

# **When Procedure Involves Matters of Life and Death: Interim Measures and the European Convention on Human Rights**

**Hannah R. Garry\***

Within the last decade of enforcement of the European Convention on Human Rights by the European Commission and European Court of Human Rights, the system has witnessed a dramatic increase of registered applications claiming that their rights have been violated by Member States. Parallel to this growth in applications to the Court, parties have made applications for interim measures orders under the Rules of the Court for urgent action to be taken. This paper is intended to provide an overview of the definition of 'interim measures' under international law and their effect on individuals and states from which they have been requested. Within the context of the European Convention on Human Rights, this article highlights: the development of the use of interim measures orders by the European Commission and the Court; the current use of interim measures orders after Protocol 11 to the Convention; and the resulting case law and compliance rate which has developed up to the present. This paper provides the first ever compilation of statistics on the use of interim measures by the Commission and the Court from 1974 to the present as demonstrated in charts attached as appendices. Finally, in light of their history within the European system, this paper analyses the

\* J.D. (2002) University of California, Berkeley and MLA (2001) Columbia University. This paper was prepared at the European Court of Human Rights (ECHR) while a Study Visitor from 5 June to 28 July 2000. Special thanks and acknowledgments are due to Judge Matti Pellonpää, Section IV, ECHR, who provided invaluable insight and critique while developing this report; to Madame Montserrat Enrich Mas, Head of Training and Visits Unit, ECHR, who initiated the writing of this report and who provided guidance as to its overall structure; to Madame Sally Dolle, Section Registrar for Section III, who answered various queries regarding the processing of interim measures applications in the Court; to Madame Nora Binder, Head Librarian, and the ECHR Library staff, for their patience and assistance in helping me to locate various documents; and to M. Phillippe Worth, ECHR Technical Support, without whom I could never have compiled the statistics properly. Finally, to Professor David Caron, UC Berkeley, and to my funders, the Mustard Seed Foundation, Virginia, USA, many thanks.

arguments for reform in the Court to deal with interim measure requests as well as for interim measure directives from the Court to be recognized as legally binding on the Member States. Questions considered include: do the increased applications for interim measures as well as their urgent and serious nature call for reform in the procedure for handling them by the Court? Have interim measures moved towards becoming customary law within Europe and more generally in international law both in terms of *opinio juris* and practice? If interim measures are found to be legally binding, is this a threat to the sovereignty of Member States or rather one more logical step towards full union within Europe?

## Introduction

Within the last decade of enforcement of the European Convention on Human Rights (hereinafter the 'Convention') by the European Commission and European Court of Human Rights (hereinafter the 'Court'), the system has witnessed a dramatic increase of registered applications claiming that their rights have been violated by Member States. In 1989, there were just 1,446 registered applications, but by 1999 that number had multiplied nearly six times to 8,402 registered applications.<sup>1</sup> The actual number of applications received by the Court but not necessarily 'registered' is much higher. For example, from 1 November 1998–30 May 2000, the Court opened 32,086 'provisional files', 13,193 of which were then 'registered'.<sup>2</sup> Presently, there is an ongoing debate as to the measures to be taken to deal with the ever-growing backlog. One of the consequences was the passage and entry into force of Protocol 11 to the Convention on 1 November 1998. This protocol drastically restructured the two-tiered system into one, abolishing the role of the European Commission so that all cases are now received and adjudicated solely by the Court. It was intended that, via Protocol 11, the system would be streamlined, eliminating duplication and delay, particularly in determining the admissibility of applications. However, the fact of increased membership within the Council of Europe (currently forty-one states representing over 800 million people), and only forty-one judges for handling the caseload, has resulted in urgent calls for continued reform through additional Protocols.<sup>3</sup> There is a real fear within Europe that justice under the Convention will be denied and confidence in the system will be lost, if there is not speedy adjudication of cases appearing before the Court.<sup>4</sup>

<sup>1</sup> See ECHR, Council of Europe, *Statistics 1.11.1998–30.5.2000* (on file with author).

<sup>2</sup> *Ibid.*

<sup>3</sup> Robert Badinter, former President of the French *Conseil Constitutionnel*, 'The Convention and the Courts of the Member States of the Council of Europe', Address before the ECHR on 8 June 2000.

<sup>4</sup> *Ibid.* Mr Badinter queried: 'we are looking to a registered caseload of 20,000 in the future. To deal with these cases, the Court would have to spend too much time; this is a form of denial of justice and must be dealt with promptly . . . [C]an the ECHR pass judgment on countries under Article 6.1 [right to a fair

Parallel to this growth in applications to the Court, parties have made applications for interim measures orders under the Rules of the Court for urgent action to be taken at an increased rate. Usually, the requested action is to be taken by the respondent state but some cases have even involved requests to individual applicants to preserve the rights of the parties pending the proceedings or in the interest 'of the proper conduct of the proceedings before it'.<sup>5</sup> The President of the Section hearing the case may also issue an order *proprio motu* for such reasons.<sup>6</sup> As of 20 July 2000, a total of 1,457 applications for interim measures have been registered by the Commission and the Court since 1974,<sup>7</sup> but a much larger number have been processed prior to the case's registration after a decision has been made as to the interim measure application. In 1997, it was estimated that the President or acting President of the Commission was dealing with approximately 200 registered applications per year, most outside of the normal sessions.<sup>8</sup> Under the Protocol 11 system, there is no permanent organ within the Court for handling applications and orders for interim measures. The President of the Section handling a case will deal with interim measures applications, and, if in doubt as to his or her decision, with the advice of the rest of the Chamber assigned the case.<sup>9</sup> Given that, at the beginning of 1998, 55 per cent of all cases in which interim measures were ordered were eventually declared inadmissible,<sup>10</sup> it has been argued that one small but effective reform for the Court might be in establishing a different procedure for handling requests for interim measures. One suggestion has been that instead of the decision resting with one individual in a Section, a separate organ which has an expertise in analyzing interim

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trial in a reasonable time] of the Convention when it itself takes too long?' See also Maud Buquicchio-de Boer, *Interim Measures by the European Commission of Human Rights*, in Michele de Salvia and Mark E. Villiger (eds.), *The Birth of European Human Rights Law*, 1998, p. 235.

<sup>5</sup> See Rules of the Court, Registry of the Court, European Court of Human Rights (4 November 1998) at Article 39(1).

<sup>6</sup> *Ibid.*

<sup>7</sup> 1974 is the date of the codification of the Commission's power to issue interim measures requests. See the section entitled 'Codification' at pp. 407–8 below.

<sup>8</sup> Buquicchio-de Boer, *op. cit.*, note 4, p. 235.

<sup>9</sup> Interview with Judge Matti Pellonpää, Section IV, European Court of Human Rights (16 June 2000). Note that the term 'Chamber' in the European Convention has two different meanings and is used to indicate both a fixed body as well as a specially constituted body for a particular case. The Chambers mentioned in Article 26(b) of the Convention set up for a 'fixed period of time' of three years are also known as Court 'Sections'. There are four Sections in the ECHR. Whereas a body of seven judges under one of the four Sections (also called a 'Chamber') considers an interim measures application as well as the actual case as referred to under Article 27(1) of the Convention. Once a case is assigned to a particular fixed Chamber/Section, a Chamber is then constituted for that particular case under it, and the President of the fixed Chamber/Section and a judge from one of the contracting states involved in the case always sit on the specially constituted Chamber. See Convention for Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Council of Europe, ETS No. 5 (as modified by Protocol 11), Articles 26 and 27. See also Rules of the Court, *op. cit.*, note 5, Rules 25 and 26.

<sup>10</sup> Buquicchio-de Boer, *op. cit.*, note 4, p. 234.

requests and which solely deals with them, may be in order.<sup>11</sup> Such reform might also be beneficial to the individual applicants for whom a thoroughly knowledgeable and expeditious review of the request is often a matter of life or death.

This paper is intended to provide an overview of the definition of 'interim measures' under international law and their effect on individuals and states from which they have been requested. Within the context of the European Convention on Human Rights, this article will highlight: the development of the use of interim measures orders by the European Commission and the Court; the current use of interim measures orders after Protocol 11 to the Convention; and the resulting case law and compliance rate which has developed up to the present. Finally, in light of their history within the European system, this paper will analyze the arguments for reform in the Court to deal with interim measure requests as well as for interim measure directives from the Court to be recognized as legally binding on the Member States. Questions to be considered include: do the increased applications for interim measures as well as their urgent and serious nature call for reform in the procedure for handling them by the Court? Have interim measures moved towards becoming customary law within Europe and more generally in international law both in terms of *opinio juris* and practice? If interim measures are found to be legally binding, is this a threat to the sovereignty of Member States or rather one more logical step towards full union within Europe?

## **Interim Measures Under International Law**

### **Recent Application in European Cases**

On 16 February 1999, legal counsel for Mr Ocalan, the leader of the PKK (Workers' Party of Kurdistan) lodged an application with the Court.<sup>12</sup> Mr Ocalan had been arrested in Kenya by Turkish security forces and taken to stand trial in Turkey before the National Security Court. At first, the Court requested the Turkish authorities to make clarifications as to Mr Ocalan's arrest and detention under Rule 54(3)(a).<sup>13</sup> Concerned that Mr Ocalan would not be able to put forward his case properly in the domestic criminal proceedings and before the Court, and as he was facing the death penalty, the Court made an interim measures order to Turkey requesting that it comply with Article 6 (right to a fair trial) of the European Convention:

<sup>11</sup> *Ibid.* p. 236.

<sup>12</sup> See Information Note No. 12 on the Case Law of the Court, November 1999, p. 17, [www.echr.coe.int/eng/INFORMATION%20NOTES](http://www.echr.coe.int/eng/INFORMATION%20NOTES).

<sup>13</sup> Rules of the Court, *op. cit.*, note 5, Rule 54(3)(a) (Procedure before a Chamber) states that: 'Alternatively, the Chamber may decide to (a) request the parties to submit any factual information, documents or other material which it considers to be relevant . . .' See also Information Note No. 4 on the Case Law of the Court, March 1999, p. 18, [www.echr.coe.int/eng/INFORMATION%20NOTES](http://www.echr.coe.int/eng/INFORMATION%20NOTES).

to respect the rights of the defence in full, including the applicant's right to see and to have unrestricted, effective access to the lawyers representing him in private, and to ensure that the applicant has an effective opportunity through lawyers of his own free choosing to exercise his right of individual petition to the Court.<sup>14</sup>

The Turkish authorities declined to comply with this interim measure order arguing that it went beyond the scope of the function that these orders are intended to serve under the Court's Rules.<sup>15</sup> The Committee of Ministers of the Council of Europe was informed of this refusal and the Court stressed to Turkey the need to comply with this order.<sup>16</sup> On 29 June 1999, Mr Ocalan was sentenced to death by the National Security Court and his appeal was rejected on 25 November 1999. On 30 November 1999, the Court issued another interim measures order to Turkey to suspend the death penalty until it had heard the case which is still pending at the time of the writing of this article.<sup>17</sup>

In November 1997, Ms Hoda Jabari, an Iranian, entered Istanbul, Turkey, illegally.<sup>18</sup> With a false Canadian passport she flew to Canada via France. In Paris, her forged passport was discovered and she was sent back to Turkey. Prior to entering Turkey the first time, she had fallen in love with a man (X) in Iran and they decided to marry. His family was against the marriage and he subsequently married another woman two years later while continuing sexual relations with Ms Jabari. In October 1997, they were walking together in the street when the police arrested them because X was married. Ms Jabari was subject to a vaginal examination while in custody. Her family managed to secure her release and she fled Iran in November. Upon return to Turkey from Paris, she requested asylum, which was rejected, because she had not filed within the five-day time limit under Turkish law. Ms Jabari was subjected to an order of deportation. She appealed on grounds that under Iranian law, she would be subject to death by stoning, whipping or flogging upon return to Iran. The Turkish government refused her appeal. After filing her case with the European Commission, an interim measure order was issued to stay the expulsion until the case was heard. The Turkish government complied.

