

M.A. and Others v. Poland

Application no. 42902/17

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

INTERVENERS

pursuant to the Registrar's notification dated 23 November 2017 that the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

14 December 2017

Summary

I. A Contracting Party has the duty to protect Convention rights when it exercises effective authority or control over persons, including where persons are present extraterritorially. Where individuals are subject to police activities at the border, whether such activities are the prevention of entry or the prevention of making, registering or lodging a claim for asylum or expulsion from the border area, these individuals are under the *de facto* control, and thus the jurisdiction of the relevant State. Positive and negative obligations are triggered under the Convention where a State exercises its jurisdiction.

II. The effectiveness of the right of individual petition under Article 34 of the Convention requires Contracting Parties (i) to ensure that the Court can consider the application under its normal procedure and/or (ii) to refrain from actions which would prevent the Court from doing so. Where interim measures are indicated by the Court, conformity with Article 34 necessitates States' strict compliance with the measure in order to preserve and protect the rights of the parties. Where a measure is indicated to prevent irreparable harm in the case of absolute and non-derogable Convention rights, including the right to freedom from torture and inhuman or degrading treatment or punishment, there is a particular imperative to comply. Non-compliance with or disrespect for an interim measure amounts to a violation of Article 34.

III. The interveners submit that where interim measures are imposed by the Court which relate to or directly affect children, there is a heavy onus on the State to act in a manner that ensures the children's well-being, care, safety and protection, which is in addition to the binding requirements of the measure as per its formulation, letter, spirit and purpose. In light of the child's best interests, the State is required to be especially diligent when complying with an interim measure, providing appropriate protective measures where necessary.

I. Jurisdiction

A. Safeguarding the effectiveness of the Convention and the rights contained therein for migrants under the Contracting Parties' jurisdiction

1. As has been frequently recognised by this Court, a key attribute of State sovereignty under general international law is the right to admit foreigners or to refuse them entry to the territory of the State. There is no general right under the Convention for a non-national to enter or remain in a State.¹ However, it is prohibited for a Contracting Party to refuse entry, and/or to return a person to face serious violations of human rights, including of the right to life, the prohibition of torture or inhuman or degrading treatment or punishment, flagrant denial of justice or the right to liberty.² Such refusals of entry are also contrary to the rights set out in the EU Charter of Fundamental Rights (Article 19)³ and the narrower prohibition on *non-refoulement* found in the 1951 Convention relating to the Status of Refugees.⁴

2. In order for these prohibitions to be practical and effective and not theoretical and illusory,⁵ Contracting Parties must have in place effective systems for identifying people within their jurisdiction who are entitled to benefit from the prohibition on refusing entry.⁶ They must also have a national procedure in place which complies with the requirements of an effective remedy particularly where the conditions which could expose the individual to a real-risk of ill-treatment in breach of Articles 2 and/or 3 of the Convention, or of other

¹ *Hirsi Jamaa and Others v. Italy*, App no 27765/09 (23 February 2012), para 113.

² *Hirsi Jamaa and Others v. Italy*, App no 27765/09 (23 February 2012), para 114.

³ Council of the EU, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1

⁴ Convention relating to the Status of Refugees, United Nations, entered into force 22 April 1954, as amended by the Protocol Relating to the Status of Refugees, United Nations, entered into force 4 October 1967.

⁵ *Arctico v. Italy*, App no 6694/74 (13 May 1980), para 33.

⁶ *Hirsi Jamaa and Others v. Italy*, App no 27765/09 (23 February 2012), para 202.

serious violations of human rights⁷ were known or ought to have been known by the Contracting State at the time of the expulsion.⁸

3. The interveners note that the obligations of Contracting Parties under the ECHR, including the prohibition on expulsion to face prohibited treatment, apply to all acts and omissions, which result from a denial of entry to those who are within their jurisdiction. The key question is whether individuals are within the jurisdiction of Contracting States for the purposes of engaging the protection of the ECHR when they are subjected to a denial of entry.

4. It is well established in this Court's case law that States exercise such jurisdiction when an individual is present (whether lawfully or unlawfully) on their territory.⁹ Moreover, this Court has recently reiterated that where a State exercises effective authority or control over persons, it also exercises jurisdiction so as to trigger the protective obligations of the State under the ECHR.¹⁰ Persons who are not present on the territory of the State fall within the State's jurisdiction, in a number of extraterritorial situations.¹¹ In *N.D. and N.T.* this Court recently confirmed that individuals subject to police activities at the border, such as the prevention of making, registering or lodging an application for asylum or, indeed, opposing a measure which would result in *refoulement*, are under the continued and exclusive control of State authorities.¹² It is therefore established that where the State authorities take action "the effect of which is to prevent migrants 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..."¹³

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

5. Contracting Parties have an obligation to secure Convention rights to all those who fall within their jurisdiction under Article 1 ECHR. This general obligation not only includes obligations of *non-refoulement* on the State, but also imposes obligations to treat persons with the dignity consonant with compliance with Convention standards and by furnishing the conditions in and by which individuals can effectively exercise their Convention rights wherever and whenever they are within their jurisdiction, lawfully or otherwise.¹⁴ Distinct obligations on States under the Convention in this respect arise when the individuals are seeking asylum, and even more so when they are children.¹⁵

6. The obligations on the State to respect the Convention rights of persons arriving at its borders include the obligation to refrain from preventing people from accessing procedures for determining their protection needs. There is an obligation¹⁶ to refrain from transferring people to States where there are substantial grounds to believe that they face a risk of a violation of their rights under Articles 2 and/or 3 ECHR or other serious human rights violations, or are at risk of onward return to other countries where they would face such risks.¹⁷ Furthermore, under Article 4 of Protocol 4 of the Convention, there is an obligation to refrain from collective expulsion.

