

**BEFORE THE GRAND CHAMBER
EUROPEAN COURT OF HUMAN RIGHTS**

Application Nos. 8675/15 and 8697/15

BETWEEN:

N.D. and N.T.

Applicant

-and-

Spain

Respondent

SUBMISSIONS FOR THE INTERVENERS

The AIRE Centre (Advice for Individual Rights in Europe), Amnesty International, ECRE (European Council on Refugees and Exiles), the Dutch Refugee Council and the International Commission of Jurists (ICJ).

5 April 2018

I. *Jurisdiction, prohibition of collective expulsion and the principle of non-refoulement under international law*

1. It is well established in this Court's case law that individuals fall within a State's jurisdiction when they are on a State's territory, lawfully or otherwise,¹ but in certain circumstances the scope of the Convention may reach beyond the territory of a Contracting Party.² Jurisdiction is exercised over any territory over which a Contracting Party to the Convention claims sovereignty or exercises functional sovereignty³ and/ or any individuals over whom it exercises authority or effective control regardless of whether the individuals are located outside of the State's territory.⁴
2. Persons who are not present on the territory of the State fall within the State's jurisdiction in a number of situations. Extraterritorially, these include, among others, where the State exercises authority or effective control, including where persons are intercepted on the high seas,⁵ arrive by sea at a port,⁶ or are on board an aircraft refused permission to land.⁷ Furthermore, people who are subject to checkpoint controls outside the territory of the Contracting Party are within its jurisdiction.⁸
3. Where the State authorities take action "the effect of which is to prevent non-nationals from reaching the borders of the State or even to push them back to another State", this "constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question..."⁹ Such an interpretation is necessary in order to avoid depriving the Convention rights of effectiveness¹⁰ and is irrespective of the border control methods employed by the Contracting Party. It, therefore, follows that the question of entry to a State's territory is not decisive when assessing whether a State is exercising or has exercised its jurisdiction. As the Court held in *Sharifi and Others v. Italy*:
"212. Aussi, la Cour ne juge pas nécessaire d'établir, dans la présente affaire, si les requérants ont été expulsés après être entrés sur le territoire italien ou s'ils ont été refoulés avant d'avoir pu le faire. Compte tenu de ce que même les interceptions en haute mer tombent sous l'empire de l'article 4, il ne peut qu'en aller de même pour le refus d'admission sur le territoire national dont, selon la thèse du gouvernement italien, feraient légalement l'objet les personnes arrivées clandestinement en Italie." (emphasis added)
4. Whilst there is no general right under the Convention for a non-national to enter or remain in a State,¹¹ it is prohibited to refuse entry to, and/or to return or transfer (a). a group of individuals present at or on the border of a Contracting Party without an individualised and detailed assessment of each and every person's particular circumstances and/or of any protection needs members of that group may wish to advance¹²; (b). an individual, where there are substantial grounds to believe s/he is at real risk of facing serious violations of human rights, including of the right to life, the prohibition of torture or inhuman or degrading treatment or punishment, or flagrant denial of justice, including in respect of the right to liberty.¹³ Individuals

¹ *Louizidou v. Turkey (Preliminary Objections)* App no 15318/89 (ECtHR, 23 March 1995), para 62; *Issa and Others v. Turkey* App no 31821/96 (ECtHR, 16 November 2004), para 71; *Al-Skeini and Others v. the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011), para 131; *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012), para 73.

² *Pad v. Turkey*, App no 60167/00, (ECtHR 28 June 2007), para. 53.

³ *Al-Skeini and Others v. the United Kingdom*, para 149.

⁴ *Issa v. Turkey*, App no 31821/96, (ECtHR 16 Nov.2005), para. 72; *Öcalan v Turkey* (Grand Chamber) App no 46221/99, (ECtHR 12 May 2005), para 91.

⁵ *Hirsi Jamaa and Others v. Italy*, paras. 78 and 180.

⁶ *Sharifi and Others v. Italy and Greece* App no 16643/09 (ECtHR, 21 October 2014).

⁷ *East African Asians (British protected persons) v. the United Kingdom* App nos 4715/70, 4783/71 and 4827/71 (ECtHR, 6 March 1978).

⁸ *Ibid.*

⁹ *Hirsi Jamaa and Others v. Italy*, op. cit., para 180.

¹⁰ *Sharifi and Others v. Italy and Greece*, op. cit., para 210.

¹¹ *Hirsi Jamaa and Other v. Italy*, op. cit., para 113.

¹² *Ibid.*, para 185.

¹³ *Ibid.*, para 114.

should be protected from collective expulsion and the risk of *refoulement*, *inter alia*, by being provided access to a procedure in which they can raise their particular circumstances regardless of their legal status and of whether the risk, in fact, materializes.

