EUROPEAN COURT OF HUMAN RIGHTS

Application Nos. 8675/15 and 8697/15

BETWEEN:

N.D. and N.T.

Applicant

-and-

Spain

Respondent

SUBMISSIONS FOR THE INTERVENORS

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

The Intervenors are most grateful to Dr Maria-Teresa Gil-Bazo, Senior Lecturer in law at Newcastle University, for her assistance in the preparation of this intervention. The views expressed herein remain those of the intervenors.

Section I: General provisions of the ECHR regulating access to the territory

1. As has been frequently recognised by this Court, a key attribute of State sovereignty is the presumptive prerogative 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 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, or flagrant denial of justice and of the right to liberty.[2] Such refusals of entry are also contrary to the rights set out in the EU Charter of Fundamental Rights (CFR) and the prohibition on non-refoulement found in the 1951 Geneva Convention on the Status of Refugees (Refugee Convention).

2. In order for these prohibitions to be practical and effective and not theoretical and illusory,[3] 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.[4]

3. As discussed further below, a unilateral declaration that an act or omission at issue occurred outside the territory (or of the consequent assertion of non-responsibility) is not alone dispositive in a determination as to whether or not to exclude the jurisdiction of the State.[5]

4. The intervenors note that the obligations of Contracting Parties under the ECHR, including as regards the principle of non-refoulement, apply to all acts and omissions, which result in a denial of entry to those who are within their jurisdiction. The key question is therefore whether individuals are within the jurisdiction of Contracting States when they are subjected to a denial of entry.

Jurisdiction

5. While jurisdiction is primarily territorial "and is presumed to be exercised on the national territory of States (…), the notion of expulsion is also principally territorial in the sense that expulsions are most often conducted from national territory."[6] It is therefore uncontroversial that individuals fall within a State's jurisdiction when they are on a State's territory, lawfully or otherwise.[7]

6. For the purposes of this intervention it will be assumed that jurisdiction is being exercised over any territory over which a Contracting Party to the ECHR claims sovereignty and any individuals over whom it exercises effective authority or control. If a State asserts sovereignty over a territory and/or exercises effective control over persons in that area, it cannot deny jurisdiction.

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[1] See e.g. *Hirsi Jamaa and Other v. Italy* App no 27765/09 (ECtHR, 23 February 2012), para 113.
[2] See e.g. *Hirsi Jamaa and Other v. Italy* App no 27765/09 (ECtHR, 23 February 2012), para 114.
[3] See e.g. *Artico v. Italy* App no 6694/74 (ECtHR, 13 May 1980).
[4] See e.g. *Hirsi Jamaa and Other v. Italy* App no 27765/09 (ECtHR, 23 February 2012), para 202.
[5] See e.g**.** *Ilaşcu and Others v. Maldova and Russia* App no 48787/99 (ECtHR, 8 July 2004); *Louzidou v. Turkey (Preliminary Objections)* App no 15318/89 (ECtHR, 23 March 1995), paras 18 and 25-27.
[6] *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012), para 178.
[7] See e.g. *Louzidou v. Turkey (Preliminary Objections)* App no 15318/89 (ECtHR, 23 March 1995), para 62; *Issa and Others v. Turkey* App no 31821//96 (ECtHR, 16 November 2004), para 71; *Al-Skeini and Others v. the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011), para 131; *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012), para 73.