⁷ *Sharifi and Others v. Italy and Greece*, App no 16643/09 (21 October 2014) para 174.

⁸ *F.G. v. Sweden*, App no 43611/11 [GC] (23 March 2016), para. 115.

⁹ *Louzidou v. Turkey* (Preliminary Objections), App no 15318/89 (23 March 1995), para 62; *Issa and Others v. Turkey*, App no 31821/96 (16 November 2004), para 71; *Al-Skeini and Others v. the United Kingdom*, App no 55721/07 (7 July 2011), para 131; *Hirsi Jamaa and Others v. Italy*, App no 27765/09 (23 February 2012), para 73.

¹⁰ *N.D. and N.T. v Spain*, App no 867515 and 869715 (3 October 2017), para 54.

¹¹ *Hirsi Jamaa and Others v. Italy* App no 27765/09 (23 February 2012), para 180; *Sharifi and Others v. Italy and Greece*, App no 16643/09 (21 October 2014).

¹² *N.D. and N.T. v Spain*, App no 867515 and 869715 (3 October 2017), para 54.

¹³ *Hirsi Jamaa and Others v. Italy*, App no 27765/09 (23 February 2012), para 180.

¹⁴ *M.S.S. v. Belgium and Greece*, App no 30696/09 (21 January 2011), paras 299-320.

¹⁵ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App no 13178/03 (12 October 2006), para 55; *Popov v. France* App nos 39472/07 and 39474/07 (19 April 2012), para 91; *Tarakhel v. Switzerland*, App o 29217/12 (4 November 2014), para 99.

¹⁶ *Hirsi Jamaa and Others v. Italy*, App no 27765/09 (23 February 2012), para 157-158.

¹⁷ *M.S.S. v. Belgium and Greece*, App no 30696/09 (21 January 2011); *Sharifi and Others v. Italy and Greece*, App no 16643/09 (21 October 2014).

7. The positive obligations on the State include, amongst others, the obligation to take all the steps reasonably expected by it in order to protect individuals from harm to their life or physical integrity of which it knew or ought to have known;¹⁸ to ensure independent, prompt and effective investigations of alleged violations of Convention rights; and to ensure access to effective remedies and reparation for such violations. The obligation to treat all individuals compatibly with the Convention includes the obligation to identify and pay special attention to the needs of people in a vulnerable situation including asylum seekers, unaccompanied children and families with children, the elderly, the sick and injured and persons with disabilities,¹⁹ irrespective of whether national authorisation to enter the territory has yet been granted.²⁰ States have an obligation to enable those who wish to identify themselves as seeking asylum to do so²¹ and to permit them access to determination procedures with all the procedural safeguards required by national law, and by EU law where that law is applicable.

II. Interim Measures

8. This Court has consistently affirmed the special character of the Convention as a treaty for the collective enforcement of human rights. The object and purpose of the Convention as an instrument for human rights protection require that its provisions be interpreted and applied so as to be practical and effective.²² In its interpretation of the Convention provisions, the Court must take into account the relevant rules of international law, and should, so far as possible, interpret the Convention in harmony with other rules of international law of which it forms part.²³

9. The institution of interim measures is an essential element of procedure before international tribunals, with particular significance for tribunals that adjudicate on human rights. Interim measures flow from the function that international tribunals were set up to perform, namely to ensure the observance of commitments undertaken by States. To that effect this Court has held that interim measures under Rule 39 of the Rules of Court are a corollary of Article 34 of the Convention which enumerates an individual's effective right to individual petition²⁴ and Article 1 which sets out the general obligation to protect the rights and freedoms set forth in the Convention.

A. The purpose of interim measures

10. Effective operation of the individual petition system requires that there be no interference with or hindrance of the individual's right to present and pursue his or her complaint before the Court.²⁵ As such, interim measures facilitate the applicant's right under Article 34 by preserving and protecting their interests and asserted Convention right(s), which could be irreparably damaged by an act or omission of a Contracting Party.²⁶ Therefore, their aim is both to safeguard the rights of the Parties in order to prevent irreparable damage²⁷ pending the decision of the Court and to permit the Court to give practical and effective protection to the Convention rights which the Contracting Parties have undertaken to secure.²⁸

¹⁸ *M.S.S. v. Belgium and Greece*, App no 30696/09 (21 January 2011); *Osman v. the United Kingdom*, App no 23452/94 (28 October 1998).

¹⁹ *Muskhadzhiyeva and Others v. Belgium*, App no 41442/07 (19 January 2010); *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App no 13178/03 (12 October 2006).

²⁰ *Saadi v. the United Kingdom* [GC], App no 13229/03 (29 January 2008).

