measure the Russian Federal Migration Service provided applicants with a 1 year temporary permit in accordance with Decree No. 274 of 09.04.2001 of the Russian Government "*On granting temporary asylum in the Russian Federation*". For example, temporary asylum was granted to *U. Ergashev* (Uzbek citizen) following a Rule 39 interim measure being granted.
- In **Slovakia** the granting of an interim measures may result in the release from detention of the applicant concerned and tolerated stay being granted to him/her. In addition the Director of the Alien and Border Police may cancel the decision on administrative expulsion. Tolerated stay is similar to the German permit of 'Duldung' and it can be provided for a maximum of 180 days with possible prolongation for various reasons. This tolerated stay grants minimum rights to its holder for example right to remain lawfully in Slovakia.
- Lawyers in **Spain** mentioned that the applicant is released from detention and their expulsion is suspended. However, no other measures are taken in relation to ECtHR's indications.
- **Swedish** lawyers stated that the applicant is given a decision suspending the expulsion until the Court has reached a final judgment. However, such a suspension does, for example, not give the applicant the right to work legally in Sweden but otherwise gives the applicant the same rights as asylum seekers.
- In **Turkey**, in the majority of cases a Rule 39 interim measure stops the deportation of the applicant but they still remain in detention, sometimes even if they have already been granted refugee status. In some cases the detention period is reduced. Consequences as to the applicants' status in the country vary depending on their circumstances. On a case-by-case basis it is possible that the applicants are not given any residence permit or are kept in detention, while in other cases they are released and issued with a temporary residence permit.
- In **Ukraine**, lawyers reported that the applicant is detained until the end of the proceedings before the ECtHR.
- Lawyers in the **United Kingdom** submitted that there was an issue concerning detention in their country in relation to Somalis after the *Sufi and Elmi v. the United Kingdom* judgment<sup>232</sup> became final, as not all Somalis were released from detention. British lawyers attributed this to the fact that some national judges were resistant in accepting *Sufi and Elmi* judgment based appeals across the Board and provided as an example, indicative of this fact, the case of *AMM and Others v. the Secretary of State for the Home Department*.<sup>233</sup>

<sup>230</sup> ECtHR: *Ergashev v. Russia* (Application No. 12106/09), 20 December 2011.

<sup>231</sup> ECtHR: *Elmuratov v. Russia* (Application No. 66317/09), 03 March 2011.

<sup>232</sup> ECtHR: *Sufi and Elmi v. the United Kingdom*, (Application No. 8319/07 and 11449/07), final on 28 November 2011.

<sup>233</sup> Upper Tribunal, Immigration and Asylum Chamber: *AMM and Others v. the Secretary for the Home Department* heard

The findings under this section suggest a divergent Member State practice. In some Member States detention is continued even if the pending deportation is suspended by Rule 39 measures, but in the majority of cases it is not. With regard to the applicant's permission to stay in the Member State pending the ECtHR's assessment of the claim, the practice varies significantly indicating a potential 'legal limbo' for applicants in this situation. This also affects the rights and entitlements of the applicant during their stay in the Member State concerned.

Taking into account the fact that the average length of proceedings before the ECtHR has increased in recent years,<sup>234</sup> it is extremely problematic that applicants remain either in detention or without any status or rights on a Member State's territory pending the examination of their claims. Although the application of Rule 39 is an interim measure in itself and is not necessarily an indication of the Court's ruling on the substance of a claim, it does indicate that there is a *prima facie* risk of a violation of a Convention right. Therefore leaving applicants in a 'legal limbo' situation increases the risk of deportation in violation of the Convention. Granting a temporary permit of stay pending the examination of the applicant's claim before the ECtHR should always be considered favourably by Member States at least as a matter of best practice. Similarly when removal is not foreseeable in the immediate future applicants should be released from detention pending the Court's assessment of their claim.

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at Field House, on 13- 21 June and 15 July 2011, CG [2011] UKUT 00445 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 25 November 2011.

<sup>234</sup> The findings of the 2011 Annual Report of the ECtHR stating that the constant and progressive increase of applications before the Court has mounted pressure to its structures and has made it difficult to keep the length of the ECtHR proceedings within acceptable time limits. ECtHR, Annual Report 2011, pg.11.