5. The principle of *non-refoulement* under the ECHR is derived from the broader prohibition of *refoulement* under international human rights law, including by the *1951 Geneva Convention relating to the Status of Refugees*¹⁴ as far as refugees are concerned, and, among others, by the *UN Convention Against Torture*,¹⁵ the *International Covenant on Civil and Political Rights*,¹⁶ the *International Convention for the Protection of All Persons from Enforced Disappearance*.¹⁷ Conduct resulting in exposure to such risk upon return is also prohibited under EU law, *inter alia*, under Articles 4 and 19 of the EU Charter of Fundamental Rights.
6. The principle of *non-refoulement* has been given a broad and consistent interpretation by numerous international treaty and EU authoritative bodies. The *Committee against Torture* (CAT) has recently reiterated that the principle of *non-refoulement* has to be applied in any territory under the State's jurisdiction or any area under its control or authority, or on board a ship or aircraft registered in the State party, to *any person*, including persons requesting or in need of international protection, without any form of discrimination and regardless of the nationality or statelessness or the legal, administrative or judicial status of the person concerned under ordinary or emergency law.¹⁸ "The concept of 'any territory under its jurisdiction'... includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of the State party".¹⁹
7. Moreover, the *Committee against Torture* sees a close connection between *non-refoulement* and collective expulsion. It has authoritatively held that, collective deportations without an objective examination of the individual cases amount to a violation of the principle of *non-refoulement* enshrined in Article 3 of the Convention against Torture (CAT). This includes practices such as "fast-track" screenings carried out by non-specialist border officials at the point of interception on land or at sea and without the presence of legal counsel or the possibility of an effective appeal.²⁰ In its recently adopted *General Comment No. 4* CAT has also reiterated, *inter alia*, the need for administrative, judicial and other preventive measures against possible violations of the principle of *non-refoulement and collective expulsion*.²¹ The principle of *non-refoulement* under international law, then, is defined by its substance rather than by its form and applies

¹⁴ The 1951 Convention relating to the Status of Refugees, 189 United Nations Treaty Series 137, entered into force 22 April 1954 (hereafter the Refugee Convention); as amended by the Protocol Relating to the Status of Refugees, 606 United Nations Treaty Series 267, entered into force 4 October 1967 (the Protocol or 1967 Protocol). (**Annex 1**).

¹⁵ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85 (**Annex 2**).

¹⁶ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 (**Annex 3**).

¹⁷ UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, United Nations, Treaty Series, Treaty Series, vol. 2716, p. 3 (**Annex 4**).

¹⁸ Committee against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, February 2018, para. 10 (**Annex 5**).

¹⁹ Committee against Torture, General Comment No. 2 (2008), Implementation of article 2 by States parties, January 2008, para. 7 (**Annex 6**).

²⁰ Committee against Torture, General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, February 2018, paras. 13 and 14, (**Annex 5**); Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, 26 February 2018, para. 40 (**Annex 7**). See also, para. 54 : "Both "pushbacks" and border closures amount to collective measures that are designed, or of a nature, to deprive migrants of their right to seek international protection and to have their case assessed in an individualized due process proceeding and, therefore, are incompatible with the prohibition of refoulement..."

²¹ Committee against Torture, General Comment No. 4 (2017), paras. 14, 18 and 49. (**Annex 5**). In particular, the following safeguards were reiterated (a) an individual and not collective examination of each case with information on why a procedure is being applied to the applicant the consequences of said procedure as well as information on the rights legally available to appeal such decision; (b) access to a lawyer, including free legal aid when necessary; (c) interpretation and translation of the relevant information into a language that he/she understands; (e) the right of appeal by the person concerned against a deportation order to an independent administrative and/or judicial body within a reasonable period of time from the notification of that order and with the suspensive effect of its enforcement; (f) an effective training of all officials who deal with persons [...].

both to transfers to a State where the person will be at a real risk of serious human rights violations (direct *refoulement*), and to transfers to States where there is a real risk of further transfer to a third country where the person will be at a real risk (indirect *refoulement*).²² It has a logical corollary: at the very least, states are obliged to give the individuals concerned the opportunity to challenge the transfer on grounds that such a transfer would expose them at a real risk of serious human rights violations.

8. The *EU Fundamental Rights Agency* (FRA) acknowledged that the principle of *non-refoulement* applies to border surveillance activities regardless of whether they are carried out at sea or on land. FRA reiterated that border or coast guards exercise effective control when they stop migrants who have reached the land border or the territorial sea and officers exercising effective control are fully bound by the principle of *non-refoulement*.²³ The FRA also voiced concerns about the legal vacuum migrants find themselves in, due to various border procedures and fences built in the EU, in particular when migrants are at the outer side of fences, such as those established in the Spanish enclaves of Ceuta and Melilla,²⁴ and in Bulgaria, Greece, Hungary and Slovenia. According to the Agency, such fences are built on the EU Member State's territory, usually with a margin of land on the outer side, which allows the authorities to undertake maintenance and repair work without having to ask the neighbouring country for access.²⁵
9. **The interveners submit that, those who are subject to the authority or effective control of a Contracting Party on or at its land border, and are prevented – whether by acts or omissions of that Contracting Party – from being individually identified and afforded the opportunity to meaningfully raise personal objections to their transfer, as the principle of *non-refoulement* and the prohibition on collective expulsions require, are in a position equivalent to that of those identified as being within a State's jurisdiction when intercepted on the high seas or in the transit zone of an airport.**

