

GRAND CHAMBER
EUROPEAN COURT OF HUMAN RIGHTS

Application no. 42120/21

R.A. v Poland

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS:
ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE CENTRE)
EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)
DUTCH COUNCIL FOR REFUGEES (DCR)
THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

*pursuant to the Registrar's notification dated 13th September on the Court's
permission to intervene under Rule 44 § 3 of the Rules of the European Court of
Human Rights*

30th September 2024

I. *Non-refoulement: obligations under Article 3 ECHR*

1. This Court has reiterated on numerous occasions that the prohibition of inhuman or degrading treatment, enshrined in Article 3 of the Convention, ‘*is one of the most fundamental values of democratic societies*’, ‘*a value of civilisation closely bound up with respect for human dignity, part of the very essence of the Convention*’.¹ Under the ECHR and other international human rights law instruments applicable to Contracting Parties, this principle entails an obligation not to transfer (*refouler*) people where there are substantial grounds for believing that they would face a real risk of serious human rights violations - including violations of Article 3² - in the event of their removal, in any manner whatsoever, from the State’s jurisdiction. **The non-refoulement principle is absolute, permitting no derogations either in law or in practice, irrespective of the conduct of the person concerned, including where such conduct may give rise to “a public emergency threatening the life of the nation”.**³
2. Contracting Parties will violate Article 3 by removing an individual ‘*where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country*’.⁴ Article 3 *non-refoulement* obligations apply both to transfers to the State where the person will be at risk (direct *refoulement*), and to transfers to States where there is a risk of onward transfer to a third country where the person will be at risk (indirect *refoulement*).⁵ They also protect individuals against both deliberate harm by State agents and non-State actors⁶ and removal to face living conditions amounting to serious ill-treatment contrary to the Convention.
3. Contracting Parties have an obligation to secure Convention rights to all those who fall within their jurisdiction withing the meaning of Article 1 ECHR. This general obligation not only includes obligations on the State of *non-refoulement*, but also obligations to treat persons with the dignity consonant with Convention standards and, in particular, to enable individuals to effectively exercise their Convention rights wherever and whenever they are within their jurisdiction, lawfully or otherwise.⁷ Treating all individuals in accordance with the Convention includes the obligation to identify and pay special attention to the needs of people in a vulnerable situation, including asylum seekers. States have an obligation **to enable those who wish to identify themselves as seeking asylum or similar protection to do so⁸ and to permit them access to determination procedures with all the procedural safeguards required by law,⁹** including access to information, legal assistance and access to effective remedies.

¹ *M.K and others v Poland*, App. no. 40503/17, 23 July 2020 § 166- 167; *M.S.S. v. Belgium and Greece* [GC], App. no. 30696/09, 21 January 2011, § 286; *M.A. v. Cyprus*, App. no. 41872/10, 23 July 2013, § 133.

² *Othman (Abu Qatada) v. the United Kingdom*, App. no. 8139/09, 17 January 2012, § 233, 258 -261; *N.A. v. the United Kingdom*, App. no. 25904/07, 17 July 2008; *Soering v. the United Kingdom*, App. No. 14038/88, 7 July 1989.

³ *Saadi v Italy* [GC], App. no. 37201/06, 28 February 2008, § 127; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; *Adel Trebourski v. France*, UNCAT, CAT/C/38/D/300/2006, 11 May 2007, § 8.2 – 8.3, UN Human Rights Committee, ‘General comment no. 31 [80]. The nature of the general legal obligation imposed on States Parties to the Covenant’, 26 May 2004, CCPR/C/21/Rev.1/Add.13, § 12.

⁴ *Soering v. the United Kingdom*, App. no. 14038/88, 7 July 1989, § 90-91, Series A no. 161; *Vilvarajah and Others v. the United Kingdom*, App. nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991, § 103, Series A no. 125; *H.L.R. v. France*, App. no. 24573/94, 29 April 1997, § 34, Reports 1997-III; *Jabari v Turkey*, App. no. 40035/98, 11 July 2000, § 38; *Salah Sheekh v. the Netherlands*, App. no. 1948/04, 11 January 2007, § 135; and *Saadi v Italy*, App. no. 37201/06, 28 February 2008, § 152; *M.S.S. v. Belgium and Greece* [GC], App. no. 30696/09, 21 January 2011, § 365.

⁵ *Salah Sheekh v. the Netherlands*, App. no. 1948/04, 11 January 2007, § 141; *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011, § 342.

⁶ *J.K and others v Sweden* [GC], App. no. 59166/12, 23 August 2016.

⁷ *M.S.S. v. Belgium and Greece* [GC], App. no. 30696/09, 21 January 2011, §§ 299-320.

⁸ *Hirsi Jamaa and Others v. Italy*, App. no. 27765/09, 23 February 2012.

⁹ *Kebe and Others v. Ukraine*, App. no. 12552/12, 12 January 2017, § 104.