²¹ *Hirsi Jamaa and Others v. Italy*, App no 27765/09 (23 February 2012).

²² *Mamatkulov and Askarov v. Turkey* [GC], App nos. 46827/99 and 46951/99 (4 Feb.2005), para 101.

²³ *Al-Adsani v. the United Kingdom* [GC], App no 35763/97 (21 Nov.2001), para 55.

²⁴ *Paladi v. Moldova*, App no 39806/05 [GC] (10 March 2009), para 84; *Mamatkulov and Askarov v. Turkey*, App nos 46827/99 and 46951/99, [GC] (4 February 2005), paras 125-128.

²⁵ *Andrey Lavrov v. Russia*, App no 66252/14 (1 March 2016), para 31; *Aoulmi v. France*, App no 50278/99 (17 January 2006); *Mamatkulov and Askarov v. Turkey*, App nos 46827/99 and 46951/99, [GC] (4 February 2005).

²⁶ *Paladi v. Moldova*, cited above para 89; *Aoulmi v. France*, cited above para 103; *Shamayev and Others v. Georgia and Russia*, App no 36378/02 (12 April 2005), para 473.

²⁷ *Paladi v. Moldova*, cited above para 89; *Ben Khemais v. Italy*, App no.246/07 (24 February 2009), para 81.

²⁸ *Mamatkulov and Askarov v. Turkey*, cited above para 125; *Aloumi v. France*, cited above para 103.

11. In situations of removal in the context of extradition or expulsion, where compliance with the prohibition on expulsion to face prohibited ill-treatment is at issue, this Court has held that the purpose of interim measures, in light of the imminent risk of irreparable harm for an applicant if removed, is to prevent the alleged or potential victim's "exposure to a real risk of ill-treatment"²⁹ in the State of destination. These interim measures, therefore, often oblige the State to refrain from removing a person pending the examination of the merits by the Court. Indeed, once a person has been subjected to removal, the protective function of the absolute obligation³⁰ of *non-refoulement* will have been rendered inoperative.

12. This Court has also indicated interim measures requiring the State to take positive action, specifically in respect of the applicant's Article 3 rights. In the pending case of *Darboe and Camara*,³¹ the Court formulated the interim measure as obliging the national authorities to move the applicants to adequate and tailored accommodation appropriate to the requirements of ensuring a child's well-being, safety and security.³²

B. The obligatory character of interim measures issued by the European Court of Human Rights and the nature of their protection

13. It is the very nature and function of interim measures - to prevent irreparable damage to the rights of the Parties and to ensure the effectiveness of examination of an individual's application under Article 34 as well as the effectiveness of an applicant's Convention rights and the protection system as a whole that necessitates their binding effect.³³ For this reason, the obligatory character of interim measures has now been repeatedly affirmed by this Court.³⁴ The Grand Chamber in *Mamatkulov and Askarov v. Turkey* affirmed that the binding nature of an interim measure followed from a State's obligation to abide by the final judgment of the Court, which, by virtue of Article 46, is legally binding.³⁵ In subsequent jurisprudence, this Court has explicitly held that interim measures have binding force on Contracting Parties to the Convention.³⁶ Indeed, in recent case law, this Court has stated that any laxity in compliance with an interim measure undermines the very protection which the Convention rights are intended to provide.³⁷

14. In order to ensure that the obligation to respect interim measures is effectively discharged, this Court has held that the State and all of its institutions must fully comply with them.³⁸ Full compliance with an interim measure requires the State to rigorously apply and enforce the measure indicated.³⁹ The formulation of the interim measure by the Court is necessarily designed to prevent the risk of irreparable harm to the applicant from being realised and in that regard Contracting States are obliged to observe the formulation, the letter, the spirit and, indeed, the very purpose of the measure.⁴⁰

15. According to the case law of this Court, adherence to the measure requires both that the State refrain from conduct in violation of the interim measure, and that it should take all steps which could reasonably

²⁹ Savridin Dzhurayev v. Russia, App no 71386/10 (25 April 2013), para 216. The Court has also given interim measures in cases related to access to medical services or a lawyer, see, *inter alia*, Shtukaturv v. Russia, App no 44009/05 (27 March 2008), para 141; Pivovarnik v. Ukraine, App no 29070/15 (6 October 2016), paras 56-62; Klimov v. Russia, App no 54436/14 (4 October 2016), para 49.

³⁰ Saadi v. the United Kingdom, App no 13229/03 (29 January 2008), para 138.

³¹ *Darboe and Camara*, App no 5797/17.

³² Similarly worded interim measures have been issued by the Court in *Abdilahi Abdulwahidi v. the Netherlands*, App no 21741/07 (12 November 2013) and *Yordanova and Others v. Bulgaria*, App no 25446/06 (24 April 2012).

³³ *Aloumi v. France*, cited above; *Savridin Dzhurayev v. Russia*, cited above, para 213.

³⁴ *Mamatkulov and Askarov v. Turkey*, cited above; *Shamayev and Others v. Georgia and Russia*, cited above; *Aloumi v. France*, cited above; *Paladi v. Moldova*, cited above; *Aleksanyan v. Russia*, App no 46468/06 (22 December 2008); *Shtukaturv v. Russia*, cited above; *Ben Khemais v. Italy*, cited above; *Olaechea Cahuas v. Spain*, App no 24668/03 (10 August 2006), para 81.

