

FIRST SECTION

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 10 February 2022 on the Court's permission to intervene under Rule 44 § 3 of the Rules of the European Court of Human Rights

I. Summary

- A. The interveners submit that the absolute obligation to respect the principle of *non-refoulement* imposes a duty on States to examine the situation that the applicants will encounter in the country of removal, irrespective of whether the applicants had an opportunity to raise such concerns and whether the destination is a third country or a country of origin. Domestic legislation precluding the authorities of the removing state to carry out such an examination and preventing protection seekers from making applications for international protection at the border will violate Article 3 of the Convention. A Contracting Party at all times retains its obligations under that provision and difficulties associated with migration flows cannot justify recourse to practices incompatible with the Contracting Parties' obligations under the Convention.
- B. The interveners further submit that the prohibition of collective expulsion under Article 4 of Protocol No. 4 would be theoretical and illusory if it did not entail an obligation to conduct a rigorous assessment, including the examination of the particular circumstances of those forming part of the group of non-nationals concerned by the measure. Departure from this principle is allowed where the individuals have arrived in large numbers of their own free will with an intention to use force to the extent that it would create a clearly disruptive situation which is difficult to control and endangers public safety of the respondent State.
- C. When examining the availability of genuine and effective means of legal entry under Article 4 of Protocol No. 4, applicants' ability to access such means should be assessed in light of their personal circumstances and the general situation in the country from where they were reaching the Contracting Party. Where the Contracting State claims that such means were accessible at embassies, border crossing points, transit zones, and other relevant facilities, applicants' *de facto* ability to safely and legally reach them should be considered, as should the effectiveness and availability of the procedures set up therein, modalities and safeguards accompanying such procedures, and the existence of effective remedies against decisions. The use of force, threats or use of treatment contrary to Article 3 ECHR in relation to asylum seekers by the third country should be regarded as active discouragement of seeking international protection through the available procedures resulting in their inability to access means of legal entry in the Contracting Party.
- D. The interveners reiterate that the EU asylum acquis interpreted in light of EU fundamental rights and principles, applicable to the Contracting Parties that are Members of the European Union, envisages effective access for all who may wish to apply for international protection to the appropriate procedures contained therein. Emergency measures adopted at the domestic level in violation of the obligations under the EU asylum acquis interpreted in light of the EU Charter on Fundamental Rights will violate EU law as no derogation from the right to apply for asylum is envisaged by the legislators.
- E. Finally, the interveners submit that 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.

II. *Non-refoulement*: assessment 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 of Article 3² - in the event of their

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

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

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.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' under the classic *Soering* test.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. In this respect, Contracting Parties have an obligation to secure Convention rights to all those who fall within their jurisdiction within 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.
4. Under this Court's jurisprudence, 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 "a rigorous one".¹¹ It is in principle for the applicant to adduce evidence "capable of proving" the classic *Soering* test.¹² But, ultimately, the decision-maker must "assess the issue in the light of all the material placed before it and, if necessary, material obtained of its own motion".¹³ Where evidence "capable of proving" such risk is adduced by the applicant, "it is for the Government to dispel any doubts about it".¹⁴ **Where the situation in the receiving state is such that the removing state can be deemed to have constructive knowledge of it, 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.**¹⁵ 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.¹⁶

³ *Saadi v Italy* [GC], 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. This is unlike in refugee law, where the principle is not absolute.

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

⁵ *Salah Sheekh v. the Netherlands*, 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], no.59166/12, 23 August 2016.

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

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

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

¹⁰ *Mamatkulov and Askarov v. Turkey* [GC], no. 46827/99 and 46951/99, 04 February 2005, § 67; *F.G. v. Sweden* [GC], no. 43611/11, 23 March 2016, § 112

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

¹² *Sufi and Elmi v. the United Kingdom*, no. 8319/07 and 11449/07, 28 June 2011, § 214.

¹³ *N v. Finland*, no. 38885/02, 26 July 2005, § 160; *Hilal v. the United Kingdom*, no. 45276, 6 March 2001, § 60; *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 13164/87 13165/87 13447/87 13448/87, 30 October 1991, § 107.

¹⁴ *N. v. Sweden*, no. 23505/09, 20 July 2010, § 53; *R.C. v. Sweden*, no. 41827/07, 9 June 2010, § 50.

¹⁵ *Mamatkulov and Askarov v. Turkey* [GC], op. cit. §, 69.

