The European Court of Human Rights' use of Interim Measures under Rule 39 of the Rules of Court

Protecting Human Rights through Preliminary Indications

Den Europæiske Menneskerettighedsdomstols brug af Midlertidige foranstaltninger efter Rule 39 i Rules of Court

Beskyttelse af Menneskerettigheder gennem Foreløbige Indikationer

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Abstract

This thesis addresses the question whether the use of interim measures by the European Court of Human Rights is a necessary, and subsequently, effective tool in the protection of human rights by an international court through Rule 39 of the Court's own set of rules, aptly named the Rules of Court. This assessment is based upon an analysis of case law from the ECtHR primarily regarding deportation, extradition or expulsion, which makes up the majority of interim measure case law from the Court. The thesis has a secondary focus on the use of interim measures in cases without a migration concern, the purpose of which is to compare and establish a pattern in the practice. The cases analyzed include Cruz Varas and Others v. Sweden, Mamatkulov and Askarov v. Turkey, Paladi v. Moldova, Saadi v. Italy, F.H. v. Sweden, Al-Sadoon and Mufhdi v. The United Kingdom, Evans v. The United Kingdom, Lambert and Others v. France, including short mentions of other cases from the ECtHR and other courts. All cases share the use of interim measures and the claim of violations of Article 2 or 3, or both; either in a migration- or an exceptional context.

The cases demonstrate how the ECtHR will indicate an interim measure with the purpose of protecting the rights described in the Convention with a particular purpose of preventing irreparable damage to the applicant(s). Furthermore, the cases demonstrate the evolution of interim measures at the European level, and how the Court balances the purpose of preventing violations to the rights of the individual against the interests of the State(s). The Court is especially critical in its assessment of States' compliance with interim measures and will hold the States to high standards regarding their attempts to do so. In some cases, the State has made inadequate attempts to comply, or has acted in direct defiance with the interim measure indication. In other cases, the Court holds that the rights of the applicant(s) will not be violated should the national act be implemented; this includes deportation orders and the withdrawal of life-sustaining medical treatment, inter alia, resulting in the Court lifting the interim measure indication.

Through analysis and assessment of the aforementioned, the thesis concludes that the use of interim measures is fundamentally necessary for the preliminary protection of human rights, and secondly that while the ECtHR can be questioned in the slow establishment of the practice as a legally binding indication, the ECtHR has created the most effective system in protecting human rights at the international level.

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1. Introduction

The use of interim measures has become a fundamental practice in the European Court of Human Rights[1] in protecting the physical integrity, liberty and the lives of many vulnerable people.[2] It is the intention of the Court to protect individuals from irreversible damage which often leads the Court to intervene in the preliminary stages of proceedings to order the State to take or refrain from taking particular actions.[3]

The Court is empowered to indicate interim measure through Rule 39 of the Rules of Court, subsequently through Article 34 of the European Convention of Human Rights.[4] The Court may indicate an interim measure to prevent damage to any right that is protected under the Convention; however, the Court often finds itself indicating such measures in immigration cases. Although the Court is not an appeals- or last-instance court on immigration matters, the competence to indicate interim measures results in the Court representing the final chance to avoid expulsion or extradition for vulnerable individuals. Applicants most often fear violations of Article 2 or 3 of the Convention; both in immigration cases and other exceptional cases, which will be explored in this thesis.

This thesis will assess the purpose of indicating an interim measure and the importance of state compliance. The thesis will assess if the case law of the ECtHR has established a practice that is successful in protecting the physical integrity, liberty and lives of the individuals within its jurisdiction.

1.2. Problem Statement

This thesis attempts to answer the following problem statement:

Does the practice of interim measures in the case law of the European Court of Human Rights support the notion that interim measures are fundamentally necessary for the protection of human rights by international tribunals?

To answer this problem statement the thesis will begin by explaining the purpose and the legal basis for indicating such measures on Contracting States to the ECHR. This explanatory section will focus primarily on the case law from the ECtHR that helped establish the practice of interim measures as binding indications. Thereafter, the thesis will expand on the case law of the ECtHR and the use of interim measures in practice. The purpose of the analysis is to examine how the theoretical use of interim measures, including the purpose, translates into the actual practice of the Court with a special focus on immigration cases, and a secondary focus on exceptional uses. The thesis will explore how the purpose of indicating interim measures, although applicable to all Articles of the Convention, finds itself mostly applied to immigration cases or cases with similar time sensitive legal issues. The analysis will focus primarily on case law from the ECtHR; however, it will also include principles as well as statements and practice of international law in order to examine the case law of the ECtHR in a larger context. Based on this, the thesis will offer an assessment of whether the case law of the ECtHR successfully supports the notion that the use of interim measures is fundamentally necessary in order to protect the human rights described in the Convention.

[1] Hereafter referred to as the Court or the ECtHR.
[2] *Annual Report 2011* of the European Court of Human Rights, page 40.
[3] Ibidem
[4] Hereafter referred to as the Convention or the ECHR.

1.3. Delimitation

With respect to the scope of the thesis, the thesis will be limited to the analysis of case law from the ECtHR and will only offer smaller statements on other tribunals or international organs when relevant to the case in question; often following the ECtHR itself, as it makes comparisons to the practice of other domestic courts or international tribunals, *et cetera*. The thesis will offer an analysis of the use of interim measures in specific cases from the ECtHR and will examine the claims of violations of certain Articles of the Convention and their relevance to the interim measure. The thesis will be delimited from analyzing Articles of the Convention independently and will only examine them in the context of their respective case and the interim measures indicated in order to protect them. The thesis will furthermore be delimited from examining claims that are not relevant to the interim measures indicated in cases where Applicants have made multiple claims.

The thesis will focus on the use of interim measures in the preliminary proceedings of the ECtHR, the Court's assessment of the States' compliance with these measures and the ultimate conclusions of the cases. The thesis will not assess the States' compliance beyond the judgment of the case, meaning that the analysis is limited to the contents of the cases as printed and distributed by the Court and will not include any further assessment of States' conduct after the final judgment.

Due to the scope of the thesis, the thesis limits itself to assessing the issue of compliance with interim measures from the view of the ECtHR. The thesis will therefore not include an assessment of the States' own views of their compliance, beyond the views which are presented in the judgments by the ECtHR.

1.4. Method and Legal Sources

This thesis approaches the source material using the traditional legal dogmatic method, which aims to describe the relevant and applicable law and practice, and the general legal situation regarding a certain area of the law. In accordance with this method, this thesis will analyze the current legal approach by describing and assessing applicable law from authoritative sources, including relevant legislation; conventions, treaties, *et cetera*., preparatory works and case law. This will allow the thesis to assess if the ECtHR has been successful in its attempt to indicate interim measures with the purpose of protecting human rights from irreparable damage.

2. The Rules of Court

2.1. Rule no. 39: Interim Measures

The ability of the ECtHR to apply interim measures in a case is found in the Rules of Court; Rule no. 39[5], which establishes that the court may indicate any interim measure to the parties of the case.[6] This terminology is somewhat peculiar and has been the topic of discussion in earlier years where it became necessary for the Court to conclude that it had the competence to issue interim measures that would obligate Contracting States to comply. The coming chapter will explain how the binding nature of interim measures was established, and thereafter, explain the purpose of indicating these measures.

[5] Formerly Rule no. 36.
[6] Rule 39 of the Rules of the Court.

2.1.2. Establishing the binding nature of interim measures

The issue of interim measures as binding obligations was first discussed in *Cruz Varas and Others v. Sweden*, decided in 1991.[7] The Case concerned a family of three, Mr. Hector Cruz Varas (the first applicant), Mrs. Magaly Maritza Bustamento Lazo (second applicant) and their son Richard Cruz (third applicant), all of whom were Chilean citizens. After lengthy immigration proceedings in Sweden, the applicants were denied asylum and scheduled to be deported back to Chile. The Applicants claimed, *inter alia*, that this deportation was in violation of Article 3 and 8 of the ECHR and submitted their application to the Commission[8] on 5 Oct. 1989. The Applicants had requested non-expulsion as they claimed, *inter alia*, that the First Applicant had been subjected to torture in Chile in the past, and that there was a risk of this reoccurring should he be deported back to Chile. Furthermore, the Applicants claimed that should they be deported while their case was pending before the Commission, they would suffer such harm that it would render the result of the case meaningless.[9] The Commission decided, on 6 October 1989, to apply Rule 36 of its Rules of Procedure[10] and to "(…)*indicate to the Government of Sweden ... that it was desirable in the interest of the Parties and the proper conduct of the proceedings before the Commission not to deport the applicants to Chile until the Commission had had an opportunity to examine the application during its forthcoming session from 6 to 10 November 1989*.".[11] The Agent of the Government of Sweden was informed through telephone at 09:10 hours on the 6 October 1989 of the decision made by the Commission, and within a few hours the remaining relevant authorities and officials had been made aware of the interim measure indicated by the Commission. However, Sweden did not comply with the measure and the First Applicant, Mr. Cruz, was deported to Chile at 16:40 hours on 6 October 1989, whilst his wife and son went into hiding in Sweden to avoid expulsion.[12] The Second and Third Applicant remained in hiding throughout the course of the case before the Commission and the Court.[13]

The Commission decided to maintain its indication after the deportation of the First Applicant, and indicated to Sweden that it would be "(…)*desirable in the interest of the parties and the proper conduct of the proceedings before the Commission, that the Government take measures which will enable this applicant's return to Sweden as soon as possible*."[14] In its report on 7 June 1990 the Commission found that there had been no violation of Article 3 and 8 of the Convention and subsequently decided not to maintain its interim measure, however the Commission did express the opinion that there had been a violation of Article 25 § 1 (now Article 34) of the Convention by not following the Rule 36 indication not to expel the First Applicant. This opinion was concluded by the Commission with twelve votes to one.[15]

On the subject of compliance with interim measures, the Commission and the Court were in disagreement. On 20 March 1991 the Court stated in agreement with the Commission that there had been no violation of Article 3 and 8 of the Convention, however, the Court disagreed with the Commission in regard to a possible violation of Article 25 § 1 as a result of non-compliance with the interim measure. It is worth observing that this disagreement was not unanimous and was voted by ten votes to nine in the Court.[16]