II. Nature and scope of the State's obligations within its jurisdiction

10. Since Contracting Parties are responsible for securing the Convention rights to all those who fall within their jurisdiction under Article 1 ECHR, the duties existing upon the State concerned go beyond mere *negative obligations*. As part of their negative obligations, Contracting Parties must abstain from any action that would prevent people from accessing procedures for determining their protection needs and must refrain from using excessive force both during activities aimed at preventing irregular entry and in operations aimed at imposing restrictions on freedom of movement or deprivation of liberty with a view to carrying out an expulsion.²⁶ There is an obligation to refrain from *refouling* those at risk to States where they would be at risk of prohibited treatment under the Convention, or at risk of onward expulsion to third countries or to their countries of origin.²⁷ Furthermore there is a *separate obligation* to refrain from collective expulsion, irrespective of whether the expulsion is carried out towards a country that does not present risks on return, simply on account of the risks associated with the failure to consider individual circumstances, implied in collective expulsion practices.²⁸
11. In order for the prohibition of *refoulement* and collective expulsions to be practical and effective and not theoretical and illusory,²⁹ Contracting Parties have *positive obligations* under the Convention which include, amongst others, the duty to take all reasonable steps to protect individuals from a real risk of harm to their life or physical integrity that were known or ought to have been known³⁰ to the Contracting Parties

²² *Salah Sheekh v. the Netherlands App. No. 1948/04*, (ECtHR 11 January 2007), para. 141; *M.S.S. v. Belgium and Greece*, [GC], App. No. 30696/09, (ECtHR 21 January 2011), para. 342.

²³ FRA, Scope of the principle of non-refoulement in contemporary border management: evolving areas of law, December 2016, p. 39, scenario 9, (**Annex 8**).

²⁴ More information regarding the situation in Ceuta and Melilla is available in **Annex 9**.

²⁵ FRA, Scope of the principle of non-refoulement in contemporary border management: evolving areas of law, December 2016, p. 40 (**Annex 8**).

²⁶ *Mutatis mutandis Sharifi and Others v. Italy and Greece*, op. cit., para 217, 219, 223.

²⁷ *M.S.S. v. Belgium and Greece App no 30696/09* (ECtHR, 21 January 2011); *Sharifi and Others v. Italy and Greece*, op. cit..

²⁸ *Georgia v Russia*, ECtHR, App no 13255/07 (ECtHR 03 July 2014).

²⁹ *Artico v. Italy App no 6694/74* (ECtHR, 13 May 1980), para. 33.

³⁰ *M.S.S. v. Belgium and Greece*, op. cit.; *Osman v. the United Kingdom App no 23452/94* (ECtHR, 28 October 1998).

concerned, as well as obligations to ensure independent, prompt and effective investigation of alleged violations of Convention rights, and to ensure effective remedies for such violations. The obligation to treat all individuals compatibly with the Convention includes the obligation to identify and adequately cater for the needs of unaccompanied (and accompanied) or separated children;³¹ the elderly; the sick and injured; persons with mental or physical disabilities; as well as others who may face specific risks or be in circumstances of greater vulnerability, such as asylum-seekers, survivors of torture, human trafficking, and/or victims of sexual- or gender-based violence,³² irrespective of their migration status.³³ States have an obligation to enable those who wish to identify themselves as being in need of international protection to do so³⁴ and to ensure their effective access to determination procedures with all the procedural safeguards required, including in particular the right to an effective remedy under international, EU and national law. To illustrate, this Court has recently held that international and domestic law recognises the right “to seek asylum” and that the 2005 Asylum Procedures Directive requires the EU Member States to “ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf”.³⁵

III. Article 4 of Protocol 4 ECHR – collective expulsions and procedural guarantees.

12. Collective expulsion of non-nationals is prohibited in absolute terms under general international law, including by all major human rights treaties.³⁶ This prohibition is considered to have assumed the status of customary international law³⁷ and, therefore, is binding on all States, regardless of their being party to a treaty expressing such prohibition.³⁸
13. In its jurisprudence on the issue, this Court has understood Article 4 of Protocol 4 as covering “any measure of the competent authorities compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group”,³⁹ indirectly maintaining how procedural shortcomings are decisive to finding the measure to be of a collective nature.
14. The Court has considered the applicability and potential violation of Article 4 of Protocol 4 in a series of cases, beginning with *Čonka v. Belgium*,⁴⁰ where it set out its findings:

61.... the Court considers that the procedure followed does not enable it to eliminate all doubt that the expulsion might have been collective.