4. Diligent application of the principle of *non-refoulement* requires the domestic authorities to examine the conditions in the country of removal in light of the standards of Article 3 of the Convention.¹⁰ Such assessment must be *rigorous*.¹¹ **Where the removing state can be deemed to have constructive knowledge of the situation in the envisaged country of removal, it is under a duty of enquiry to verify, before removal, that the person concerned will not face a real risk of prohibited treatment in the country of destination and/or in any third country through which they may transit.**¹² Where the alleged risk of being subjected to treatment contrary to Article 3 concerns living conditions for asylum seekers in a receiving third country, that risk is also to be assessed by the expelling State.¹³
5. The amendments to the *Act on foreign nationals* and the *Act on granting protection to foreign nationals* in the territory of the Republic of Poland, which are part of the regulation restricting border traffic in connection with Covid-19, were signed by the president on 22 October 2021. They focus on those who have entered Poland irregularly and provide for grounds for removal of a foreign national from Poland even if the individual has applied for international protection. The *Act on foreign nationals* introduces a new category of administrative decision in the form of an order on unauthorised border crossings. The order seeks to prevent entry and to return those who cross the external border irregularly. It is intended to be absolute, meaning that it may be issued and executed even in a situation where the foreign national concerned has made an application for international protection. Moreover, the *Act on granting protection to foreign nationals* provides authorities with the power to refrain from examining an application for international protection submitted by a foreign national who entered irregularly, unless they arrived directly from a territory in which they were in danger of persecution and can provide credible reasons for the irregular border crossing.¹⁴ In addition, on 2 September 2021, a state of emergency was introduced in part of the Podlaskie and Lubelskie provinces. It limited the possibility of staying in places indicated in the act, located in the immediate vicinity of the border with Belarus.¹⁵
6. This Court found that the exact content of the expelling State's duties under the Convention may differ depending on whether it removes applicants to their country of origin or to a third country.¹⁶ Removal to a third country must be preceded by a thorough examination of whether the intermediate country's asylum procedure affords sufficient guarantees to prevent an asylum seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks they face from the standpoint of Article 3.¹⁷ In such cases, authorities are precluded from removing individuals merely on the basis of assumptions regarding a certain country's asylum system, but must conduct a *proprio motu* assessment of "*the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice*" based on up-to-date information available at the time of the assessment.¹⁸ Such information includes authoritative findings regarding the risk of denial of access to asylum systems, including those made by UNHCR, Council of Europe and reputable non-governmental organisations.

¹⁰ *Mamatkulov and Askarov v. Turkey* [GC], App. nos. 46827/99 and 46951/99, 4 February 2005, § 67; *F.G. v. Sweden* [GC], App. no. 43611/11, 23 March 2016, § 112.

¹¹ *Sufi and Elmi v. the United Kingdom*, App. Nos. 8319/07 and 11449/07, 28 June 2011, § 214; *Chahal v. the United Kingdom* [GC], App. no. 22414/93, 15 November 1996, § 96; *Saadi v. Italy*, App. no. 37201/06, 2 February 2008, § 128.

¹² *Mamatkulov and Askarov v. Turkey* [GC], op. cit., § 69.

¹³ *Ilias and Ahmed v Hungary* [GC], App. no. 47287/15 [GC], 21 November 2019, § 131.

¹⁴ Helsinki Foundation for Human Rights (HFHR); Legal note on the draft amendment to the laws on foreigners and granting them protection < [The draft amendment of the Act on Foreigners and the Act on Granting Them Protection violate EU asylum law principles – legal opinion of the HFHR Helsinki Foundation For Human Rights](#) >; Comments on the bill amending the Act on foreign nationals and the act on granting protection to foreign nationals < [draft-law-comments-eng-FINAL.pdf \(hfhf.pl\)](#) >

¹⁵ HFHR, Access to asylum denied at Polish-Belarusian border, September 2021, [HFHR-Access-to-asylum-denied-in-Poland_Sep-2021.pdf](#)

¹⁶ *Ilias and Ahmed v Hungary* [GC], App. no. 47287/15 [GC], 21 November 2019, § 128.

¹⁷ *Ibid.*, § 137.

¹⁸ *Ibid.*, § 141.