7. Persons who are not present on the territory of the State fall within the State's jurisdiction, in a number of extraterritorial situations. "A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction."[8] These include, among others, where persons are present in an international transit zone[9] and, extraterritorially, where the State exercises authority and control, including where persons are intercepted on the high seas,[10] arrive by sea at a port,[11] or are on board an aircraft refused permission to land.[12] Furthermore, people who are subject to checkpoint controls outside the territory of the contracting State are within its jurisdiction.[13] It is also accepted that a Contracting State may exercise jurisdiction in a third country due to the effective authority or control of its military forces in an armed conflict.[14]

8. 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…"[15] Such an interpretation is necessary in order to avoid depriving the Convention rights of effectiveness in such circumstances.[16] In *Sharifi and Others v. Italy*, the Court held that:

   "*212. Aussi, la Cour ne juge pas nécessaire d'établir, dans la présente affaire, si les requérants ont été expulsés après être entrés sur le territoire italien ou s'ils ont été refoulés avant d'avoir pu le faire. Compte tenu de ce que même les interceptions en haute mer tombent sous l'empire de l'article 4,* ***il ne peut qu'en aller de même pour le refus d'admission sur le territoire national*** *dont, selon la thèse du gouvernement italien, feraient légalement l'objet les personnes arrivées clandestinement en Italie.*" *(emphasis added)*

9. It seems clear therefore that those who are subject to the effective authority or control of a Contracting Party **on or at its land border** and are prevented by the acts and omissions of that Contracting Party from making, registering or lodging an application for international protection or otherwise opposing a measure that would result in *refoulement* are in a position analogous or equivalent to that of those identified as being within a State's jurisdiction when intercepted on the high seas or in the transit zone of an airport.

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

10. Since Contracting States are responsible for securing the Convention rights to all those who fall within their jurisdiction under Article 1 ECHR, this not only imposes obligations of non-refoulement on the State,[17] but also imposes obligations on the State to respect, protect and fulfil Convention rights by treating persons with the dignity consonant with

[8] *Ilaşcu and Others v. Maldova and Russia* App no 48787/99 (ECtHR, 8 July 2004), para 317.
[9] *Amuur v. France* App no 19776/92 (ECtHR, 25 June 1996).
[10] *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012), para180.
[11] *Sharifi and Others v. Italy and Greece* App no 16643/09 (ECtHR, 21 October 2014).
[12] *East African Asians (British protected persons) v. the United Kingdom* App nos 4715/70, 4783/71 and 4827/71 (ECtHR, 6 March 1978).
[13] *Jaloud v. the Netherlands* App no 47708/08 (ECtHR, 20 November 2014).
[14] *Issa and Others v. Turkey* App no 31821//96 (ECtHR, 16 November 2004); *Al-Saadoon and Mufdhi v. the United Kingdom* App no 61498/08 (ECtHR, 4 October 2010); *Al-Skeini and Others v. the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011); *Al-Jedda v. the United Kingdom* App no 27021/08 (ECtHR, 7 July 2011).
[15] *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012), para 180.
[16] *Sharifi and Others v. Italy and Greece* App no 16643/09 (ECtHR, 21 October 2014), para 210.
[17] This issue is not specifically addressed in this intervention as that aspect of the present complaint has been declared inadmissible.

compliance with Convention standards wherever and whenever they are within their jurisdiction, lawfully or otherwise.

11. *The obligations to respect* on the State in respect of persons arriving at its borders include the obligation to refrain from *preventing* people from accessing procedures for determining their protection needs and the obligation to refrain from the excessive use of force to effect the imposition of restrictions on freedom of movement or deprivation of liberty in order to effect an expulsion. There is an obligation to refrain from *refouling* those at risk to States where they would be at risk, or at risk of onward return to their countries of origin.[18] Furthermore there is an obligation to refrain from collective expulsion.

12. *The obligations to protect and fulfil* on the State include, amongst others, the obligation to take all the steps it is reasonable to expect the State to take to protect individuals from harm to their life or physical integrity of which it knew or ought to have known[19] as well as obligations to ensure independent, prompt and effective investigation of alleged violations of Convention rights, and to ensure effective remedies for such violations. The obligation to treat all individuals compatibly with the ECHR includes the obligation to identify and pay special attention to the needs of unaccompanied (and accompanied) children, the elderly, the sick and injured and persons with disabilities[20], irrespective of whether national authorisation to enter the territory has yet been granted.[21] States have a obligation to enable those who wish to identify themselves as being in need of international protection to do so[22] 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 the applicable law.[23]

Section II: Article 4 of Protocol 4 ECHR – collective expulsions, denial of access to the territory and international protection determination procedures

13. Collective expulsion is prohibited absolutely[24] under general international law, including by all major human rights treaties. This prohibition is considered to have assumed the status of customary international law[25] and, therefore, is binding on all States, regardless of their being party to a treaty expressing such prohibition.[26]

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

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

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

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

[22] *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012).