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[7] Cruz Varas and Others v. Sweden, Judgment of 20 March 1991, (Plenary)
[8] European Commission of Human Rights
[9] Crus Varaz, para 91
[10] In present time known as Rule 39 of the Rules of Court
[11] Cruz Varas, para 56
[12] Ibidem, para 60
[13] Ibid., para 33
[14] Cruz Varas, para 61
[15] Ibidem, para 66
[16] Ibid., para 105,

The Court made the following conclusions. Firstly, the Court concluded that Rule 36 had only the status of a rule of procedure and could not be "(…) *considered to give rise to a binding obligation on Contracting Parties*".[17] The Court stated that this was clear in the wording of the rule: "*may indicate*", which remains the same in present time, and reflected the view that the measure was in fact not binding upon the Contracting State, Sweden. Secondly, the Court stated that this interpretation of Rule 36 was also clearly reflected in the wording of the measure indicated towards Sweden in the case in question. In this indication the Commission had stated that it would be "desirable" for Sweden to not deport the Applicants while the case was pending.[18] The Court therefore concluded in their judgment of 20 March 1991 that interim measures indicated towards a Contracting State through Rule 36 could not be considered legally binding and therefore did not obligate Contracting States to comply. The Court followed this statement by declaring that in order for interim measures, indicated by the Commission, to be legally binding upon the Contracting States there must be found such a provision directly in the Convention, and the Court concluded that such a provision was not present.[19] The Applicants had claimed that such a provision was present in Article 25 § 1 of the Convention, however the Court concluded that although Article 25 § 1 obligated the Contracting States to not hinder the effective exercise of the right of petition, that did not constitute a provision in the Convention which empowered the Commission to order interim measures of a legally binding nature.[20]

Furthermore, the Court went on to determine that the almost total compliance[21] by Contracting States to interim measures in the past was not an indication that Contracting States believed the measures indicated through Rule 36 were binding obligations.[22] Therefore, this level of compliance did not bestow competence upon the Commission to indicate interim measures of a binding nature. The Court concluded that this high level of compliance exhibited by Contracting States was a reflection of "*good faith co-operation with the Commission in cases where this was considered reasonable and practicable*",[23] and not an acceptance of the measures as legally binding. The Court did not expand further on the concept of good faith, nor did it offer its own definition of the principle, however it cited the Vienna Convention on the Law of Treaties 1969 Article 31 on the concept of good faith which states that: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."[24] This Article is referenced by the Court in other cases[25] where the existence of good faith in regards to interpretation and compliance is questioned. It is often accompanied by the subsequent mention of Article 32 of the same convention which aids in interpretation by studying the preparatory works of a treaty to help establish its object and purpose.

The Court decided that the high level of compliance by Contracting States with measures imposed through Rule 36 did not establish the competence for the Court to create new rights and obligations that were not already present in the Convention. Finally, the Court concluded that general principles of international law would not assist in resolving this matter

[17] Ib., para 98
[18] Ib.
[19] Cruz Varas, para 99
[20] Ibidem
[21] Melse, Arine, 'Inherent powers of the European Court of Human Rights; part of the judicial function of an international public authority.', PhD Thesis (University of Copenhagen, Riga Graduate School of Law), June 2017, AU Library Database. Page 58.
[22] Cruz Varas, para 100
[23] Ibidem
[24] Vienna Convention on the Law of Treaties 1969 Art. 31 § 1
[25] See Mamatkulov and Askarov v. Turkey, Saadi v. United Kingdom

as "*the question whether interim measures indicated by international tribunals are binding is a controversial one and no uniform legal rule exists*."[26]

In short, the Court concluded in *Cruz Varas* that the Commission could not order interim measures through Rule 36 that would obligate Contracting States. Such a competence was not present in Article 25 § 1, nor was it present anywhere else in the Convention.[27] The decision to comply with an interim measure would be left to the Contracting States with the appreciation of the practice of good faith and co-operation.[28]

This interpretation of Rule 36 and Article 25 § 1 remained in the practice of the Court for approximately 15 years until *Mamatkulov and Askarov v. Turkey*.[29] The case concerned two Uzbek nationals and members of an opposition party who were arrested in Istanbul Airport with an international arrest warrant on suspicion of involvement in homicide, a bomb explosion and attempted terrorist attacks on the President of Uzbekistan.[30] The Uzbek authorities requested their extradition leading to the applicants claiming before the Court, *inter alia*, that extradition to Uzbekistan would put their lives at risk and that they would be in danger of being submitted to torture in violation of Article 2 and 3 of the Convention.[31] The Applicants plead the Court under Rule 39 of the Rules of Court[32] to indicate an interim measure upon Turkey to not fulfill the extradition. On 18 March 1999 the Court decided to indicate upon the Turkish government an interim measure, on the basis of Rule 39, to not extradite the applicants as it was desirable in the interest of the parties and of the smooth progress of the proceedings before the Court.[33] The Court extended this interim measure on 23 March 1999,[34] however, the Applicants were handed over to Uzbek authorities on 27 March 1999 in direct defiance with the decision of the Court.[35] This lead to the Court concluding, for the first time, that a Contracting State that fails to comply with interim measures indicated under Rule 39 of the Rules of Court subsequently fails to comply with its obligations under Article 34 of the Convention.[36]

The Court explained that while it had concluded correctly in *Cruz Varas* that competence to indicate binding measures was not to be found in Article 25 § 1 of the Convention, this only regarded the then operating European Commission of Human Rights, which was responsible for indicating interim measures through Rule 36 at the time *Cruz Varas* was determined.[37] The Court stated in Mamatkulov that during the proceedings of *Cruz Varas* the Court had confined itself to examining the Commission's competence to order interim measures, not its own,[38] explaining why it was now possible to conclude that interim measures indicated by the Court[39] would obligate Contracting States directly under Rule 39, through Article 34.

The decision was expected[40] as the Court had previously expressed its regret in a statement regarding the Protocol No 11 amendments, where it held the opinion that an opportunity

[26] Cruz Varas, para 101
[27] Ibidem, para 102,
[28] Ibidem
[29] Mamatkulov and Askarov v.Turkey, Judgment of 4 February 2005 (Grand Chamber)
[30] Ibidem, para 12 & 18
[31] Ibid., para 16 & 20
[32] Previously Rule 36 of the Rules of Procedure
[33] Mamatkulov, para 24
[34] Ibidem, para 26
[35] Ibid., para 27
[36] Ib., para 139
[37] Mamatkulov, para 118
[38] Ibidem
[39] "The Chamber or, where appropriate, the President of the Section or a duty judge(…)", Rule 39 § 1.
[40] The decision was not unanimous; firstly, decided in the Chamber ruled by six votes to one, later to be upheld in the Grand Chamber by fourteen votes to three. (para 139)

to fill a legislative gap had been lost.[41] Protocol No 11 had dissolved the previously operating European Commission of Human Rights[42] and established the individual's right to direct access to the ECtHR through Article 19 and Article 34 of the Convention.[43] Consequently, the dissolution of the Commission and its function to indicate interim measures of a non-binding nature, lead to the establishment of the Court's competence to indicate interim measures of a binding nature.

In *Mamatkulov* the Court analyzes the perception of interim measures in international law as well as international tribunals who have expressed their views on the concept since the conclusion of *Cruz Varas*.[44] In this analysis the Court explained that recent decisions and orders by international tribunals had stressed the importance and purpose of interim measures and had concluded that compliance with such measures was necessary to ensure the effectiveness of their decisions, and that the purpose of interim measures were to preserve the rights of the parties while the case was pending.[45] The Court drew parallels between the views on interim measures from international bodies such as the United Nations, the International Court of Justice(ICJ) and the Inter-American Court of Human Rights and found that while different procedural rules applied to interim, provisional, precautionary or preliminary measures, their significant role in ensuring the protection of the parties' rights remained the same.[46]

This new and more uniformly established perception of interim measures in international law stood in direct contradiction to what the Court had previously stated in *Cruz Varas* where it held that no uniform legal rule existed on the requirement to comply with interim measures and the importance hereof.[47] This change in international law ultimately helped the Court establish not only the binding nature of interim measures, but also their importance and significant contribution to the protection of human rights during proceedings.

2.1.3. Establishing the purpose of interim measures

The previous chapter explains the competence of the Court to indicate interim measures that are legally binding to Contracting States through the case law of the ECtHR, and the jurisprudence of international law. This chapter will focus on the purpose of indicating such measures.

In *Mamatkulov* the ECtHR Grand Chamber reiterated a statement made by the Chamber in an earlier judgment of the case.[48] The Chamber found that "(…) *any State Party to the Convention to which interim measures have been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation must comply with those measures and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment*."[49]

This statement expressed an understanding of interim measures that is echoed in the practice of human rights case law of other international tribunals, which the ECtHR Grand Chamber also refer to in their judgment of 4 February 2005.[50] The universal perception of

[41] Melse, A, (2017), 'Inherent powers of the European Court of Human Rights; part of the judicial function of an international public authority.', PhD Thesis (University of Copenhagen, Riga Graduate School of Law), AU Library Database. Page 59.
[42] The European Commission of Human Rights had been responsible for indicating interim measures through Rule 36 (now Rule 39) until its dissolution in Protocol 11.
[43] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, Strasbourg, 11.V.1994
[44] Mamatkulov, para 110
[45] Ibidem, para 113
[46] Mamatkulov, para 112-113.
[47] See Chapter 1.1, page 4, para 2.
[48] Judgment of 6 February 2003.
[49] Ibidem, para 110
[50] Mamatkulov, para 111-117

interim measures is that they are ordered by an international tribunal or other enforcement body with the simple intention to protect the Applicant from "(…)*grave and irreparable injury*."[51] In Mamatkulov this perception was confirmed by the Court when it stated that although it receives "*a number of requests*"[52] it only applies interim measures in cases where the threat of irreparable damage is imminent.[53] *Irreparable damage* and *imminent* have become the preferred terms in the practice of the Court since *Mamatkulov* and has since been used in numerous cases where the Court has indicated interim measures, and in cases where the Court has reviewed if a Contracting Party complied with interim measures.