7. Indeed this Court has found in *M.K. and others v. Poland* and *D.A. and others v. Poland* that where the applicants could arguably claim that there was no guarantee that their asylum applications would be seriously examined by the third country, the assessment of those claims should have been carried out by the Contracting Party's authorities acting in compliance with their procedural obligations under Article 3 of the Convention.¹⁹ Moreover, the Contracting Party 'would be under an obligation to ensure the applicants' safety, in particular by allowing them to remain within their jurisdiction until such time that their claims had been properly reviewed by a competent domestic authority'.²⁰ Reiterating the absolute nature of the right guaranteed under Article 3, the Court stated that the scope of that obligation was not dependent on whether the applicants had been carrying documents authorising them to cross the Contracting State's border or whether they had been legally admitted to their territory on other grounds.
8. **The interveners submit that the absolute obligation to respect the principle of non-refoulement requires States to examine, proprio motu, the situation that the applicants will encounter in the envisaged removal country irrespective of whether they had an opportunity to raise such concerns and whether the destination is a third country or a country of origin. Where the person is returned to a third country, the authorities are precluded from operating on the basis of generalized assumptions, and must, instead, examine the quality and functioning of the asylum and reception system in practice, including reception conditions, quality of protection procedures, content of international protection, and guarantees against ill-treatment upon return to such country and against onward refoulement. Domestic legislation and/or practice precluding the authorities of the removing state from carrying out such an examination and preventing asylum seekers from making applications for international protection at the border will violate Article 3 of the Convention. Migratory pressure, potential national security concerns, the behaviour of third States, or the Contracting Party's capacity constraints, cannot justify migration management allowing for derogations from non-derogable rights under the Convention.**²¹
9. To comply with Article 3's procedural safeguards, individuals must be told, in simple, non-technical language that they can understand, the reasons for their removal, and the process available for reviewing or challenging the decision.²² Accessible legal advice and assistance may be required for the individual to fully understand his or her circumstances.²³ Further, individuals at an arguable risk of prohibited treatment under the Convention have the right to an effective remedy, which is not theoretical and illusory, which allows for the review and, if appropriate, for the reversal of the decision to remove.²⁴ This Court's jurisprudence found a remedy ineffective, *inter alia*, when removal takes place before the practical possibility of accessing the remedy;²⁵ due to the lack of automatic suspensive effect;²⁶ obstacles in physical access to and/or communication with the responsible authority;²⁷ and lack of (free) legal assistance and access to a lawyer.²⁸

¹⁹ *D.A. and Others v. Poland*, App. no. 51246/17, § 64, 8 July 2021; *M.K. and Others v. Poland*, App. nos. 40503/17 and 2 others, § 178, 23 July 2020.

²⁰ *Ibid.*, § 178.

²¹ *Hirsi Jamaa and Others*, cited above, § 179.

²² *Ibid.*, § 204; *Čonka v. Belgium*, App. No. 51564/99, 5 February 2002, § 44.

²³ Guideline 5, 'Remedy against the removal order' in Council of Europe, Committee of Ministers, 'Twenty Guidelines on forced return', 4 May 2005, as referenced by the ECtHR in *De Souza Ribeiro v. France*, App. No. 22689/07, § 47.

²⁴ *Shamayev and Others v. Georgia and Russia*, App. No. 36378/02, 12 April 2005, § 460; *M.S.S. v. Belgium and Greece*, op. cit.; *Čonka v. Belgium*, op. cit., § 77-85.

²⁵ *Shamayev and Others v. Georgia and Russia*, App. No. 36378/02, 12 April 2005, § 460; *Labsi v. Slovakia*, App. No. 33809/08, 15 May 2012, § 139.

²⁶ *Gebremedhin v. France*, App. No. 25389/05, 26 July 2007, § 66-67; *Baysakov and others v. Ukraine*, App. No. 54131/08, 18 February 2010, § 74; *M.A. v. Cyprus*, App. no. 41872/10, 23 July 2013, § 133.

²⁷ *Gebremedhin v. France*, App. no. 25389/05, 26 April 2007, § 54; *I.M. v. France*, App. no. 9152/09, 14 December 2010, § 130; *M.S.S. v. Belgium and Greece* [GC], op. cit., § 301-313.

²⁸ *M.S.S. v. Belgium and Greece* [GC] op. cit., § 319; *mutatis mutandis*, *N.D. and N.T. v. Spain* App. Nos. 8675/15 and 8697/15, 3 October 2017, § 118.