[23] See Section 2 below.

[24] 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, available at: http://www.refworld.org/docid/453883fd1f.html [accessed 20 November 2015], para 13(d).

[25] The ILC Special Rapporteur on the expulsion of aliens held that the prohibition of collective expulsion assumed the status of a general principle of international law "recognised by civilised nations". See UN General Assembly, *Third report on the expulsion of aliens / by Maurice Kamto, Special Rapporteur,* 19 April 2007, A/CN.4/581, available at http://www.refworld.org/docid/49997af527.html, para 115.

[26] 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

14. In a series of cases, beginning with *Čonka v. Belgium,*[27] the Court has considered whether Article 4 of Protocol 4 has been engaged and if so, whether it has been violated. In *Čonka,* the Court set out its findings:

> 61…. *the Court considers that the procedure followed does not enable it to eliminate all doubt that the expulsion might have been collective.*
> *62. That doubt is reinforced by a series of factors: firstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation (see paragraphs 30 and 31 above); secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed.*
> *63. In short, at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account.*

15. In the case of *Hirsi Jamaa v. Italy*[28], the Court established that the applicants, although on the high seas, were within the jurisdiction of Italy, even if not on its territory. The Court then went on to look at whether there had been a **collective** expulsion:

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

16. The Court thus held that the return of persons who were within the jurisdiction of Italy (even if not on its territory), without any identification procedure or any individualised decision was in violation of Article 4 of Protocol 4.

17. More recently, the cases of *Sharifi*[29] and *Khlaifia and Others v. Italy*[30] have addressed this issue. The case of *Khlaifia* concerned a group of Tunisians, who had arrived on the Italian island of Lampedusa. The applicants were registered and finger-printed, then transferred to Palermo (Sicily), held on a ship moored in the harbour there, and finally flown back to Tunisia. In relation to the complaints under Article 4 of Protocol 4, the

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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, available at http://www.refworld.org/docid/45139acfc.html. See also, Council of Europe: Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005, available at: http://www.refworld.org/pdfid/42ef32984.pdf. 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.

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

[28] *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012).

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

[30] *Khlaifia and Others v. Italy* App no 16483/12 (ECtHR, 1 September 2015).

Court, although distinguishing *Hirsi* because the applicants in *Khlaifia* had been the subject of an identification procedure, held:

> *«156 ... la simple mise en place d'une procédure d'identification ne suffit pas à exclure l'existence d'une expulsion collective. Elle estime de surcroît que plusieurs éléments amènent à estimer qu'en l'espèce l'expulsion critiquée avait bien un caractère collectif.* ***En particulier, les décrets de refoulement ne contiennent aucune référence à la situation personnelle des intéressés ; le Gouvernement n'a produit aucun document susceptible de prouver que des entretiens individuels portant sur la situation spécifique de chaque requérant auraient eu lieu avant l'adoption de ces décrets ; un grand nombre de personnes de même origine a connu, à l'époque des faits incriminés, le même sort des requérants ; les accords bilatéraux avec la Tunisie (paragraphes 28-30 ci-dessus) n'ont pas été rendus publics et prévoyaient le rapatriement des migrants irréguliers tunisiens par le biais de procédures simplifiées, sur la base de la simple identification de la personne concernée de la part des autorités consulaires tunisiennes****.*
> *157. Cela suffit à la Cour pour exclure l'existence de garanties suffisantes d'une prise en compte réelle et différenciée de la situation individuelle de chacune des personnes concernées (voir, mutatis mutandis, Čonka, précité, §§ 61-63). (emphasis added)*