³¹ *Muskhadzhiyeva and Others v. Belgium* App no 41442/07 (ECtHR, 19 January 2010); *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* App no 13178/03 (ECtHR, 12 October 2006); *Defence for Children International (DCI) v. Belgium* App no 69/2011 (ECSR, 23 October 2012); *Defence for Children International (DCI) v. the Netherlands* App no 47/2008 (ECSR, 20 October 2009).

³² *O.M. v. Hungary* App no 9912/15 (ECtHR, 5 July 2016), para 53.

³³ *Saadi v. the United Kingdom* App no 13229/03 (ECtHR, 29 January 2008).

³⁴ *Hirsi Jamaa and Others v. Italy*, op. cit..

³⁵ *A.E.A. v. Greece* App no. 39034/12 (ECtHR 15 March 2018), para. 83.

³⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 13(d) (**Annex 10**).

³⁷ The ILC Special Rapporteur on the expulsion of aliens held that the prohibition of collective expulsion assumed the status of a general principle of international law “recognised by civilised nations”. See UN General Assembly, *Third report on the expulsion of aliens / by Maurice Kamto, Special Rapporteur*, 19 April 2007, A/CN.4/581, para 115 (**Annex 11**).

³⁸ Treaty prohibitions on collective expulsions are contained in Article 4 of Protocol 4 to the ECHR, Article 12.5 of the African Charter, Article 22.9 ACHR, Article 26.2 of the Arab Charter on Human Rights, and Article 22.1 ICRMW. Although no express ICCPR provision prohibits collective expulsions, the Human Rights Committee has been clear that “laws or decisions providing for collective or mass expulsions” would entail a violation of Article 13 ICCPR: UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, (**Annex 12**). See also, Council of Europe: Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005, (**Annex 13**). Guideline 3. Prohibition of collective expulsion. A removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned, and it shall take into account the circumstances specific to each case. The collective expulsion of aliens is prohibited.

³⁹ *Andric v Sweden* App no 45917/99 (ECtHR, 23 February 1999), para. 1.

⁴⁰ *Čonka v. Belgium* App no 51564/99 (ECtHR, 5 February 2002).

62. That doubt is reinforced by a series of factors: firstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation (...); secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed.

63. In short, at no stage in the period between the service of the notice on the aliens to attend the police station and **their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account.** (emphasis added).

15. In respect of whether there had been a collective expulsion in *Hirsi Jamaa v. Italy*⁴¹ regarding the operation transferring applicants to Libya, the Court held:

185. In the instant case, the Court can only find that the transfer of the applicants to Libya was carried out without any form of examination of each applicant's individual situation. It has not been disputed that the applicants were not subjected to any identification procedure by the Italian authorities, which restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil. Moreover, the Court notes that **the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers.**

That is sufficient for the Court **to rule out the existence of sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination.** (emphasis added)

16. Accordingly, in a situation concerning the transfer of persons who were within the jurisdiction of Italy, albeit in circumstances where that jurisdiction was exercised extraterritorially, the Court maintained that the lack of or inadequacy of procedural guarantees and of an individualised assessment – providing for the identification of the individuals concerned and affording to them an opportunity to meaningfully raise any objections – constitute violations of Article 4 of Protocol No. 4.
17. The Court has made it clear that the key factor to determine the collective dimension of expulsions does not lie in the number of non-nationals expelled *per se* or in the existence of individualised decisions only, but in the effectiveness of the guarantees provided and in the material circumstances and context surrounding the event.
18. In *Georgia v. Russia*⁴² this Court attributed the breach of Article 4 Protocol 4 to the features of the conduct of expulsions at the material time noting that (§175) “after the circulars and instructions had been issued, and the number of Georgian nationals expelled – from October 2006 – made it impossible to carry out a reasonable and objective examination of the particular case of each individual” and that there was in place “a coordinated policy of arresting, detaining and expelling Georgian nationals from October 2006”, which also showed the collective nature of the expulsion. This finding was irrespective of the fact that on a formal level (§175) “a court decision was made in respect of each Georgian national”.
19. In *Khlaifia and Others v. Italy*, despite finding negatively on the facts, the Grand Chamber observed that the violation of Article 4 Protocol 4 had been adverted by the carrying out of two forms of identification in the circumstances of the case, the establishment of the applicants' nationality and the provision of a ‘genuine and effective possibility of submitting arguments against their expulsion’ (§254). In the same line of reasoning, it must be inferred that for expulsion measures to be compatible with this provision – as interpreted by the Court in its jurisprudence – they must, at a minimum, satisfy the above requirements.
20. In this context, the Court has considered that the lack of access to information in a language a non-national understands is a major obstacle in making the access to relevant procedures effective and reiterated the

⁴¹ *Hirsi Jamaa and Others v. Italy*, op. cit..