## Conclusion

This report examines the role and application of ECHR Rule 39 interim measures for asylum legal practitioners in the Council of Europe Member States surveyed. It has highlighted a number of areas, which show both the important role that Rule 39 plays in safeguarding the rights of those in need of international protection and also the necessity of further reform at the national level to secure the rights of refugees and other migrants.

Amongst the findings, this analysis has shown that there is very little information available on the application of Rule 39 in the countries surveyed. The Council of Europe has published a number of documents providing guidance on the admissibility criteria of the Court including the Practice Direction in Rule 39 but still lawyers from only a small minority of State Parties submit requests for interim measures to the Court. An additional factor is the limited training opportunities available on the applicability of Rule 39 in asylum cases.

Although there is no express right to asylum under the European Convention on Human Rights, over the years, the Court has interpreted Art. 3 ECHR so as to incorporate a right not to be sent back to a country where there is a real risk of torture or other degrading or inhuman treatment. It is clear that Rule 39 measures are predominantly applicable in deportation or expulsion cases where there is a real risk of a violation of Art. 3 ECHR upon return to a particular country. However, Rule 39 has also been implemented to indicate to Member States to provide accommodation, and ensure access to medical treatment whilst in detention depending on the individual circumstances of the claim.

Until 2011 the number of Rule 39 requests increased exponentially, which created pressure on the Court's workload. In response, the Court found innovative ways to deal with similar and repetitive cases concerning returns to Iraq and Greece under the terms of the Dublin II Regulation. Such responses by the Court need to be analysed further and evaluated for their impact on Rule 39 requests and Member State's actions and policies.

The report's findings in relation to why recourse to the European Court of Human Rights is necessary and any practical obstacles that exist at the national level to submitting Rule 39 requests to the Court highlights a number of areas of concern in Member State practice. The lack of suspensive effect of appeal procedures in national jurisdictions or its non-automatic nature was recorded both as an obstacle impeding access to the Court as well as a reason why recourse to ECtHR is indispensable in the first place.

Expedited deportation procedures and the credibility assessment practice in processing asylum claims at the national level were found to be among the other main reasons why legal practitioners take cases to the ECtHR. In particular, the use of accelerated asylum and/or expulsion procedures creates a serious obstacle to the right of individual application to the Court in accordance with Art. 34 ECHR. This research clearly demonstrates the failure of States to implement truly effective national legal remedies.

The report contains recommendations for Member States to better guarantee access to legal remedies and to the Court in their respective jurisdictions. Action is necessary to better ensure asylum seekers' access to the Court and to specifically address the needs of particularly vulnerable applicants.

ECRE/ ELENA acknowledges that some of these proposals will require incremental development and the possibility of providing support and/or technical assistance to particular Member States. Notwithstanding this, the on-going discussion on the reform of the Court provides an opportunity to consider the findings of this report in this respect.

It is hoped that this overview of the current application of Rule 39 measures in asylum cases, will contribute to a broader discussion on how to improve access to the European Court of Human Rights and equally to secure the rights of asylum seekers and refugees in Member States in ensuring that all asylum seekers are provided with a fair opportunity to have their claims for international protection examined.

## **Annex A**

### **1. List of ECRE /ELENA Recommendations**

1. The Practice Direction on Rule 39 should be made available in the official languages of all State Parties to the Council of Europe in order to raise awareness among legal practitioners and contribute to a more effective use of this Rule of the Court.
2. The Council of Europe should develop a comprehensive strategy and action plan on Rule 39 training with the consultation of UNHCR, non-governmental organisations and other relevant stakeholders. Such training should also incorporate the general Convention legal framework and the admissibility criteria for applications before the Court.
3. Where a lead case concerning the safety of return to a particular country is pending before the European Court of Human Rights, Member States should suspend removals to that country.
4. The European Court of Human Rights should ensure that the applicant's legal representatives are informed of all requests for information to the respondent government concerning their application. The legal representatives should also be given the opportunity to respond to government's submissions to the Court in relation to their application.
5. Legal representatives submitting Rule 39 requests to the Court should ensure that such requests are accompanied by all necessary supporting documents, in particular relevant domestic Court, Tribunal or other decisions together with any other relevant material for the examination of the applicant's case where available.
6. In line with Resolution 1788 (2011) detailed statistical information on Rule 39 interim measures should be collected by Member States and made publicly available.
7. In line with Resolution 1788 (2011) Member States must guarantee both in law and in practice the right of individual petition to the Court under Article 34 including the right to submit Rule 39 requests where necessary.
8. Member States should ensure that legal representatives receive sufficient and timely notification of any enforcement or removal action being undertaken by the authorities concerning their clients.
9. Member States must ensure that the right to an effective remedy under Article 13 of the European Convention on Human Rights is respected both in law and in practice.
10. Member States must comply with the letter and spirit of interim measures indicated by the Court under Rule 39. In line with Recommendation 1956 (2011) the Committee of Ministers should establish a mechanism for follow-up and investigation in cases of non-compliance. Statistical information on non-compliance should also be published.