II. Collective expulsions: individualised assessment under Article 4 of Protocol 4 ECHR

10. Collective expulsion of non-nationals is prohibited in absolute terms under general international law, including by all major human rights treaties.²⁹ This prohibition is a rule of customary international law³⁰ and, therefore, binding on all States.³¹
11. The Court's interpretation of the term 'expulsion' has been informed by the *travaux préparatoires* of Article 4, Protocol 4 (A4P4).³² The Court has considered that the term "in the generic meaning in current use" – "to drive away from a place" – refers to any forcible removal of a non-national from a State's territory or jurisdiction, irrespective of the lawfulness of the person's presence, the length of time they have spent in the territory, the location in which they were apprehended, and their status³³ and regardless of their conduct when crossing the border³⁴ and of whether they were "merely passing through."³⁵ The notion of expulsion encompasses any measures constituting a formal act or conduct attributable to a State by which a non-national is compelled to leave the territory or jurisdiction of that State if their personal circumstances have not been adequately examined, including instances in which persons who arrived at the respondent State's border were stopped and returned,³⁶ and even when the measure concerned is not classified as "expulsion" in domestic law.³⁷
12. This Court has stressed that measures not complying with the Convention do not become compliant simply because they may be aimed at preventing unauthorised border crossings at a time when a Contracting Party faces challenges in respect of increased arrivals of migrants.³⁸ Under the Convention, "migration challenges" cannot justify violations of the rights and freedoms guaranteed by the Convention and which the Contracting Parties have undertaken to secure to everyone within their jurisdiction,³⁹ including where such challenges are caused or exacerbated by conduct attributable to a third State. Potential exceptional or emergency situations cannot be invoked to suspend the application of Convention rights without a legitimate derogation under Article 15, which prohibits derogations from absolute rights under the Convention, including Article 3, and derogations inconsistent with the State's other obligations under international law, including the prohibition of collective expulsion.
13. A4P4 prohibits States from returning non-nationals without adequately examining their individual personal circumstances and therefore without enabling them to put forward arguments against the removal measures envisaged by the authorities.⁴⁰ In order to determine whether there has been a

²⁹ 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, § 13(d).

³⁰ 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", UN GA, 'Third report on the expulsion of aliens / by Maurice Kamto, Special Rapporteur', 19 April 2007, A/CN.4/581, § 115.

³¹ 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. See also, Council of Europe: Committee of Ministers, 'Twenty Guidelines on Forced Return', 4 May 2005. 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.

³² *Hirsi Jamaa and Others*, op.cit., §.174.

³³ *Khlaifia and Others v. Italy*, App. no. 16483/12, 15 December 2016, § 243.

³⁴ *M.D. and Others v Hungary*, App. no. 60778/19, 19 September 2024, § 35.

³⁵ *Georgia v. Russia (I)*, App. no. 13255/07, 3 July 2014, § 168.

³⁶ *N.D. and N.T. v. Spain*, op. cit., §§ 187 and 197, *D. A. and others v Poland*, op. cit., §. 79.

³⁷ *Shahzad v. Hungary*, App. no. 12625/17, 8 July 2021, § 48,.

³⁸ *Hirsi Jamaa and Others*, op.cit., § 179.

³⁹ *N.D. and N.T.*, op.cit., § 110, *Shahzad v Hungary*, op. cit., § 51.

⁴⁰ *Sharifi and Others v. Italy and Greece*, App. no. 16643/09, § 210, 21 October 2014, and *Hirsi Jamaa and Others*, op.cit., § 177.

sufficiently individualised examination, it is necessary to consider the circumstances of each such case and to verify whether a decision to return non-nationals took into consideration the specific situation of each individual concerned.⁴¹

14. In this context, this Court will first consider whether the State has provided **genuine and effective access to means of legal entry**, in particular border procedures that allow for applications to be submitted and processed in a manner consistent with international standards.⁴² When assessing the procedures' accessibility, due regard must also be given to independent reports evidencing, *inter alia*, a wider State policy of refusing entry to non-nationals seeking international protection.⁴³
15. When considering whether a State has provided genuine and effective means of legal entry, this Court has had regard to whether a person without identification documents, could have sought entry on humanitarian grounds and whether such grounds as defined by the national legislation could have applied to the applicant concerned. In respect of asylum seekers, when they express their intention to seek international protection at the border crossing, it will trigger an examination of personal circumstances. To demonstrate that this obligation has been effectively fulfilled thereby providing a genuine and effective access to means of legal entry, the State concerned has to provide detailed information in this regard as to the location of border crossing points, the procedures for submitting applications, the availability of interpreters and legal assistance to inform asylum-seekers of their rights and information showing that applications had actually been made at those border points.⁴⁴
16. This Court has affirmed that, while the Convention does not prevent States from requiring applications for international protection to be submitted at the existing border crossing points, such entry points, wherever they exist, should secure the right to seek protection under the Convention, and particularly under Article 3, in a genuine and effective manner.⁴⁵ When examining whether such procedures in the transit zones at the Hungarian border with Serbia fulfilled these criteria, the Court found that the limited access to the transit zones and the lack of any formal procedure accompanied by appropriate safeguards governing the admission of individual migrants in such circumstances, could not be considered as effective means of legal entry.⁴⁶
17. **The interveners submit that a third country's use of force and threats of treatment contrary to Article 3 ECHR against asylum seekers deliberately and often decisively disincentivize those seeking international protection through the available procedures from accessing means of legal entry to the Contracting Party and resulting in their inability to do so. In such circumstances, the interveners urge the Court to find that no real effective procedure to seek international protection existed in the Contracting Party.**
18. Second, it has to be considered whether there were **cogent reasons not to make use of the genuine and effective access to means of legal entry**, which were based on objective facts for which the State was responsible.⁴⁷ Should the Court find that the use of force or threats of prohibited ill-treatment resulting in the inability to access means of legal entry cannot lead to the conclusion that no effective means of legal entry existed, such threat of ill-treatment should be regarded by this