In *Mamatkulov* the Applicants claimed, *inter alia*, that their extradition to Uzbekistan would lead to torture and would put their lives at risk.[54] The Court explained that although most of the Rule 39 requests it receives concern the right to life, Article 2, prohibition of torture, Article 3, and occasionally the right to respect for private and family life, Article 8, it is not restricted in the Convention to only try cases where these claims are present.[55] Interim measures can be indicated with the purpose to prevent damage to any and all rights that are protected in the Convention, but there is a requirement that the risk be imminent, meaning that it is forthcoming, impending or happening soon. This means that expulsion, extradition and deportation cases make up the majority of the cases where the Court indicates interim measures because these are time-sensitive matters that often meet the requirement for *imminent risk* of violating a right protected by the Convention.[56] Immigration cases will be further examined and analyzed in Chapter 2 and discussed in Chapter 3.

In *Paladi v. Moldova*[57] the Applicant was not facing deportation, instead he claimed that he did not receive the proper medical treatment necessary to treat his many illnesses whilst being held in custody after being accused of several violations of the Moldovan criminal code.[58] The Applicant was diagnosed by numerous specialists, whom all agreed that he could not receive proper treatment in prison detention or prison hospital as these did not possess the proper resources to administer the necessary treatments.[59] The director of the prison hospital confirmed this, and informed the district court on multiple occasions that the prison hospital was not properly equipped to treat the applicant. The district court did not respond immediately to this issue, but after lengthy proceedings and multiple new diagnoses, the Minister of Health ordered a medical commission to determine the state of health of the Applicant. This order came after the Applicant had lost consciousness during a court hearing and had been rushed to the hospital by ambulance where he was treated for "suspected myocardial failure".[60] After considering the issue the commission determined that the Applicant had received all necessary treatments and had not suffered from the temporary interruptions of treatment during proceedings as was proved by his stable blood pressure, measured before and after interruption.[61]

The Applicant claimed, *inter alia,* to the ECtHR that the State of Moldova had violated Article 3 by subjecting him to inhuman treatment through insufficient medical care. He claimed, secondly, that Article 34 had been violated due to the lack of compliance with the interim measure indicated by the Court to stay the execution of the Applicant's transfer out of

[51] Pasqualucci, J. M. (2005). Interim measures in international human rights: Evolution and harmonization. Vanderbilt Journal of Transnational Law, 38(1), page 4.
[52] Mamatkulov, para 104
[53] Ibidem
[54] See Chapter 1.1, page 4, para 4.
[55] Mamatkulov, para 104
[56] Ibidem
[57] Judgment of 10 March 2009 (Grand Chamber)
[58] Ibidem, para 22-33
[59] Ibid.
[60] Paladi, para 41
[61] Ibidem, para 43

a specific treatment facility to a prison hospital.[62] The Chamber unanimously held that there was a violation of Article 3, *inter alia*, to which the Grand Chamber agreed, although not unanimously.[63] The Chamber held by six votes to one that there had been a violation of Article 34 through the lack of compliance by the state. The Grand Chamber ultimately agreed with the Chambers finding of an Article 34 violation, however there was clear dissent with the votes being nine to eight.[64]

In *Paladi* the Court reiterated statements made in *Mamatkulov* about the importance of protecting the individual against imminent risks and irreparable damage through Rule 39, subsequently Article 34. It expanded on the understanding of "*imminent risk*" and "*irreparable damage*" by explaining that an interim measure indicated based on these terms was not open for interpretation by the Contracting State.[65] Additionally, it was not possible for the Contracting State to question the decision of the Court to indicate an interim measure by attempting to "verify" through its own judgment if a risk of irreparable damage was imminent.[66] In *Paladi* it was concluded by the Court that an interim measure is indicated with the purpose of protecting the applicant's right to enjoyment of the core rights of the Convention. Furthermore, the objective of indicating an interim measure is to preserve and protect the rights and interests of both parties in a dispute before the Court, pending the final judgment.[67]

Additionally, the Court concluded that should the damage which an interim measure was indicated to prevent not have occurred, despite the Contracting State's failure to comply with the measure, it would be irrelevant for the assessment of whether the State had fulfilled its Article 34 obligations.[68] The Court stated that "(…)*the intentions or reasons underlying the acts or omissions in question are of little relevance when assessing whether Article 34 of the Convention was complied with*",[69] meaning that a failed attempt to comply equals failure to comply if not all reasonable steps have been taken. The fact that the State had "good intentions" in their attempt is not adequate to qualify as compliance with Article 34, however, the Court did state that a failure to comply can be considered as a non-violation of Article 34 if the Contracting State has taken all reasonable steps to comply with the interim measure and compliance had not been possible.[70] This is what the Court calls an objective impediment.[71]

An objective impediment is to be understood, firstly, as something that directly prevents the Government from complying with the interim measure and, secondly, as something the Government is not in control of. In *Paladi* the Court commented on the negligence of the Government of Moldova by pointing out, *inter alia*, that the Government Agent's Office lacked personnel to answer urgent calls from the Registry.[72] The Court found this particularly disturbing as it had been a regular working day in Moldova, and furthermore, the Court felt that it displayed a lack of commitment in assisting the Court in preventing irreparable damage to the Applicant.[73] The Government claimed, *inter alia*, that compliance was impossible due to lack of proper time. The Court was able to refute and disprove this by pointing out that the Government had proven with its own previous actions that it could in fact react swiftly to important developments, but for, what the Court called "unexplained reasons", it had failed to do so in

[62] Ibid., para 55
[63] Ib., para 71-77
[64] Ib., para 114
[65] Ib., para 90
[66] Ib.
[67] Paladi, para 89
[68] Ibidem
[69] Ibid., para 87
[70] Ib., para 87-90
[71] Ib., para 92
[72] Ib., para 97
[73] Ib.

the present case.[74] This negligence did not qualify as an objective impediment as none of the factors had been out of the control of the Government, and so the Court concluded in *Paladi* that the Government had not taken all reasonable steps to comply with the interim measure and this failure to comply constituted a violation of Article 34. As mentioned earlier, this was decided with dissent; nine votes to eight.

In short, the Contracting State is obligated to comply with an interim measure by taking all reasonable steps[75], and only in exceptional cases will non-compliance not be considered a violation of Article 34. The Court will not consider it a mitigating circumstance that the rights of the Applicant remained uncorrupted during the Contracting State's failure to comply with the interim measure, as the State will have violated Article 34 of the Convention, regardless, if not all reasonable steps were taken.

2.1.4. Consequences of violating the rights protected by the Convention

If the Court finds that a Contracting State has violated Article 34 by not complying with an interim measure the State will face the same consequences as having violated any other article in the Convention. The judgments of the Court are binding to the Contracting States,[76] and therefore the States are required to implement any and all changes necessary to prevent that a violation of the same kind may occur again in the future. In some cases, this will be resolved by making changes to national legislation if the Court has found that the legislation itself is contradictory to the Convention. In other cases, the Court may find that the correct consequence is just satisfaction after Article 41 if domestic law does not allow for complete reparation to be made.[77] Just satisfaction is most frequently awarded through financial just satisfaction which can be made in three forms: pecuniary loss, non-pecuniary loss, and costs and expenses.[78]

Pecuniary loss is awarded when the applicant is to be placed in the position in which they would have been had the violation not happened; known as the principle of *restitutio in integrum*. This may be compensation for loss actually suffered; the principle of *damnum emergens* and loss or diminished gain expected to occur in the future, through the principle of *lucrum cessans*.[79] Non-pecuniary loss is awarded to Applicants as financial compensation for non-material harm, for instance mental or physical suffering.[80] Lastly, the Court can order the reimbursement of an Applicant's costs and expenses, for instance reimbursement for legal assistance, court registration fees, travels expenses to and from court hearings, *et cetera*.[81]

In *Paladi* the Applicant received just satisfaction for pecuniary- and non-pecuniary losses as well as costs and expenses.[82] In *Mamatkulov* the applicants received just satisfaction through non-pecuniary loss, and costs and expenses.[83] In *Saadi v. The United Kingdom*[84,85], a case regarding an Iraqi Kurd who fled the Kurdish Autonomous Region of Iraq in 2000, the Court awarded just satisfaction for costs and expenses, but did not award the applicant any

[74] Ib., para 99
[75] Paladi, para 92
[76] Art. 46 of the Convention
[77] Rules of Court. Practice directions. Just satisfaction claims, p. 65 (1. Jan. 2020). https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf
[78] Ibidem, page 66
[79] Ibid.
[80] See footnote 77
[81] Ibidem, page 67
[82] Paladi, para 114
[83] Mamatkulov, para 139
[84] Judgment of 29 January 2008 (Grand Chamber)
[85] Not to be confused with Saadi v. Italy, which will be examined in Chapter 2.

other just satisfaction. The Court held unanimously that the finding of a violation in itself was sufficient just satisfaction for the non-pecuniary damage sustained by the Applicant.[86]

In short, this means that a Contracting State that does not comply with a Rule 39 indicated interim measure, which is binding through Article 34 of the Convention, may be ordered by the Court to satisfy an Applicant's claim of just satisfaction, according to Article 41. Just satisfaction may be considered satisfied through the finding of a violation in itself, as the Court found in *Saadi v. The United Kingdom*, or the Court will consider it necessary that the Contracting State compensate the Applicant's losses through pecuniary, non-pecuniary, or costs and expenses satisfaction. As mentioned above, the State will be obligated to make the necessary changes to domestic legislation if it is found to be in violation of the Convention.

3. Interim measures in the practice of the European Court of Human Rights

The Court stated in *Mamatkulov* it receives "*a number of requests*"[87] for interim measures, but only indicates them in cases where there is an imminent risk of irreparable damage. Most requests for interim measures are rejected, as can be seen in the statistics provided by the Court.[88] In a total of 1,570 decisions in 2019 the Court granted requests for interim measures in 145 cases and dismissed them in 544 cases. The remaining cases fell outside the scope of Rule 39 of the Rules of Court and were thus rejected for being inadmissible. 49% of the requests granted by the Court concerned deportation or other migration cases.

3.1. Right to Life & Prohibition of Torture: Article 2 & Article 3

The right to life and the prohibition of torture are rights protected separately with their own article in the Convention, however, they are often claimed collectively in cases to the ECtHR. This is especially true for cases regarding immigration issues such as expulsion, extradition or deportation. Applicants of these types of cases will often claim a risk of life or a risk of torture simultaneously, and often in relation to the same issue at the receiving country; for instance, receiving countries with a history of applying death penalties or torturous investigative methods, or in countries where history indicates discrimination of certain groups; ethnic, religious, *et cetera*. The coming chapter of this thesis will therefore analyze cases from the ECtHR where the applicants claim a violation of Article 2 or 3, or both simultaneously. Thereafter, the Chapter will include an analysis of cases with the use of interim measures that exceptionally do not concern immigration issues.