### **Interim Measures Defined**

The concept of interim measures (also known as provisional measures) is one which has been incorporated into international law out of domestic law as a tool for a court

<sup>14</sup> See Information Note No. 4 on the Case Law of the Court, March 1999, p. 18, [www.echr.coe.int/eng/INFORMATION%20NOTES](http://www.echr.coe.int/eng/INFORMATION%20NOTES).

<sup>15</sup> See Information Note No. 5 on the Case Law of the Court, April 1999, p. 6, [www.echr.coe.int/eng/INFORMATION%20NOTES](http://www.echr.coe.int/eng/INFORMATION%20NOTES).

<sup>16</sup> *Ibid.*

<sup>17</sup> See Information Note No. 12, *op. cit.*, note 12, p. 17.

<sup>18</sup> See generally *Jabari v. Turkey*, Provisional Judgment of 11 July 2000, App. No. 40035/98, [www.echr.coe.int/hudoc](http://www.echr.coe.int/hudoc).

to stop the execution of a decision or order where it has been subsequently challenged in pending proceedings before a court of law.<sup>19</sup> Their purpose is to 'preserve the respective rights of the parties pending the decision' of a court<sup>20</sup> and to also ensure the effectiveness of the tribunal's jurisdiction and authority.<sup>21</sup> Within the Convention system, the effect of an interim measures order is to immediately preserve the *status quo ante* with the purpose of preventing irreparable damage while the judicial proceedings are pending.<sup>22</sup> The order is an urgent one and may be of a prohibitive or proactive nature whereby either party to the case may be required to take action or to refrain from certain actions. For example, before the European Commission, individual applicants have been requested to begin eating thereby calling off their hunger strike.<sup>23</sup> In other cases before the Court, as demonstrated in the examples given above, respondent governments have been requested to refrain from deportation of individuals under their immigration laws until the Court has ruled. These measures are a practical and necessary device for preventing irreversible harm to either party's case such as the destruction of crucial evidence pertaining to the facts or danger to an individual applicant's health and well-being. They are also important for ensuring that the proceedings of the case are properly handled.

### **Binding or Non-Binding?**

As highlighted by the *Cruz Varas* case before the Court, a principal issue regarding interim measures is the extent to which an order for such measures is binding upon issuance by an international tribunal.<sup>24</sup> On 28 January 1987, Mr Cruz Varas, his wife and two-year old child arrived in Sweden from Chile and the following day applied for political asylum.<sup>25</sup> Cruz Varas had been involved in political parties and activities (including attempts to assassinate General Pinochet) against the Pinochet regime. The Swedish authorities rejected his asylum application and later, when he appealed, he revealed that on several occasions he and his family had their lives threatened. He himself suffered from several incidents of torture, electric shock and sodomy at the hands of persons thought to be a part of the Pinochet government. He stated that he did not reveal these facts in earlier interviews with the Swedish police because he

<sup>19</sup> See Gomien *et al.*, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, 1996, p. 49.

<sup>20</sup> See *Anglo-Iranian Oil (UK v. Iran)*, (1951) ICJ Reports 8 at 93 (interim Protection Order of 5 July) as cited in David D. Caron, 'Interim measures of protection: Theory and practice in light of the Iran-United States Claims Tribunal' (1986) 46 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 473.

<sup>21</sup> Caron, *op. cit.*, note 20, p. 474.

<sup>22</sup> Gomien *et al.*, *op. cit.*, note 19, p. 49.

<sup>23</sup> Carl Aage Norgaard, 'Interim measures under the European system for protection of human rights', in Ole Due *et al.* (eds.), *Festschrift til*, 1994, p. 284.

<sup>24</sup> See generally *Cruz Varas and Others v. Sweden*, Judgment of 20 March 1991, ECHR, Series A No. 201.

<sup>25</sup> *Ibid.*

feared they were linked to the Chilean police; he also found it psychologically difficult to relate these painful events. Despite these new developments and doctors' reports verifying them, the Swedish immigration authorities denied his asylum request and ordered he and his family to be expelled. On 5 October 1989, the Commission received an emergency request for interim measures requesting the Swedish Government not to expel the Cruz Varas family. At 9:10 am on 6 October 1989, the Commission indicated to the Swedish Government by telephone call that it was desirable not to expel the family until the case was heard by the Commission. At 12 noon, the same was confirmed by fax. At 4:40 pm, the Immigration Board went ahead with the expulsion despite knowledge of the Commission's order. Cruz Varas was deported, but his wife and son went into hiding in Sweden. Upon return to Chile, Cruz Varas was allegedly threatened and his brothers-in-law were attacked, mistreated and asked questions about him. He subsequently fled to Argentina.

The crux of the controversy is whether an interim measures order must be considered as a judgment, fully binding and enforceable before an international tribunal. While the binding nature of such an order is presumed under domestic law, the same is not necessarily true for international law.<sup>26</sup>

The debate has generated controversy because it questions matters of inherent jurisdiction and state sovereignty as the orders are often directed at states who are party before the international tribunal. As early as 1929, Mr Root of the International Commission of Jurists, in establishing the Statute of the Permanent Court of International Justice (PCIJ),<sup>27</sup> expressed his views that orders for interim measures may not be binding.<sup>28</sup> Later, in 1931, when the PCIJ revised its Rules, Judge Schucking declared that 'measures of protection, being only interim measures, *had no binding force*'.<sup>29</sup> However, the record of the meetings indicates that several other judges on the PCIJ were not in agreement with Judge Schucking on this matter.<sup>30</sup> In 1952, in the *Anglo-Iranian Oil Company* case, the ICJ avoided the question of interim measures contested by the Iranian Government altogether by deciding that the decision on the matter should wait until final judgment.<sup>31</sup> The case was then struck off the docket as the ICJ found it lacked jurisdiction.<sup>32</sup>

More recently, in the *Genocide* case, the ICJ issued a provisional measures order on 8 April 1993 calling for Yugoslavia to prevent acts of genocide and not to commit

<sup>26</sup> See B.A. Ajibola, 'International Court of Justice', in M.K. Bulterman and M. Kuijer (eds.), *Compliance with Judgments of International Courts*, 1996, p. 14.

<sup>27</sup> The PCIJ was the predecessor to the present-day International Court of Justice.

<sup>28</sup> *Ibid.*

<sup>29</sup> Shabtai Rosenne, *The Law and Practice of the International Court*, 1965, notes 141–2, as cited in Ajibola, *op. cit.*, note 26, p. 14.

<sup>30</sup> See Ajibola, *op. cit.*, note 26, p. 14.

<sup>31</sup> (1952) ICJ Reports 93 (visited 14 June 2000), [www.icj-cij.org/icjwww/idecisions/isummaries/iukisummary520722.htm](http://www.icj-cij.org/icjwww/idecisions/isummaries/iukisummary520722.htm).

<sup>32</sup> *Ibid.*

acts of genocide against Bosnian Muslims within Bosnia and Herzegovina.<sup>33</sup> As to the binding nature of the order, which was subsequently flouted in practice, Judges Ajibola and Weeramantry attached separate opinions to the second order for provisional measures of 13 September 1993 by the ICJ.<sup>34</sup> They both expressed the view that orders for interim measures must be seen to impose legal obligations on the respondent. Judge Ajibola pointed out that under Article 74 of the Rules of the Court, an interim measure is to be considered urgently with priority over all other cases; he also argued that the order influences the outcome of the adjudication and should thus be considered 'part' of the 'whole' judgment.<sup>35</sup>

Despite these arguments, the Court relied on precedent set by the PCIJ in the *Free Zones of Upper Savoy and the District of Gex* case<sup>36</sup> and held that 'unlike the final judgment of the Court, orders of the Court have no "binding force" or "final effect" in the decision of any dispute'.<sup>37</sup> However, it stated again in its second order for provisional measures that Yugoslavia should immediately and effectively implement the first order to prevent and to cease any acts of genocide.

Thus, the debate as to the binding effect of interim measures orders in international law continues. Despite the reasoning in the *Genocide* case affirming such orders to be non-binding, some judicial decisions and academic have argued strongly that orders for interim measures should in fact be binding. The arguments of Judges Ajibola and Weeramantry are particularly persuasive especially in cases where such orders involve matters of life or death such as preventing genocide or stopping expulsions as such acts will obviously cause irreparable damage to the parties and affect the outcome of the case on the merits.

These recent arguments in favor of interim measures have recently been given tremendous authority with the ruling of the ICJ on 27 June 2001 in *Lagrand Case (Germany v. United States of America)* whereby the Court declared for the first time ever that provisional measures are legally binding. The Court held that its order of 3 March 1999 to the U.S.A. to stay the execution of Walter Lagrand 'was not a mere exhortation' but 'created a legal obligation for the United States' under Article 41 of the ICJ statute.

<sup>33</sup> *Request for the Indication of Provisional Measures Order*, (1993) ICJ Reports 389 (visited 14 June 2000), [www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm](http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm).

<sup>34</sup> *Further Request for the Indication of Provisional Measures Order*, (1993) ICJ Reports 389, see Separate Opinion of Judge Ajibola, para. 4 (visited 15 June 2000), [www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm](http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm).

<sup>35</sup> *Ibid.* See Separate Opinion of Judge Ajibola, at para. 5.

<sup>36</sup> Order of 19 August 1929, PCIJ, Series A, No. 22, as cited in Ajibola, *op. cit.*, note 26, p. 15.

<sup>37</sup> (1993) ICJ Reports 389, as cited in Ajibola, *op. cit.*, note 26, p. 15. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* (visited 14 June 2000), [www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm](http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm).

## History of Interim Measures Under the European Convention of Human Rights

### Informal Practice

Within the text of the European Convention of Human Rights, no provision was made for interim measures. During the drafting of the Convention, the draft of 12 July 1949 contained within its Article 35 a rule regarding interim measures with language almost identical to that of Article 41 of the ICJ Statute on interim measures. It was subsequently omitted with no evidence in the *travaux préparatoires* as to the reason for its rejection. It has been suggested that the drafters could not have foreseen how the current system under the European Convention would have developed to the extent that it did and that their primary concern was in quickly establishing a system of human rights protection in the aftermath of the Second World War.<sup>38</sup> Necessity soon dictated that the European Commission begin to make interim measures requests to Member States with the first inter-state case request made in 1957 to the Government of Cyprus, only two years after the Commission began functioning.<sup>39</sup> In this case, the Government of Cyprus agreed not to execute an individual. In 1968, in the first *Greek Case*, the Commission successfully intervened on behalf of a resistance fighter, and then, in the second *Greek Case*, on behalf of several persons facing the death penalty in Athens.<sup>40</sup> In the 1960s and 1970s, a number of applicants to the Commission complained of imminent expulsions to states where they feared persecution and treatment in violation of Article 3 (prohibition against torture and inhumane and degrading treatment or punishment) of the Convention on political grounds. In these cases, the Commission found under Article 3 that the Member State had an obligation to be aware of the risk which potentially faced an individual they intended to extradite or deport and not to do so where it would violate Article 3.<sup>41</sup> In nearly all of the cases where the Commission made an informal request to stay deportation, the Member States complied.