³⁵ *Mamatkulov and Askarov v. Turkey*, cited above paras 123-125.

³⁶ *Savridin Dzhurayev v. Russia*, cited above and more recently in *Andrey Lavrov v. Russia*, cited above.

³⁷ *Savridin Dzhurayev v. Russia*, cited above para 213 referencing the Izmir Declaration and the Committee of Ministers Interim Resolution CM/ResDH(2010)83.

³⁸ *Kondrulin v. Russia*, App no 12987/15 (20 September 2016), para 47 and *Shtukaturv v. Russia*, cited above, para 144.

³⁹ By analogy *Andrey Lavrov v. Russia* cited above and *Makharadze and Sikharulidze v. Georgia*, App no 35254/07, 22 November 2011, para 99 where the authorities were held to have circumvented the interim measure by substituting its own judgment for that of the Court.

⁴⁰ *Zokhidov v. Russia*, App no 67286/10 (4 October 2013); *Paladi v. Moldova*, cited above, para 91; *Savridin Dzhurayev v. Russia*, cited above, para 216; *Konovalchuk v. Ukraine*, App no 31928/15 (13 October 2016), para. 77.

have been taken to comply with the order of interim measures.⁴¹ The burden lies with the State to establish that all reasonable steps have been taken by all its institutions to ensure such compliance.⁴² When in an exceptional case, an objective impediment exists which prevents compliance, the State is obliged to take all reasonable steps to remove the impediment and to keep the Court informed about the situation.⁴³ Moreover, a State Party cannot substitute its own judgment for that of the Court in deciding whether it agrees with the risk assessment of the Court, the time limit or to what extent to comply with interim measures.⁴⁴ Indeed, it is for the Court alone to decide the content and duration of the interim measure.⁴⁵ This Court has held that interim measures stopping the removal of an individual due to a real risk of ill-treatment or instructing the authorities to act to safeguard an individual's personal, physical or mental health, well-being, safety or security⁴⁶ leave little doubt as to their purpose or rationale⁴⁷ and that measures requiring preventative or positive action by the State cannot be circumvented by a re-appraisal of the soundness of the Court's measure or, indeed, a decision to override it.⁴⁸

16. The required diligence under Article 34 ECHR further necessitates that the State comply with the interim measure "as a matter of urgency."⁴⁹ Delays in immediately complying with the interim measure have been held to either amount to an attempt to hinder the applicant from benefiting from his rights under Article 34⁵⁰ or negligence attributable to the State since it is demonstrative of an absence to adequately facilitate compliance with the measure.⁵¹

17. Given that interim measures are intended to preserve and protect the rights and interests of the Parties pending the Court's consideration of the case, orders for interim measures are not to be construed as a decision on the merits of the case.⁵² The obligation to comply with such measures applies irrespective of the merits of the case, and of whether "the damage which an interim measure was designed to prevent subsequently turns out not to have occurred despite a State's failure to act in full compliance with the interim measure".⁵³ *A fortiori*, the State Party's belief as to the merits of the case is irrelevant to the obligation to comply with interim measures.

C. Interim measures in other international courts and tribunals

18. When examining the legal effect and nature of protection of an interim measure under Rule 39 of the Rules of the Court reference must be made to relevant rules of international law applicable in the relations between the Parties, as per Article 31(3)(c) of the Vienna Convention on the Law of Treaties. In *Mamatkulov and Askarov v Turkey*, the Grand Chamber took note of the established mechanism of interim, provisional or precautionary measures in the procedures of other international tribunals and quasi-judicial authorities and that they were deemed legally binding on the Parties signatory to the applicable international instrument.⁵⁴

19. Consistently in the jurisprudence of these various international authorities, the binding nature of interim measures is based on the necessity to preserve the facts of the situation pending adjudication of the case, and

⁴¹ *Al-Saadoon and Mufdhi v. The United Kingdom*, App no 61498/08 (30 June 2009) and *Paladi v. Moldova*, cited above, para 88.

⁴² *Olaechea Cahuas v. Spain*, cited above, para 70; *Paladi v. Moldova*, cited above, paras 90 and 91.

⁴³ *Al-Saadoon and Mufdhi v. The United Kingdom*, as cited above, paras 162-163.

⁴⁴ *Salakhov and Islyamova v. Ukraine*, App no 28005/08 (14 March 2013), paras 216-224.

⁴⁵ *Yordanova and Others v. Bulgaria*, App no 25446/06 (24 April 2012), paras 49-53.

⁴⁶ See *Abdilahi Abdulwahidi v. the Netherlands*, cited above; *Darboe and Camara*, App no 5797/17; *Salakhov and Islyamova v. Ukraine*, cited above; *R.R. and Others v. Hungary*, App no 19400/11 (4 December 2012), para 4; *Andrey Lavrov v. Russia*, cited above; *Khloyev v. Russia*, App no 46404/13 (5 February 2015), para 67.

⁴⁷ *Savridin Dzhurayev v. Russia*, cited above, para 216.

⁴⁸ *Salakhov and Islyamova v. Ukraine*, cited above; *Trabelsi v. Belgium*, App no 140/10 (4 September 2014), para 151.