3.1.1. Case law

Saadi v. Italy

The Applicant, Mr. Saadi, was a Tunisian national who had been sentenced to serve four years and six months in prison in Italy for criminal conspiracy, forgery and receiving stolen goods. Furthermore, he had been sentenced to expulsion and was to be deported back to Tunisia once he had served his sentence in Italy.[89] The Applicant had been accused of conspiracy to commit acts of violence with the purpose of spreading terror, however this charge was ultimately altered to criminal conspiracy, as the Italian court found that the acts did not constitute international terrorism, but instead only criminal conspiracy. On 4 August 2006, after being imprisoned uninterruptedly in Italy since 9 October 2002, the Applicant was released and the Minister

[86] Saadi, para 93
[87] Para 104
[88] Factsheet on Interim Measures. Statistics, p. 12. (March 2020). Available on the internet: https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf
[89] Saadi v. Italy, para 14, Judgment of 28 February 2008 (Grand Chamber)

of Interior ordered him deported to Tunisia four days later.[90] The Applicant requested political asylum in Italy and claimed that he would be subjected to torture and ill-treatment as he had been tried *in absentia* in the Tunis military court in Tunisia and sentenced, *inter alia*, to twenty years in prison and "administrative supervision".[91] On 16 august 2006 the Applicant's asylum request was declared inadmissible by the Head of the Milan police authority on the ground that the Applicant was a threat to national security, which lead the Applicant to ask the ECtHR on 14 September 2006 to suspend or annul the decision to deport him. On the following day, the Court asked the Italian government to provide it with information regarding the Applicant's conviction by the Tunis military court, and the possibility for reopening proceedings or retrial. After receiving information from the Government, the Court ultimately decided to indicate an interim measure asking the Italian Government to stay the Applicant's expulsion until further notice.[92]

Before examining if the execution of the expulsion order against the Applicant would constitute a violation of Article 3 of the Convention the Court stated that the examination "*must necessarily be a rigorous one*"[93] and would include all the materials presented by the parties, and if necessary, materials obtained *proprio motu*. The Court further clarified that when examining if an expulsion constitutes a violation of the Convention the Court will primarily assess those facts that were known or ought to have been known at the time of the expulsion, because this will constitute the relevant timeframe. However, the Court also specified that when an expulsion order has not yet been executed, for instance due to a Rule 39 indication, the relevant timeframe will be that of the proceedings of the Court. This means that the Court may take into consideration facts that have become known to it after the date of the initial expulsion order. Consequently, historical facts are "of interest" as they may shed light on the current situation and the possible developments, however, present circumstances are decisive.[94] The Court continues to explain that it is very cautious and careful when examining the material placed before it when an applicant is seeking intervention through a Rule 39 indicated interim measure,[95] meaning that Rule 39 interim measures are only indicated after meticulous consideration.

Article 3 is one of the shortest articles in the Convention and reads, in its entirety: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*." This absolute prohibition of torture and inhuman or degrading treatment is also pointed out by the Court in this case as "*one of the fundamental values of democratic societies*".[96] The Court points out that Article 3, unlike other articles in the Convention, makes no provision for exceptions, and due to its absolute phrasing derogation from it is not possible under Article 15, as concluded in *Soering v. The United Kingdom*.[97] The absolute nature of Article 3 has been questioned by Contracting States on multiple occasions, and in the present case of *Saadi v. Italy* the United Kingdom acted as a third-party intervener claiming that the risk of torture or inhuman and degrading treatment toward the Applicant should be weighed against the risk that the Applicant poses to the State. The United Kingdom has made claims similar to this in other notable cases, the most prominent examples being *Soering v. The United Kingdom* and *Chahal v. The United Kingdom.*[98] The Court has continuously stated regarding these claims that the absolute nature of Article 3 cannot be questioned by balancing the real risk of torture to the Applicant

[90] Ibidem, para 31-32
[91] Saadi, para 29
[92] Ibidem, para 41
[93] Ibid., para 128
[94] Ib., para 133
[95] Ib., para 142
[96] Saadi, para 127
[97] Soering v. The United Kingdom, judgment of 7 July 1989 (Plenary), para 88
[98] Chahal v. The United Kingdom, Judgment of 15 November 1996 (Grand Chamber)

against the risk of security to the State, or the general severity of the crimes committed by the Applicant.[99]

The prohibition of torture and inhuman or degrading treatment is absolute; however, it is not detailed in Article 3 what kind of treatment qualifies as torture, inhuman or degrading. In order to determine if the Applicant is under risk to being subjected to any treatment which may fall under the scope of Article 3, the Court will examine both the general situation of the receiving country, and the personal circumstances of the Applicant. The Court declared that it will often attach importance to information found in "*reports from independent international human rights protection associations (...) or governmental sources (...)*" but that "*the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3*".[100] In the present case the Court sites the above-mentioned reputable sources, and states that there is reason to believe that the Applicant may be subjected to the following treatments in Tunisia if the expulsion order is executed: *hanging from the ceiling, threats of rape, administration of electric shocks, immersion of the head in water, beatings and cigarette burns.*[101] These are all actions that the Court believes have been sufficiently proven to be taking place in Tunisia, and the Court furthermore explains that the existence of domestic law in Tunisia which prohibits the above-mentioned treatments, and the "diplomatic assurances" received by Italy from the embassy in Tunis are not sufficient to disprove that there is a real risk of torture and inhuman or degrading treatment to the Applicant if he were to be deported.[102]

The Court therefore concluded that if the expulsion order against Mr. Saadi were to be executed, it would constitute a violation of Article 3 of the convention.[103] The Applicant had not been expulsed at the time of the judgment, which is why the Court did not question the State's compliance with the Rule 39 interim measure as there was no indication, or claim from the Applicant, that the measure had not been complied with.

The Court held that the finding of a violation constituted sufficient just satisfaction for the non-pecuniary damages sustained by the Applicant, and therefore only required Italy to pay costs and expenses.[104] Had the applicant been expulsed in defiance with the interim measure, and had the Applicant suffered from this, it is plausible that the Court would have found reason to declare pecuniary or non-pecuniary damage satisfaction, however this was not the case.

F.H. v. Sweden

The Applicant, an Iraqi national named Mr. F.H., arrived in Sweden on 9 January 1993 with his three children. The Applicant applied for asylum in Sweden and claimed that deporting him back to Iraq would put him in severe risk of torture and death. He claimed that he could face death as a penalty for alleged crimes committed during his employment in the military. Furthermore, he claimed that due to his religious background he also faced a risk of torture and death as a result of discriminatory acts. Additionally, he claimed a risk to his life in regard to attacks from "*extremist militias*".[105]

During the lengthy asylum proceedings in Sweden the case evolved when the applicant was found guilty of murdering his wife in Sweden after she had joined him and their children.[106] The Applicant was sentenced to forensic psychiatric care, the duration of which would

[99] Soering, para 88., Chahal, para 81., Saadi, para 141
[100] Saadi, para 131
[101] Saadi, para 143
[102] Ibidem, para 147
[103] Ibid., para 146 + 194
[104] Ib., para 194
[105] F.H. v. Sweden, para 73, Judgment of 20 January 2009 (Chamber)
[106] F.H., para 16

be determined by a medical evaluation. Subsequently, the Applicant was ordered by the court to be expulsed from Sweden with a prohibition of return. The Applicant was released from forensic psychiatric care on 14 December 2004 which brought to light the subject of his pending expulsion. The Applicant was detained on 27 July 2006 awaiting the enforcement of his expulsion order. The ECtHR indicated an interim measure through Rule 39 to the Swedish government asking that they suspend the expulsion, whilst also requesting that the Government give its opinion on whether the applicant was in risk of being tried and sentenced to death in Iraq.[107] After careful consideration of the Applicant's individual case, and after signing an agreement with Iraq to assist the returns of Iraqis in Sweden to Iraq, including forced returns, the Government claimed that the expulsion of the Applicant would not constitute a violation of Article 2 or 3 of the Convention.

When assessing if Sweden had complied with their obligations under the Convention the Court considered firstly if the current state of security in Iraq was in itself enough to constitute a real risk of Article 2 and 3 being violated. The Court, and Sweden in its claims, mentioned multiple statements made by international institutions and NGO's who all agreed that the security situation in Iraq was "problematic" and therefore they did not recommend the forced return of persons to Iraq. The Court declared that it was well aware of these recommendations, however, it stated that these recommendations were based only partly on the security situation and partly on the practical problems such as shelter, health care and property restitution.[108] In terms of whether this was sufficient to amount to a violation of Article 3, the Court had this to say: "*where reports are focused on general socio-economic and humanitarian conditions, the Court has been inclined to accord less weight to them, since such conditions do not necessarily have a bearing on the question of a real risk to an individual applicant of ill-treatment within the meaning of Article 3*".[109] Consequently, the Court concluded that while it agreed that the situation in Iraq was problematic, it was not so serious as to cause, by itself, a violation of Article 3 should the applicant be forcibly returned.[110] Although the Court did not disagree with international institutions and NGO's and their claim that the situation was "problematic", the Court was reluctant to find this sufficient to pose a real risk to the Applicant.

The Court proceeded to examine if the Applicant's personal situation would make his return to Iraq a violation of Article 2 or Article 3. In assessing his personal situation, the Court considered his claims; 1) being killed or persecuted as a result of his Christian faith, 2) being sentenced to death, or killed by militia groups as a result of his membership of the Republican Guard and the Ba'ath Party, 3) being sentenced a second time for the murder of his wife.