The developing practice led to a recommendation in 1971 by the Consultative Assembly of the Council of Europe to the Committee of Ministers for the need to draft an additional Protocol to the Convention providing explicit power to order interim measures in certain contexts. Increased requests to prevent expulsion led to the obvious conclusion that, where an individual might be tortured or killed, it would lead to irreparable damage to the case before the Commission.<sup>42</sup> The Committee of Ministers declined to make the ordering of interim measures an

<sup>38</sup> See R.StJ. Macdonald, 'Interim measures in international law, with special reference to the European system for the protection of human rights' (1993) 52 ZaoRV 731.

<sup>39</sup> Buquicchio-de Boer, *op. cit.*, note 4, p. 229.

<sup>40</sup> *Ibid.*, pp. 229–30.

<sup>41</sup> Norgaard, *op. cit.*, note 23, p. 280.

<sup>42</sup> Macdonald, *op. cit.*, note 38, p. 734.

explicit power primarily because it was seen to be unnecessary in light of the adequacy of the informal system for making requests to the Member States.

### **Codification**

In 1974, encouraged by the consistency of the Member States in complying with its informal requests for interim measures, the Commission, through Article 36 of the Convention,<sup>43</sup> adopted Rule 36 of its Rules of Procedure which states:

The Commission, or when it is not in session, the President may indicate to the parties any interim measure the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it.<sup>44</sup>

In 1982, the Court likewise adopted the power to apply interim measures under Article 55 of the Convention<sup>45</sup> through Rule 36 of the Rules of the Court whereby it 'indicates' to any party or applicant an interim measure.<sup>46</sup> In practice, before the abolition of the role of the Commission under Protocol 11, Rule 36 was rarely used because interim measure applications typically came at the beginning of the cases before they were brought before the Court.<sup>47</sup> Once the case was sent to the Court by the Commission, its interim measures requests did not apply and the Court would issue a new request under its Rule 36 resulting in a risk of extradition or deportation from the time when the Commission's request expired until the time that the Court made a new request.<sup>48</sup> This situation was rectified with an amendment to Rule 36 of the Rules of the Court which came into force on 1 April 1989 whereby the Commission's interim measure request remained after transfer to the Court unless the President decided differently.

In 1977, the Parliamentary Assembly again urged the Committee of Ministers to advise the Member States of the Convention not to expel or extradite persons who may face treatment prohibited under Article 3. The Committee did so in a

<sup>43</sup> See Convention for Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Council of Europe, ETS No. 5, Article 36, which states: 'the Commission shall draw up its own rules of procedure.'

<sup>44</sup> See 'Amendments to the Rules of Procedure of the European Commission of Human Rights' (1974) 17 *Yearbook of the European Convention on Human Rights* 52.

<sup>45</sup> See European Convention, *op. cit.*, note 9 at Article 55, which states: 'the Court shall draw up its own rules and shall determine its own procedure.'

<sup>46</sup> See 'Revised Rules of Court (Adopted on 24 November 1982)' (1982) 25 *Yearbook of the European Convention on Human Rights* 16. Revised Rule 36 of the Court states: 'Before the constitution of a Chamber, the President of the Court may, at the request of a Party of the Commission, of the applicant or of any other person concerned, or *proprio motu*, indicate to the Parties any interim measure which it is advisable for them to adopt. The Chamber when constituted or, if the Chamber is not in session, its President, shall have the sole power.' Notice of these measures shall be immediately given to the Committee of Ministers.

<sup>47</sup> Norgaard, *op. cit.*, note 23, at 286.

<sup>48</sup> *Ibid.*, p. 286.

recommendation in 1980 for states 'to comply with any interim measures which the European Commission of Human Rights might indicate under Rule 36 of its Rules of Procedure, as, for instance, a request to stay extradition proceedings pending a decision on the matter'.<sup>49</sup>

With the entry into force of Protocol 11 eliminating the role of the European Commission, the Commission recommended again that interim measures be made a part of the Convention.<sup>50</sup> The Court also unanimously recommended that the new single Court have the power to issue binding interim measures orders.<sup>51</sup> Meanwhile, the Committee on Migration, Refugees and Demography of the Parliamentary Assembly of the Council of Europe made a proposal that Rule 36 should be made obligatory for Member States.<sup>52</sup> In spite of this overwhelming support, the Committee of Ministers again declined to make Rule 36 a part of the Convention and thus unquestionably binding. Rule 36 became Rule 39 of the Court with the same wording of the former, giving the Court only the power to *request* that interim measures be taken by an individual applicant or Member State.

However, it is interesting to note that, under paragraph 2 of Rule 39, the Committee of Ministers was given the role of following up on compliance by Member States with interim measures orders; one reason for this was to compensate for interim orders not being binding.<sup>53</sup> While the Committee of Ministers had this supervisory role in the Revised Rules of the Court issued in 1982, it was not given the same role with regard to the interim measures orders issued by the Commission under Rule 36 as it was established in 1974. This is an important fact given that prior to Protocol 11 the Commission and not the Court issued the majority of interim measure orders. This practice of the representatives of the Member States following up on compliance with interim measures orders under the Court, which now is the only body issuing such orders, may arguably be leading up to a consensus that interim measures orders should in fact one day be binding. It is interesting to note that this procedure of follow-up by the Committee of Ministers is the same as the procedure followed after issuance of a binding final judgment under Article 46(2) of the Convention.<sup>54</sup> Furthermore, enforcement is strengthened by the new power of the Court in paragraph 3 to request any information from the parties in a case as to implementation of the order.<sup>55</sup>

<sup>49</sup> Recommendation No. R. (80) 9, (1980) 23 *Yearbook of the European Convention on Human Rights* 78, as cited in Norgaard, *op. cit.*, note 23, p. 291.

<sup>50</sup> Buquicchio-de Boer, *op. cit.*, note 4, p. 235.

<sup>51</sup> R. Ryssdal, 'Discussion', in Bulterman and Kuijer, *op. cit.*, note 26.

<sup>52</sup> See Draft Report, AS/PR (1997) 2 revised 19 February 1997, as cited in Vigdis Vevstad, *Refugee Protection: a European Challenge*, 1998.

<sup>53</sup> Pellonpaa, *op. cit.*, note 9.

<sup>54</sup> See European Convention, *op. cit.*, note 9 at Article 46(2), which states: 'the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.'

<sup>55</sup> See Rules of the Court, *op. cit.*, note 5, Rule 39(3).

## Procedure on Interim Measures Under the European Convention

### The Burden of Proof

An interim measure may be indicated to the parties either through a request by one of the parties to the case, or of any person concerned, or of the Court's own motion *proprio motu*.<sup>56</sup> The Commission and the Court have applied a narrow test to a broad procedural rule which must be met in order for interim measure requests to be accepted and issued to a Member State. An individual request must show that:

- (1) there is a clear risk of a violation of rights protected under the Convention; and
- (2) the violation at issue, *prima facie*, carries the risk of irreparable damage.<sup>57</sup>

However, it should be noted that the applicant does not have to meet the same high threshold required for establishing an actual violation once the case reaches the merits. In principle, both prongs of this test are applied to a lower degree and what must be established is a probability of both.<sup>58</sup> Evidence of this lower threshold is supported by the fact that, as stated earlier, 55 per cent of all cases where interim orders are issued are subsequently struck off as inadmissible.

As the Commission and the Court have had to rely on the good faith of the Member State in complying with the interim order, they have issued them only in extreme cases where there is an 'apparent real and imminent risk of irreparable harm'.<sup>59</sup> 'The idea behind interim measures of conserving the rights of the parties pending the decision of the tribunal presupposes that there is an imminent danger . . . urgently demanding action by the Tribunal.'<sup>60</sup> Additionally, the applicant requesting interim measures must demonstrate exhaustion of domestic remedies by providing copies of all decisions as there may be no pending proceedings with 'suspensive effect'.<sup>61</sup> There are cases, however, where the Commission or Court has decided to make an interim measures request in advance of the domestic decision; such an order is conditional on the outcome of the domestic court hearing.<sup>62</sup> The Commission and Court have done this rarely, but have in cases where the deportation or extradition is

<sup>56</sup> See *ibid.*, Rule 39(1).

<sup>57</sup> Gomien *et al.*, *op. cit.*, note 19, p. 52.

<sup>58</sup> Interview with Judge Matti Pellonpää, Section IV, European Court of Human Rights, Strasbourg (28 June 2000).

<sup>59</sup> Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 1998, p. 14.

<sup>60</sup> Caron, *op. cit.*, note 20, p. 491.

<sup>61</sup> Reid, *op. cit.*, note 59, p. 14.

<sup>62</sup> L.J. Clements *et al.*, *European Human Rights: Taking a Case Under the Convention*, 2nd edn, 1999, p. 61. See also Buquicchio-de Boer, *op. cit.*, note 4, p. 233.

planned to take place immediately after the rendering of the domestic decision-making an interim measures application impossible.<sup>63</sup>

The credibility of the applicant's request is extremely important and presentation of evidence such as a medical report and country conditions documents (for expulsion cases under Article 3) have proved helpful in corroborating the applicant's request.<sup>64</sup> Practitioners before the Court have argued that general background documents alone are insufficient, however, and there must be 'solid evidence to link the applicant with a threat of immediate danger'.<sup>65</sup> However, given the lower threshold of proof required for having an interim measures application granted, it has been pointed out that, at the interim measures stage, an applicant does not need such solid evidence of a direct personal link; general background documents from Amnesty International or UNHCR may at times be sufficient.<sup>66</sup> In expulsion and extradition cases, the Commission and the Court have tended to look to 'all the circumstances' of the case which includes 'foreseeable consequences' if the interim measures are not taken in light of country conditions as well as the 'personal circumstances' of the applicant.<sup>67</sup> The narrow scope of the Commission and the Court's ruling is demonstrated by the fact that 'risk of criminal prosecution for refusal to undertake military service or desertion' or 'mere belonging to a minority group or opposition movement in the country of destination' have both been insufficient to demonstrate risk of a clear violation of Article 3.<sup>68</sup> If the applicant has already been granted refugee status by the government or UNHCR, the Commission and Court have generally found this to be a *prima facie* case warranting issuance of an interim measures order blocking deportation;<sup>69</sup> but the issuance of a mere Convention Travel Document by the authorities only gives rise to a 'rebuttable presumption' of imminent persecution if returned.<sup>70</sup>

There are various reasons and factors which play into why an application under Rule 36 or Rule 39 has been found not to meet the burden of proof required for an interim measures order. Besides general lack of credibility in the request and/or lack of specific background evidence corroborating the specific claim, applications have been rejected because there was no actual expulsion/extradition order in place at the

<sup>63</sup> Norgaard, *op. cit.*, note 23, p. 282.

<sup>64</sup> *Ibid.*, p. 284.

<sup>65</sup> Clements, *op. cit.*, note 62, p. 62.

<sup>66</sup> Pellonpaa, *op. cit.*, note 58.

<sup>67</sup> Buquicchio-de Boer, *op. cit.*, note 4, p. 231.