18. The intervenors invite the Court to note that in *Khlaifia* it emphasised that even the individual identification and registration of those concerned was not sufficient to exclude that their expulsion being collective – in breach of Article 4 of Protocol 4 – if there was no reference to their personal circumstances, no personal interview and a large number of people were all treated the same way. The Court will recall that in other assessments of the appropriateness of asylum procedures it took into account whether the national authorities interviewed the applicant.[31] The Court will recall that it indicated a potential incompatibility with its obligations under Article 4 of Protocol 4 with the French procedures in *I.M. v. France* in which there was a personal interview but it only lasted only half an hour.[32]

19. The intervenors consider that these principles apply *a fortiori* to those intercepted at a land border, denied identification and registration as well as information about, and access to asylum procedures where this is relevant. Where persons are expelled in such circumstances, they not only fall within the *scope* of Article 4 of Protocol 4 ECHR but also are presumed to be the victims of a *violation* of its provisions.

20. Once Article 4 of Protocol 4 is engaged – and arguably violated – it is incumbent on the State, under Article 13 ECHR, to have in place an effective remedy. To be effective, a remedy must have automatic suspensive effect whenever there is a potential breach of the principle of *non-refoulement*, at least with regard to the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, or the prohibition of collective expulsions, in light of the absolute nature of these human rights obligations. This has been made clear in *Čonka*, *Hirsi*, *Sharifi* and *Khlaifia*.[33]

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[31] See e.g. *Charahili v. Turkey* App no 46605/07 (ECtHR, 13 July 2010); *Nasimi v. Sweden* App no 38865/02 (ECtHR, 16 March 2004).
[32] *I.M. v. France* App no 9152/09 (ECtHR, 2 February 2012), para 155.
[33] *De Souza Ribeiro v. France* App no 22689/07 (ECtHR, 13 December 2012), para 82; *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012), para 206; *Mohammed v. Austria* App no 2283/12 (ECtHR, 6 June 2013), para 80; *Khlaifia and Others v. Italy* App no 16483/12 (ECtHR, 1 September 2015).

Section III: Application of the Convention rights in accordance with article 53 ECHR and obligations under EU law

21. As Article 53 ECHR makes clear, the provisions of the Convention must not be applied in such a way as to diminish the human rights protection, 'which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a part'.

22. Where the applicable law is binding EU law, Article 53 ECHR means that no provision of the ECHR, including Article 4 of Protocol 4 can be interpreted in relation to States (who are bound by that EU law) in a manner, which diminishes the rights and reduces the rights protection guaranteed under the applicable EU law.[34]

The applicable EU law

23. EU law, and in particular the EU asylum *acquis,* is relevant to the present case in two ways.[35] First, the principle of the rule of law runs like a golden thread through the Convention.[36] As a result, the Convention requires that all measures carried out by the Contracting Parties that affect an individual's protected rights must be "in accordance with the law". In some circumstances the law will be EU law.

24. In this context, in determining whether the Contracting Parties' obligations under the Convention are engaged in any particular case — and, if so, the scope and content of these obligations — this Court has had regard to the EU asylum *acquis* materially relevant to those questions when the Respondent States are themselves legally bound by that *corpus* of law.[37]

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[34] *Aristimuño Mendizabal v. France* App no 51431/99 (ECtHR, 17 January 2006); *M.S.S. v. Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

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

[36] The Convention's preamble recalls the rule of law.