In regard to the first claim the Court took into consideration the factual situation in Iraq. The Court declared awareness that a person's religion is explicitly written on the person's identity card in Iraq making it increasingly difficult to conceal one's beliefs in a given situation. Secondly, the Court acknowledged recent attacks on Christians in Iraq, but the Court highlighted the effort of the Iraqi government in condemning and intervening, and ultimately concluded that should the applicant need the assistance of the Iraqi government it would be readily available. The Court also stressed that no extremist Islamic groups or others had taken responsibility for the recent attacks and so it concluded that the attacks were carried out by individuals and thus the applicant would be able to seek protection from the Government should he need it. Lastly, the Court concluded that with a lack of persecutory behavior from the Government and from a larger group or groups of extremists there was no real risk that the Applicant be persecuted or ill-treated due to his religious beliefs.[111]

[107] Ibidem, para 40
[108] Ibid., para 91
[109] Ib., para 92
[110] F.H., para 93
[111] Ibidem, para 97

When examining if the Applicant would face prosecution for his time in the military the Court focused mainly on the Applicant's own narration of his time in the military during his asylum interviews upon first arriving in Sweden. The Applicant had stressed multiple times that he never took part in missions that killed civilians or others, and that his primary function was within the transportation and support area. He had deserted the army when ordered to carry out attacks on Shi'as in 1992 but had never claimed that he was sought or wanted by Iraqi authorities for any crime. The court observed that former Republican Guards[112] had successfully been integrated into the new army without prosecution for their attachment to the previous army and therefore the Court concluded that there was no real risk of the Applicant being sentenced to death, or any other sentence, for his work in the army or for his desertion.

When assessing the possible risks to the Applicant due to his affiliation with the Ba'ath Party it became clear that the Court was skeptical of the Applicant's claims as there were inconsistencies in his reports of his relationship with the party. The Applicant had claimed a high rank in the party while simultaneously claiming that he was only a sympathizer and observer. This caused the Court to conclude that his reports were inconsistent and that his specific relationship with the party could not be established. When considering that there were no reports of persons with similar affiliations with the party, as those claimed by the Applicant, being sentenced to death or persecuted, the Court concluded that there was no evidence to support the Applicant's claim that he would be subjected to ill-treatment or the death sentence.

The Court's suspicion with the Applicant's claims became more apparent when they assessed the risk of him being subjected to torture or murder by Shi'a militia groups for his work in the Republican Guard. This claim was not made by the Applicant when the proceedings initially began and was added by the Applicant later without any substantial evidence. The Court reiterated that a danger of this kind may be protected under Article 3 of the Convention, however, in the present case there was a ceasefire lasting more than one year and furthermore, there was no evidence indicating that the applicant was wanted by Shi'a militias. Subsequently the claim was not made by the Applicant in a credible manner, as compared to his other claims.[113] In regard to the legitimacy of the Applicant's claims and the approach the Court took when examining the claims of asylum seekers, it made the following statement: "*The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies*."[114] The Court ultimately concluded that while it tends to be more lenient when assessing the claims of asylum seekers, leniency could not be applied in this case as the Applicant had made unreliable claims and statements regarding the risk of persecution by Shi'a militias.

Lastly, the Court examined the legitimacy of his claim that he would be convicted a second time in Iraq for the murder of his wife. The claim lacked evidence and considering the current state of the Iraqi Penal Code, which prohibited retrials in Iraq of persons who had been convicted by final judgment in other countries, the Court finally concluded that there was no real risk of the Applicant being retried in Iraq for the murder of his wife.[115]

The dissenting judges held that Sweden had not dispelled any doubts about the applicants claims, and therefore believed that the expulsion would be a violation of his rights, however, the majority of the Court held by 5 votes to 2 that the expulsion of the Applicant would

[112] The official title of Mr. F.H. in the military prior to deserting.
[113] F.H., para 103
[114] Ibidem, para 95
[115] F.H., para 104

not give rise to violations of Article 2 or 3 of the Convention. The Court held that the expulsion order could be implemented without giving rise to a violation. The Rule 39 interim measure indication to suspend the expulsion of the Applicant did therefore not prove to be an early indication of how the case would conclude. No other violations were found, and therefore no just satisfaction awarded.

Al-Sadoon and Mufdhi v. The United Kingdom

Al-Sadoon[116] was a case regarding two Iraqi nationals who were detained by British forces in Basra, Iraq, and transferred to the custody of Iraqi forces in defiance with an indication made by the Court through Rule 39. The case expanded on the purpose of indicating interim measures by reiterating the importance of interim measures in ensuring the effectiveness of the Courts proceedings. The case also expanded on the understanding of "objective impediment" when assessing if a State's failure to comply with an interim measure would constitute a violation of Article 34.

The United Kingdom became an occupying power in Iraq in May 2003 and with this came the responsibility for civilian lives and rights under numerous international obligations including the Convention, section III of the Hague Regulations on the Laws and Customs of War on Land (1907) and the Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 1949) ("the Fourth Geneva Convention")[117,118].

The Applicants, two Iraqi nationals and high-ranking members of the Ba'ath Party, were arrested by British forces in Basra after the murders of two British servicemen in 2003. The Applicants were initially classified as "security detainees"[119] in their interment, which was later changed to "criminal detainees"[120] in 2006. The Basra Criminal Court found, after the initial investigation, that the alleged offences constituted war crimes and therefore fell under the jurisdiction of the Iraqi High Tribunal (IHT).[121] The IHT requested the transfer of the Applicants from the British forces to Iraqi custody to stand trial on charges carrying the death penalty.[122] After multiple requests the Applicants were transferred to the custody of Iraqi authorities on 31 December 2008.[123]

Prior to this transfer, on 22 December 2008, the Applicants lodged an urgent application for an interim measure to the Court. The Court gave an indication under Rule 39 on 30 December 2008 that the Applicants should not be removed or transferred from the custody of the British forces until further notice, however, the UK did not comply with this measure and transferred the Applicants to the Iraqi authorities the next day.

The Government claimed that it had no other option than to transfer the Applicants after the expiration of the mandate of the Multinational Force (MNF) which took place on 31 December 2008. The Court quickly rebutted this claim by stating that these circumstances did not constitute an objective impediment as they were "*of the respondent State's own making*."[124] The Court quoted the Government with a statement from a letter about the transfer: "(…) *the Government took the view that, exceptionally, it could not comply with the measure indicated by the Court; and further that this action should not be regarded as a breach of Article 34 in*

[116] Al-Sadoon and Mufdhi v. The United Kingdom, Judgment of 2 March 2010 (Chamber)
[117] Article 27, 41, 42, 78
[118] Al-Sadoon, para 11
[119] Al-Sadoon, para 42
[120] Ibidem, para 46
[121] Ibid., para 47
[122] Ib., para 131
[123] Ib., para 80
[124] Ib., para 162

this case. The Government regard the circumstances of this case as wholly exceptional. It remains the Government policy to comply with Rule 39 measures indicated by the Court as a matter of course where it is able to do so."[125] This statement was the Government's attempt to justify their lack of compliance by claiming that compliance was impossible due to an objective impediment as the Court had previously decided in *Paladi* could justify non-compliance. As described in Chapter 2.1.3. of this thesis, the Court's view of objective impediment as found in *Paladi*, is that it is the responsibility of the Government to demonstrate that such an impediment was present in the specific case, and to demonstrate that this impediment specifically prevented the Government from complying with the Rule 39 indication. In this case the Government claimed that it had no other option than to recognize the authority of the Iraqi courts and therefore had no other option than to transfer the Applicants to Iraqi authorities. The Court disagreed strongly with this claim and clarified that a Contracting State cannot enter into an arrangement or agreement with a state that does not uphold its obligations under the Convention and entering into an agreement which would transfer prisoners who would face the death penalty would violate Article 2 of the Convention, subsequently Article 1 of Protocol 13.[126]

The Court was very reluctant to agree with the Government that an objective impediment had been present in the case, which is clear in the Court's rather stringent assessment. As cited above, the Court stated that this alleged impediment was of the Governments own doing and could therefore not qualify as objective. The Court agrees with the findings of the domestic courts who had previously found that the attempts made by the Government before 31 December 2008 were not sufficient to secure any binding assurances to ensure that the death penalty would not be applied. In fact, the Court was so swift and severe in their assessment of the Government's attempts to comply with the interim measure that it stated that the Government had not satisfied the Court in demonstrating that it had taken all reasonable steps, "*or indeed any steps"*[127] to comply with the Rule 39 indication. Such a statement cannot be overlooked and cannot be viewed as anything but a strong indication of the expectations from the Court for States to comply with interim measures. The Court did not contradict that the situation had been difficult, however, the wording of the Court's assessment sets a tone that is very unsympathetic toward the United Kingdom and the circumstances created by the Government itself. The Court held by six votes to one that the lack of compliance with the Rule 39 indication constituted a violation of Article 13 and Article 34 of the Convention.[128]

The Court recognized that the Applicants must have endured an enormous fear of the possibility of execution after the death penalty was reintroduced in Iraq in 2004, and further exclaimed that this fear only grew larger over time, especially around the time the transfer eventually took place. It was the Court's assessment and opinion that this fear must have caused the Applicants "*intense psychological suffering*" and that this continued beyond the date of the transfer.[129] The Court held that this suffering had been so severe that the Court believed the United Kingdom to have violated Article 3 of the Convention by subjecting the Applicants to this amount and type of suffering. It is an interesting development as the Court has not always been this empathetic to mental suffering. In *Cruz Varas* in 1991 the Applicant suffered from post-traumatic stress disorder, and his mental health appeared to deteriorate after his deportation to Chile,[130] however the Court was less empathic in comparison to this newer case from 2010. In *Cruz Varas* the Court stated that while the Applicant's mental health was shown to have deteriorated after his deportation, the Court did not find substantial grounds for his fears,

[125] Ib., para 81
[126] Al-Saadoon, para 138
[127] Ibidem, para 163
[128] Ibid., para 180
[129] Al-Sadoon, para 136
[130] Cruz Varas, para 84

and therefore did not consider the expulsion to be a violation of Article 3. While the circumstances of the two cases are not identical, they do have the fear of torture or fear of death in common, but the Court's assessment in *Al-Saadoon* shows more leniency and empathy for the mental suffering associated with fear compared to the assessment made in *Cruz Varas*, which preceded *Al-Saadoon* by approximately 20 years.