<sup>68</sup> *Ibid.*, p. 231.

<sup>69</sup> See e.g. *Khadjawi v. Turkey*, Decision to Strike Case of 6 January 2000, App. No. 52239/99, in which the Iranian applicant was tortured in Iran and later was granted refugee status by the Dutch Government where his wife was a refugee; however, he was in Turkey at the time of the case where he had entered illegally on his way to the Netherlands; the Turkish Government instituted deportation proceedings to Iran. The case was struck off the list after the Turkish Government complied with the Court's Rule 39 order and released the applicant to the Netherlands.

<sup>70</sup> Buquicchio-de Boer, *op. cit.*, note 4, p. 233.

time of the request. Another reason has been the failure to exhaust domestic remedies for suspending the deportation or extradition itself. A change in the country conditions of the state one is being deported/extradited to may also have weight in the decision. Illegal stay in a Member State and failure to pursue rigorously some kind of residence status is another factor. If the application has to do with a claim that the family will be split up due to the deportation in violation of Article 8 (right to respect for private and family life) of the Convention, the ability of the family to follow the applicant back to the country he or she is being expelled to will probably result in rejection. Commission of crimes in a Member State and especially recidivism may have negative bearing. Finally, if the interim measures request is brought under an Article of the Convention where interim measures requests are not usually applied (such as Article 8 or Article 6 (right to a fair trial)), the chances of an application being found to meet the requisite burden of proof are not as great.

### **Making Applications Under the Old Rule 36 and New Rule 39**

Under Rule 36 of the Commission and the Court, the Commission or its President or the President of the Court could indicate an interim measure order to a Member State. Rule 36 specifically provided that the individual applicant or any other person concerned could make an application for such an order to be made to a Member State. The individual did so by any form of written communication addressed to the Secretariat of the Commission outlining the facts of the case with supporting evidence. Typically, the application had to be submitted right after the rendering of the domestic decision on the case providing the Commission with copies of the decisions. This was in order to give the Commission enough time to intervene in the case with an interim measures order, especially in cases of deportation orders.<sup>71</sup> However, a demonstration of exhaustion of domestic remedies did not have to be shown where the pending domestic cases did not have suspensive effect.<sup>72</sup> In practice, given the urgency of such requests, the Commission often received them by fax on Friday afternoons just hours before an expulsion as a number of Member States typically carried out deportations on weekends.<sup>73</sup> The Commission would deal with the application urgently, amending its timetable to review it as soon as possible, and where the Commission was not in session, the President was empowered to make the decision. The President would do so in collaboration with a senior member of the Commission's legal Secretariat.<sup>74</sup>

Where the application was granted, the applicant and the respondent government were immediately informed, the case was registered, and the government was

<sup>71</sup> Gomien *et al.*, *op. cit.*, note 19, p. 52.

<sup>72</sup> Reid, *op. cit.*, note 59, p. 14.

<sup>73</sup> Buquicchio-de Boer, *op. cit.*, note 4, p. 233.

<sup>74</sup> *Ibid.*, p. 234.

requested to make written observations on the admissibility and merits of the case. However, a decision to apply Rule 36 did not prejudice the Commission's subsequent rulings on admissibility and the merits.<sup>75</sup> The interim orders were issued for a limited amount of time, usually until the end of the Commission's following session. They could then be renewed depending upon the 'continued existence of the risk'.<sup>76</sup>

Where the application was denied, the applicant was immediately informed and was asked whether or not he or she wanted to continue pursuing the case. Norgaard, former President of the Commission, pointed out that it was not surprising that many of the applications for interim measures regarding stopping deportation were denied given the short amount of time the Commission had for reviewing a request often leading to a lack of adequate information available for meeting the threshold test of risk under Article 3.<sup>77</sup> Furthermore, the Commission was anxious not to cause delay of a 'legitimate' deportation which could not meet the Article 3 test.<sup>78</sup> If the applicant did want to continue, the application was formally registered. Often, many of these rejected cases which did continue were later found to be inadmissible as the applicants failed to produce any new evidence.<sup>79</sup> At its discretion, the Commission could still expedite review of the case, departing from its usual timetable under Rules 27 and 28 of Procedure (Rule 41 of the present Rules of the Court).<sup>80</sup> The Commission could also inform the Member State concerned that an application for interim measures had been introduced under Rule 41 of the Commission (Rule 40 of the present Rules of the Court).<sup>81</sup> The latter step often produced the intended effect of issuing an interim measures order, without actually having to do so, as governments sought to avoid the 'stigma' of being issued an interim measures order.<sup>82</sup>

As mentioned previously, under Rule 36, the Commission handled the majority of applications for interim measures at the earlier stages of a case. The Court also had the power to issue interim measures orders. When the Commission transferred a case to the Court, the Court would continue to apply any interim measures orders unless the President or the Chamber decided otherwise.<sup>83</sup>

Under Rule 39 after Protocol 11, little has changed in the actual procedure for bringing an interim measures application. Now, the request is addressed to the Court Registry and the President of the Chamber to which it is assigned handles the request

<sup>75</sup> *Ibid.*

<sup>76</sup> Reid, *op. cit.*, note 59, p. 15.

<sup>77</sup> Norgaard, *op. cit.*, note 23, p. 287.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd edn, 1990, p. 66. See also Rules of the Court, *op. cit.*, note 5 at Article 41.

<sup>81</sup> Van Dijk and van Hoof, *op. cit.*, note 80, p. 66. See also Rules of the Court, *op. cit.*, note 5, Article 41.

<sup>82</sup> Clements, *op. cit.*, note 62, pp. 61–2.

<sup>83</sup> Gomien *et al.*, *op. cit.*, note 19, p. 50.

with or without the advice of the rest of the Chamber.<sup>84</sup> Often, the President will consult a judge familiar with the country at issue (who will give a recommendation on acceptance or refusal of the application with supporting reasons) and its law in addition to analyzing the documentation provided in the application.<sup>85</sup> The Court has a checklist which the President follows, looking at such criteria as: grounds of fear; evidence submitted; Convention issue or Article invoked; reasons for leaving home country; whether applicant applied for political asylum and decision made as to it; date of arrival in Member State; decisions by the Member State administrative or judicial bodies on expulsion/extradition of the applicant; availability of any other domestic authority to stop the impending expulsion/extradition; suspensive effect of domestic remedies; government assurances given by the state to be expelled or deported to; and involvement of UNHCR and decisions made by that body. A party to the case may apply more than once for interim measures to be taken; however, if it is for the same interim measure, it is advisable that new elements or arguments with substantiation be submitted in support of the request as it likely that it will be rejected.

The practice for processing the applications varies according to the circumstances of the case. In addition, there appears to be certain differences in the way the applications are handled by different Sections.<sup>86</sup> With the passage of Protocol 11 and under new Rule 39, it was established that interim measure applications should be automatically registered instead of after the interim measure request is accepted or rejected.<sup>87</sup> Prior to Rule 39, interim applications were merely 'provisional'. Automatic registration has the effect of making the applications available to the public from the very beginning. This registration procedure is now being fully implemented in the procedure of the Court.<sup>88</sup>

<sup>84</sup> Pellonpaa, *op. cit.*, note 9 (Judge Pellonpaa indicated that, when he was President of his Section, if he had any doubts as to the merits of the application, he would bring it before the rest of the Section for a vote if in the circumstances time permitted and an immediate decision was not needed).

<sup>85</sup> *Ibid.*

<sup>86</sup> For example, in very exceptional circumstances, such as high-profile cases like those involving Pinochet and Ocalan, Sections I and III of the Court may call an emergency meeting of the Chamber handling the case where the President of the Section has any doubts at all regarding a decision on the application for an interim measures order. Interview with Madame Sally Dolle, Section Registrar for Section III, European Court of Human Rights (3 July 2000). Other Sections, such as Section IV, have not for the time being called for such emergency meetings. This is due to the fact that they have not had to deal with such high-profile cases, and also perhaps to some extent is a consequence of a general policy usually to bring the application before the normally scheduled weekly Chamber meeting where time permits. See Pellonpaa, *op. cit.*, note 9.

<sup>87</sup> The reason for automatic registration of the interim measure application rather than merely labelling it a 'provisional file' is because lawyers of the Court usually consider the latter. As a matter of principle, it was decided that, once a file reaches the stage of coming before a judge or Chamber for consideration, as in the case of an interim measure application, the case should be registered. Such procedure increases uniformity and transparency in procedure. See Pellonpaa, *op. cit.*, note 58.

<sup>88</sup> *Ibid.*

## Practice Under Rule 36 and Rule 39

### Applications in the Case Law

The majority of interim measures applications granted by the Commission and the Court have involved cases of expulsion or extradition and applicants have alleged risk of violations under Article 2 (right to life) or Article 3 of the Convention.<sup>89</sup> However, applications have also been made in cases involving alleged violations of the right to respect for private and family life, matters of detention, interference with property rights, and the effective exercise of the right of petition, among others. Only in a few cases have interim measure applications been accepted in these latter cases as meeting the 'irreparable damage' test.<sup>90</sup>

For those expulsion/extradition cases involving potential violations of Articles 2 and 3, various categories of risk have been claimed by applicants should they be returned, including the effect on the applicant's health such as the possibility of the commission of suicide upon deportation due to the applicant's psychiatric condition;<sup>91</sup> the possibility of the applicant having a miscarriage;<sup>92</sup> or no access to treatment for an applicant with AIDS.<sup>93</sup> Other cases have involved the risk of inhuman treatment where one would face the death penalty upon deportation.<sup>94</sup> Still others have involved the risk of facing actual torture or inhuman or degrading treatment or punishment upon return.<sup>95</sup> For example, one Lebanese woman alleged

<sup>89</sup> Clements, *op. cit.*, note 62, p. 61.

<sup>90</sup> See generally *ibid.*; Gomien *et al.*, *op. cit.*, note 19; Norgaard, *op. cit.*, note 23; and Reid, *op. cit.*, note 59.

<sup>91</sup> See *Choudry v. UK*, Admissibility Decision of 13 May 1996, App. No. 27949/95 (Commission rejected a Rule 36 application for the applicant who had expert medical reports confirming this to be the case if the applicant was deported to Pakistan). See [www.echr.coe.int/hudoc](http://www.echr.coe.int/hudoc).

<sup>92</sup> See *Poku v. UK*, Admissibility Decision of 15 May 1996, App. No. 26958/95 (unpublished) (Commission accepted a Rule 36 application requesting the UK not to deport the applicant in the later stages of a difficult pregnancy with a medical history of miscarriages), as cited in Reid, *op. cit.*, note 59, p. 14.

<sup>93</sup> See *D v. UK*, Judgment of 2 May 1997, Reports of Judgments and Decisions 1997-III (Commission accepted a Rule 36 application where the applicant was an AIDS victim who would have no access to proper treatment if deported to St Kitts.).

<sup>94</sup> See *Soering v. UK*, Judgment of 7 July 1989, Series A No. 161 (application accepted); *Nivette v. France*, App. No. 44190 (application refused), Information Note No. 12, *op. cit.*, note 12, p. 18; *Yonghong v. Portugal*, App. No. 50887/99 (application refused), Information Note No. 10 on the Case Law of the Court, September 1999, p. 21, [www.echr.coe.int/eng/INFORMATION%20NOTES](http://www.echr.coe.int/eng/INFORMATION%20NOTES).