¹⁶ *Ilias and Ahmed v Hungary*, no. 47287/15 [GC], 21 November 2021, § 131.

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 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.¹⁷ 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.¹⁸
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.¹⁹ 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 3.²⁰ 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.²¹ 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.
7. Indeed this Court has recently 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.²² 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*'.²³ 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* imposes a duty on States to examine the situation that the applicants will encounter in the country of removal, irrespective of whether the applicants 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 pre-conceived assumptions, but must 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 precluding the authorities of the**

¹⁷ Helsinki Foundation for Human Rights (HFHR); Legal note on the draft amendment to the laws on foreigners and granting them protection < <https://bit.ly/3vDDWBN>>; Comments on the bill amending the Act on foreign nationals and the act on granting protection to foreign nationals < <https://bit.ly/35xfAyR> >

¹⁸ HFHR, Access to asylum denied at Polish-Belarusian border, September 2021, <https://bit.ly/3ILChOI>

¹⁹ *Ibid*, *Ilias and Ahmed*, § 128

²⁰ *Ibid*, § 137.

²¹ *Ibid*, § 141.

²² *D.A. and others v Poland*, § 64, *M.K. and others v Poland*, § 178

²³ *Ibid*

removing state to carry 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 faced by the Contracting Party cannot justify migration management allowing for derogations from non-derogable rights under the Convention.²⁴

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.²⁵ Accessible legal advice and assistance may be required for the individual to fully understand his or her circumstances.²⁶ 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.²⁷ This remedy must exist in practice as well as in law and cannot be unjustifiably hindered by the acts or omissions of the authorities.²⁸ This Court's jurisprudence found a remedy ineffective, *inter alia*, when removal takes place before the practical possibility of accessing the remedy;²⁹ due to the lack of automatic suspensive effect;³⁰ excessively short time limits in law for submitting the claim or an appeal;³¹ insufficient information on how to gain effective access to the relevant procedures and remedies;³² obstacles in physical access to and/or communication with the responsible authority;³³ lack of (free) legal assistance and access to a lawyer;³⁴ and lack of interpretation.³⁵

III. Collective expulsions: assessment under Article 4 of Protocol 4 ECHR

10. The Court has interpreted the term "expulsion" in the generic meaning in current use ("to drive away from a place"),³⁶ as **referring to any forcible removal of a non-national from a State's territory, irrespective of the lawfulness of the person's stay, the length of time they have spent in the territory, the location in which they were apprehended, and their status.** The notion of expulsion within the meaning of Article 4 of Protocol No. 4 (A4 P4) should be applied to measures that may be characterised as constituting a formal act or conduct attributable to a State by which a foreigner is compelled to leave the territory of that State if their personal circumstances have not been examined, including the situations in which persons who arrived at the border of the respondent State were stopped and returned to the originating State,³⁷ and even if the measure concerned is not classified as "expulsion" in domestic law.³⁸
11. This Court has stressed that the measures aimed at preventing unauthorised border crossings at a time when a Contracting Party is faced with a substantial influx of migrants and problems with managing migratory flows cannot bring practices into compliance with Convention practices which would be otherwise non-compatible.³⁹ Under the Convention, the context of migration **cannot justify an area outside the law where individuals are**

²⁴ *Hirsi Jamaa and Others*, cited above, § 179

²⁵ *Hirsi Jamaa and Others v. Italy*, op. cit., .204; *Čonka v. Belgium*, App. No. 51564/99, 5 February 2002, §. 44.

²⁶ Guideline 5. Remedy against the removal order in CoE Committee of Ministers "Twenty Guidelines on forced return" adopted on 4 May 2005 as referenced by the ECtHR in *De Souza Ribeiro v. France*, App. No. 22689/07, §. 47.

²⁷ *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.

²⁸ *Čonka v. Belgium* ECtHR, op. cit, para.46, 75.

²⁹ *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.

³⁰ *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*, ECtHR, Application no. 41872/10, 23 July 2013, § 133.

³¹ *I.M. v. France*, App. No. 9152/09, 14 December 2010, §.144; *M.S.S. v. Belgium and Greece*, App. No. 30696/09, [GC], 21 January 2011, §. 306.

³² *Hirsi Jamaa and Others v. Italy*, op. cit., §. 204.

³³ *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*, App. No. 30696/09, [GC], 21 January 2011, §. 301 - 313.

