Asylum Requests at the ECHR and its Rule 39 Emergency Procedures[1]

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Preliminary and Doctrinal Issues

The central practical problem arising out of the application of the Rule 39[3] at the European Court of Human Rights (ECHR) is how to assess the probabilities of future harm that might result if a particular country, a contractual state to the European Convention on Human Rights, were to reject the asylum request. In *Chahal v. the United Kingdom*,[4] a 1996 case, in paragraphs 73-74, the Court elucidated the basic formula,

> "where *substantial grounds* had been shown for believing that the person in question, if expelled, would face *a real and personal risk* of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country – Article 3 of the European Convention on Human Rights implies the obligation not to expel the person in question to that country."

This is the issue of *refoulement* such we also find in Article 3 of the UN Convention against Torture where in turn the Committee against Torture (UNCAT) uses the *Chahal* test:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there *are substantial grounds* for believing that he would be in danger of being subjected to torture.

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[3] http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/REGLEMENT_EN_Avril2011.pdf
Rule 39 (Interim measures)
1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted *in the interests of the parties* or of the proper conduct of the proceedings before it.
2. Notice of these measures shall be given to the Committee of Ministers.
3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.

[4] *Chahal v. the United Kingdom*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V ([GC], no. 22414/93)

> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

From a judicial perspective, whether it be national or international, the main problem with this test is that it relies on the probability of a *future* event, which is impossible to predict accurately. Legal analysis of cases, with which the courts are daily confronted, deals with a *past* event. The truth finding concerning the past event, dealt with by evidentiary rules etc., assesses the probability for the liability of the event that has – and certainly so! – already happened. Where the probability of future events is in question, such as e.g. in child custody cases and in pre-trial detention cases, the law is generally at a loss. Here it is dealing with a situation that has not yet happened. Even in cases of probable case (reasonable suspicion) assessment in the initial stages of criminal procedure, the law is nevertheless dealing with the probability of an event that has definitely happened or not happened. The initial assessment in probable cause cases is an assessment based on penury of evidence. Nevertheless, it deals with an event that lies in the past and has therefore definitely happened.

The problem with the *Chahal* test, although it refers to *substantial* grounds for believing that the person in question would face a real and personal risk, is that it refers to the probabilities of a future event, which might or might not happen. According to the Rule 39 of the Rules of Court of the ECHR, the idea is to freeze the situation in the interests of the good administration of justice –, in situations where the Court needs time and opportunity in order to proceed to the examination of the factual basis of the case in question.

Generally speaking, this is the basis for most emergency interim measures in most legal systems. The reference to the *interests of the parties* in Rule 39 to the effect that the rule may be invoked not only because it is in the interest of good administration of justice, but because it also protects the interests of the parties, however, now threatens to make – out of the ECHR in Strasbourg – an over flooded immigration court. The Court may not like it, yet it is itself responsible for this development. When the Rules of Court were first adopted, after 1998, the drafters of

the Rules ought to have understood that the reference to the interests of the parties will become a Pandora's Box or, better, a slippery slope. Thereafter, the hundreds and maybe thousands of these unrehearsed "cases" have been, in violation of the subsidiarity principle, "decided" impromptu and without real feedback as to what were the consequences of particular Rule 39 decisions.