[37] See *M.S.S. v. Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), paras 57-86 and 250*,* where the Grand Chamber analysed the scope and content of the Contracting Parties' obligations under Article 3 of the Convention in the light of relevant provisions of EU law by which the Greek authorities were bound. See also *Sufi and Elmi v. the United Kingdom* App nos 8319/07 and 11449/070 (ECtHR 28 November 2011), paras 30-32 and 219-226, where the Fourth Section of the Court had regard to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"), as well as to a preliminary ruling by the European Court of Justice, as the CJEU was then known, following a reference lodged by the Dutch Administrative Jurisdiction Division of the Council of State (Afdeling Bestuursrechtspraak van de Raad van State) in the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie* asking, *inter alia*, whether Article 15(c) of the Qualification Directive offered supplementary or other protection to Article 3 of the Convention.

Relevant fundamental rights and principles of EU Law

25. <u>*The right to effective legal protection*</u> has been most clearly set out in the case of *Marks and Spencer plc v. Commissioners of Customs & Excise* in which the CJEU stated that:

> "*Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts (...) not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought* by it.[38]

26. This approach corresponds broadly to the ECtHR's guiding principle that rights must be practical and effective not theoretical and illusory.[39]

27. <u>*The right to be heard*</u> was reiterated most recently in the cases of *Mukarubega*[40] and *Boudjilida,*[41] wherein the CJEU repeated that:

> "The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely."[42]

28. <u>*The prohibition of refoulement and the prohibition of torture and inhuman or degrading treatment or punishment*</u> *(Article 19 (2) and Article 4 of the Charter of Fundamental Rights of the European Union (CFR)*,[43] prohibiting Member States from returning an individual to a situation where he would be at risk of torture, inhuman or degrading treatment or punishment. This includes rejection at the border, interception and indirect refoulement. Member States obligations under these Articles apply, regardless of whether the person seeking protection at the border has explicitly applied for international protection, implying an obligation on Member States to proactively assess the risk of refoulement.[44]

29. <u>*The prohibition of collective expulsions*</u> *(Article 19 (1) CFR)*, which reflects Article 4 of Protocol 4. As such, and in the context of the EU asylum *acquis,* it attracts the EU law right to effective legal protection, which is buttressed by the EU right to be heard. The EU law right to an effective remedy under Article 47 CFR includes a right of access to such a remedy. Article 47 encompasses the general attributes of an effective remedy under international law, including that such remedies be prompt, accessible, available before an independent authority and leading to cessation and reparation.[45] The accessibility element is made explicit in Article 47, which requires that free legal aid be provided when necessary to ensure effective access to justice. Furthermore, the CJEU has considered that Article 47 comprises the right of access to a court or tribunal even in those matters that

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[38] Case C-62/00 *Marks and Spencer plc v. Commission of Customs & Excise* [2002] ECR I-6348, para 27.
[39] *Artico v. Italy* App no 6694/74 (ECtHR, 13 May 1980).
[40] Case C-166/13 *Sophie Mukarubega v. Préfet de police and Préfet de la Seine-Saint-Denis* [2014] ECLI:EU:C:2014:2336.
[41] Case C-249/13 *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques* [2014] ECLI:EU:C:2014:2431.
[42] Case C-277/11 *M. M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General* [2012] ECLI:EU:C:2012:744, para 87.
[43] The EU Charter of Fundamental Rights (CFR) became legally binding with the coming into force of the Lisbon Treaty, Article 6 of which grants it the same legal status as the EU treaties themselves.
[44] *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012), para 157.
[45] International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: a Practitioners' Guide* (International Commission of Jurists 2006), available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/right-to-remedy-and-reparations-practitioners-guide-2006-eng.pdf, 46-49.

are not recognised as falling within the scope of Article 6 ECHR by the ECHR's jurisprudence.[46]

30. *The right to asylum (Article 18 CFR)*, a subjective and enforceable right of individuals who are entitled to it to be granted international protection under EU law. The beneficiaries of this provision are all individuals, who may be eligible for international protection on grounds established under any instrument of international law, including the 1951 Refugee Convention, and EU law, or as a consequence of the principle of *non-refoulement* as established in the Convention jurisprudence. Since asylum is a shared competence between the Union and its Member States, the protection of Article 18 CFR applies in all areas of activity of the Union and its Member States that fall within the scope of application of EU law.