³⁴ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, [GC], 21 January 2011, §.319; *mutatis mutandis*, *N.D. and N.T. v. Spain* App. Nos. 8675/15 and 8697/15, 3 October 2017, §. 118.

³⁵ *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, [GC], 23 February 2012, §. 202.

³⁶ *Khlaifia and Others v. Italy* [GC], no. 16483/12, 15 December 2016, §. 243, and *Hirsi Jamaa and Others*, op.cit.,§.174

³⁷ *N.D. and N.T v. Spain.*, cited above, §§ 187 and 197, *D. A. and others v Poland*, §. 79

³⁸ *Shahzad v Hungary*, §. 48

³⁹ *Hirsi Jamaa and Others*, op.cit, § 179

covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.⁴⁰

12. The purpose of A4 P4 is to prevent States from being able to return a certain number of non-nationals without examining their personal circumstances and therefore without enabling them to put forward their arguments against the measure taken by the responsible authority.⁴¹ In order to determine whether there has been a sufficiently individualised examination, it is necessary to consider the circumstances of each such case and to verify whether a decision to return a non-national took into consideration the specific situation of the individuals concerned.⁴² In *D.A. v Poland* this Court found that despite the fact that the applicants had received individual decisions refusing them entry to the territory of the Contracting Party and had been interviewed by border officials, their statements regarding their wish to apply for asylum were disregarded and therefore did not properly reflect the reasons given by the applicants to justify their fear of persecution. As a result, these decisions were not based on a sufficiently individualised examination of the circumstances of the applicants' cases.⁴³ Similar findings were reached in *M.K. v Poland*.⁴⁴ The Court found these cases to exemplify a wider state policy of not receiving applications for international protection from persons presenting themselves at the Polish-Belarusian border and returning those persons to Belarus in violation of domestic and international law.⁴⁵
13. In the most recent case relating to collective expulsion reiterating the principles set out by the Grand Chamber in *N.D. and N.T. v Spain*⁴⁶ the Court held that *'the exception excluding the responsibility of a State under A4 P4 should also apply to situations in which the conduct of persons who crossed a land border in an unauthorised manner, deliberately took advantage of their large numbers and used force, was such as to create a clearly disruptive situation which was difficult to control and endangered public safety'*⁴⁷ This wording suggests that such conduct needs to fulfil a number of criteria, which have to be construed strictly due to the fact that they apply to a situation limiting the scope of protection afforded by A4 P4.⁴⁸ **Where applicants have not intentionally arrived in large numbers with the aim to take advantage of their large numbers and to use force to the extent that it would create a clearly disruptive situation which is difficult to control and endangers public safety, the respondent State should generally not be able to rely on the principle established in *N.D. and N.T.***
14. In this context, this Court will also consider whether the State provided **genuine and effective access to means of legal entry**, in particular border procedures which allow for applications to be submitted and processed in a manner consistent with international norms.⁴⁹ When assessing the accessibility of procedures, due regard must also be given to independent reports evidencing *inter alia* a wider state policy of refusing entry to non-nationals seeking access to international protection,⁵⁰ such as reports published by the Council of Europe, UN, Human Rights Watch, Amnesty International and others regarding the situation at Poland's external borders.⁵¹ Where the State has provided genuine and effective access to means of legal entry, but an applicant did not make use of such access, it has to be considered, without prejudice to the application of Articles 2 and 3 ECHR, whether

⁴⁰ *N.D. and N.T.*, op.cit., § 110, *Shahzad v Hungary*, § 51

⁴¹ *Sharifi and Others*, op.cit. § 210, and *Hirsi Jamaa and Others*, op.cit., § 177

⁴² *Hirsi Jamaa and Others*, op.cit., § 183

⁴³ *D.A. and others v Poland*, op.cit., § 82

⁴⁴ *M.K. and others v Poland*, op.cit., §§ 219 - 220

⁴⁵ *D.A. and others v Poland*, § 83

⁴⁶ *N.D. and N.T. v. Spain*, op.cit, § 201

⁴⁷ *M.H. and others v Croatia*, § 294

⁴⁸ ECtHR: "only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (*Labita v. Italy* [GC], no. 26772/95, § 170; *Velinov v. the former Yugoslav Republic of Macedonia*, no. 16880/08, § 49)." (*Khlaifia and Others v Italy*, no. 16483/12, § 88); CJEU: "The strict approach of the CJEU to interpreting exceptions to differential treatment suggests any exceptions will be interpreted narrowly, since it places emphasis on the importance of any rights created for individuals under EU law" (CJEU, C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 15 May 1986, §. 36); UNHCR: "[The Convention] had to be interpreted in a manner which ensured that rights were given a broad construction and that limitations were narrowly construed, in a manner which gave practical and effective protection to human rights,..." (Saadi v UK, no. 13229/03, § 55).