<sup>95</sup> See *SN v. Switzerland*, Admissibility Decision of 10 September 1993, App. No. 22406/93 (application accepted where Pakistani applicant was an opponent of the current political regime in Pakistan), [www.echr.coe.int/hudoc](http://www.echr.coe.int/hudoc); and *Bodika v. France*, Admissibility Decision of 12 October 1999, App. No. 48135/99 (application accepted where the applicant was a recognized refugee whose status was withdrawn due to crimes he committed; he was threatened with deportation to Angola) (in French), [www.echr.coe.int/hudoc](http://www.echr.coe.int/hudoc). See generally *Vilvarajah and Others v. UK*, Judgment of 30 October 1991, Series A, No. 215 (application rejected); *Chahal v. UK*, Judgment of 15 November 1996, Reports of Judgment and Decisions 1996-V (application accepted); *Ahmed v. Austria*, Judgment of 17 December

she would face strict house arrest and ill-treatment from her husband's family if returned.<sup>96</sup> Several of the cases brought under Articles 2 and 3 have alleged facing risks in violation of those Articles because of their status. For example, interim measure applications have been made to stop expulsions of army deserters.<sup>97</sup> In addition, applications have been made to the Commission and the Court to stop expulsions of persons because they belong to a particular ethnic group.<sup>98</sup>

Besides trying to stop extradition or expulsion, applicants have also requested interim measures for securing evidence required for a case.<sup>99</sup> In cases involving conditions of detention under Article 5 (right to liberty and security), applicants have sought interim measures for preserving their health while detained,<sup>100</sup> for the free choice of a doctor,<sup>101</sup> and for access to a lawyer.<sup>102</sup> The Commission has also made

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1996, Reports 1996-VI (application accepted); *HLR v. France*, Judgment of 29 April 1997, Reports 1997-III (application accepted); *Khadjawi v. Turkey*, *op. cit.*, note 69.

- <sup>96</sup> See *Mezher v. Sweden*, Admissibility Decision of 6 July 1995, App. No. 25849, [www.echr.coe.int/hudoc](http://www.echr.coe.int/hudoc).
- <sup>97</sup> See *R. v. Denmark*, Admissibility Decision of 14 October 1991, App. No. 16381/90 (application accepted where the applicant was an Iranian army deserter), [www.echr.coe.int/hudoc](http://www.echr.coe.int/hudoc); *FD v. Norway*, Admissibility Decision of 10 September 1993, App. No. 21576/93 (application accepted where Kosovo Albanian applicants were deserters of the Federal Yugoslav army), [www.echr.coe.int/hudoc](http://www.echr.coe.int/hudoc); *Bogrov v. Sweden*, App. No. 50866/99 (application rejected of Russian national who deserted from the Russian army after being sent to Chechnya and was rejected refugee status by the Swedish Government), Information Note No. 10, *op. cit.*, note 94, p. 20.
- <sup>98</sup> See *Vilvarajah and Others v. UK*, *op. cit.*, note 95 (application rejected because Commission held that mere belonging to a minority group such as the Tamil applicants facing deportation to Sri Lanka was insufficient to stay their deportation after their asylum application failed; their personal position was held to be no worse generally than any of the other members of the Tamil community in Sri Lanka); *Balac v. Netherlands*, App. No. 47813/99 (application rejected of Yugoslav national of Muslim and Serbian origin who spent most of her life in Sandjak, a Serbian region with a large Muslim minority; she alleged she was subject to harassment while studying in Belgrade and was rejected asylum in the Netherlands) Information Note No. 6 on the Case Law of the Court, May 1999, p. 15, [www.echr.coe.int/eng/INFORMATION%20NOTES](http://www.echr.coe.int/eng/INFORMATION%20NOTES).
- <sup>99</sup> See *Baader, Ensslin, and Raspe v. Germany*, App. Nos 7522/76, 7586/76 and 7587/76, Decisions and Reports 14, p. 74 (Commission issued an interim measures order to allow two delegates from the Commission to visit Stammheim Prison in Stuttgart, Germany, immediately following the deaths of three terrorists of the Red Army who brought claims before the Commission regarding prison conditions and their treatment in prison), as cited in Norgaard, *op. cit.*, note 23, p. 285.
- <sup>100</sup> See *Patan v. Italy*, Decision of 5 March 1985, App. No. 11488/85 (in French) (Commission issued an interim measures order to the Italian Government to take all necessary measures to preserve the health of the applicant who was serving a five-year prison sentence and was under a severe state of depression to the point where her life was in danger); *Llijkov v. Bulgaria*, Admissibility Decision of 20 October 1997 (Commission issued a Rule 36 request to the Bulgarian Government to preserve the applicant's health in prison and also directed the applicant to suspend his hunger strike), [www.echr.coe.int/hudoc](http://www.echr.coe.int/hudoc).
- <sup>101</sup> See *Soysal v. Turkey*, App. No. 50091/99 (Court refused to issue a Rule 39 request for the applicant to have a choice of doctor in Turkish prison on the grounds that he was regularly being seen by a doctor and given treatment), Information Note No. 13 on the Case Law of the Court, December 1999, p. 22, [www.echr.coe.int/eng/INFORMATION%20NOTES](http://www.echr.coe.int/eng/INFORMATION%20NOTES).
- <sup>102</sup> See *ibid.* (Court refused to issue a Rule 39 request for the applicant to have access to his German lawyers as he was able to meet freely with his Turkish lawyers who could then collaborate with the

interim measures orders for applicants in detention to stop their hunger strikes.<sup>103</sup> An interim measure order has been issued ordering a Member State to make humanitarian provisions such as food, water and medicine for the individual applicants.<sup>104</sup> Finally, the Court has even issued an order to prevent the application of the death penalty until the case before it was heard.<sup>105</sup>

### Statistics

Since the codification of issuance of interim measures orders under Rule 36 in 1974, a total of 1,457 such applications have been registered.<sup>106</sup> From 1974 to 31 October 1998, prior to Protocol 11, a total of 1,221 were registered with 252 accepted resulting in an acceptance rate of 20.6 per cent.<sup>107</sup> After the passage of Protocol 11, from 1 November 1998 to 20 July 2000, a total of 236 requests have been registered with 39 accepted, giving an acceptance rate of 16.5 per cent.<sup>108</sup> It is interesting to note that, after the passage of Protocol 11, there has been a significant decrease in the acceptance rate of applications. However, the annual average number of orders issued has *increased* from 20.4 per year to 23.3.<sup>109</sup> Overall, from 1974 to the present, the acceptance rate of applications by the Commission and the Court is at an average of 20 per cent.<sup>110</sup> This stricter application of the test for an Article 39 request may be due in part to a perception by the Court of Member States being somewhat less willing to comply with interim measures orders in light of the *Cruz Varas* case and the failure by Member States to make interim measures orders legally binding under Protocol 11. Nevertheless, the compliance rate by Member States with interim measure orders to this date remains unusually high.

It was not until 1991 that the Commission and Court began to see a tremendous growth in the number of applications for interim measures.<sup>111</sup> In 1990, just eighteen

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Germany lawyers); see also *Ocalan v. Turkey*, *op. cit.*, note 14 (Court issued a Rule 39 order requesting the Turkish authorities to allow the applicant unrestricted, effective access to his lawyers in private).

<sup>103</sup> See App. No. 9911/82, as cited in Norgaard, *op. cit.*, note 23, p. 285; *Vakalis v. Greece*, Decision of 15 January 1993, App. No. 19796/92 (in French), [www.echr.coe.int/hudoc](http://www.echr.coe.int/hudoc); and *Llijkov v. Bulgaria*, *op. cit.*, note 100.

<sup>104</sup> See *BM and 51 Others v. Spain*, Decision of 11 September 1992, App. No. 20347/92 (in French) (case of expulsion of 52 African refugees to Morocco from Spain; Morocco refused to receive them and they were stranded in an area of 1,000 square metres of uncertain sovereignty; the Commission ordered interim measures for Spain to provide food, water and medicine to them as they were living in conditions of burning sunshine without shelter, water or sanitary provisions), [www.echr.coe.int/hudoc](http://www.echr.coe.int/hudoc).

<sup>105</sup> See *Ocalan v. Turkey*, *op. cit.*, note 12.

<sup>106</sup> See Appendix A.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> See Appendices D and E.

<sup>110</sup> *Ibid.*

<sup>111</sup> See Appendix B.

applications were received, but that number jumped to 212 in 1991.<sup>112</sup> The largest number of applications received since 1974 was in 1992 at an all-time high of 216.<sup>113</sup> Since then, within the last five years, from 1995 to 1999, there has been an average application load of 114.6 applications with 21.8 accepted per year.<sup>114</sup> The vast majority of these applications have involved extradition/expulsion, and the reasons for this dramatic increase most likely include political and economic turmoil in central and eastern European countries resulting in increased numbers of asylum seekers coupled with increasingly restrictive immigration laws and policies applied within Western Europe.<sup>115</sup>

Country statistics indicate that the largest number of the total interim measures applications of 1,524 made from 1987 to 20 July 2000 have regarded France (50 per cent) and Sweden (10 per cent).<sup>116</sup> Others with regard to which the majority of applications have been made include, in descending order, Germany (7 per cent), the Netherlands (6 per cent), Switzerland (5 per cent) and the UK (4 per cent).<sup>117</sup> Twenty-three other Member States have had applications made of less than fifty each, making up a total of 18 per cent of all applications received.<sup>118</sup> Prior to Protocol 11, from 1987 to 31 October 1998, the largest number of orders subsequently issued were to France (117) and Sweden (45); however, following Protocol 11, the largest number of orders have been made to Turkey (9), France (7) and the UK and Netherlands with five each.<sup>119</sup>

### **Compliance by Member States**

Due to the non-binding nature of interim measures orders, the Commission and the Court have had to rely on the good faith of the Member States to comply with their requests; consequently, both bodies have in practice applied the measure conservatively, only intervening in domestic affairs where there was a 'real risk' of imminent, irreparable harm to the case.<sup>120</sup> As a consequence, Member States have for the most part complied with interim orders, with only four cases of non-compliance by 1993 out of 166 orders issued.<sup>121</sup> As of 20 July 2000, a total of 291

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> Buquicchio-de Boer, *op. cit.*, note 4, p. 235.

<sup>116</sup> See generally Appendices C–E.

<sup>117</sup> See Appendix C.

<sup>118</sup> *Ibid.*

<sup>119</sup> See Appendices D and E.

<sup>120</sup> Reid, *op. cit.*, note 59, p. 14.

<sup>121</sup> Norgaard, *op. cit.*, note 23, p. 283. See *US Citizen v. Netherlands*, App. No. 11615/85, as cited in *ibid.*, p. 291 (Commission issued a Rule 36 order on the morning of the scheduled extradition of a US citizen who alleged risk of ill-treatment in prison in the USA if returned where he was wanted for sexual abuse and battery committed against young boys; the Netherlands government extradited him anyway, informing the

orders have been issued<sup>122</sup> and there have been at least two more cases of non-compliance in the *Ocalan v. Turkey* and the *Conka v. Belgium* applications since 1993.<sup>123</sup> All of these, except for the *Ocalan* case, have involved requests for interim measures to stop extradition or expulsions on grounds of violation of Article 3 if the applicants were returned.