31. Moreover, the right to international protection under Article 18 CFR embraces the following elements: (a) access to fair and efficient asylum procedures and an effective remedy; (b) treatment in accordance with adequate reception and (where detention is prescribed by law, necessary and proportionate) detention conditions; and (c) the grant of international protection in the form of refugee or subsidiary protection status when the criteria are met.[47]

The EU asylum acquis

32. The EU asylum *acquis* is comprised of a number of legal instruments and their interpretation by the CJEU. Of those instruments, the most pertinent for this intervention is the Asylum Procedures Directive[48] (in force from 2 January 2006 to 20 July 2015) and the recast Asylum Procedures Directive[49] (in force on 20 July 2015 and had to be transposed by 20 July 2015), which provides for effective access to the asylum procedure for all applicants, without any exception.[50] The recast Asylum Procedures Directive, currently in force, contains several provisions that expressly refer to procedures at borders. It is thus clear that the EU asylum *acquis* applies not only to applications for international protection made by those who have been authorised to enter a State's territory but also to border procedures.

33. The European Commission has recently drawn attention to the lack of effective access to the asylum procedure in the context of border procedures: "it should be noted that access to the asylum procedure may also be considered to be hampered where, in practice, asylum seekers are not able to safely and easily reach a crossing point or a transit zone to submit their asylum application because of the manner in which border infrastructure, including border fences, have been built".[51]

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

[47] UNHCR intervention before the Court of Justice of the European Union in the cases of N.S. v. Secretary of State for the Home Department in United Kingdom and M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland, 2011.

[48] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2003] OJ L 326/13 ('Asylum Procedures Directive').

[49] 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').

[50] Recast Asylum Procedures Directive, Recital 25.

[51] See *http://www.statewatch.org/news/2015/oct/eu-com-letter-hungary.pdf.*

Effective access to asylum determination procedures

34. Under the recast Asylum Procedures Directive, asylum seekers have the right to enter and remain on the territory and in the transit zones of Member States until a final decision has been made.[52] The recast Asylum Procedures Directive applies to applications made **on the territory, at the border, in territorial waters or in the transit zones of the Member States**.[53]

35. As a result, as the EU asylum regime stands at present, in order to make a formal request for international protection, most refugees and others seeking subsidiary protection under EU law are obliged to reach and/or cross the borders of EU Member States in an irregular manner often relying on documents provided by people smugglers. If they are unable to reach the territory (or territorial waters or transit zones), they are unable to access the whole package of asylum determination procedures and safeguards contained in the EU asylum *acquis* and in national law. Even if they have reached the territory, EU law does not protect them from being penalised for illegal arrival.[54]

36. The recast Asylum Procedures Directive specifically refers in several places – set out below – to procedures **at the border** and states:

> (26) *With a view to ensuring effective access to the examination procedure, officials who first come into contact with persons seeking international protection**, in particular officials carrying out the surveillance of land or maritime borders or conducting border checks**, should receive relevant information and necessary training on how to recognise and deal with applications for international protection, inter alia, taking due account of relevant guidelines developed by EASO. They should be able to provide third-country nationals or stateless persons who are present in the territory**, including at the border**, in the territorial waters or in the transit zones of the Member States, and who make an application for international protection, with relevant information as to where and how applications for international protection may be lodged. Where those persons are present in the territorial waters of a Member State, they should be disembarked on land and have their applications examined in accordance with this Directive. (emphasis added)*[55]

37. Moreover, Article 6(1) of the recast Asylum Procedures Directive obliges EU Member States authorities to facilitate the registration of asylum applications, including recording information or statements of the asylum seeker relating to the substance of their request for international protection and imposes an obligation on Member States to ensure that such authorities receive the relevant information and the appropriate training to perform their task properly.