⁴⁹ *N.D. and N.T. v. Spain* [GC], op.cit., § 209.

⁵⁰ *M.K. and Others v Poland*, Nos. 40503/17, 42902/17, 43643/17, 23 July 2020, §. 208.

⁵¹ Human Rights Watch; "Die here or go to Poland": Belarus and Poland Shared Responsibility for Border Abuses, 24 November 2021; Amnesty International; Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum-seekers and migrants facing pushbacks from the EU, 20 December 2021 < <https://bit.ly/3pAZfjL>>; Amnesty International; Digital investigation proves Poland violated refugee's rights, 30 September 2021 <https://bit.ly/35u4pXQ>; CoE Commissioner for Human Rights, Country Visit, Poland <https://bit.ly/3J3la98>; OHCHR, Press briefing notes on Poland/Belarus border <https://bit.ly/3Grjs0l>

there were cogent reasons not to do so which were based on objective facts for which the State was responsible.⁵²

15. When considering whether the State has provided genuine and effective means of legal entry, this Court has assessed whether a person without identification documents, could have sought entry to it on humanitarian grounds and whether such grounds as defined by the national legislation could have applied to the applicants concerned.⁵³ In respect of asylum seekers, this Court has noted that where domestic law allows for an intention to seek international protection to be expressed at the border crossing, it will trigger an examination of personal circumstances.⁵⁴ 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 such as *'the location of the border crossing points, the modalities for lodging applications there, the availability of interpreters and legal assistance enabling asylum-seekers to be informed of their rights, and information showing that applications had actually been made at those border points'*.⁵⁵
16. This Court has noted 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 should secure the right to request protection under the Convention, and in particular Article 3, in a genuine and effective manner.⁵⁶ 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 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.⁵⁷
17. The use of force or threats of prohibited ill-treatment resulting in the inability to access means of legal entry should be regarded by this Court, at a minimum, as a 'cogent reason' for not using the means of legal entry that have been provided. However, this Court is also invited to consider whether said force or threat of prohibited treatment resulted in the complete inability of applicants to access legal means of entry. **The interveners submit that the use of force and threats of or treatment contrary to Article 3 ECHR in relation to asylum seekers by the third country should be regarded as active discouragement of seeking international protection through the available procedures resulting in their inability to access means of legal entry in the Contracting Party. In such circumstances it must be concluded that no effective procedure to seek international protection existed in the Contracting Party**
18. **The interveners further submit that the prohibition of collective expulsion under Article 4 of Protocol No. 4 would be theoretical and illusory if it did not entail a rigorous assessment, including the examination of the particular circumstances of those forming part of the group of non-nationals concerned by the measure. This obligation also entails their effective identification and registration as well as the right to receive information about access to applicable protection procedures and remedies. The obligation to act *proprio motu* is necessarily engaged when the applicants concerned come from the countries the removal to which will be *prima facie* in violation of the Convention based on the information know or ought to have been known to the authorities of the country of removal. Where the applicants claim to have been under the exclusive control of the authorities during the removal operation, and when credible sources consistently describe the circumstances of such removal operations, such evidence should be taken into account in corroboration of the applicant's claim.**
19. **Where the individuals have not arrived in large numbers of their own free will and with an intention to use force so as to create a clearly disruptive situation difficult to control and endangering public safety, the respondent State should not rely on the exception from this principle.**

⁵² *N.D. and N.T. v. Spain*, [GC], op.cit., § 201, 209-211

⁵³ *Ibid.*, §. 296

⁵⁴ *Ibid.*, §. 300

⁵⁵ *Ibid.*

⁵⁶ *Shahzad v Hungary*, §. 62; *N.D. and N.T. v Spain*, § 209 – 210.

⁵⁷ *Shahzad v Hungary*, §. 65.