11. The Committee of Ministers in cooperation with the European Court of Human Rights should closely monitor the extent of Member State compliance with Rule 39 measures. Individual practitioners and NGOS should facilitate this process by reporting incidences of non-compliance and/or publish statements in this respect, as soon as such action is known.

12. Member States should establish coherent and streamlined follow-up mechanisms for Rule 39 interim measures to ensure all relevant authorities take cognisance of such Court decisions.

## **Annex A**

### **2. ELENA Rule 39 Research Questionnaire**



## **SURVEY ON RULE 39 INTERIM MEASURES**

**July 2011**

### **Introduction**

*Since 2010 there has been a substantial increase in the number of applications for Rule 39 interim measures before the European Court of Human Rights. This increasing demand for Rule 39 requests is a result not only of the problems faced by those seeking international protection in Europe, but also the lack of effective remedies at the national level. This survey aims to provide a brief snapshot of the experience of national lawyers within the ELENA network in applying for Rule 39 interim measures before the European Court of Human Rights.*

This survey will be circulated to all national ELENA co-ordinators and it is intended that these co-ordinators will also consult with national lawyers applying for Rule 39 interim measures on behalf of asylum seekers with regard to the asylum procedure, expulsions cases, detention, and other relevant areas of concern.

1. In what Section of the European Court of Human Rights is your State Party listed?
2. Do immigration and asylum lawyers in your jurisdiction have a lot of experience in applying for Rule 39 interim measures? If not, please provide an explanation.
3. Have lawyers in your jurisdiction received training on how to apply for Rule 39 interim measures before the Court? Please provide any further information.
4. In what types of asylum cases are Rule 39 interim measures typically requested in your country (for e.g. Dublin transfer cases, returns to Iraq, collective deportation, border cases, accelerated asylum procedures, etc)? Please explain the context.
5. Does your country collect detailed statistical information on Rule 39 interim requests? If so, could you please provide these statistics?
6. Do you know of any cases where Rule 39 interim measures were granted on the basis of a potential Article 3 violation on grounds other than expulsion, such as mistreatment related to detention, living conditions, access to medical treatment, etc? If so, please provide further information.
7. Do you know of any cases in which the Court requested specific indications from the State apart from preventing removal in expulsion cases when granting Rule 39 interim measures, for instance, ensuring lawyers access to asylum seekers in detention? If so, please provide further information, including whether the request was made at the Court's own discretion or at the instigation of the applicant.
8. Has the Court ever granted Rule 39 interim measures for Convention articles other than Article 3 in your jurisdiction? If so, on what grounds and in what context?
9. Do you have information on whether the Court has written to your Government indicating that it will impose interim measures for certain groups of applicants for a certain period of time? What reasons did the Court provide for these indications?
10. Are you aware of any cases where the Court has requested further objective information on the country of return from the State and/or legal representatives/UNHCR?
11. Are you aware of any cases in which the Court has granted interim measures for an indefinite term? Please provide any details you have.
12. Do you know of any cases where the Court requested further information before granting or when reviewing the nature of a Rule 39 interim measure? Please elaborate.

13. Has the Court ever applied unusual reasoning in its decisions when granting Rule 39 interim measures? One example of such unusual reasoning is the Court's 2010 decision in consideration of a transfer under the Dublin Regulation of a Somali applicant to Greece, when the Court took into account the security situation in South and Central Somalia in reaching its conclusion.