⁴¹ *Hirsi Jamaa and Others*, op.cit., § 183. In *D.A. v. Poland*, § 82, the Court determined that despite the applicants receiving individual decisions denying them entry and being interviewed by border officials, their asylum claims were disregarded, leading to decisions that lacked a sufficiently individualized examination. Similar findings were made in *M.K. v. Poland*. The Court concluded that these cases reflected a broader state policy of refusing to accept international protection applications at the Polish-Belarusian border and returning individuals to Belarus, in violation of domestic and international law. *M.K. and others v Poland*, op.cit., §§ 219 – 220. Moreover, in *J.A. and Others v. Italy*, the Court found a violation of Article 4 of Protocol No. 4 as the applicants were not interviewed before signing the refusal-of-entry orders and either received no copies or standardized orders that failed to consider their personal situations (App. no. 21329/18, 30 March 2023, §§ 106-116).

⁴² *N.D. and N.T. v. Spain* [GC], op.cit., § 209.

⁴³ *M.K. and Others v Poland*, op. cit, §. 208.

⁴⁴ *N.D. and N.T. v. Spain* [GC], op.cit., §§ 212-217; *A.A. and Others v. North Macedonia*, App. nos. 55798/16, 55808/16, 55817/16, 5 April 2022, §§ 116-122.

⁴⁵ *Shahzad v Hungary*, op. cit, § 62; *N.D. and N.T. v Spain*, op. cit, §§ 209 – 210.

⁴⁶ *S.S. and Others v. Hungary*, App. nos. 56417/19 and 44245/20, 12 October 2023, §§ 45-52.

⁴⁷ *N.D. and N.T. v. Spain* [GC], op. cit, §§ 201 and 209-211

Court, at a minimum, as a ‘cogent reason’ for failing to using the means of legal entry that have been provided.

19. If the State had in fact provided genuine and effective means of legal entry, and there were no cogent reasons to not make use of them, this Court has established that **in highly exceptional situations** a Contracting Party’s responsibility under A4P4 may not be engaged when the lack of individual procedure can be attributed to the applicant’s own culpable conduct.⁴⁸ This was found to be the case in *N.D. and N.T. v. Spain*, where the applicants were considered to have sought to deliberately evade available procedures by crossing a border irregularly in large numbers through the use of force, creating a clearly disruptive situation endangering public safety, while the State provided genuine and effective means of legal entry.⁴⁹ It is clear that such exceptions must be construed narrowly and do not apply to a situation where there is not a mass arrival of migrants accompanied by a major use of force attributable to the culpable conduct of applicants. Moreover, in line with the non-penalisation clause of the 1951 Refugee Convention,⁵⁰ mere irregular entry into a country, be it with the aim of seeking international protection or with the aim of passing through, cannot be regarded as culpable conduct aimed at preventing identification. The Court has previously emphasized that the Convention protection cannot be dependent on formal considerations such as whether persons entitled to it were admitted to the territory of a Contracting Party in conformity with a particular provision of national or European law applicable to the situation in question.⁵¹ A4P4 is further explicitly applicable to people entering and passing through a country of their own initiative.⁵² Where deliberate actions by bordering States may create clearly disruptive and unsafe situations, such as through channelling large groups of people to irregular border crossing points, this cannot be regarded as the applicant’s own culpable conduct. The *N.D. and N.T.* exception requires the applicant’s **deliberate and culpable** causation of clearly disruptive and unsafe situations.
20. **Where individuals have not arrived in large numbers of their own free will and do not have the intention to take advantage of their large numbers and of the use of force, thus creating a clearly disruptive situation difficult to control and endangering public safety, the respondent State may not rely on any exception to their A4P4 obligations.**

III. EU legal standards and international law relating to non-refoulement and collective expulsions

21. The interveners note that under Article 53 ECHR, where Contracting Parties are also bound by EU law, the Court must ensure that the Convention rights are interpreted and applied in a manner that does not diminish the protection of rights guaranteed under the applicable EU law.⁵³ EU law aligns with Article 15 ECHR, which permits derogations only in exceptional circumstances “[...] in a limited and supervised manner” and mandates safeguards, and ensures that absolute rights like *non-refoulement* under Article 3 ECHR remain non-derogable, as well as rights under Article 2, 4 (1) and 7. In determining whether the Contracting Parties’ obligations under the Convention are engaged in a particular case - and, if so, the scope and content of these obligations - this Court has considered the EU asylum *acquis* materially relevant when the Respondent States are legally bound by that *corpus* of law.⁵⁴

⁴⁸ *Ibid.*, § 201.

⁴⁹ *Ibid.*, § 201.