20. **When examining the existence of genuine and effective means of legal entry, applicants' ability to access such means should be assessed in light of their personal circumstances and the general situation in the country from which they sought to reach the Contracting State from. Where the Contracting State claims that such means had been accessible at the Embassies, border crossing points, transit zones, and other relevant facilities, applicants' *de facto* ability to safely and legally reach them should be taken into account, as well as the effectiveness and availability of the procedures set up therein, modalities and safeguards accompanying such procedures, and the existence of effective remedies against decisions. Considering the nature of the data to be provided, it is for the authorities of the Contracting Party to demonstrate that the conditions of effective and genuine access to legal entry had been met.**

IV. EU law and international law relating to non-refoulement and collective expulsions

21. The interveners note that under Article 53 ECHR, where Contracting Parties to the ECHR are also bound by EU law, the Court must ensure that the Convention rights are interpreted and applied in a manner which does not diminish the rights guaranteed under the applicable EU law.⁵⁸
22. The EU Charter of Fundamental Rights (CFR)⁵⁹ 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) and the right to an effective remedy and to a fair trial (Article 47).
23. EU law, including the EU asylum *acquis*,⁶⁰ is relevant to the present case as the principle of the rule of law runs like a golden thread through the Convention.⁶¹ The Convention requires that all measures carried out by Contracting Parties that affect an individual's protected rights be "*in accordance with the law*".⁶² In some circumstances the law will be EU law. In this context, 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.⁶³ The EU asylum *acquis* is comprised of a number of legal instruments and their interpretation by the CJEU. Under the recast Asylum Procedures Directive (APD),⁶⁴ which provides for effective access to the asylum procedure for all applicants, without any exception,⁶⁵ border procedures shall ensure in particular that persons willing to apply for international protection: "*(a) have the right to remain at the border or transit zones of the Member State; (b) are immediately informed of their rights and obligations; (c) have access to interpretation; (d) are interviewed [...] by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law; (e) can consult a legal adviser or counsellor*".⁶⁶
24. Moreover, Article 6(1) of the APD obliges EU Member States' authorities to facilitate the registration of asylum applications, including recording information or statements of the applicant or relating to the substance of their request for international protection, and obliges Member States to ensure that such authorities receive the

⁵⁸ 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.

⁵⁹ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

⁶⁰ 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.*"

⁶¹ The Convention's preamble recalls the rule of law.

⁶² See Article 1 and 8 (2) ECHR

⁶³ *M.S.S. v. Belgium and Greece*, op. cit., §§ 57-86 and 250. *Sufi and Elmi v. the United Kingdom*, 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 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("*the Qualification Directive*"), as well as to a preliminary ruling by the European Court of Justice in the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie* asking, *inter alia*, whether Article 15(c) of the Qualification Directive offered supplementary or other protection to Article 3 of the Convention. See also *M.A. and Others v. Lithuania*, op. cit., §. 113, *N.D. and N.T. v. Spain*, op. cit., § 180.

⁶⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 ('recast Asylum Procedures Directive'). In force on 20 July 2015 and had to be transposed by 20 July 2015) apart from Articles 31(3), (4) and (5) which must be transposed by 20 July 2018.

⁶⁵ Recast Asylum Procedures Directive, Recital 25.

⁶⁶ Recast Asylum Procedures Directive, Articles 2(p), 6, 8, 10-12, 15 and 19.

relevant information and the appropriate training to perform their task properly.⁶⁷ The Directive does not further impose any formal requirements on applicants with regard to how an asylum application must be made. The Directive does not envisage suspensions of the asylum procedures based on the national security, migratory pressure or any other grounds. Neither does it provide for the possibility to derogate from its provisions on these grounds irrespective of the emergency or other measures adopted at the national level.

25. The Court of Justice of the European Union (CJEU) has stated that one of the objectives pursued by the APD is to ensure the easiest possible access to the procedure for granting international protection. In order to ensure 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 unauthorised third-country national should have sufficient procedural guarantees to pursue his or her application at all stages of the procedure.⁶⁸
26. In light of the CJEU's jurisprudence requiring EU law provisions to be interpreted so as to provide them with *effet utile*,⁶⁹ the EU asylum *acquis* requires Member States to provide information detailing the possibility of making an application for international protection available to all non-nationals including those apprehended during the surveillance operations or present at border crossings, including transit zones, and at external borders.⁷⁰ Construed in light of the obligations under the EU Charter, in particular Articles 18 and 19, such information must be provided proactively to all those apprehended at or near the border in order to make non-*refoulement* obligations and access to right to asylum under the Charter available not only in law, but in practice. Moreover, in order to be effective and useful, such information must be provided in a language the non-nationals concerned understand.⁷¹
27. **The interveners submit that any expression of the wish to obtain protection to any Member State authority must be considered an application "being made", whether done orally or in writing and regardless of whether the person uses the words "asylum" or "protection".**
28. **The interveners highlight that the EU asylum *acquis* interpreted in light of EU fundamental rights and principles envisages effective access for all who may wish to apply for international protection to the appropriate procedures contained in the APD. Moreover, the Directive envisages the right to an effective remedy against any decision regarding an asylum application, including at the border and in the transit zone.⁷² This is only possible after an individualised identification and a meaningful opportunity to raise objections, which itself requires having had prior access to information about the procedures and legal assistance. Emergency measures adopted at the domestic level in violation of the obligations under the EU asylum *acquis* interpreted in light of the Charter will violate EU law as no derogation from the right to apply for asylum is envisaged under EU law.**