14. Do you know if and in what instances your State has ignored the Court's Rule 39 order for interim measures?

15. Are there any practical obstacles, such as accelerated procedures, to applying for Rule 39 interim measures on behalf of asylum seekers in your country? If so, please provide further information.

16. If your country is one in which lawyers request a lot of Rule 39 interim measures, can you provide any information on why recourse to the European Court of Human Rights is necessary? Are there effective national remedies available or does your country lack proper legal procedures and safeguards?

17. If the Court imposes Rule 39 interim measures, does this influence local procedure when the case is reviewed?

18. If deportation is suspended by Rule 39 interim measures, what are the consequences on detention pending deportation? What kind of stay permit is given while the case is pending at the Court?

19. Do you have any recommendations on how to improve the efficiency of Rule 39 measures, either by way of individual or general measures? If so please elaborate further.

20. Generally, please provide any further comments you may have on requests for Rule 39 interim measures:

## ANNEX A

### 3. 2010 Statistics on Rule 39 interim measures in the Member States surveyed<sup>235</sup>

Country	Total Number of Interim Measures Requested	Granted	Refused (including out of scope)
Austria	62	23	39
Belgium	153	100	53
Bulgaria	9	2	7
Cyprus	52	44	8
Denmark	56	29	27
Finland	193	81	112
Germany	79	1	78
Greece	26	10	16
Hungary	4	1	3
Ireland	2	0	2
Italy	52	19	33
Lithuania	0	0	0
The Netherlands	376	168	208
Norway	22	9	13
Portugal	0	0	0
Russia	77	17	60
Slovakia	6	3	3
Spain	14	0	14
Sweden	901	642	259
Switzerland	38	0	38
Turkey	53	7	46
Ukraine	29	7	22
The United Kingdom	1032	126	906

<sup>235</sup> This data was obtained by consulting the Country Profiles of the participating Member States on the Court's website.

## ANNEX A

### 4. 2011 Statistics on Rule 39 interim measures in the Member States surveyed <sup>236</sup>

Country	Total Number of Interim Measures Requested	Granted	Refused (including out of scope)
Austria	43	5	38
Belgium	31	6	25
Bulgaria	6	2	4
Cyprus	2	0	2
Denmark	14	9	5
Finland	67	11	56
Germany	76	1	75
Greece	5	0	5
Hungary	5	0	5
Ireland	7	0	7
Italy	21	5	16
Lithuania	1	0	1
The Netherlands	174	24	150
Norway	31	0	31
Portugal	1	0	1
Russia	64	6	58
Slovakia	2	0	2
Spain	40	33	7
Sweden	566	26	540
Switzerland	67	7	60
Turkey	58	3	55
Ukraine	33	4	29
The United Kingdom	776	34	742

<sup>236</sup> This data was obtained by consulting the Country Profiles of the participating Member States on the Court's website.

## ANNEX B

### 1. Guide to submitting a request for interim measures pursuant to Rule 39

This guidance note should be read in conjunction with the Practice Direction on Requests for Interim Measures (Rule 39 of the Rules of the Court).<sup>237</sup> Applicants or their legal representatives, who make a request for an interim measure pursuant to Rule 39 of the Rules of Court, should comply with the requirements set out in the Court's Practice Direction. Failure to comply with the conditions set out in the Practice Direction may lead to such cases not being accepted for examination by the Court.

#### Rule 39 of the Rules of Court:

- 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.*

If the Court is reliably informed that a violation is about to take place, it can direct the Member State concerned to take interim measures to prevent the violation occurring. Interim measures are temporary actions to be taken before the Court's formal examination of a case is completed. For example, the Court can direct a Member State not to send a person to another country where they might be at risk of torture or another violation of the Convention.

#### I. Requests to be made by Fax or Registered Letter

Requests for interim measures under Rule 39 in urgent cases, particularly in extradition or deportation cases, should be sent by facsimile or registered post/courier. The Court will not deal with requests sent by email. If sending the request by post please note that it should not be sent via ordinary postal delivery since there is a risk that the information will not arrive at the Court in sufficient time for the Court to examine the matter. The amount of time taken in delivering the post should also be considered. The request should be in one of the official languages of the Contracting Parties. All requests should bear the following title, which should be written in bold on the face of the request:

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<sup>237</sup> The Practice Direction on Interim Measures is available here: [ECHR Practice Direction on requests for interim measures under Rule 39 of the Rules of the Court](#)

Other practical information on the use of interim measures is available at:

<http://www.echr.coe.int/ECHR/EN/Header/Applicants/Interim+measures/Practical+information/>

Legal Representatives in asylum cases should also consult the UNHCR legal 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 available on the Refworld website.