⁴² *Georgia v Russia* App no 13255/07 (ECtHR 03 July 2014), paras. 175 -178.

importance of guaranteeing anyone subject to an expulsion measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.⁴³

21. In the same vein as with the principle of *non-refoulement*, the absolute nature of the prohibition of collective expulsions entails that any difficulty Contracting Parties may experience, for example, due to enhanced migration flows, can never justify their recourse to practices incompatible with the Convention and its Protocols.⁴⁴
22. Once Article 4 of Protocol 4 is engaged – and arguably violated – it is incumbent on the State, under Article 13 ECHR, to have in place and guarantee access to an effective remedy. To be effective, a remedy must offer independent and rigorous scrutiny before the competent authorities in the domestic procedures before the collective expulsion took place. This has been made clear in *Čonka*, *Hirsi* and *Sharifi*.⁴⁵
23. Moreover, a remedy must be effective in practice as well as in law, rather than theoretical and illusory and cannot be unjustifiably hindered by the acts or omissions of the authorities.⁴⁶ This Court's jurisprudence highlights a number of obstacles that may render the remedy against conduct or omissions prohibited under the Convention ineffective, *inter alia*, removing the individual before he or she had the practical possibility of accessing the remedy;⁴⁷ excessively short time limits in law for submitting the claim or an appeal;⁴⁸ insufficient information on how to gain effective access to the relevant procedures and remedies;⁴⁹ obstacles in physical access to and/or communication with the responsible authority;⁵⁰ lack of (free) legal assistance and access to a lawyer;⁵¹ and lack of interpretation.⁵²
24. **The interveners submit that the prohibition of collective expulsion under Article 4 Protocol 4 would be theoretical and illusory if it did not entail a thorough and rigorous assessment, including the examination of the particular circumstances of those forming part of the group of non-nationals concerned by the measure. This obligation also entails their effective identification and registration as well as information about, and access to applicable protection procedures and remedies where relevant. These safeguards apply whenever the individuals concerned fall within Contracting Parties' jurisdiction, including in circumstances when jurisdiction is exercised extraterritorially and irrespective of their migration status.**

IV. Application of Convention rights in accordance with Article 53 ECHR and obligations under EU law

25. As Article 53 ECHR makes clear, the provisions of the Convention must not be applied in such a way as to diminish human rights protection, "which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a part".
26. Where the applicable law is binding EU law, Article 53 ECHR means that no provision of the ECHR, including Article 4 of Protocol 4, should be applied in relation to States (who are bound by that EU law) in

⁴³ *Hirsi Jamaa and Others v. Italy* op. cit., para. 204; *Sharifi and Others v. Italy and Greece*, op. cit., para. 217.

⁴⁴ *Hirsi Jamaa and Others v. Italy*, op. cit. para 179.

⁴⁵ *De Souza Ribeiro v. France* App no 22689/07 (ECtHR, 13 December 2012), para 82; *Hirsi Jamaa and Others v. Italy*, op. cit. para 206; *Mohammed v. Austria* App no 2283/12 (ECtHR, 6 June 2013), para 80.

⁴⁶ *Čonka v. Belgium*, op. cit. para. 46, 75.

⁴⁷ *Shamayev and Others v. Georgia and Russia*, App No. 36378/02, (ECtHR 12 April 2005), para. 460; *Labsi v. Slovakia*, App no 33809/08, (ECtHR 15 May 2012), para. 139.

⁴⁸ *Mutatis mutandis I.M. v. France*, App no 9152/09, (ECtHR 14 December 2010), para. 144; *M.S.S. v. Belgium and Greece*, op. cit. para. 306.

⁴⁹ *Hirsi Jamaa and Others v. Italy*, op. cit. para. 204.

⁵⁰ *Mutatis mutandis Gebremedhin v. France*, App no 25389/05, (ECtHR 26 April 2007), para. 54; *I.M. v. France*, App no 9152/09, (ECtHR 14 December 2010), para. 130; *M.S.S. v. Belgium and Greece*, op. cit., paras. 301 - 313.

⁵¹ *Mutatis mutandis M.S.S. v. Belgium and Greece*, op. cit. para. 319.

⁵² *Hirsi Jamaa and Others v. Italy*, op. cit., para. 202.

a manner that would diminish the rights and reduce the protection guaranteed under the applicable EU law.⁵³

A. The applicable EU law: relevant fundamental rights and principles of EU law

27. EU law, including but not limited to the EU asylum *acquis*,⁵⁴ is relevant to the present case as the principle of the rule of law runs like a golden thread through the Convention.⁵⁵ The Convention requires that all measures carried out by the Contracting Parties that affect an individual's protected rights must be "in accordance with the law". In some circumstances the law will be EU law.
28. In this context, in determining whether the Contracting Parties' obligations under the Convention are engaged in any particular case — and, if so, the scope and content of these obligations — this Court has had regard to the EU asylum *acquis* materially relevant to those questions when the Respondent States are themselves legally bound by that *corpus* of law.⁵⁶
29. *The right to effective legal protection* has been most clearly set out in the case of *Marks and Spencer plc v. Commissioners of Customs & Excise* in which the CJEU stated that: "*Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts (...) not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it.*"⁵⁷
30. This approach corresponds broadly to the ECtHR's guiding principle that rights must be practical and effective as opposed to theoretical and illusory.⁵⁸
31. *The right to be heard* was reiterated most recently in the cases of *Mukarubega*⁵⁹, *Boudjilida*,⁶⁰ and *M*⁶¹ wherein the CJEU repeated that: "*the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely.*"⁶²

⁵³ *Aristimuño Mendizabal v. France* App no 51431/99 (ECtHR, 17 January 2006); *M.S.S. v. Belgium and Greece*, op. cit..