⁴⁹ *Paladi v. Moldova*, cited above, para 98; *Groni v. Albania*, App no 25336/04 (7 July 2009), para 194.

⁵⁰ *Aleksanyan v. Russia*, App no 46468/06 (22 December 2008), para 231.

⁵¹ *Paladi v. Moldova*, cited above, paras 96-98.

⁵² *Olaechea Cahuas v. Spain*, cited above, para 81.

⁵³ *Paladi v. Moldova*, cited above, para 89.

⁵⁴ *Mamatkulov and Askarov v. Turkey*, cited above, para 124.

to prevent irreparable damage to the interests of one of the Parties.⁵⁵ To illustrate, in *the LaGrand case (US v. Germany)*, before the International Court of Justice, the Court held that the object and purpose of the Statute of the Court as well as the terms of Article 41 of the Statute, read in context, required interim measures to be binding.⁵⁶

20. Before human rights courts and tribunals, interim measures have the additional function of preserving, pending full consideration of the case, the capacity of the tribunal to provide real and effective protection of the human rights guaranteed by its governing treaty, and to provide an effective remedy for breach of those rights.⁵⁷ Since interim measures are intended to preserve the equal rights of the Parties pending the ultimate examination of a case and to ensure the effectiveness and integrity of a final decision, other international courts and tribunals, as is the case with this Court, have held that measures imply no decision on the merits of the case, including on the question of jurisdiction.⁵⁸

21. Interim measures are thus closely linked with the substance of the rights protected by the governing treaty and with the Contracting Parties' undertaking in good faith to abide by those rights, as well as by the adjudicatory process that ensures their protection. For example, the Inter-American Court of Human Rights has ruled that provisional measures represent a means to protect substantive human rights and are a true preventive jurisdictional guarantee.⁵⁹

22. Stemming from the principle in international human rights law that provisional measures are not only precautionary, but have a role in protecting human rights,⁶⁰ the Inter-American Court and Commission both regularly require States to take a range of positive operational measures in implementation of its provisional measures, including measures to guarantee access to the refugee status determination procedure.⁶¹ In *Manuel Escalona Sánchez, Wilfredo Matos Gutiérrez and Ortelio Abrahante Bacallao*, for example, the Commission indicated to the State that it must refrain from returning the applicants in order to protect their lives and their personal integrity. In addition it indicated to the Bahamas that it should grant the applicants a legal remedy respecting the principle of *non-refoulement* in order to assess if they have the right of asylum and to furnish the Commission with the outcome of the decision for the purposes of deciding whether or not the interim measure should be maintained.⁶²

D. Non-compliance with interim measures

23. In *Mamatkulov and Askarov v Turkey*, this Court held that failure by a Contracting State to adhere to an interim measure prevented the Court from effectively examining the applicant's complaint, had hindered the effective exercise of the right of complaint and, accordingly, constituted a violation of Article 34 of the Convention.⁶³

24. Jurisprudence of this Court requires that compliance by a State is to be assessed by reference to the formulation of the interim measure and a State's compliance with the letter and the spirit of the measure indicated to it.⁶⁴ Failure to comply with the letter or spirit of an interim measure has been found by this Court

⁵⁵ Committee Against Torture, Rules of Procedure Rule 108, provides for "such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations." Human Rights Committee Rules of Procedure Rule 86: interim measures may be indicated "to avoid irreparable damage to the victim of the alleged violation.

⁵⁶ International Court of Justice, *LaGrand case (Germany v. USA)* (27 June 2001), para 102.

⁵⁷ UN Human Rights Committee, *Piandiong v. the Philippines*, CCPR/C/70/D/869/1999, para 5.1; *Validzhon Khalilov v. Tajikistan*, CCPR/C/83/D/973/2001, para 4.1; *Mansaraj and others v. Sierra Leone*, CCPR/C/77/D/1086/2002, para 5.1.

⁵⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*) Order of 13 September 1993, para 24; Inter-American Commission on Human Rights, *Detainees in Guantanamo Bay, Cuba Request for Precautionary Measures*, (13 Mar. 2002).

⁵⁹ Order of the Inter-American Court of Human Rights of 29 November 2006, *Provisional Measures Regarding the Republic of Colombia, Matter of Giraldo-Cardona*, para 5.

⁶⁰ *Ibid* para 4-8.

⁶¹ Inter-American Commission on Human Rights, Resolution 19/2014, MC 141/14, *Manuel Escalona Sánchez, Wilfredo Matos Gutiérrez y Ortelio Abrahante Bacallao, Bahamas* (30 June 2014).

⁶² *Ibid* para 23.

⁶³ *Mamatkulov and Askarov v. Turkey*, cited above, paras 125 and 129.