**"Rule 39 - Urgent"**  
**Person to Contact: Name & Contact Details<sup>238</sup>**

**[In deportation or extradition cases]**  
**Date & Time of Removal & Destination**

**The postal address is:**

The Registrar, European Court of Human Rights, Council of Europe, F-67075 STRASBOURG  
CEDEX.France

**The dedicated fax number for Rule 39 request is:<sup>239</sup>**

**+33 (0)3 88 41 39 00**

If the Court has not responded to an urgent request under Rule 39 within the anticipated period of time, applicants or their representatives should follow up with a telephone call to the Registry during working hours (+33 (0)3 88 41 20 18)

**II. Making requests in good time**

Requests for interim measures 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 national decision has been given, it is advisable to submit a Rule 39 without waiting for the decision indicating the date on which it will be taken and any other supporting information. Applicants and their representatives should be aware that it may not be possible to examine in a timely and proper manner requests which are sent at the last moment.

**III. Accompanying information**

It is essential that requests be fully reasoned and accompanied by all necessary supporting documents, in particular relevant domestic court, tribunal or other decisions together with any other material, which is considered necessary to support the applicant's claim. The facts of the applicant's case and the articles of the ECHR invoked should also be included. Where the case is already pending before the Court, reference should be made to the application number allocated to it. In cases concerning extradition or deportation, details should be provided of the expected date and time of the removal, the applicant's address or place of detention and his or her official case reference number if known. Where possible a copy of the national decisions (administrative and judicial) relating to the applicant's case should be submitted to the Court.

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<sup>238</sup> The contact details should be as comprehensive as possible and it is best to provide a mobile number for the acting legal representative.

<sup>239</sup> As noted on the Court's website on 11 April 2012

## Annex B

### 2. Letter from Russian Organisations & Lawyers concerning the abduction and transfer of European Court of Human Rights' applicants to particular countries

**The President of the European Court of Human Rights  
The Commissioner for Human Rights  
The Committee of Ministers  
The Committee on Legal Affairs and Human Rights of PACE**

17 April 2012

We, representatives of the applicants before the European Court of Human Rights and human rights NGOs, are writing to draw the attention of the bodies of the Council of Europe to the facts of systemic breach of the Court's indications under Rule 39 of the Rules of the Court by the authorities of the Russian Federation in the cases where the applicants' extradition or expulsion to the countries where they may face high risk of ill-treatment is in question.

Since the Court's judgment in the case of *Iskandarov v. Russia* (no. 17185/05, 23 September 2010) where it found the Government responsible for the applicant's abduction and transfer to Tajikistan, several repeated incidents of that kind have taken place. In the cases of *Savriddin Dzhurayev v. Russia* (no. 71386/10), *Abdulkhakov v. Russia*, (no. 14743/11), *Koziyev v. Russia*, (no. 58221/10) and *Zokhidov v. Russia* (no. 67286/10) the applicants disappeared on Russian territory and were subsequently found in detention facilities in Tajikistan and Uzbekistan. The Court was informed about these incidents by applicants' representatives. By the letter from the Registrar of the Court of 25 January 2012 the Representative of the Russian Federation was informed of deep concern of the President of the Court about the situation, the negative impact it may have on the Court's authority, and "*possible continuation of such unacceptable incidents in cases of other applicants to whom the interim measures still apply on account of the imminent risk of violation of their rights under Articles 2 and 3 of the Convention in the countries of destination*". The Letter contained a list of 25 applicants before the Court whose expulsions and extraditions were suspended under interim measures issued pursuant to Rule 39.