⁵⁴ The EU asylum *acquis* is the *corpus* of law comprising all EU law adopted in the field of international protection claims. The EU asylum *acquis* is "a body of intergovernmental agreements, regulations and directives that governs almost all asylum-related matters in the EU." "Under EU law, Article 78 of the TFEU [Treaty on the Functioning of the EU] stipulates that the EU must provide a policy for international protection, subsidiary protection and temporary protection, "ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with [the 1951 Geneva Convention and its Protocol] and other relevant treaties", such as the ECHR, the UN Convention on the Rights of the Child (UNCRC), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), ICCPR, ICESCR. The EU asylum *acquis* measures have been adopted under this policy, including relevant to this intervention: the Dublin Regulation (Regulation (EU) No. 604/2013), the Qualification Directive (2011/95/EU), the Asylum Procedures Directive (2005/85/CE) and its recast (2013/32/EU) and the Reception Conditions Directive (2003/9/CE) and its recast (2013/33/EU)." See, Fundamental Rights Agency, *Handbook on European law relating to asylum, borders and immigration, Edition 2014* (European Union Agency for Fundamental Rights 2014) 64-65. (Annex 14).

⁵⁵ The Convention's preamble recalls the rule of law.

⁵⁶ *M.S.S. v. Belgium and Greece*, op. cit., paras 57-86 and 250. *Sufi and Elmi v. the United Kingdom* App nos 8319/07 and 11449/070 (ECtHR 28 November 2011), paras 30-32 and 219-226, where the Court had regard to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"), as well as to a preliminary ruling by the European Court of Justice in the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie* asking, *inter alia*, whether Article 15(c) of the Qualification Directive offered supplementary or other protection to Article 3 of the Convention.

⁵⁷ Case C-62/00 *Marks and Spencer plc v. Commission of Customs & Excise* [2002] ECR I-6348, para 27.

⁵⁸ *Artico v. Italy* App no 6694/74 (ECtHR, 13 May 1980), para. 33.

⁵⁹ Case C-166/13 *Sophie Mukarubega v. Préfet de police and Préfet de la Seine-Saint-Denis* [2014] ECLI:EU:C:2014:2336.

⁶⁰ Case C-249/13 *Khaled Boudjilida v. Préfet des Pyrénées-Atlantiques* [2014] ECLI:EU:C:2014:2431.

⁶¹ Case C-560/14, *M v Minister for Justice and Equality, Ireland, Attorney General* [2017] ECLI:EU:C:2017:101. In the present case the Court of Justice held that an interview must be arranged in order to examine the application with full knowledge of the facts in light of specific circumstances.

⁶² Case C-277/11 *M. M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General* [2012] ECLI:EU:C:2012:744, para 87.

32. The prohibition of refoulement and the prohibition of torture and inhuman or degrading treatment or punishment (Article 19 (2) and Article 4 of the Charter of Fundamental Rights of the European Union (CFR)),⁶³ preventing Member States from returning an individual to a situation where he would be at a real risk of torture, inhuman or degrading treatment or punishment. The prohibition applies to factual scenarios such as rejection at the border, interception and indirect *refoulement*. Member States obligations under the above mentioned Articles apply, regardless of whether the person seeking protection at the border has explicitly applied for international protection, implying an obligation on Member States to proactively assess the risk of *refoulement* when read in conjunction with Article 52(3) CFR.⁶⁴
33. The prohibition of collective expulsions (Article 19 (1) CFR), which reflects Article 4 of Protocol 4. As such, and in the context of the EU asylum *acquis*, it attracts the EU law right to effective legal protection, which is buttressed by the EU right to be heard. The EU law right to an effective remedy under Article 47 CFR includes a right of access to such a remedy. Article 47 encompasses the general attributes of an effective remedy under international law, including that such remedies be prompt, accessible, and available before an independent authority and leading to cessation and reparation.⁶⁵ The accessibility element is made explicit in Article 47, which requires that free legal aid be provided when necessary to ensure effective access to justice. Furthermore, the CJEU has considered that Article 47 comprises the right of access to a court or tribunal even in those matters that are not recognised as falling within the scope of Article 6 ECHR by the ECHR's jurisprudence.⁶⁶
34. The right to human dignity (Article 1 CFR) recognises the inviolable character of this provision as “the real basis of fundamental rights”⁶⁷ suggesting that the respect and protection of human dignity must permeate the implementation of EU law as a whole. The interveners note that in cases involving expulsions, the CJEU attributed the ‘*fundamental importance*’ of the prohibition under Article 4 (corresponding to Article 3 ECHR) *inter alia* to its “close link” to Article 1 CFR.⁶⁸ In its settled and recent case law this Court raised the issue of human dignity when dealing with mass migration flows.⁶⁹
35. The right to asylum (Article 18 CFR) is a subjective and enforceable right of individuals who are entitled to be granted international protection under EU law. The beneficiaries of this provision are all individuals, who may be eligible for international protection on grounds established under any instrument of international law, including the 1951 Refugee Convention, and EU law, or as a consequence of the principle of *non-refoulement* as established in the Convention jurisprudence. The protection of Article 18 CFR applies in all areas of activity of the Union and its Member States that fall within the scope of application of EU law.
36. Moreover, the right to asylum under Article 18 CFR embraces the following elements: (a) access to fair and efficient asylum procedures and an effective remedy; (b) treatment in accordance with adequate reception and (where detention is prescribed by law, necessary and proportionate) detention conditions; and (c) the grant of international protection in the form of refugee or subsidiary protection status when the criteria are met.⁷⁰