⁶⁴ *Paladi v. Moldova*, cited above, para 91.

where the State has removed or extradited the applicant to a country where the applicant faced a real risk of ill-treatment, regardless of whether or not the specific third country had been mentioned in the interim measure;⁶⁵ where the State had not immediately placed individuals in certain structures, environments or facilities;⁶⁶ or where it had failed to provide them with certain treatment,⁶⁷ or access to lawyers⁶⁸ or medical attention.⁶⁹ Anything less than strict compliance with the interim measure has been found by this Court to render a violation of the Convention otiose and to irreversibly lower the level of protection of the rights on which the applicant had been relying.⁷⁰ Indeed, it is because of the risk of irreparable harm to the enjoyment of an applicant's Convention rights where a State does not comply with an interim measure that this Court has indicated that disrespect for a Rule 39 request is, in itself, to be seen as a violation of Article 34. This is the case regardless of whether the applicant had actually experienced any difficulties in presenting and pursuing his application with the Court after expulsion in breach of the measure.⁷¹

25. For their part, other international courts and tribunals have held that the non-respect of interim measures can render a communication or petition procedure futile and may strike at the very heart of cooperation with the relevant body and its function to consider the merits of the case. In *Piandiong v. the Philippines*, the Human Rights Committee considered that a State Party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration of communications by the Committee, or to render examination by the Committee moot and "the expression of its views nugatory and futile". The Committee further considered that disregard of such measures, especially by acts of an irreversible nature such as execution or deportation, undermined the substance of the Covenant rights.⁷² Similarly, the Committee against Torture has emphasised that a failure to respect interim measure would render the individual communications procedure futile in many cases. The Committee has found that compliance with a request for interim measures is essential to protect against irreparable harm to the individual, pending the decision of the Committee, and to ensure that any eventual finding by the Committee is not "nullified" or rendered purely academic because of action taken whilst the process is ongoing.⁷³

III. States' particular obligations when complying with interim measures where children are concerned

A. The special situation of children under the Convention

26. Children are not always named as applicants in cases involving their well-being. The Court nevertheless considers itself required to consider their best interests. In *G.S. v. Georgia*,⁷⁴ where only the mother was the applicant, the Court expressed its views on the assessment of the child's best interest by the national court, considering it in light of its principles and case law on the issue. Many other cases where the children were not themselves applicants, have taken this approach.⁷⁵

⁶⁵ *Trabelsi v. Italy*, App no 50163/08 (13 April 2010), para 67; *Zokhidov v. Russia*, cited above, para 205; *Savridin Dzhurayev v. Russia*, cited above, paras 215-217; *Abdulkhakov v. Russia*, App no 14743/11 (2 October 2012), para 231.

⁶⁶ *Aleksanyan v. Russia*, cited above, para 230.

⁶⁷ *Andrey Lavrov v. Russia*, cited above, para 19.

⁶⁸ *Shtukurov v. Russia*, cited above, para 33.

⁶⁹ *Kondrulin v. Russia*, cited above para 43.

⁷⁰ This has been reiterated in several resolutions by the Committee of Ministers, *inter alia*, Resolution CM/Res(2010)25, which highlights the duty to respect and protect Article 34 of the Convention and thus promptly and effectively take action in order to fulfil the requirements of the interim measure as specified by the Court, see *Savridin Dzhurayev v. Russia*, cited above, para 118 and *Trabelsi v. Belgium*, cited above, para 150.

⁷¹ *Olaechea Cahuas v. Spain*, cited above, paras 75-83.

⁷² Human Rights Committee, *Piandiong v. the Philippines*, CCPR/C/70/D/869/1999 (19 October 2000), para 5.1 – 5.3. These points were reiterated by the Committee in *Validzhon Khalilov v. Tajikistan*, CCPR/C/83/D/973/2001 (13 April 2005) para 4.1.

⁷³ Committee Against Torture, *TPS v. Canada*, CAT/C/24/D/99/1997 (4 September 2000), para 15.6; *Cecilia Rosana Nunez Chipana v. Venezuela*, CAT/C/21/D/110/1998, 16 December 1998), para 8; *Mafhoud Brada v. France*, CAT/C/34/D/195/2002 (24 May 2005), para 13.4.

⁷⁴ *G.S. v. Georgia*, App no 2361/13 (21 July 2015), paras 59-61.

⁷⁵ See primarily *Ignaccolo-Zenide v. Romania*, App no 31679/96 (25 January 2000); *E.S. v. Romania and Bulgaria*, App no 60281/11 (19 July 2016); *G.N. v. Poland*, App no 2171/14 (19 July 2016); *Bianchi v. Switzerland*, App no 7548/04 (22 June 2006).

⁷⁵ *G.S. v. Georgia*, as cited above, paras 59-61.

27. The Court has consistently held that children, due to their age and personal situation, are amongst the most vulnerable persons in society.⁷⁶ When considering asylum seeking children their vulnerability is increased.⁷⁷ Respect for this increased vulnerability of the asylum seeking child,⁷⁸ *qua* child and *qua* asylum seeker, must be a primary consideration taking precedence over their irregular migration status,⁷⁹ and entails a number of tailored protective measures under the Convention. Moreover, this Court has ruled that children do not lose the rights they are entitled to as children simply because they have the good fortune of being accompanied.⁸⁰

28. Independently of the general obligations States owe towards all asylum seekers, the Court recognises that specific duties and guarantees are owed to families with children within this category. These obligations were explicitly outlined in *Tarakhel v. Switzerland*, where the Court stated that the ‘special protection’ owed to asylum seeking children is particularly important in view of their “specific needs and their extreme vulnerability’. This applies even when they are accompanied by their parents”.⁸¹

B. The special situation of children under international human rights treaties

29. The UN Convention on the Rights of the Child (CRC),⁸² the International Covenant on Civil and Political Rights (ICCPR)⁸³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸⁴ all acknowledge the specific vulnerability and status of a child. These treaties oblige States to provide specific safeguards and guarantees for the protection and care of children. The Court has previously held that the ECHR does not exist in a vacuum and States remain bound by the obligations under international law when implementing the Convention.⁸⁵ In this respect, particular importance is given to the obligations stemming from the CRC.