In apparent disregard of the Court's disturbance at this unprecedented situation, an identical incident took place just two months after the Court's Letter. On 29 March 2012 Mr. Nizomkhon Dzhurayev, an applicant in a case pending before the Court (no. 31890/11), whose name was on the above mentioned list, disappeared in the Moscow Region. The Court was informed about this on the day that it occurred. On 2 April 2012 the Representative of the Respondent Government submitted that the authorities had no information on the whereabouts of the applicant. On 7 April 2012 it became known that the applicant was in custody in a detention facility of the national security service of Tajikistan. On the same day he appeared in a broadcast on the Tajik TV: he claimed that he had voluntarily come to Tajikistan and surrendered to the authorities.

It is noteworthy that the above-mentioned cases are substantially similar. Thus, Mr. Mukhamadrusi Iskandarov, Mr. Savriddin Dzhurayev and Mr. Sukhrob Koziyev, who were

on the wanted list in Tajikistan, were apprehended in Russia by unidentified persons and then forcibly moved without passports or other travel documents to the country of destination, where they all were forced to sign confessions and acknowledged under torture that they had surrendered voluntarily.

The case of Nizomkhon Dzhurayev is analogous to the previous cases that prompted the concern of the President of the Court. None of the above mentioned applicants could have been moved across the state border of the Russian Federation without the authorities' knowledge and consent. In the above-mentioned case of *Iskandarov* the responsibility of the Russian authorities for the applicant's abduction and transfer to Tajikistan was established by the Court. The fact that the incident of Nizomkhon Dzhurayev took place not only after the Court's judgment in the case of *Iskandarov* but also after the Court's Letter of 25 January 2012 underscores the Russian authorities' neglect to the Court's indications.

We believe that the repeated incidents which violate Russia's obligations under the Convention are only possible because of the complete lack of effective investigation into each case, and the resulting impunity of persons responsible for such grave violations. In addition the Russian Federation authorities have made no effort to remedy the situation by seeking the return of the applicants who were illegally rendered to the jurisdiction of the requesting states. The measures the authorities report about, turn out to be absolutely ineffective and cannot protect anyone from possible abduction. Namely, the authorities have reported that a copy of the Court's Letter of 25 January 2012 has been sent to all relevant national agencies. However since the applicants were illegally transferred across Russian borders, without passing border formalities, this pro-forma step has no practical impact. Also some of the applicants, whose names were on the above list of 25 persons, were summoned to the prosecutors' offices and questioned as to whether they had ever been threatened with abduction or if any attempted abduction had taken place. Clearly, this measure cannot exclude future attempts of abductions in the absence of political will to prevent such violations.

In all the cases the authorities claim that they are not responsible for transferring the applicants to Tajikistan. They also refuse to return the applicants' moved to Tajikistan and Uzbekistan, referring to the national sovereignty of those countries and lack of appropriate legal mechanisms. This reasoning is absolutely unconvincing since the above mentioned cases involved the applicants' disappearances and illegal secret transfers to the countries of destination. Such a process in reality can take place only when there are extra-legal relationships that exist between the Russian authorities and authorities in those countries.

In this connection we kindly ask you to insist that the Russian authorities remedy violated rights of Mr. Mukhamadruzi Iskandarov, Mr. Savriddin Dzhurayev, Mr. Sukhrob Koziyev, Mr. Nizomkhon Dzhurayev and Mr. Rustam Zokhidov by securing their return to Russia. Fulfillment of this will demonstrate the Russian Federation's respect for the obligations under the Convention and the importance of the protection of human rights to the Government.

Signatures:

*Memorial Human Rights Centre, Tatiana Kasatkina, Executive Director*

*Civic Assistance Committee, Svetlana Gannushkina, the Head*

*Anna Stavitskaya, Advocate, the applicants' representative before the European Court,*

*Elena Ryabinina, the applicants' representative before the European Court,*

*Head of the Program "Right for Asylum" of Human Rights Institute*

*Nadezhda Ermolayeva, Advocate, the applicants' representative before the European Court*