It is bizarre that the most fatal questions in this process are decided on the basis of a fax sent in from a lawyer at 5pm on a Friday, where there is no pre-existing file on the applicant's case. In other words, the issue here is not to freeze the situation in a case, simply because there has *not been any case* so far, i.e. the case arises with the facts. But the facts faxed in by the lawyer at that late stage of development, for example, as well as the issue of exhaustion of domestic remedies and other procedural prerequisites do, in such a situation, hang in the air. They cannot be properly considered by the Court due to the nature of emergency. The asylum applicant may be put on the next plane to some African or Asian country. If the Rule 39 request is rejected in cases where the asylum seeker (the applicant) is refused the application of Rule 39 and is sent back to the country in question, the case is irretrievably closed. This cannot be in the interests of good administration of justice. Yet the decision to permit refoulement in the sense the word is used in Article 3 of the UN Convention against Torture, must be made on the spot with very little evidence available one way or the other. On the other hand, in cases where the expulsion is frozen, the emergency case may become a real and normal ECHR case because now the applicant and his lawyer have the opportunity to challenge the internal asylum procedures. This connects to Article 13 of the European Convention on Human Rights because the national remedy in cases of deportation of aliens, which arrive at the ECHR via Rule 39, must have a suspensive effect. If they don't have this suspensive effect, they are in violation of Article 13. In cases where the asylum seeker is deported before he has had the chance to have his case reviewed by the ECHR we find a violation not only of Rule 39 but also of Article 13, the letter giving the right to an effective domestic remedy.[5] If that remedy happens the case is then resolved. If the remedy does not happen the case may nevertheless, in a regular fashion, arrive at the ECHR.

[5] See *Bulus v. Sweden*, no. 9330/81, Decision of 19 January 1984.

It is thus reasonable to conclude that the Rule 39 in such cases does serve the interests of justice. This will be true, however, only for cases where the Rule 39 has been applied. The reliance on the domestic evidence in cases where the Rule 39 is not applied, i.e., the person who is expulsed lacks, as we have said, any feedback in that we really don't know what would have happened to the person so expulsed.

The clear issue in such a situation, which has from times immemorial (Roman Law) been solved with the use of presumptions in law, is, in other words, where to place the burden of proof in such a situation. It would hardly be acceptable from the humanitarian point of view to place the burden of proof and the risk of non-persuasion squarely on the shoulders of the applicant who may be, at the time of the invocation of the Rule 39 request, in some asylum centre cut off from the outside world and with scarce contacts with his lawyer.

In many respects this kind of commencing of the case is not only bizarre but is most irregular given the subsidiary nature of international jurisdiction. The situation might be compared to the U.S. Supreme Court deciding on execution of death penalty stays. But such situations are appropriately uncommon, exceptional and extraordinary – as they should be. The problem with asylum interim measures, from the point of view of the ECHR, is in the precipitousness of the avalanche of these no longer uncommon, exceptional and extraordinary cases. They must be decided almost on the spot.

Article 3 of the UN Convention against Torture in its paragraph 2 requires the domestic authorities to procure the necessary information in order to prevent the exclusive placement of the burden of proof and of the risk of non-persuasion on the applicant. The technical question here is thus what may the Court do in cases of incomplete information coming from domestic authorities? The logic of presumptions would therefore place the risk of non-persuasion upon the contracting state. This in turn ought to mean that the incomplete evidence concerning the Rule 39 situation would automatically trigger the application of Rule 39.

It follows logically that it is in the interests of the contracting state to gather that information and submit it to the Court, i.e., unless they want the Court to apply the otherwise rebuttable presumption.

Clearly, this places a burden on the domestic authorities. They must gather, insofar as possible, the evidence concerning the case in question on the one hand, whereas they must also be informed and they must transmit that information, too, to the Court concerning the general situation in the country concerned – precisely along the lines of the Article 3 of the UN Convention against Torture.

In fact, this operation has in certain contracting states, such as Sweden and the Netherlands, developed to the point where the operative tasks of domestic authorities have been efficiently fulfilled both concerning the particular person in question as well as the general situation in the country.

The ECHR Judge deciding the Rule 39 request is then confronted with ample evidence one way or the other and he is in a better position to avoid the false negatives where the danger to the person in question would be overlooked and he would be irreversibly sent back to his or her country of origin.

If such a Judge then tells us that even during the judicial recess of the ECHR he is obliged to decide on average at least three such cases a day and where this information is forthcoming in the form of e-mails transmitted via Blackberry, then we are in a position to understand that the reference to the "immigration court of Europe" really implies a flooding of the decision-making process in the Court of last resort with a number of cases that are all but "last resort" cases.