30. The particular vulnerability of child asylum seekers is recognised by Article 22 CRC and by CRC General Comment (GC) 14, which covers this issue.⁸⁶ To fully enjoy their CRC rights, children must be appropriately protected and assisted, recognising that their lack of skills, maturity and access to resources makes them more reliant on the authorities for the protection of their rights.⁸⁷ In the asylum sphere, this means that States have a duty to duly support children ensuring their effective access to the procedure.

31. The UN CRC’s GC 7 on the rights of early childhood emphasises how very young children are holders of all rights under the CRC.⁸⁸ This GC recognises that these children are particularly vulnerable as they face a rapid developmental change and are less able to comprehend the adversities they face or resist the harmful effects of their circumstances.⁸⁹ It notes that as a consequence they will be particularly affected in the asylum context, due to being disoriented by losing familiar surroundings and relationships.⁹⁰

32. In November 2017 two joint General Comments of the Committee on the Rights of the Child and the Committee on the Rights of Migrant Workers, Nos. 3 and 4, addressed, respectively, the general principles

⁷⁶ UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) 29 May 2013, CRC/C/GC/14, para 6; *Rahimi v. Greece*, App no 8687/080 (5 July 2011), para 87.

⁷⁷ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App no 13178/03 (12 October 2006), para 55; *Popov v. France*, App nos 39472/07 and 39474/07 (19 April 2012), para 91; *Tarakhel v. Switzerland* [GC], App no 29217/12 (4 November 2014), para 99.

⁷⁸ *M.S.S. v. Belgium and Greece* [GC], App no 30696/09 (21 January 2011), para 232.

⁷⁹ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App no 13178/03 (12 October 2006), para 55.

⁸⁰ *Muskhadzhiyeva and Others v. Belgium*, App no 41442/07 (19 January 2010), paras 58 and 62; *Popov v. France*, App nos. 39472/07 and 39474/07 (19 January 2012), para 91; UN CRC General Comment No. 6, para 15.

⁸¹ *Tarakhel v. Switzerland* [GC], App no 29217/12 (4 November 2014), para 119; *S.F. and Others v. Bulgaria*, App no 8138/16 (7 December 2017), paras 88-90.

⁸² Convention on the Rights of the Child (CRC), 20 November 1989, United Nations.

⁸³ International Covenant on Civil and Political Rights, 16 December 1966, United Nations.

⁸⁴ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations.

⁸⁵ *Pini and Ors v. Romania*, App no 78028/01 (22 June 2004), para 138.

⁸⁶ UN CRC General Comment No. 14, paras 75-76; UN CRC Article 22.

⁸⁷ UN CRC General Comment No. 7, para 32.

⁸⁸ UN CRC Article 1.

⁸⁹ UN CRC, General Comment No. 7, para 36.

⁹⁰ UN CRC, General Comment No. 7, para 36(c).

on the human rights of children in the context of international migration and corresponding State obligations in countries of origin, transit, destination and return.⁹¹ While recognising children’s vulnerability in the migration context, the Committees make clear that migrant children should be “treated first and foremost as children” and should be regarded as “individual rights holders”, unaffected by their parents’ or guardians’ migration status.⁹² They also stress that States have obligations to protect all migrant children coming under their jurisdiction, including when those obligations arise from the exercise of effective control “outside its borders” and in “transit zones” where migration control or surveillance are in place. Accordingly, the duty to protect applies to children falling under the state’s jurisdiction while “attempting to enter [its] territory”.

33. In the context of *non-refoulement*, the above principles require dedicated measures to protect asylum-seeking children affected by return measures. A decision to return a family which includes child asylum seekers to a third country requires (under Article 3 UNCRC) an individualised assessment of childrens’ best interests and of their circumstances to determine the risks they may face. The 2017 joint GC No. 3 notes that, the *non-refoulement* principle requires States not to “reject [them] at a border or return him or her to a country where there are substantial grounds for believing that he or she is at real risk of irreparable harm”.⁹³

C. Children subject to interim measures

34. Regardless of whether children are eventually granted asylum, Contracting Parties are still under a positive obligation to protect them from treatment contrary to Article 3 of the Convention. The protection provided must be practical and effective, especially for vulnerable persons such as very young children.⁹⁴ The assessment of the minimum threshold required to engage Article 3 is relative and will depend on all of the circumstances of the case.