The Court held unanimously that the mental suffering endured by the Applicants amounted to an Article 3 violation by the United Kingdom. The assessment was that the transfer of the applicants had "*failed to take proper account*"[131] of the United Kingdom's obligations under Article 2 and 3 of the Convention and Article 1 of Protocol 13, however, the Court did not find it necessary to also decide whether there had been violations of the Applicant's rights under Article 2, and Article 1 of Protocol 13, since the circumstances had already resulted in the Court finding a violation of Article 3.[132]

Regarding the consequences placed upon the United Kingdom for violating Article 3, and Article 13 and 34 of the Convention, the Court held unanimously that the finding of a violation constituted sufficient just-satisfaction for non-pecuniary damages suffered by the applicants, and therefore the UK was only to pay costs and expenses.[133]

3.2. Exceptional cases

While immigration cases make up approximately half of the interim measures granted by the Court, there are exceptional cases where Rule 39 indications are also made. Immigration cases are most often the type of cases that meet the requirement for imminent and real risk of damage to the Applicant, however, other types of cases have also received interim measure indications. In the following chapter the thesis will focus on the Court's use of interim measures in these exceptional and notable cases, and where relevant will discuss if the measure was a prediction of how the Court would ultimately conclude the case.

3.2.1. Case law

Evans v. The United Kingdom

This case explored the possibility to allow the Applicant permission to use the embryos fertilized by her former partner after he had withdrawn his consent. The case offers an interesting discussion on the understanding of Article 2 and 8 of the Convention, *inter alia*.

The Applicant had undergone fertility treatments with her then-partner and had discovered that she had pre-cancerous tumors in both ovaries which required her to have her ovaries removed. The Applicant was advised that she would be able to extract eggs prior to the removal of her ovaries with the purpose of fertilizing them. She could have them implanted after finishing cancer treatments; approximately 2 years later. The couple was informed that the clinic could only offer the freezing of fertilized eggs due to the low chances associated with the freezing of unfertilized eggs. The couple was furthermore informed that they would be required to sign a contract regarding the fertilized embryos and their consent to the future implantation of them. The couple was informed that their consent could be withdrawn individually or together at any time up until the point of implantation. Should either party withdraw their consent, the clinic would be required to destroy the embryos.[134] The procedures went ahead as explained above, and the fertilized embryos went into storage awaiting the 2-year period before they

[131] Al-Saadoon, para 143
[132] Ibidem, para 145
[133] Ibid., para 180
[134] Evans v. The United Kingdom, Judgment of 10 April 2007 (Grand Chamber), para 15

could safely be implanted in the Applicant's uterus. Approximately 6 months after the procedures had concluded, the couple ended their relationship and the Applicant's former partner withdrew his consent to the use of the embryos. This led to lengthy national proceedings during which the embryos were kept in storage to avoid their deterioration before the case had been concluded.

When the case reached the ECtHR the Applicant claimed, *inter alia*, that her rights to family life under Article 8 were to be violated should the embryos be destroyed. She also claimed that the embryos enjoyed the right to life under Article 2 of the Convention. The Court decided to indicate to the Government that it was desirable to take the appropriate measures to ensure that the embryos be preserved until such a time that the Court had completed its examination of the case. The Court specified that this indication was not with prejudice to any decision of the Court as to the merits of case.[135]

When examining the Applicant's claims the Grand Chamber agreed with both the Chamber and the domestic courts who had shown great sympathy with the special and unfortunate circumstances the Applicant found herself in. The Court recognized that were it not to agree with her claims, the consequence would be that the Applicant could never become a biological parent.[136]

When assessing the claimed violation of Article 8 of the Convention the Court looked at legislation and case law from other Member States as well as The United States and Israel. The Court concluded that no consensus was found amongst the Member States and that Article 8 left a wide margin for the individual state to regulate this rather delicate and ethical issue.[137] The domestic rules included the right for either party to withdraw their consent prior to the implantation of the embryos in the uterus, and the Court held that these rules "*struck a fair balance between the competing interests*"[138]and therefore did not find a violation of Article 8 in the national legislation. The Court did not agree with the claim of the Applicant that she should be allowed to use the embryos without the consent of her former partner, however, the Court did explain that it would be within the rights of the state to have regulated the issue in such a way that the case may have concluded in the Applicant's favor. The Court reiterated that this would be possible in different states which had different "*religious, social and political cultures*".[139]

The Court swiftly concluded that no violation of Article 2 was present. The Court stated that "*in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere.*".[140] In English law the embryos did not have independent rights or interests and could not claim, or have claimed on their behalf, a right to life under Article 2, which the Court found to be in compliance with the United Kingdom's obligations under the Convention.

The Court found no violations and therefore did not agree with any of the claims made by the applicant. The Rule 39 indicated interim measure was consequently not a premature indication of how the case would be concluded, and once again, acted only in its intended preliminary capacity to avoid any irreparable damage to the applicant.

[135] Evans, para 5
[136] Ibidem, para 73 + 90
[137] Ibid., para 77
[138] Ib., para 92
[139] Ib., para 85
[140] Evans, para 54

Lambert and Others v. France

Vincent Lambert sustained serious head injuries in a road-traffic accident on 29 September 2008 which left him tetraplegic, in a state of complete dependency and unconscious.[141] He received medical treatment including physiotherapy and communication therapy with the purpose of establishing a means of communication for approximately 5 years, all of which yielded no results. The medical staff who had treated and overseen the patient all these years held the opinion that he was in a chronic vegetative state with no signs indicating a minimally conscious state. His state of consciousness had been deteriorating over some time, and he showed no signs of ever regaining consciousness or communicative abilities as he was found to have sustained irreversible brain damage.[142] As a result of this assessment the doctor responsible for the patient decided to withdraw his nutrition and hydration to "*allow death to resume its natural course and to relieve the suffering*"[143], which was the sentiment behind the "Leonetti Act" that allows for doctors in France to assess a patient in the "end-of-life" stage and decide to withdraw their care.[144] This decision was made with the wishes of the patient in mind and the inclusion of the patient's wife and was later supported by the Conseil d'État.[145] However, some family members, including the patient's parents, were unhappy with the decision and applied for its reassessment, and ultimately applied to the ECtHR claiming violations of Article 2, 3 and 8 of the Convention.[146] The Court decided to indicate a Rule 39 interim measure on 24 June 2014, the day after receiving the application, upon the Government to stay the execution of the decision of the Conseil d'État to discontinue the patient's treatment in the interest of the parties and the proper conduct of the proceedings before the Court.[147] This case is an exceptional example of the damage the Court aims to avoid, as the result of the withdrawal of the patient's treatment would be death, and therefore a possible violation of Article 2 of the Convention. Many cases assess the possibility and probability of a risk to the life of the applicant; however, this case is an exceptional example of a situation where the Court knows explicitly that the applicant[148] will die as a result of the decision made by the Conseil d'État.

The Court was certain that the patient would die as a result of the withdrawal of his treatment and therefore it no longer had to assess if there was a risk of irreparable damage or whether this risk was imminent. The death of the patient was certain, and therefore the Court only had to assess if this would result in a violation of Article 2, 3 or 8 as claimed by the applicants. The Court specified that the wording of Article 2 places upon the Contracting States both a negative and a positive obligation; the former being the obligation to refrain from the "intentional" taking of a life, and the latter being the obligation to take appropriate steps to safeguard the lives of those within its jurisdiction.[149] In the present case the Court addressed the two obligations separately to help determine if a violation was to happen.

When addressing the negative obligation to not intentionally take a life the Court differentiated between the concept of *euthanasia* and *assisted suicide*, and "*therapeutic abstention*" which the Court explained to be the withdrawal or withholding of treatment that had become unreasonable.[150] The Court quickly concluded that the present case did not raise a

[141] Lambert and others v. France, Judgment of 5 June 2015, (Grand Chamber), para 11
[142] Ibidem, para 40-41
[143] Ibid., para 31
[144] Ib., para 14
[145] Ib., para 45
[146] Lambert, para 3
[147] Factsheet on Interim Measures.
[148] In *Lambert* the patient himself was not an applicant directly, as he was in a chronic vegetative state and his parents applied on his behalf, however, for the sake of semantics this thesis refers to him as an applicant for the purpose of comparing his case to others where similar claims are made.
[149] Lambert, para 117
[150] Ibidem, para 119

question of a violation of the State's negative obligations, as French legislation, the Leonetti Act, *et cetera*., did not allow for the intentional taking of a life, and only allowed for the withdrawal of life-saving treatment under certain specific circumstances.[151]

The Court proceeded to make a longer analysis of the Leonetti Act, and other supportive legislation, to determine if France had violated their positive obligations under Article 2 of the Convention. The Court explained that it had never ruled on a case regarding the subject of this particular case, however, it had examined cases concerning similar claims and issues.[152] The Court observed that it had never found violations of Article 2 in the similar cases, and had only found a violation of Article 8 on rare occasions, often relating to something administrative, like the national court's dismissal of the case, rather than the State's positive obligations under Article 2.[153] Some of the previous cases presented to the Court had regarded euthanasia, but the Court stressed that this was not the issue in the present case, and no parties disagreed with this statement. The issue of the case was rather if the withdrawal of life-sustaining treatment would violate the State's positive obligations under Article 2. The Court cited two cases, *Glass* and *Burke*,[154] and the factors which had been examined in those cases in order to answer the question of compliance with Article 2. The Court had taken the following factors into account: 1) domestic law and practice, 2) the wishes of the patient and their close relations, and the opinions of medical personnel, 3) the possibility to approach the domestic courts should there be doubt about the decision serving the interests of the patient.[155] The Court took these factors into consideration as well as the Council of Europe's "*Guide on the decision-making process regarding medical treatment in end-of-life situations*" in the present case.[156]

In its assessment the Court reiterates the rank of Article 2 as being one of the most fundamental provisions in the Convention, however, the Court simultaneously recognizes that when addressing complex issues of scientific, legal and ethical origin there is a certain margin of appreciation left in the capable hands of each State. The Court made comparisons to the previously discussed *Evans v. the United Kingdom* when addressing the consequences of the lack of a European consensus on an issue, and how this led the Court to determine the existence of the margin of appreciation in a case.[157] The Court also concludes that while a margin of appreciation is awarded to the States, it is still in the power of the Court to review whether or not the State has complied with its obligations under the Convention.[158]

The Court's assessment of the previously mentioned 3 factors is rather extensive and shows a serious dedication to exploring and consequently protecting the rights described in the Convention. The Court explains that the lack of European consensus and the margin of appreciation results in States taking different approaches to resolve the issue, which is also stated by the Council of Europe in the Guide (cited above). After a lengthy and detailed assessment, the Court ultimately concluded, with the use of the 3 factors and the Council of Europe Guide, that the State of France had complied with their positive obligations under Article 2 of the Convention, *i.e*., no violation was found. The Court highlighted the Leonetti Act as being well-described and easily used in practice, and focused on statements made regarding its use, which affirmed that the legislation was to be used on patients whose "*pathological condition had become chronic, resulting in the person's physiological deterioration and the loss of his or her*

[151] Lambert, para 124
[152] Ibidem, para 136
[153] Ibid., para 139
[154] Ib., para 143
[155] Ib.
[156] Ib.
[157] Ib., 144
[158] Lambert, para 148

cognitive and relational faculties, (where) *obstinacy in administering treatment could be regarded as unreasonable if no signs of improvement were apparent*."[159] The Court concluded that the legislative framework laid down by the Conseil d'État presented a highly meticulous decision-making process, and further concluded that the judicial remedies available to the applicants of this particular case had resulted in an in-depth examination where all opinions could be expressed and would be carefully considered.[160] The Court concluded that there was no violation of Article 2 in the event of the Conseil d'État judgment being implemented, and as a result, the life-sustaining treatment being withdrawn.