38. In light of the CJEU's jurisprudence requiring EU law provisions to be interpreted in a way which provides them with *effet utile*[56], Article 8(1) requires Member States to provide information detailing the possibility of making an application for international

[52] Recast Asylum Procedures Directive, recital 26 and arts 3, 9 and 43.
[53] Recast Asylum Procedures Directive, art 3.
[54] The recent Case of Qurbani at the CJEU concerned an Afghan national asylum seeker who travelled through Iran, Turkey and Greece with the assistance of a people smuggler and entered Germany on a forged passport. He immediately applied for international protection. He was prosecuted for travelling with forged documentation. The case was referred to the CJEU.[54] Article 31 of the 1951GC states that individuals who come directly from a territory where their life or freedom are threatened shall not be penalised for their illegal entry. The CJEU held that there was no corresponding provision to Art 31 included in the asylum *acquis* and it did not therefore have jurisdiction to answer the question referred. (Mr Qurbani's asylum claim was duly processed in Germany). Case C-481/13 *Mohammad Ferooz Qurbani* [2014] ECLI:EU:C:2014:2101.
[55] Recast Asylum Procedures Directive, Recital 26.
[56] Case C-213/89 *Factortame and Others* [1990] ECR I-2433, para 20; Case C-118/00 *Gervais Larsy v. Institut national d'assurances sociales pour travailleurs indépendants (Inasti)* [2001] ECR I-5063, paras 50-53.

protection available to all third country nationals held in detention facilities or present at border crossing points, including transit zones, and at external borders. Such information must be provided pro-actively to all those apprehended at the border or held in detention facilities on an equal footing. Moreover, in order to be effective and useful, such information must be provided in a language the third country nationals concerned are able to understand.[57]

39. Article 8(2) envisages that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, and at external borders.

40. Moreover, the Directive does not further impose any formal requirements to applicants with regard to how an asylum application must be made. Any expression of the wish to obtain protection to any Member State authority must be considered as an application "being made", whether this is done orally or in writing and regardless of whether the words asylum or protection have been used by the person concerned.

41. This is in line with the finding of this Court in the case of *Hirsi*, that the obligations of States under Article 3 ECHR apply regardless of whether the person intercepted has explicitly applied for international protection. According to the Court, it was for the Italian authorities, faced with a situation in which human rights were being systematically violated, to "find out about the treatment to which the applicants would be exposed after their return" and to ascertain "how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees".[58]

42. Under EU law, in order to ensure full respect of the right to asylum and the principle of *non-refoulement* enshrined in Article 18 and 19 of the EU Charter of Fundamental Rights respectively, effective access to an asylum procedure an inclusive and broad interpretation of when an application is "made" under the directive is necessary in order to ensure effective access to the asylum procedure and the rights deriving from it.

43. It is clear from the foregoing that the EU asylum acquis envisages effective access to all who may wish to apply for asylum to the appropriate procedures contained in the recast Asylum Procedures Directive.

44. **In conclusion, the Intervenors submit that the prohibition on *refoulement* applies to acts or omissions resulting in exclusion from the territory of a Contracting Party of individuals on or at its land borders (and therefore under its jurisdiction). Additionally, the collective denial of access to the territory of a Contracting party to individuals at its land borders (and therefore under its jurisdiction), without consideration being given to each individual's circumstances, constitutes a violation of Article 4 Protocol 4. It also engages the responsibility of EU States under the EU asylum *acquis* in relation to any individuals who may wish to have sought international protection. Such measures thus constitute an aggravated instance of a violation of Article 4 Protocol 4 because of the additional serious breaches by States of their international and EU law obligations.**

[57] Recast Asylum Procedures Directive, art 8(1) interpreted in light of the principle of effectiveness. See e.g. Case C-13/01 *Safalero Srl v. Prefetto di Genova* [2003] ECR I-8679, para 49.
[58] *Hirsi Jamaa and Other v. Italy* App no 27765/09 (ECtHR, 23 February 2012), para 133.