In all of the expulsion/extradition cases, the Commission strongly advised the particular Member States to comply with the interim measure request. As stated in the *Cruz Varas* decision, each Member State that deports despite an interim measure request to the contrary knowingly assumes the risk of an Article 3 violation.<sup>124</sup> This is a serious matter indeed, given that, under the Convention, Article 15(2) (derogation in time of emergency), Article 3 is non-derogable no matter what the circumstances. The *Cruz Varas* case considered in 1991, was the first time a Member State refused to comply with the Commission in a case regarding an expulsion (the previous non-compliance regarded an extradition). This is interesting to note in that one justification Member States have used for not complying with a Rule 39 request has been that they have assurances from the receiving state that the applicant will not be harmed upon return.<sup>125</sup> It may be more likely in an extradition case involving an extradition treaty where such assurances are on paper that the risk of ill-treatment upon return is less than in an expulsion case where there are often only verbal assurances at the diplomatic level. Another justification for non-compliance has been the conflict between the interim measures request by the Commission or the Court

*Contd.*

Commission that it was impossible under Dutch law to keep him any longer); *Mansi v. Sweden*, Admissibility Decision of 7 December 1989, App. No. 15658/89 and Report of the Commission, 9 March 1990, [www.echr.coe.int/hudoc](http://www.echr.coe.int/hudoc); *Cruz Varas v. Sweden*, *op. cit.*, note 24; and *DS, SN and BT v. France*, Admissibility Decision of 16 October 1992, App. No. 18560/91 (in French), [www.echr.coe.int/hudoc](http://www.echr.coe.int/hudoc) (Commission issued a Rule 36 order to stop the expulsion of three women from Sri Lanka who were refused asylum by the government and UNHCR in France and who claimed to be a part of the Tamil Tigers; the French government informed the Commission that it was impossible not to expel them).

<sup>122</sup> See Appendix A.

<sup>123</sup> See *Ocalan v. Turkey*, App. No. 46221/99, Information Note No. 3 on the Case Law of the Court, February 1999, p. 11, and Information Note No. 4, *op. cit.*, note 14, p. 18 (in this famous case, involving the leader of the PKK (Workers' Party of Kurdistan) in Turkey, the court made a Rule 39 order on 4 March 1999 to secure Ocalan's rights under Article 6 of the Convention in the domestic trials 'to respect the rights of the defence in full, including the applicant's right to see and to have unrestricted, effective access to the lawyers representing him in private, and to ensure that the applicant has an effective opportunity through lawyers of his own free choosing to exercise his right of individual petition to the Court'); *Conka v. Belgium*, App. No. 51564/99, Information Note No. 12, *op. cit.*, note 12, pp. 3 and 4 (the Court issued a Rule 39 order to block the deportation of Slovak gypsies claiming refugee status in Belgium because of assaults by skinheads in Slovakia; the Belgium Government refused them asylum, and during their appeal, issued a non-appealable deportation order; on 5 October 1999, they were deported), [www.echr.coe.int/eng/INFORMATION%20NOTES](http://www.echr.coe.int/eng/INFORMATION%20NOTES).

<sup>124</sup> See *Cruz Varas v. Sweden*, *op. cit.*, note 24, para. 103.

<sup>125</sup> See e.g. *DS, SN and BT v. France*, *op. cit.*, note 121, para. 1.

and the domestic law or administrative structure of the Member State which makes suspension of an extradition or deportation difficult or impossible.<sup>126</sup> For example, in *US Citizen v. Netherlands*,<sup>127</sup> the Dutch Government informed the Commission that it was impossible under Dutch law to continue to detain the applicant in line with the interim measures request and he was subsequently extradited to the USA.<sup>128</sup> Furthermore, the actual execution of a stay of deportation in line with a request by the Court may not be a matter under the direct control of the central government of the Member State and may actually be under the jurisdiction of local/regional or independent authorities. For example, in the *Cruz Varas* decision, the Swedish Ministry of Labour informed the Commission that it could not stay the deportation of the applicant since the matter was pending before the independent National Board of Immigration.<sup>129</sup> Section 38 of Sweden's 1980 Aliens Act stipulated that the original decision on expulsion lies with the National Board of Immigration with an appeal to the Ministry of Labour.<sup>130</sup>

In at least three of the cases of non-compliance by Member States with interim measures orders, the applicants did indeed suffer from actual or a risk of torture or inhuman treatment upon return. In the *Cruz Varas* case, the applicant's family was mistreated and his life was threatened upon return to Chile causing him to flee to Argentina. In the *DS, SN and BT v. France* case, the three women from Sri Lanka were detained and interrogated upon return to Colombo. Their freedom of movement was restricted and they subsequently fled to Thailand. Another tragic example is the *Mansi v. Sweden* case.<sup>131</sup> In this case, a Jordanian citizen of Palestinian origin applied for asylum in Sweden and was subsequently rejected by the Swedish authorities despite corroboration of his statements that he suffered imprisonment, persecution and torture by an expert doctor's report and a psychiatrist's report. A decision was made to expel the applicant. He made an application to the European Commission on 19 October 1989 and the Commission requested the Swedish Government not to expel the applicant until the case was considered on 20 October. The Commission's request was denied and, on 21 October, the applicant was expelled to Jordan. Upon arrival in Jordan, the security forces detained, interrogated and tortured him for one week. After staying a few days in a hospital, he was released on 5 or 6 November and told to report to the police in Amman on a daily basis. On 9 March 1990, the Commission issued a report that a friendly settlement had been reached between Sweden and the applicant.

<sup>126</sup> See Gomien *et al.*, *op. cit.*, note 19, p. 51.

<sup>127</sup> See *US Citizen v. Netherlands*, App. No. 11615/85, as cited in Norgaard, *op. cit.*, note 23, p. 291.

<sup>128</sup> See also *Altun v. Federal Republic of Germany*, Commission Report of 7 March 1984, DR 36, p. 236 (case in which the Commission asked Germany to stay the extradition of the Turkish applicant to Turkey; Germany complied but urged the Commission to decide the matter as quickly as possible as it was no longer able to detain the applicant under German law).

<sup>129</sup> See *Cruz Varas v. Sweden*, *op. cit.*, note 24, para. 58.

<sup>130</sup> *Ibid.*

<sup>131</sup> See generally *op. cit.*, note 121.

Sweden issued regrets, gave the applicant permanent residence, and paid compensation and legal fees.

Where states have complied with interim measures orders, a majority of the cases have subsequently been declared inadmissible in light of new evidence introduced by the respondent state.<sup>132</sup> It is crucial to note the powerful impact that the Commission and Court have played in the eventual outcome of the cases where interim measures orders have been issued. By the end of 1997, 33 per cent of all such cases were then formally settled or struck off the Commission's list after the applicant declared that he or she was satisfied with the respondent state's revoking of the domestic decision.<sup>133</sup> Often, in cases of expulsion/extradition, the state has taken a proactive measure in light of the interim measures order such as issuing the applicant permanent residency or refugee status before any decision is made as to the admissibility or the merits.<sup>134</sup> Where this has occurred, the Commission has then asked the applicant if he or she wants to continue with the case. Where the applicant has indicated no, the Commission has stricken the case under Article 30(1)(a) of the Convention (now Article 37(1)(a)) where the 'applicant does not intend to pursue his application'.<sup>135</sup> Where the applicant fails to respond or indicates that he or she wishes to continue the application, the Commission or Court have usually stricken the case under Article 30(1)(b) of the Convention (now Article 37(1)(b)) as 'the matter has been resolved'.<sup>136</sup> In such cases, the Commission and the Court have often found no further reason to examine the petition for respect of human rights under the Convention.<sup>137</sup>

### **Rejected Interim Measures Applications**

It is impossible to know what have been the results for all of the 1,166 interim measures applications which have been rejected by the Commission and the Court since 1974. Unless the applicants continue to pursue the case to the admissibility and merits stage, the case disappears from the Court's radar screen. It is heartening to note that the Commission and the Court have tended to give more serious attention to applications relating to extradition or expulsion where there is the very serious matter of facing prohibited treatment under Article 3. On the other hand, it is impossible to know how many rejected applicants have suffered such treatment upon return and have been unable to pursue their case further, effectively denying them of their right under Article 34 of the Convention to effectively bring an application

<sup>132</sup> Buquicchio-de Boer, *op. cit.*, note 4, p. 234.

<sup>133</sup> *Ibid.*, p. 235. See also *Khadjawi v. Turkey*, *op. cit.*, note 69.

<sup>134</sup> Norgaard, *op. cit.*, note 23, p. 289.

<sup>135</sup> *Ibid.* See also European Convention, *op. cit.*, note 9, Article 37.

<sup>136</sup> *Ibid.*

<sup>137</sup> Norgaard, *op. cit.*, note 23, p. 289.

before the Court whereby 'the High Contracting Parties undertake not to hinder in any way the effective exercise of this right'.<sup>138</sup>

One case, *Vilvarajah and Others v. UK*,<sup>139</sup> offers a cautionary tale for the present system of review of these applications. In this case, solicitors for the five applicants from Sri Lanka were fortunately able to keep the case before the Commission and the Court even after their deportation. All five had claimed that as young Tamils they risked interrogation, detention and physical harm if returned to Sri Lanka; they made a Rule 36 application to the Commission to stop the UK from deporting them after their asylum applications were refused and while the applications were under judicial review. The Commission rejected the application, giving deference to the UK Government's knowledge and experience in dealing with large numbers of asylum seekers from Sri Lanka, and agreed with the reasoning that none of the applicants was personally at risk and that they faced the same general risks of all young Tamil men in Sri Lanka at that time. This was despite the representations made by the British Refugee Council, the United Kingdom Immigration Advisory Service and a Member of Parliament, that they should not be deported. All suffered either from detention, interrogation, ill-treatment, arrests of family members or death of family members upon return. Fortunately, in the end, the UK Government granted them asylum upon appeal and they were enabled to return to the UK, but only after enduring some very harrowing experiences after deportation.

## Conclusions and Recommendations

A survey of the case law of the Commission and the Court under the European Convention indicates that, while interim measures have still not officially been declared to be customarily binding by the Member States, in practice there has been near strict observance of interim measures requests in Europe. This fact gives weight to the argument of some legal scholars and judges that there is movement towards eventual recognition of them having a customarily binding nature. Furthermore, the majority of these requests have had to do with risk of treatment under Article 3 of the Convention, a provision which is non-derogable under any circumstances under Article 15 of the Convention. Since it has been established that Member States are responsible for violations under Article 3 upon extradition/expulsion of an individual to another state, Member States have paid close attention to interim measures requests made under that Article.

<sup>138</sup> See European Convention, *op. cit.*, note 9, Article 34 which states: 'The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.'

<sup>139</sup> See *op. cit.*, note 95.

Consequently, since the 1960s, interim measures orders have served as a powerful tool of the Commission and the Court, in very urgent circumstances, to save hundreds of lives. Member States have endeavoured to skirt around what is seen to be a 'stigma' within Europe of having an Article 36 or 39 request directed their way. The willingness of Member States to comply with these requests is a positive indicator of their faith in the extraordinary system established under the European Convention whereby individuals have standing to bring claims against sovereign states before an international tribunal. Due to the strict interpretation of its interim measures power, trust has been established between the Court and the governments of the Member States who know that frivolous Article 39 requests will not be made. Following the entry into force of Protocol 11, the calls by the Commission, the Court and the Parliamentary Assembly of the Council of Europe, in addition to nearly four decades of consistent observance of interim measures requests by Member States, are strong indicators of them becoming more like a customarily binding order within Europe as a region. However, this has been tempered by the fact that the Member States still have expressly declined to make them a part of the Convention itself. This is of small consequence *if* Member States continue their good faith compliance with the Court in these matters and the Court continues to seriously consider all applications made to it.