The Court found no violations in regard to the remaining claims made by the applicants, and so the Rule 39 indicated interim measure did not prove to be a foretelling of how the case would conclude. Although Mr. Lambert had been kept on life-sustaining treatment during the lengthy proceedings and examinations of his case, it was found by the Court to be reasonable to have withdrawn his treatment earlier, and therefore withdrawing it after the judgment would be equally reasonable and in compliance with France's obligations under the Convention.

4. Evaluation of the use of Interim Measures in ECtHR case law

4.1. Assessing the justifications of immigration cases constituting the majority of Interim Measure indications

The ECtHR indicates interim measures in cases where there is an imminent risk of irreparable damage to the applicant. This requirement is most often met by expulsion, extradition and deportation cases which made up 49% of the indications granted by the Court in 2019.[161] These statistics, as mentioned in Chapter 2 of this thesis, might confuse one to believe that the Court acts as an appeals court in immigration cases from Contracting States, however this is far from correct. What immigration cases have in common that make them especially eligible for Rule 39 indications are, firstly, their immediate nature. In order to submit an application to the ECtHR, the applicant must have exhausted all domestic options.[162] This often means that the applicant of an immigration case is on the brink of deportation when their case becomes eligible for application with the ECtHR, making it a case with an imminent risk of irreparable damage, as established in Mamatkulov. This does not mean that the subject of an immigration case is more significant than that of other cases, instead it means that the matter is more pressing and time-sensitive, which often results in it receiving priority in the order in which cases are delt with, according to Rule 41 of the Rules of Court.

Additionally, immigration cases are eligible for Rule 39 indications as they often regard Article 2 or 3 violations, both of which represent fundamental protections in the Convention, and both of which could amount to significant damages if they were violated. This makes immigration cases prime examples of why the use of Rule 39 indications is fundamentally necessary for the proper proceedings of the Court, and correspondingly, for the protection of the rights described in the Convention.

When reading the cases examined in this thesis that regard immigration matters, one will most likely adopt an empathic view on immigration cases before the ECtHR, and one might even wonder why immigration cases are not automatically given priority over other cases; or, at the very least, why Article 2 or 3 cases are not automatically given priority over other cases. As mentioned, numerous times in this thesis, immigration cases, especially those concerning applicants that are facing immediate deportation, are often the subject of possible

[159] Ibidem, para 157
[160] Ibid., para 181
[161] Factsheet on Interim Measures
[162] ECHR, Article 35

risk of life or torture, which makes them high priority cases. What separates them from other cases is the possibility to prevent the violation. Other cases examined by the Court often concern claims of violations that have, allegedly, already occurred, however in immigration cases the Court has the opportunity to possibly prevent the damage to an applicant by indicating an interim measure and prioritizing it over other cases. All of these reasons make it fair to wonder why immigration cases are not given priority instantly by principle, and while this is a fair concern, it goes against the principle of individual examination. While it might be beneficial for the applicants of immigration cases to be instantly prioritized above others, it could result in the neglect of other cases. This could lead to violations of the Convention, which is avoided when all cases are examined equally upon reception. It is only a desired result of the Convention and the Rules of Court that immigration cases may be the subject of an interim measure indication and prioritization more often than other cases. Sorting cases in order of which is more time sensitive is not discriminatory if the case has been examined equally to others.

4. 2. Assessing if the Court is justified in not re-examining Interim Measure indications

The ECtHR claims to only apply Rule 39 interim measures when there is an imminent risk of irreparable damage to the individual's rights as protected by the Convention. This claim seems to be supported when reviewing the general practice and case law of the Court, which ultimately shows that the Court is careful in applying interim measures, and often rejects the applications for Rule 39 intervention. Although the Court often rejects applications, due do their being inadmissible, it is clear from the analysis made in this thesis that the Court has to decide very quickly if it is necessary to the protection of the individual's rights to indicate an interim measure. However, the haste of this decision does not mean that the Court will make an error in choosing to apply an interim measure. The ECtHR does not question if its decision to imply an interim measure was correct. There are multiple reasons for this approach. Firstly, the Court decides to indicate an interim measure only when certain criteria are met, such as the requirement for imminent risk of irreparable damage. In the cases examined in this thesis, the Court indicated interim measures with the purpose of preventing death or torture to the applicants; a purpose which hardly needs to be re-evaluated or re-examined by the Court during the proceedings of the case. When a case is concluded, and the Court has not found a violation of the Articles of the Convention, it will lift the Rule 39 indication as the interim measure will have served its purpose.

Furthermore, the establishment of the binding nature of interim measures by the dissolution of the European Commission of Human Rights through Protocol 11, and the subsequent establishment of the practice of the Court in indicating these measures, has resulted in the indications being binding decisions *on par* with other judgments made by the Court. Additionally, the name *interim measures* clearly indicates that the measure is a temporary solution and does not necessarily indicate how the case will conclude after further examination, as can be seen in the case analysis above. The use of Rule 39 indications as a temporary measure acts as an essential tool in ensuring the protection of the rights described in the Convention. If the rights of the Convention could not be temporarily protected while the Court proceedings went ahead, the applicants of a case could risk having their rights violated before the conclusion of the proceedings, as was originally claimed by the applicants in Cruz Varas. This would lead to unnecessary damage to the individual and leave little room for just satisfaction. While the victims might receive financial just satisfaction as a compensation for the damages they have suffered, it is fair to assume that they would have preferred to not suffer the damages in the first place, and as a principle of the Convention they should not have to endure any violations of their rights even if they receive just satisfaction in the end. It is apparent from the case law following the decision of *Cruz Varas* that the Court now agrees with their claim that suffering

the violation before the conclusion of the Court's proceedings nullifies the result of the case, even in the event that the case is concluded in the interest of the applicant.

4.3. Assessing why compliance with Interim Measures is fundamentally necessary

The ECtHR makes Rule 39 indications as a preventative measure in cases where there is an imminent risk of irreparable damage to the applicant. Interim measures have not always been legally binding to the Contracting States of the Convention, and this has presented a struggle for the Court in the past. As observed in *Cruz Varas*, the Court struggled with the non-binding nature of interim measures, as it kept the Court from being able to take preventative measures in order to protect the applicants from being deported before the Court could properly assess the case. The establishment of the binding nature of the interim measures decided in the judgment of *Mamatkulov* was much needed as it finally concluded that the Court indeed had the competence to take preventative measures in order to ensure basic human rights protection of the people within its jurisdiction.

The Court claims that the ability of to indicate interim measures is the first step in ensuring the protection of basic human rights, but this step has no proper impact if States do not comply with it. In the coming chapter I will therefore discuss and explain why compliance with interim measures is equally as important as the indication itself.

In *Cruz Varas* the applicant was deported in defiance with an interim measure indicated by the Commission, and although the Court ultimately concluded that deporting the applicant would not lead to a violation of Article 3 and 8, the risk of a violation had been present enough to justify an interim measure indication in order to avoid irreparable damage to the applicant. A similar scenario took place in *Mamatkulov* where the applicants were extradited to Uzbekistan against an interim measure indication. The applicants claimed that Article 2 and 3 violations were probable, which reiterates the importance of compliance with interim measures as a preventative action where there is a real and imminent risk of violations of fundamental rights.

As mentioned throughout this thesis, the Court will occasionally reference case law from other international tribunals, or perceptions of international law principles in its judgments. Interim measures are not a concept unique to the ECtHR and is a common practice amongst other international tribunals, for example those established by the United Nations, and the Inter-American Court of Human Rights. Both of these have, as mentioned earlier, stated that interim measures, and compliance with them, is fundamentally necessary for the effectiveness of human rights protection. However, both have also experienced lack of compliance by Signatory States: Trinidad and Tobago executed an applicant in defiance with an interim measure indicated by the U.N. Human Rights Committee.[163] Trinidad and Tobago also, infamously, executed two prisoners in defiance with an interim measure indicated by the Inter-American Court of Human Rights.[164] The United States has likewise not complied with interim measures indicated by the ICJ and the Inter-American Commission ordering to halt the executions of prisoners.[165] These defiances are particularly brutal as they result directly in the deaths of the applicants; a result that cannot possibly be rectified. While this thesis does not focus on the use of interim measures regarding the death penalty specifically, the concept is very present in all of the cases examined.

Many of the applicants of immigration cases claim that deportation will subject them to either torture or the death penalty, or death as a result of torture or persecution, *et cetera*. Likewise, the exceptional cases of Chapter 2.2. also examined the topic of death and the right

[163] Pasqualucci, J. M. (2005). Interim measures in international human rights: Evolution and harmonization. Vanderbilt Journal of Transnational Law, 38(1), page 47.
[164] Ibid. p. 48
[165] Pasqualucci, J. M. (2005), p. 48

to life. The Court, or earlier the Commission, has issued interim measures, in all the immigration cases analyzed in this thesis, to further the right to individual petition with the Court, which in practice means that the State is refrained from deporting the applicant while the proceedings are before the Court. The immigration cases from the ECtHR analyzed in this thesis all differ from the examples of the USA and Trinidad and Tobago, because the States in the ECtHR cases were not the executioners in the literal sense. However, these States all had a unique and invaluable opportunity to prevent the torture or death of the applicants, which made it completely essential to the applicants' human rights that the States complied with the interim measures.