*and 12 lawyers and the applicants' representative before the European Court*

## Annex B

### 3. Chart documenting the abduction of ECtHR applicants in 2011-2012 in Russia

Name	<i>Abdulkhakov</i>	<i>Koziyev</i>	<i>Savridin Dzhurayev</i>	<i>Zokhidov</i>	<i>Nizomkhon Dzhurayev</i>
DOB	24.06.1979	17.04.1976	27.02.1985	21.12.1972	05.03.1967
Citizenship	Uzbekistan	Tajikistan	Tajikistan	Uzbek	Tajikistan
ECtHR app. №	14743/11	58221/10	71386/10	67286/10	31890/11
Rule 39 issued	08.03.2011	08.10.2010	07.12.2010	19.11.2010	27.05.2011
Search warrant issued by	Uzbekistan	Tajikistan	Tajikistan	Uzbekistan	Tajikistan
Legal status in Russia at the time of kidnappings	<ul style="list-style-type: none"> <li>▶ Extradition decision came into forth</li> <li>▶ Released after 18 months detention</li> <li>▶ Has been appealing against the refusal in temporary asylum</li> <li>▶ Recognised as a person in need of international protection by UNHCR</li> </ul>	<ol style="list-style-type: none"> <li>1 Extradition decision came into forth</li> <li>2. Released after 12 months detention</li> <li>3. Has been appealing against the refusal in refugee status</li> <li>4 Approached UNHCR for international protection</li> </ol>	<ol style="list-style-type: none"> <li>1 Extradition decision came into forth</li> <li>2Released after 18 months detention</li> <li>3Received temporary asylum</li> <li>4Recognised as a person in need of international protection by UNHCR</li> </ol>	<p>Extradition decision is cancelled and entered into forth</p> <p>Released due to the cancellation of the extradition decision</p> <p>Has been appealing against the refusal in refugee status</p> <p>Approached UNHCR for international protection</p>	<ol style="list-style-type: none"> <li>1. Extradition decision came into force, but could not be executed following a ECtHR injunction.</li> <li>2. He was due to be released but was charged with another fabricated crime.</li> <li>3. Released on the 29<sup>th</sup> March 2012 and disappeared the same day</li> <li>4. Approached UNHCR for international protection</li> </ol>
Time and place of kidnapping	23.08.2011 day time, Moscow	23.08.2011 day time, Moscow	31.10.2011 evening, Moscow	21.12.2011 kidnapped from home AM, St. Petersburg	29.03.2012 disappeared immediately after being released, Moscow
Time and place of removal from Russia	Night of 23/24.08.2011 Domodedovo airport	Night of 23/24.08.2011 Domodedovo airport	Night of 01/02.11.2011 Domodedovo airport	Evening of 21.12.2011, Pulkovo airport According to FMS information he was expelled to Uzbekistan	unknown
Destination	Khudjand, Tajikistan	Khudjand, Tajikistan	Khudjand, Tajikistan	Samarkand, Uzbekistan	Tajikistan
Current situation	Released on 23.11.2011 after 3 months detention	In detention while his case is being heard and is facing a 30-year sentence.	In detention while his case is being investigated and is facing a 28-year sentence.	Was in detention in Samarkand and now removed to Tashkent. More information needed	In custody in a detention facility of the national security service of Tajikistan. On the 7 <sup>th</sup> April 2012 he appeared in a broadcast on the Tajik TV: he claimed that he had voluntary come to Tajikistan and surrendered to the authorities.

## Annex B

### 4. Number of applications in which Rule 39 requests have been granted by the European Court of Human Rights (by Respondent State and year of decision) for transfers of applicants pursuant to the Dublin agreements.<sup>240</sup>

Number of applications in which Rule 39 requests have been granted by the ECtHR (by Respondent State and year of decision) for transfers under expulsion pursuant to the Dublin agreements.							
State	2007	2008	2009	2010	2011	2012	Grand Total
Austria				14	1	3	18
Belgium		5	25	25	1	1	57
Denmark				28	6	1	35
Finland			110	63	7		180
France	1	8	11	64	38	1	123
Germany					1		1
Greece			13	24			37
Iceland			1				1
Italy			1	7	4		12
Netherlands			45	108	7	2	162
Norway				2			2
Switzerland						1	1
Sweden			1	23			24
United Kingdom		82	136	46	2		266
<b>Grand Total</b>	<b>1</b>	<b>95</b>	<b>343</b>	<b>404</b>	<b>67</b>	<b>9</b>	<b>919</b>

<sup>240</sup> Information obtained from the European Court of Human Rights' Public Relations Unit as of 20 April 2012. The Dublin Agreements incorporates the Dublin II Regulation and agreements with Dublin II Regulation Associate States (Iceland, Liechtenstein, Norway and Switzerland).

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