There are, however, two interrelated factors which have recently threatened to jeopardize this pleasant coexistence between the Court and the Member States with regard to interim measures: the increased xenophobia resulting in restrictive immigration and asylum policies in Europe and a dramatic rise within the Court of applications made to it under the Convention. The large majority of interim measures requests previously made by the Commission and the Court have involved expulsion or extradition of aliens. These cases indicate the remarkable fact that the Convention provides protection for all individuals within the borders of its Member States no matter what their nationality – an example to the rest of the world that protection of human rights is founded on the principle of non-discrimination. However, as pointed out by Nuala Mole, Europe has witnessed in the past decade an influx of aliens in unprecedented numbers due in part to the thaw of the Cold War, the increased mobility of people generally worldwide through air travel, and economic pull factors.<sup>140</sup> Legal immigration has reached a per capita rate of intake that is about double that of the USA and double Europe's rate of intake a decade ago.<sup>141</sup> Meanwhile, illegal immigration is estimated to be half a million per year.<sup>142</sup> As for asylum seekers, in 1999, Europe admitted 366,000 which is 20 per cent more

<sup>140</sup> See Nuala Mole, 'Asylum and the European Convention on Human Rights', Directorate General of Human Rights, H/Inf (2000) 8 Prov, Second Colloquy on the European Convention on Human Rights and the Protection of Refugees, Asylum Seekers and Displaced Persons, Strasbourg, 19–20 May 2000, p. 7.

<sup>141</sup> R. Jeffrey Smith, 'Nightly a Furtive Invasion via Italy', *International Herald Tribune*, 24 July 2000, p. 2, [www.iht.com/IHT/TODAY/MON/FPAGE/immig.2.html](http://www.iht.com/IHT/TODAY/MON/FPAGE/immig.2.html).

<sup>142</sup> *Ibid.*, p. 1.

than in 1998 and is equivalent to 81 per cent of the total asylum-seekers admitted into industrialized nations.<sup>143</sup> An unfortunate consequence has been the passage of increasingly strict national laws as well as regional agreements with regard to asylum seekers due to the perception of western European states in the European Union that economic migrants are abusing the asylum system to gain entry.<sup>144</sup> As stated by the United Nations High Commissioner for Refugees, 'immigration policies are becoming so restrictive that asylum-seekers – those who claim they are fleeing persecution – would soon be able to enter Europe only by parachute'.<sup>145</sup>

Simultaneously, in the early 1990s, the Commission and Court witnessed a dramatic increase in the number of applications made to it for interim measures, many for blocking deportations of aliens. With the increased pressure that the Court is feeling in the new millennium to process and churn out decisions on literally thousands of individual applications, there is a danger that the Court will increasingly become 'factory-like' in its consideration of interim measures applications, without considering in sufficient detail the merits of each application. The result would be to the detriment of individual applicants truly at risk as in the *Vilvarajah* case. On the other hand, there is a real tension within the Court not to lose its efficacy and efficiency by becoming bogged down with issues such as interim measures before even getting to the admissibility and merits stages of each case.

In light of this tension between the need on the one hand for continued efficiency and uniformity and on the other for due process review of interim measures applications, the following practical recommendations can be made to improve the current system within the Court:

- (1) Continue the current practice of keeping interim measures applications before the individual Sections handling the case.

Despite the well-intentioned arguments which have been offered for the establishment of a permanent Section within the Court which deals solely with interim measures applications, it seems that this would only result in duplication and delay in processing the case. Many of the same analyses regarding the real risk of ill-treatment and irreparable harm would be considered yet again by one of the four Sections who handle the case at the admissibility and merits stages of the case. It

<sup>143</sup> Final Report on the Commission Working Document entitled 'Towards Common Standards on Asylum Procedures' (SEC (1999) 271-C5-0157/1999-1999/2148 (COS)), European Parliament Doc. (A5-123/2000), p. 10 (19 April 2000).

<sup>144</sup> *Ibid.*, p. 7. Regional agreements which have restricted asylum policy in Europe include the Schengen Agreement of 1990 with suppression of controls at common frontiers; the Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community (15 June 1990); and the Treaty of Amsterdam (11 and 12 December 1998). See also Jeffrey Smith, *op. cit.*, note 141, p. 4. In the UK, government authorities now use a programme to hold airlines and transport companies liable for bringing in illegal immigrants. Meanwhile, Spain has recently imposed harsher penalties for businesses hiring illegal immigrants.

<sup>145</sup> Jeffrey Smith, *op. cit.*, note 141, p. 3.

seems logical to have the process begun in the particular Section responsible for the case from the beginning. Furthermore, the creation of yet another part of the Court will result in bureaucratic overgrowth and will only slow down the process. It is hard to imagine that an additional Section, though experts on how to handle interim measures applications, can be quicker than one individual, the Section President, who currently makes urgent decisions within matters of hours. Also, the influx of these applications from month to month is variable so that there may be times when this very specialized unit would have little else to keep them occupied.

- (2) Develop a more uniform, systematic review of applications which applies across the board to all Sections.

With the entry into force of Protocol 11 and the present system of four Sections of judges operating quite independently from each other, a real problem with interim measures applications is that the manner in which they are handled may vary widely according to the circumstances of the cases and the policies of the Sections. As mentioned previously, one Section keeps the decision almost strictly within the hands of the Section President, while another Section may be more prone to allow for consultation with the rest of the Chamber handling the case where time permits, in particular in high-profile cases. Furthermore, the Section President changes every three years. It can be a matter of chance whether an interim measures application gets assigned to a Section with a more strict or more lenient Section President or procedure for reviewing the application. While it seems that most of the Section Presidents at least have a checklist for reviewing the application and usually consult a country judge on the Court, a more systematic set of internal guidelines for the entire Court to follow in reviewing these applications would be in order. It seems that this would be in the interests of making the decision less arbitrary and would also give each incoming Section President better guidance for making an expedient, judicious and fair decision.

- (3) Maintain accurate records of accepted and rejected applications for purposes of precedent and uniform decision-making in the future.

At present, there is no systematic, centralized record-keeping in the Court which combines information on the types of interim measures applications received, the Member States which the applications relate to, the rate of receipt, the acceptance/rejection rates, and the rationale for acceptance/rejection of various types of applications for the purposes of precedent. This is due in part to the fact that, prior to Protocol 11, not all interim measures applications were registered and merely remained provisional. The consequence is that a record of them has been lost. The current practice of registering all applications immediately is a step in the right direction. However, the system for record-keeping on the types of applications received and the reasons for acceptance or rejection of them again varies by Section. A centralized database for all of these applications would provide a helpful resource for reference for future Section Presidents in making their decisions with regard to various types of applications.

- (4) Develop and maintain an up-to-date database on country conditions through the Court's *proprio motu* power for quick reference.

Former President of the Commission Norgaard pointed out the disconcerting fact that the need to make very quick decisions on interim applications measures has often resulted in not all of the relevant information being available to meet the threshold requirement for a 'real risk', especially with regard to Article 3.<sup>146</sup> The unfortunate consequence may be that a number of meritorious applications are denied, especially coupled with the Court's concern not to make frivolous requests to the Member States. Often, all that the Section President may have time to consult is whatever documents the applicant submits to him or her with the interim measures request and the opinion of the country judge at the Court. It is doubtful that an applicant facing deportation and at the eleventh hour has the time to collect all of the necessary documents for corroborating his or her request. In this day of twenty-first-century technology and communications capabilities, it seems that a centralized database of up-to-date country conditions documents could be maintained through the Court's *proprio motu* power; such information can be solicited relatively easily through the Internet, through international human rights organizations, through various news sources, government bodies and the UN.

- (5) Publish consistent bi-annual and annual reports on interim measures applications received and compliance rates of Member States for the Committee of Ministers.

While all interim measures requests made by the Court are currently communicated to the Committee of Ministers under Rule 39 on a case-by-case basis, the Court should consider regular publication of bi-annual and annual reports on interim measures applications it receives, drawn from a centralized database as mentioned above. Such reports could indicate basic statistics on types of applications received; numbers of applications received by country; and compliance rates of Member States with requests made by the Court. Such simple reporting would have value both for deterrence and compliance purposes in the future.

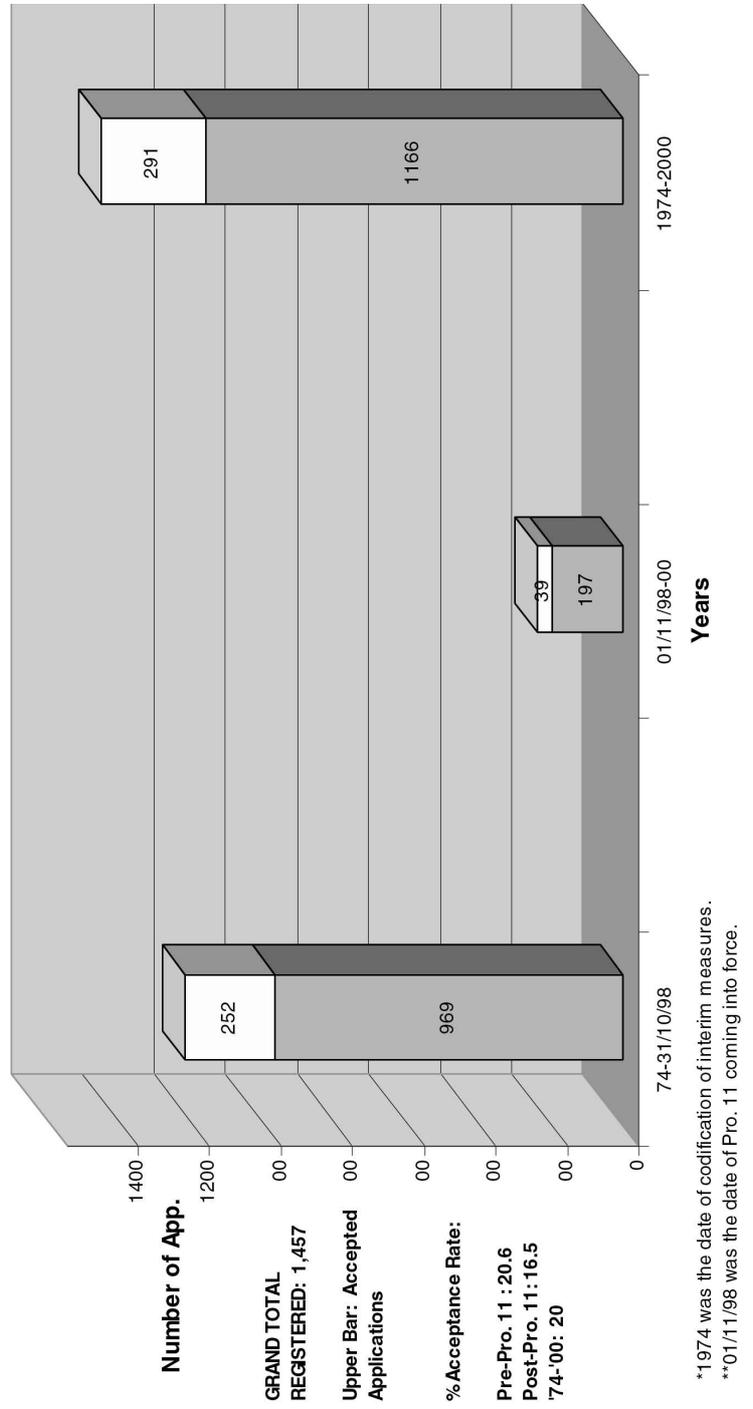
It is obvious that the continued efficacy of enforcement of the European Convention on Human Rights is at a critical juncture in its history. The success of this system at giving a voice to the individual applicant before an international forum is unprecedented both in terms of international law and practice. The use of interim measures by the Commission and the Court through its inherent powers to protect individual rights in urgent circumstances is at the very core of the spirit behind the Convention – to ensure that individuals have an effective remedy when their rights are violated. However, the overwhelming response by individuals within Europe to the Convention system threatens to undo this very success. In spite of the urgency

<sup>146</sup> Norgaard, *op. cit.*, note 23, p. 287.