35. Under Article 3, the CRC establishes the best interest of the child as the primary consideration in all actions concerning children.⁹⁵ This principle is described as a fundamental interpretative legal principle, substantive right and rule of procedure.⁹⁶ In this latter sense, it requires States to provide an explanation as to how Article 3 CRC was respected in practice in a decision and to document its assessment outlining “what criteria it is based on; and how the child’s interests have been weighed against other considerations”.⁹⁷ In the migration sphere, the child’s best interests should be ensured through individual procedures as an integral part of any administrative or judicial decision.⁹⁸

36. This Court has frequently recognised the principle of the primacy of the best interests of the child.⁹⁹ In *Rahimi v Greece* it confirmed that the assessment of the child’s best interests must be undertaken separately and prior to a decision that will affect that child’s life.¹⁰⁰ Accordingly, any decision-making process involving children requires a documented evaluation of the possible impact of the decision on the child’s best interests.¹⁰¹ In the migration context, a special regime is required for asylum procedures and reception conditions for children, which must be distinct from those applicable to adults, and must take into account all elements of a child’s interests in a specific situation.¹⁰²

⁹¹ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 4 (2017) of the CMW and No. 23 (2017) of the [CRC] on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return and Joint general comment No. 3 (2017) [...] on the general principles regarding the human rights of children in the context of international migration (16 November 2017).

⁹² Joint General Comment No. 3, para 15.

⁹³ Joint General Comment No. 3, para 46.

⁹⁴ *Z and Others v. the United Kingdom*, App no 29392/95 (10 May 2001), para 73.

⁹⁵ UN CRC, General Comment No. 14, paras 7-9.

⁹⁶ *Rahimi v. Greece*, as cited above, para 108.

⁹⁷ UN CRC, General Comment 14, para 6(c).

⁹⁸ UN CMW and UN CRC, Joint General Comment No. 3, para 30.

⁹⁹ *Neulinger and Shuruk v. Switzerland [GC]*, App no 41615/07 (6 July 2010), para 135.

¹⁰⁰ *Rahimi v. Greece*, as cited above, para 108.

¹⁰¹ UN CRC, General Comment No. 14, paras 6(c) and 14(b).

¹⁰² UN CRC, General Comment No. 14, para 54, 75 -76.

37. Protecting children's rights is also largely dependent on the necessary support being provided to the person responsible for them. Article 5 CRC recognised primary caregivers as the 'major conduit through which young children are able to realize their rights'.¹⁰³ The UN Committee on the Rights of the Child emphasises the interdependencies between parents and children, with children's rights being largely conditional on the adequacy of the support provided to this category.¹⁰⁴

38. As noted above, where the execution of a return decision has been prevented by a decision of the Court to adopt interim measures pursuant to Rule 39, failure to comply with such measures has repeatedly been found to violate the Convention.¹⁰⁵ The risk of serious, irreversible harm to an applicant where interim measures are not respected is increased when the rights at stake are those of a particularly vulnerable category of subjects, such as asylum seeking children. Indeed, this Court has held that when the petitioner who is the subject of interim measures is in a particularly vulnerable situation, such as the custodial parents accompanying young children the State has an obligation under the Convention (and under Article 3 CRC) to grant "effective protection...not only in law, but also in practice".¹⁰⁶ In such cases there are "weighty reasons warranting extraordinary measures of protection."¹⁰⁷

39. In the case of children who are not applicants but who are the indirect beneficiaries of an interim measure, the need for such extraordinary measures of protection has led the Court to impose interim measures pending the examination of an Article 8 violation and the particularly harmful effect on the psychological and/or physical well-being of the child in the case of return.¹⁰⁸ In line with the Court's previous case law, the interveners submit that in situations affecting children, as a particularly vulnerable group of persons, States have a positive duty under Article 34, read in conjunction with a child's best interests, to furnish all the necessary facilities to undertake a proper and effective examination of a child's complaint.¹⁰⁹ Where interim measures are imposed by the Court and they affect the best interests of children, there is a weighty onus on the State to act in a manner which ensures children's well-being, care, safety and protection,¹¹⁰ which is in addition to the binding requirements of the measure as regards its formulation, letter, spirit and purpose.

IV. Conclusion

40. Interim measures are a vital mechanism indicated in urgent cases where there is an immediate risk of irreparable harm. Stemming from the nature of the rights which interim measures commonly protect, this Court, along with other international bodies has found them to be binding. Where interim measures relate to children, irrespective of whether children are applicants, the State has an enhanced duty to the children and must abide by the measure indicated with special diligence and take the appropriate protective measures which the age, level of maturity, environment and experiences of the children require. Such obligations must be strictly and consistently adhered to, in all cases, and with all efforts of all institutions of the State, irrespective of the State Party's view of the merits of the case, including on issues of jurisdiction.

¹⁰³ UN CRC, General Comment No. 7, para 16.

¹⁰⁴ UN CRC, General Comment No. 7, para 16.

¹⁰⁵ Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, "Urgent need to deal with new failures to co-operate with the European Court of Human Rights", 31 May 2013.

¹⁰⁶ *Savridin Dzburayev v. Russia*, cited above, para 262.

¹⁰⁷ *Kasymakhunov v. Russia*, App no 29604/12 (14 November 2013), para 185.

¹⁰⁸ *Neulinger and Shuruk v. Switzerland*, App no 41615/07 (6 July 2010), para 139.

¹⁰⁹ *Andrey Lavrov v. Russia*, cited above, para 31; *Naydyon v. Ukraine*, App no 16474/03 (14 October 2010), para 63.

¹¹⁰ By analogy see *Neulinger and Shuruk v. Switzerland*, cited above, para 146.