Applicants in immigration cases are particularly vulnerable to human rights violations, as is illuminated by the cases in this thesis, however, the applicants in the exceptional cases of Chapter 2.2. have made similar claims to those of immigration cases stating that the implementation of their domestic judgments would result in loss of life, violating Article 2. This reiterates why interim measures are completely essential to the proper function of the ECtHR and the effectiveness of its decisions. It furthermore reiterates why it is necessary for the Court to be swift when assessing if an interim measure should be indicated. While no unjustifiable loss of life was found in the cases of the ECtHR analyzed in this thesis (see *Evans*, *Lambert*) the cases of Trinidad and Tobago, and The USA serve as cautionary tales for the consequences of not complying with an interim measure. The unjustifiable loss of life would be a devastating blow to the fundamental principles of the ECHR.

4.3.1. Assessing the possibility of a margin of appreciation in interpreting Interim Measure indications

A common issue in cases where the state has not complied with an interim measure is that the state claims that they either complied to the best of their abilities, perhaps claiming an objective impediment like in *Al-Sadoon*. In other cases, the state will claim that direct compliance was not necessary as they complied by implementing other measures equal to those indicated, *i.e.,* the state will claim that they have assessed the contents and purpose behind the interim measure and made their own assessment as to what would be most advantageous for the case. An example of the latter is *Paladi* where the state claimed, in disagreement with the interim measure, that they could treat the applicant properly in another facility, even though the interim measure required that the applicant not be removed from his current treatment center.

It is worth questioning whether the state should be awarded a larger margin of appreciation in regard to how an interim measure should be complied with. As mentioned earlier in this thesis, the Court recognizes a certain margin of appreciation regarding the interpretation and compliance with specific articles of the Convention; especially when there is a lack of European consensus on the matter. An example of this is the case of *Evans* where the Court recognized a certain margin of appreciation for the states to decide when they consider a fertilized egg as a life with the protections under the Convention, *i.e.,* the right to life in Article 2, *et cetera*. The Court clarified that since the Convention did not offer specifications on the matter, and since the Court had tolerated differentiating legislation and practice from other Contracting States, it would only be fair to allow the United Kingdom to decide when a fertilized egg has achieved "life" *on par* with the meaning of Article 2.

This margin of appreciation is also present in *Lambert* where the Court recognizes France's ability to decide, in compliance with the principles of the Convention and the Council's Guide, when it is appropriate to withdraw life-sustaining treatment. It was again the case that there was no European consensus on the matter of ending life-sustaining treatment, leading to the result that France could only be required to comply with the specific negative and positive obligations found in Article 2, and in the Convention in general.

In some cases, the wording of an interim measure indication can be compared to a margin of appreciation. Many of the interim measure indications we have explored in this thesis have required that the State "take all necessary means or steps" to ensure that the applicant is not deported, extradited or expulsed to the receiving country, before the Court can assess the matters of the Case, or before the State can provide the Court with proper assurances that the applicant's rights will not be violated upon arrival in the receiving country. The Court may not specify further how this measure will be satisfactorily complied with; however, it will assess the compliance in its examination of the case as a whole, and as held in *Al-Saadoon*, the Court has high expectations for the States' compliance with interim measures. It is expected that the Contracting States exhaust all their options in order to comply with interim measures and subsequently protect the rights of the applicant. Therefore, while the Court may allow for the state to "choose" how it will comply with the measure, the expectations for the compliance to be adequate are very high. The Court may word the Rule 39 indication in such a way that it reads as if a margin of appreciation is present, however, the Court's expectations are remarkably high and any attempts at compliance that have not exhausted all options, and have resulted in a failure to comply, cannot be accepted, as held in *Al-Sadoon*.

This leaves the question: why are States awarded a margin of appreciation in the interpretation of certain articles of the Convention, example; the right to life in Article 2, but the States are not awarded the same leniency in the compliance with interim measures?

To answer this, I will first remind the reader of the purpose of indicating interim measures as presented in Chapter 1, and further explored in Chapter 2, of this thesis. The purpose of indicating an interim measure, especially in immigration cases, is to avoid irreparable damage to the applicant and their rights.

There are examples of cases where the State was found to be in violation of Article 34 of the Convention by not complying with an interim measure, even after *Mamatkulov* where the Court established that Rule 39 indications were legally binding.

The problem with allowing States to question the decision of the Court to indicate an interim measure is firstly, that it weakens the authority of the Court to allow for States to question its decisions to a degree where they can choose not to follow an indication of this magnitude. Secondly, it puts the rights protected by the Convention, and subsequently the Court, in danger of irreparable damage, as leniency toward the States' interpretation of interim measure indications leaves room for the State to demote the importance of the basic rights protected by the Convention. An example of this is the multiple attempts by the United Kingdom to claim that the risk of torture to the applicant should be weighed against the risk the applicant poses to the State.[166] Had the Court not intervened with such an approach to the interpretation of Article 3 and interim measures, it could have established a rather damaging practice of interpreting the interests of the States above the rights of the individual.

4.4. Assessing if dissenting opinions in the Court factor into the use of Interim Measures

In *Cruz Varas* the still-acting Commission voted almost unanimously, by twelve votes to one, that they believed a violation of Article 25 § 1 (now Article 34) had occurred when Sweden deported the applicant against an interim measure indication. The Court disagreed with this, although the disagreement only won by one vote, being ten votes to nine. Dissent was clearly an issue in this case, which ponders the question of the relevance of dissent in the ECtHR regarding interim measures and compliance.

In *Cruz Varas* and later in *Mamatkulov* it was made clear that the Court did not disagree on the purpose of indicating an interim measure, however it had disagreed on the binding nature of such an indication, and the compliance with it. While the binding nature has been established

[166] Saadi, para 138

long ago, the Court still examines compliance with interim measures and votes with dissent to this day.

Dissent is of course not a new concept in the Court. The majority vote decides the judgment, as is the foundation of any democratic vote. However, it is interesting to review a case as *Cruz Varas* from 1991 where the decision regarding compliance with Article 25 § 1 was only decided by one vote. This is particularly daunting as the interpretation of then Rule 36 and Article 25 § 1 remained in the practice of the Court until Mamatkulov in 2005. This shows that while there was already doubt within the Court about the use of and compliance with interim measures throughout the 1990's, it took almost fifteen years before this doubt was settled and a new practice was put in place.

Some might argue that this is only a theoretical problem as most States complied with the interim measures even though they were not binding, however, the example of *Cruz Varas* contradicts this argument. Mr. Varas ultimately lost his case because he could not prove that his medically acknowledged PTSD and scars from torture[167] had been inflicted upon him by the national authorities of Chile.[168] It is highly critical that such a deportation took place without repercussion to the responsible State. In comparison, the Court found the United Kingdom to be in violation of Article 3 by subjecting the applicants in *Al-Sadoon* to the fear of possibly being subjected to the death penalty in Iraq. The Court stated that "*it is reasonable to assume that this fear caused the applicants intense psychological suffering*".[169] This statement reads somewhat ironic compared to the statements made in *Cruz Varas* where the Court did not grant the applicant the benefit of the doubt when considering if his psychological and physical wounds were proven to have been inflicted by the authorities of the receiving State. Arguably, Mr. Varas did not suffer any physical harm after his deportation, however, it is fair to assume that he may have experienced fear to the same degree as the applicants in *Al-Sadoon*; a hypothesis which is supported by the fact that his wife and child went into hiding fearing their own deportation.

Based on the above, it is clear that the practice of the Court has changed over time, which is only positive. It is only regrettable that *Mamatkulov* had not been decided earlier so as to help avoid deportations like in that of *Cruz Varas*. The dissent in *Cruz Varas*, while critical, is a result of the democratic foundations of the Court and is ultimately a positive aspect of the practice of the Court. As the Court itself has stated in *Evans* and *Lambert*: when there is no European consensus on a matter, the Court allows for a certain margin of appreciation.[170] Therefore, it is fair to conclude that if the Court recognizes differentiating opinions amongst the Member States, then we must also recognize differentiating opinions amongst the Court.

5. Conclusion

Interim measures are indicated in the early stages of proceedings as a preventative measure to avoid any and all possible violations of the rights protected in the Convention. An interim measure is however not an indication of how the Court will ultimately judge the case once proceedings have concluded. The Court is more lenient in its decision to indicate an interim measure compared to its assessment of possible convention violations. This is due to the purpose of the interim measure which is to prevent any irreparable damage to the rights of the individual.

When analyzing the use of interim measures in the practice of the ECtHR it is immediately apparent that the use of interim measures is fundamental to the protection of the rights of

[167] Cruz Varas, para 27 + 44 + 45
[168] Cruz Varas, para 84
[169] Al-Sadoon, para 136
[170] Paraphrased

the ECHR. It is clear that the Court does not apply Rule 39 in its proceedings unless there is a real risk of the applicant being subjected to treatment which could cause them irreparable damage or in other ways may deny the applicant the right to individual application found in Article 34 of the Convention.

Due to the often time-sensitive subject matter of immigration cases, the Court is required to act very swiftly when indicating interim measures; often indicating such measures within a few days of receiving the application. This haste is necessary due to the urgency of the cases which are often regarding extradition, expulsion or deportation. Although the Court is not an appeals court for immigration cases, the nature of urgency of these cases and the principle of interim measures often overlap which creates a pattern of Rule 39 being used more often in immigration cases than other cases. Even though the Court is often forced to act quickly when indicating an interim measure this decision is always based on a meticulous examination of the materials before it. The decision is made in the interest of the individual's rights and is not necessarily a premature indication of how the Court will ultimately conclude the case at the end of the proceedings.

The Court has very high expectations for the compliance to interim measures and holds the Contracting States to high standards. Interim measure indications rarely leave room for interpretation and are hardly the subject of a margin of appreciation, and rightfully so. As the "gate-keeper" of the rights protected in the Convention it is only justifiable that the Court holds the competence to indicate temporary measures upon a state in order to protect the rights of an individual from irreparable damage. While the Court allows for a margin of appreciation in other matters, it is only reasonable that it retains this extraordinary ability to protect human rights.

As a subject matter, human rights and their protection can be discussed and criticized into oblivion, however, regarding the success of the European Convention on Human Rights I can only agree with Ed Bates in his statement that "*it has created the most effective system of international protection of human rights in existence*."[171]

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