⁶³ The EU Charter of Fundamental Rights (CFR) became legally binding with the coming into force of the Lisbon Treaty, Article 6 of which grants it the same legal status as the EU Treaties themselves.

⁶⁴ *Hirsi Jamaa and Others v. Italy*, op. cit. para 157.

⁶⁵ International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: a Practitioners' Guide* (International Commission of Jurists 2006), 46-49, (Annex 15).

⁶⁶ Case C-199/11 *Europese Gemeenschap v. Otis NV* [2012] ECR I-000, para 49; Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland* [2010] ECR I-13849, para 60.

⁶⁷ Explanations Relating to the Charter of Fundamental Rights, Explanation on Article 1, 2007/C 303/02 (Annex 16).

⁶⁸ Cases C-404/15, C-659/15 PPU *Aranyosi and Căldăraru*, EU:C:2016:198 [2016], paras 85 – 86; Case C-578/16 PPU - *C. K. and Others*, ECLI:EU:C:2017:127 [2017], para 59.

⁶⁹ *Khlaifia v. Italy* App no. 16483/12[GJ] (ECtHR 15 December 2016), paras. 158 and 184.

⁷⁰ UNHCR intervention before the Court of Justice of the European Union in the cases of *N.S. v. Secretary of State for the Home Department* in United Kingdom and *M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform* in Ireland, 2011; UN High Commissioner for Refugees (UNHCR), UNHCR public statement in relation to Zuheyr Freyeh

B. The EU asylum *acquis*: effective access to international protection procedures

37. The EU asylum *acquis* is relevant in situations where international protection needs are engaged and is comprised of a number of legal instruments and their interpretation by the CJEU. Of those instruments, the most pertinent for this intervention is the Asylum Procedures Directive (APD)⁷¹ and the recast Asylum Procedures Directive (recast APD),⁷² which provide for effective access to the asylum procedure for all applicants, without any exception.⁷³
38. It applies not only to applications for international protection made by those who have been authorised to enter a State's territory but also at the borders, *inter alia*, concerning border procedures⁷⁴ and should be interpreted in light of the relevant fundamental rights and principles of EU and international law.⁷⁵
39. The European Commission has drawn attention to the lack of effective access to the asylum procedure in the context of border procedures: *"it should be noted that access to the asylum procedure may also be considered to be hampered where, in practice, asylum seekers are not able to safely and easily reach a crossing point or a transit zone to submit their asylum application because of the manner in which border infrastructure, including border fences, have been built"*.⁷⁶
40. As the EU asylum regime stands at present, in order to make a formal request for international protection, most seeking international protection under EU law are obliged to reach and/or cross the borders of EU Member States in an irregular manner often relying on documents provided by people smugglers. If they are unable to reach the territory (or territorial waters or transit zones), they are unable to access the whole package of international protection determination procedures and safeguards contained in the EU asylum *acquis* and in national law.
41. Under the 2005 APD⁷⁷ and the recast APD the border procedures shall ensure in particular that persons willing to apply for international protection: "(a) have the right to remain at the border or transit zones of the Member State; (b) are immediately informed of their rights and obligations; (c) have access to interpretation; (d) are interviewed [...] by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law; (e) can consult a legal adviser or counsellor [...]".⁷⁸
42. Moreover, Article 6(1) of the recast APD obliges EU Member States authorities to facilitate the registration of asylum applications, including recording information or statements of the asylum applicant or relating to the substance of their request for international protection and imposes an obligation on Member States to ensure that such authorities receive the relevant information and the appropriate training to perform their task properly. The Directive does not further impose any formal requirements to applicants with regard to how an asylum application must be made. **The interveners submit that any expression of the wish to obtain protection to any Member State authority must be considered as an application "being made", whether this is done orally or in writing and regardless of whether the words asylum or protection have been used by the person concerned.**

Halaf v. the Bulgarian State Agency for Refugees before the Court of Justice of the European Union, August 2012, C-528/11. (Annexes 17 and 18).