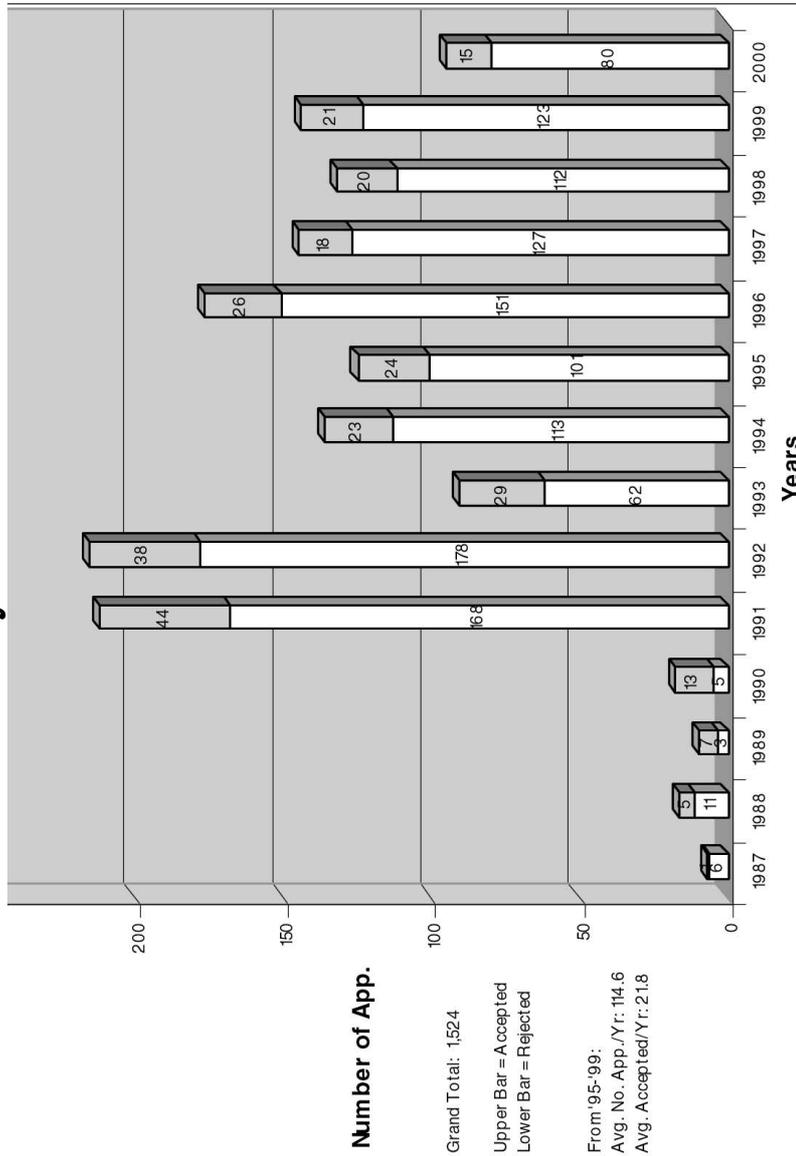
felt within the Council of Europe at this point to deal with the growing backlog of cases, it is imperative that the need for efficiency and efficacy not lead to the sacrifice of proper administration of justice. This applies as well to the discrete area of consideration of interim measures applications where there may be the temptation to reject more applications to stop deportation in light of recent xenophobic tendencies by Member States against aliens generally.

The Convention was drafted during a time when much of Europe was coming out of a war which caused many of its own citizens to suffer persecution and become refugees themselves. Asylum seekers and refugees in Europe today, outside of their own countries without the attendant rights of citizenship, are among those most in need of the Convention's protection. It is the challenge of the Court today to remain true to the spirit of the Convention, despite the various winds of change blowing throughout its Member States.

**APPENDIX A  
Total Interim Measures Applications Registered and Accepted or Rejected:  
1974\* - 20 July 2000**



**APPENDIX B  
Interim Measures Applications Received by the European Human Rights Commission  
and the ECHR from 1987 – 20 July 2000\***



Number of App.

Grand Total: 1,524

Upper Bar = Accepted

Lower Bar = Rejected

From 95-'99:

Avg. No. App./Yr: 114.6

Avg. Accepted/Yr: 21.8

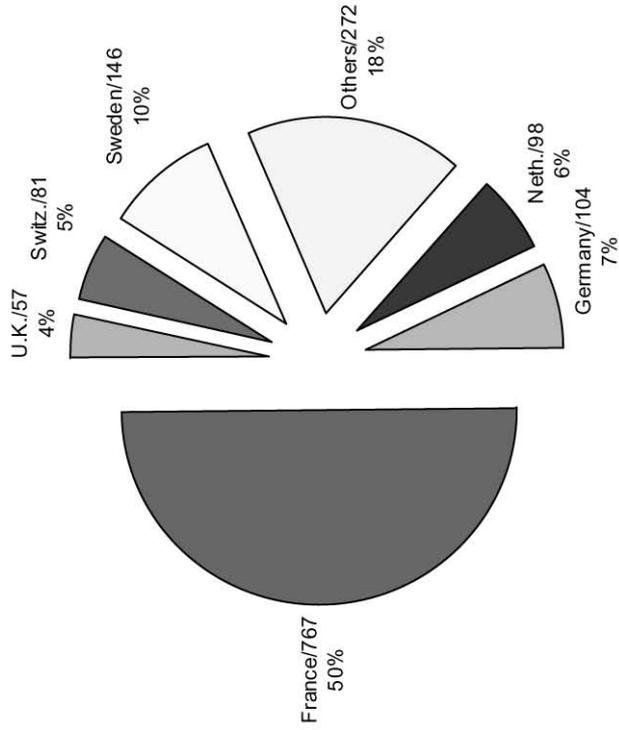
\*Chart indicates both provisional and registered applications.

**APPENDIX C  
Total Interim Measures Applications Received\*:  
1987-20 July 2000 (re: Member State)**

**Grand Total:  
1,524**

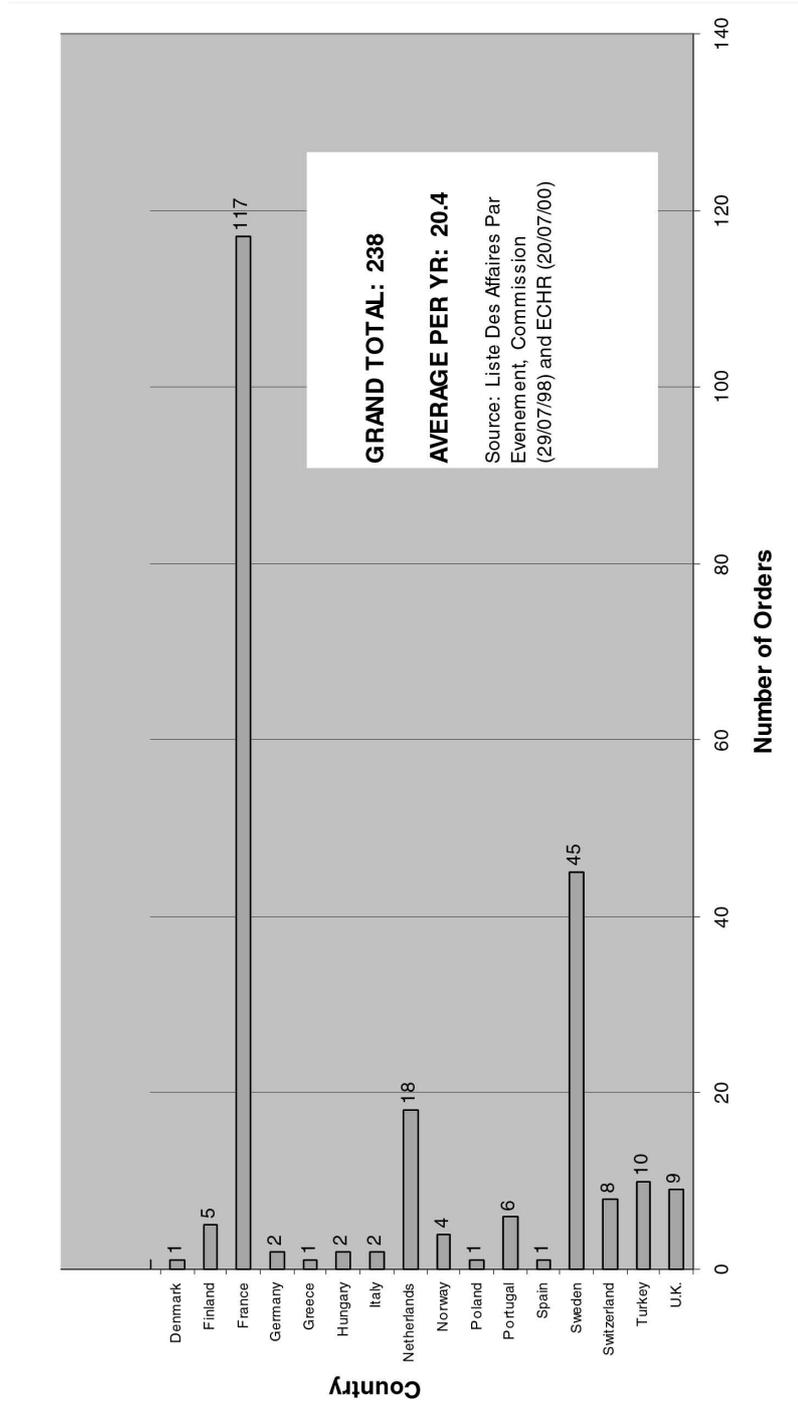
**Others = Countries with fewer than 50 app. each.**  
(Austria/18, Belgium/27, Bulgaria/2, Croatia/12, Cyprus/1, Czech R./6, Denmark/33, Finland/24, Greece/6, Hungary/8, Ireland/1, Italy/10, Latvia/1, Lithuania/2, Luxembourg/2, Norway/20, Poland/9, Portugal/9, Slovak R./7, Slovenia/2, Spain/19, Turkey/46, Ukraine/5).

Sources: Listes Des Affaires Par Evenement, Commission and ECHR, (29/07/98) and (20/07/00)



\*T his chart indicates provisional and registered applications.

**APPENDIX D**  
**Rule 36 European Commission of Human Rights Orders Issued to Member States:**  
**1987-31 October 1998**



**APPENDIX E  
Rule 39 ECHR Interim Orders Issued to Member States: 1 Nov. 1998 – 20 July 2000**