⁵⁰ UN General Assembly, ‘Convention Relating to the Status of Refugees’, United Nations, Treaty Series, vol. 189, p. 137, 28 July 1951, available at: https://treaties.un.org/doc/Treaties/1954/04/19540422%2000-23%20AM/Ch_V_2p.pdf.

⁵¹ *S.S. and Others v Hungary*, op. cit. § 50

⁵² *Georgia v Russia (I)*, op. cit.; § 168.

⁵³ As regards EU Member States, the ECHR 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 party.” The Court will recall that in *MSS* the Grand Chamber took into account Greece’s obligations under the Reception Conditions Directive, as part of its national law, to ensure adequate material reception conditions, finding that the situation of extreme poverty brought about by the inaction of the State was treatment contrary to Article 3 ECHR.

⁵⁴ *M.S.S. v. Belgium and Greece*, op. cit., §§ 57-86 and 250; *Sufi and Elmi v. the United Kingdom*, App. nos. 8319/07 and 11449/070, 28 November 2011, § 30-32 and 219-226, where the Court had regard to Council Directive 2004/83/EC of 29

22. The EU Charter of Fundamental Rights (CFR)⁵⁵ enshrines guarantees fundamental to the issues under consideration, such as the right to asylum (Article 18), the protection of human dignity (Article 1), the prohibition of torture and inhuman and degrading treatment (Article 4), protection in the event of removal, expulsion or extradition (Article 19)⁵⁶ and the right to an effective remedy and to a fair trial (Article 47). It applies to all situations governed by EU law.
23. The EU asylum *acquis* comprises a number of legal instruments and their interpretation by the European Court of Justice (CJEU). The Asylum Procedures Directive (APD)⁵⁷ provides for effective access to the asylum procedure for all applicants, without exception.⁵⁸ Border procedures shall ensure in particular that persons wishing 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”.⁵⁹
24. Moreover, Article 6(1) of the APD requires EU Member States to facilitate asylum application registration, including recording applicants' information, ensuring authorities are trained to perform their tasks effectively, and obliging authorities to refer asylum applicants to competent bodies as soon as they express a wish to apply for asylum.⁶⁰ The Directive does not impose formal requirements on applicants for submitting asylum applications and does not allow for the suspensions of procedures based on national security, migratory pressure, or other grounds, nor does it permit derogations from its provisions regardless of national emergency measures.
25. The CJEU has affirmed that one of the objectives pursued by the APD is to ensure the most effective access to the procedure for granting international protection.⁶¹ In order to guarantee such access, Member States have an obligation under Article 6 APD to ensure that persons who have applied for international protection have the "concrete possibility to lodge an application as soon as possible". An applicant should have sufficient procedural guarantees to pursue their application at all stages of the procedure.⁶²
26. In light of the CJEU's jurisprudence requiring EU law provisions to be interpreted so as to provide them with *effet utile*,⁶³ the EU asylum *acquis* requires Member States to provide information, detailing the possibility of making an application for international protection, to all non-nationals including those apprehended during the surveillance operations or present at border crossings, such as transit zones, and at external borders.⁶⁴ Construed in light of the obligations under the EU Charter, and particularly Articles 18 and 19, such information must be provided to all those apprehended at or near the border in order to make *non-refoulement* protection and access to the right to asylum

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* (Case C-465/07), asking, inter alia, whether Article 15(c) of the Qualification Directive offered supplementary or other protection to Article 3 of the Convention. See also *M.A. and Others v. Lithuania*, op. cit., § 113, *N.D. and N.T. v. Spain*, op. cit., § 180.

⁵⁵ European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012.

⁵⁶ Paragraph 1 of Article 19 is a prohibition on collective expulsion and has the same meaning and scope as A4P4 according to the Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35.

⁵⁷ 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’). This Directive came into 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.

⁵⁸ *Ibid*, Recital 25.

⁵⁹ *Ibid*, Articles 2(p), 6, 8, 10-12, 15 and 19.

⁶⁰ C-36/20 PPU *VL v. Ministerio Fiscal*, 25 June 2020, ECLI:EU:C:2020:495, § 58 – 60.

⁶¹ *Ibid*, § 63

⁶² *Ibid*, § 63 – 64; see also Advocate General Szpunar opinion on the same case, 30 April 2020, § 61.

⁶³ C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, [1990] ECR I-2433, § 20; Case C-118/00 *Gervais Larys v. Institut national d’assurances sociales pour travailleur indépendants (Inasti)* [2001] ECR I-5063, § 50-53; Recast Asylum Procedures Directive, Article 8 (1).