⁷¹ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2003] OJ L 326/13 ('Asylum Procedures Directive'), in force from 2 January 2006 to 20 July 2015.

⁷² Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 ('recast Asylum Procedures Directive'). In force on 20 July 2015 and had to be transposed by 20 July 2015) apart from Articles 31(3), (4) and (5) which must be transposed by 20 July 2018.

⁷³ Recast Asylum Procedures Directive, Recital 25.

⁷⁴ Asylum Procedures Directive, Article 3 and its recast.

⁷⁵ Asylum Procedures Directive, Recitals 8 and 9.

⁷⁶ European Commission, letter to the Permanent Representative of Hungary to the European Union, 6 October 2015.

⁷⁷ Asylum Procedures Directive, Recital 10 and Article 45.

⁷⁸ Recast Asylum Procedures Directive, Articles 2(p), 6, 8, 10-12, 15 and 19.

43. In light of the CJEU's jurisprudence requiring EU law provisions to be interpreted in a way which provides them with *effet utile*⁷⁹, the EU asylum *acquis* requires Member States to provide information detailing the possibility of making an application for international protection available to all non-nationals held in detention facilities or present at border crossing points, including transit zones, and at external borders.⁸⁰ Such information must be provided pro-actively to all those apprehended at the border or held in detention facilities on an equal footing. Moreover, in order to be effective and useful, such information must be provided in a language the non-nationals concerned understand.⁸¹
44. **The interveners submit that the EU asylum *acquis* interpreted in light of EU fundamental rights and principles⁸² envisages effective access to all who may wish to apply for international protection to the appropriate procedures contained in the Asylum Procedures Directive and its recast. Moreover, both Directives envisage the right to an effective remedy against any decision regarding an asylum application, including at the border and the transit zone.⁸³ This is only possible after an individualised identification and a meaningful opportunity to raise objections, which in itself requires having had prior access to information about the procedures and legal assistance.**

C. Other relevant EU law instruments

46. Alongside the EU asylum *acquis*, for the purposes of this submission, it should be recalled that the implementation of the EU Schengen Borders Code,⁸⁴ which regulates border operations and as such, applies (Article 3) 'to any person crossing the internal or external borders' of the EU, must be applied 'without prejudice to: (...) (b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement' and compliant with 'the principles recognised [by the CFR]'.⁸⁵ These include— as listed above — the prohibition of collective expulsion and *refoulement*, the right to an effective remedy and the individual right to asylum. Moreover, under Article 5(4)(c), on an exceptional basis, the entry of third-country nationals who do not fulfill the conditions at Article 5(1) "may be authorised by a Member State [...] on humanitarian grounds, on grounds of national interest or because of international obligations". Finally, Article 13(1) specifies that refusal of entry to members of groups not meeting the requirements under Article 5(1) and (4) shall be "without prejudice to the application of special provisions concerning the right of asylum and to international protection".
45. **In conclusion, the interveners submit that the prohibition of *refoulement* applies to acts or omissions resulting in exclusion or transfer from the territory of a Contracting Party of individuals under its jurisdiction, including where those acts or omissions are carried out on or at its land borders. Additionally, the collective denial of access to the territory of a Contracting Party to individuals on or at its land borders (and therefore under its jurisdiction), without consideration being given to each individual's circumstances, constitutes a collective expulsion in violation of Article 4 of Protocol 4. The responsibility of EU States under the EU asylum *acquis* is engaged in relation to any individuals who may wish to seek international protection. Such measures thus constitute an aggravated instance of a violation of Article 4 of Protocol 4 because of the additional serious breaches by Contracting Parties of their international and EU law obligations.**

⁷⁹ Case C-213/89 *Factortame and Others* [1990] ECR I-2433, para 20; Case C-118/00 *Gervais Larsy v. Institut national d'assurances sociales pour travailleurs indépendants (Inasti)* [2001] ECR I-5063, paras 50-53 ; Recast Asylum Procedures Directive Article 8 (1).

⁸⁰ Asylum Procedures Directive, Article 45 and Recast Asylum Procedures Directive, Article 8.

⁸¹ Recast Asylum Procedures Directive, Article 8(1) interpreted in light of the principle of effectiveness. Case C-13/01 *Safalero Srl v. Prefetto di Genova* [2003] ECR I-8679, para 49.

⁸² See paras. 29 – 39, Section IV.A. for more information.

⁸³ Asylum Procedures Directive, Recital 27 and Article 39; Recast Asylum Procedures Directive, Recitals 25, 30 and Article 46.

⁸⁴ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016. (Annex 17).

⁸⁵ Ibid, Recital 20.