⁶⁴ Recital 26 Recast Asylum Procedures Directive, as well as Article 6.1 § 3 and Article 8 of the same Directive.

under the Charter available in practice. Moreover, in order to be effective and useful, such information must be provided in a language the non-nationals concerned understand.⁶⁵

27. A series of EU legal instruments (the new EU Pact on Migration and Asylum) entered into force on 11 June 2024, transforming some existing instruments and creating new ones, most of which will apply from 12 June 2026. The newly established Regulation addressing situations of crisis and *force majeure* in migration and asylum (Crisis Regulation) creates three special legal regimes to manage the asylum system in cases of “mass influx,” “instrumentalization” and “*force majeure*.”⁶⁶ In situations of “instrumentalization”, the Crisis Regulation only allows for a limited number of temporary derogations⁶⁷ from the new Asylum Procedures Regulation.⁶⁸ It contains a very limited set of timebound measures that cannot be equated to a general exception to disapply asylum law. Both instruments recognise the absolute nature of the *non-refoulement* principle⁶⁹ and ensure that the right to asylum and to protection from torture continues to apply during derogations.⁷⁰
28. **The interveners emphasize that the EU asylum *acquis* and fundamental rights ensure effective access to asylum procedures for all who may wish to apply for international protection, as specified in the APD. The Directive guarantees the right to an effective remedy against any asylum decision, including at borders and transit zones. This requires individual identification and a meaningful chance to raise objections, necessitating prior access to information and legal assistance. Emergency measures adopted at the domestic level that hinder access to international protection procedures are in breach of the Charter and secondary EU law, as no derogation from the right to apply for asylum is envisaged under EU law.**

IV. Living conditions at the border under Articles 2 and 3 ECHR

29. As underscored above, this Court has consistently held that the obligation of the State Parties under Article 1 of the ECHR to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Articles 2 and 3, requires States to take measures to ensure that individuals within their jurisdiction are not subjected to ill-treatment.⁷¹
30. EU asylum law provides that applicants for international protection shall be guaranteed access to material reception conditions which provide for an adequate standard of living and, *inter alia*, protect their physical and mental health and that these conditions should be guaranteed without interruption.⁷² In *R.R and Others v. Hungary*, this Court noted, in accordance with the EU recast Reception Conditions Directive (rRCD), that “*the authorities were in principle required to ensure that material reception conditions are provided to asylum seekers*”.⁷³ In addition, this Court has recognised the relevance and application of the CJEU jurisprudence, which refers to the “*minimum standards laid down by the rRCD*” in respect of material conditions of reception for applicants for international protection.⁷⁴

⁶⁵ 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, § 49.

⁶⁶ Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, PE/19/2024/REV/1, OJ L, 2024/1359.

⁶⁷ E.g., delay in registration, prolongation of the border procedure and expanded scope of the border procedure.

⁶⁸ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, PE/16/2024/REV/1, OJ L, 2024/1348, Article 59 (1)(c).

⁶⁹ Article 11 (10) of the Crisis Regulation; Asylum Procedures Regulation, Recital 58.

⁷⁰ Article 11 (10) of the Crisis Regulation.

⁷¹ *Hirsi Jamaa and Others v. Italy*, op. cit., § 70, § 114.

⁷² Directive 2013/33/EU (recast) Reception Conditions Directive (rRCD), Article 3(1); Article 17(1),(2); C-233/18 *Haqbin v. Federaal Agentschap voor de opvang van asielzoekers*, 12 November 2019, § 50.

⁷³ *R.R and Others v. Hungary*, App no. 36037/17, 2 March 2021, § 54, § 58.

⁷⁴ For example, See *B.G and Others v. France*, App no. 63141/13, 10 September 2020, § 45; see also: Case C-79/13 *Saciri and Others*, 27 February 2014, § 46-51.

31. In the asylum context, it has been held that unacceptable individual living conditions constituting a serious infringement of human dignity and attributable to Contracting Parties' acts or omissions may give rise to a violation of Article 3.⁷⁵ In order to constitute a violation, the inadequacy of the living conditions "*must attain a minimum level of severity [...] the assessment of [which] depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim*".⁷⁶ This Court has held that a lack of respect for human dignity in living conditions can undoubtedly give rise to feelings of fear, anxiety or inferiority that leads to despair.⁷⁷ This Court has also noted that insalubrious living conditions may amount to degrading treatment contrary to Article 3.⁷⁸ Moreover, this Court has indicated that State responsibility under Article 3 ECHR may be engaged in certain circumstances where an applicant "*who is totally dependent on public assistance is confronted with indifference on the part of the authorities*".⁷⁹
32. The Commissioner for Human Rights of the Council of Europe has also reiterated that "*everyone has the right, on arrival at the border of a Member State, to be treated with respect for his or her human dignity*".⁸⁰ **In accordance with this Court's jurisprudence, the Contracting Party has a positive obligation to accommodate asylum seekers in dignified living conditions; to take steps to ensure that no individuals within their jurisdiction are subject to treatment prohibited by the Convention; and to ensure that the health of persons is adequately secured.**
33. The interveners recognize that the provision of adequate reception conditions to a large number of migrants in a vulnerable situation, including asylum seekers,⁸¹ can require significant financial and logistical resources. However, the circumvention of relevant safeguards under international law, including under the ECHR, cannot be rendered permissible owing to financial and logistical constraints.⁸² **The interveners stress that this Court has made it clear that due to the absolute character of Article 3 ECHR, a State cannot be absolved of its obligations under that provision⁸³ and that difficulties associated with migration flows cannot justify recourse to practices incompatible with the Contracting Parties' obligations under the Convention, in particular, the need to ensure everyone's human dignity at all stages of their reception procedure.**
34. This Court has recognised that asylum seekers are members of a "*particularly underprivileged and vulnerable population*".⁸⁴ Asylum seekers have few resources and can only rely on the State for assistance. It is, therefore, crucial for the Contracting Parties "*to provide accommodation and decent material conditions*"⁸⁵ for asylum seekers in order not to render them more vulnerable. The Contracting Parties must "*exercise particular care to avoid situations which may reproduce the plight that forced these persons to flee in the first place*".⁸⁶

V. Article 13 in conjunction with Article 3 and Article 4 Protocol No. 4

35. Once Article 3 and/or A4 P4 is engaged it is incumbent on the State, under Article 13 ECHR, to 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

⁷⁵ *M.S.S v. Belgium and Greece* [GC], Op. Cit., § 338.

⁷⁶ *Ibid.*, § 219; *Sufi and Elmi v. United Kingdom*, App nos. 8319/07 and 11449/07, 28 June 2011, § 213.

⁷⁷ *V.M. and Others v. Belgium*, App no. 60125/11, 7 July 2015, § 162-163.

⁷⁸ *M.S.S v. Belgium and Greece*, [GC], Op. Cit., § 233.

⁷⁹ *B.G and Others v. France*, Op. Cit., § 81.

⁸⁰ Council of Europe Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders, CommDH(2001)19, 19 September 2001, Article I(1).

⁸¹ *N.H and Others v. France*, App no. 28820/13, 2 July 2020, § 162.

⁸² *Mutatis mutandis, Orchowski v. Poland*, App. no. 17885/04, 22 October 2009, § 120, § 153.

⁸³ *M.S.S v. Belgium and Greece* [GC], Op. Cit., § 223.

⁸⁴ *Ibid.*, § 251.

⁸⁵ *Ibid.*, § 250-251.

⁸⁶ *O.M. v. Hungary*, App. no. 9912/15, 5 July 2016, § 53.

expulsion took place.⁸⁷ In addition, this Court has reiterated that the remedy available must have suspensive effect to meet the requirements of Article 13 of the Convention.⁸⁸

36. **Under Article 47 of EU Charter, the *guarantees* of Article 6 ECHR, including effective access to court, may apply in circumstances where Article 6 would not apply under the Convention itself.** Similarly, the UN Principles and Guidelines that govern the question of effective remedies, adopted unanimously by the UN General Assembly, affirm that States must take appropriate legislative, administrative, and other measures to prevent violations and to investigate them effectively, promptly, thoroughly and impartially and to provide for effective remedies and reparation.⁸⁹
37. The interveners reiterate, in the context of Article 13, that treating all individuals compatibly with the Convention includes the obligation to identify and pay special attention to the needs of people in a vulnerable situation. States have an obligation to enable those who wish to identify themselves as seeking asylum to do so⁹⁰ and to permit them access to determination procedures with all the procedural safeguards required by national law,⁹¹ including access to information, legal aid and access to effective remedies.
38. **The interveners submit that the inherently vulnerable situation of asylum seekers requires the special attention of public authorities to ensure their full and effective access to domestic remedies in order to meet the intended purpose of Article 13.⁹² States must therefore provide guarantees based on the *sui generis* needs of an applicant, including medical or psychological assistance, which meet the standards of Article 13 and applicable EU law.⁹³**

⁸⁷ *De Souza Ribeiro v. France*, App. no. 22689/07, 13 December 2012, § 82; *Hirsi Jamaa and Others v. Italy*, op. cit. § 206; *Mohammed v. Austria*, App. no. 2283/12, 6 June 2013, § 80.

⁸⁸ *Khlaifia and Others v. Italy* [GC], op.cit., § 17; *M.S.S. v. Belgium and Greece* [GC], o.cit., § 388; *Hirsi Jamaa and Others*, op.cit., § 206

⁸⁹ UN General Assembly, ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’, 21 March 2006, A/RES/60/147, part II (3) A, B and C.

⁹⁰ *Hirsi Jamaa and Others v. Italy*, Op Cit.

⁹¹ *Kebe and Others v. Ukraine*, App. no. 12552/12, 12 January 2017, § 104.

⁹² *M.S.S. v. Belgium and Greece*, [GC], Op. Cit., § 233.

⁹³ *Ibid.*; *Thimotheaews v. Belgium*, App. no. 39061/11, 4 April 2017, § 73.