V. 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.⁷³ In *Bosphorus v. Ireland*, the Court stated that "*a Contracting Party is responsible under Article 1 ... for all acts and omissions of its organs regardless of whether the act or*

⁶⁷ CJEU, Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495, § 58 - 60

⁶⁸ Ibid, § 63 - 64. See also Advocate General Szpunar opinion on the same case, 30 April 2020, § 61.

⁶⁹ CJEU, C-213/89 Factortame and Others [1990] ECR I-2433, § 20; Case C-118/00 *Gervais Larsy v. Institut national d'assurances sociales pour travailleurs indépendants (Inasti)* [2001] ECR I-5063, § 50-53; Recast Asylum Procedures Directive Article 8 (1).

⁷⁰ Recital 26 Recast Asylum Procedures Directive, as well as Article 6.1 § 3 and Article 8 of the same Directive.

⁷¹ 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.

⁷² Asylum Procedures Directive, Recital 27 and Article 39; Recast Asylum Procedures Directive, Recitals 25, 30 and Article 46.

⁷³ *Hirsi Jamaa and Others v. Italy*, No. 27765/09 (23 February 2012), § 70, § 114.

omission... was a consequence of domestic law or of the necessity to comply with international legal obligations".⁷⁴

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.⁷⁵ 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*".⁷⁶ 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.⁷⁷
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 3.⁷⁸ 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*".⁷⁹ 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.⁸⁰ This situation combined with the lack of prospects to see their situation improve can reach the threshold of gravity required by Article 3 of the Convention and constitute degrading treatment.⁸¹
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*".⁸² **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,⁸³ 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.⁸⁴ **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 provision⁸⁵ 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.**

⁷⁴ *United Communist Party of Turkey and Others v. Turkey*, (30 January 1998), Reports 1998-I, pp. 17-18, § 29 in *Bosphorus v. Ireland*, No. 45036/98 (30 June 2005), § 153.

⁷⁵ Article 3(1); Article 17(1),(2), Directive 2013/33/EU (recast) Reception Conditions Directive (rRCD); CJEU, *Haqbin v. Federaal Agentschap voor de opvang van asielzoekers*, C-233/18, 12 November 2019, § 50.

⁷⁶ *R.R and Others v. Hungary*, No. 36037/17, 2 March 2021, § 54, § 58.

⁷⁷ For example, See *B.G and Others v. France*, No. 63141/13, 10 September 2020, § 45; CJEU, *Saciri and Others*, C-79/13, 27 February 2014, § 46-51.

⁷⁸ *M.S.S v. Belgium and Greece* [GC], op. cit., § 338.

⁷⁹ *Ibid.*, § 219; *Sufi and Elmi v. United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011, § 213.

⁸⁰ *V.M. and Others v. Belgium*, no. 60125/11, 7 July 2015, § 162-163.

⁸¹ *Ibid.*

⁸² Article I(1) of the 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.

⁸³ *N.H and Others v. France*, no. 28820/13, 2 July 2020, § 162.

⁸⁴ *Mutatis mutandis, Orchowski v. Poland*, no. 17885/04, 22 October 2009, § 120, § 153.

⁸⁵ *M.S.S v. Belgium and Greece* [GC], op. cit., § 223.

34. This Court has recognised that asylum seekers are members of a “*particularly underprivileged and vulnerable population*”.⁸⁶ 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*”⁸⁷ 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*”.⁸⁸
35. This Court has noted that insalubrious living conditions may have a profound effect on a person’s dignity and cause a feeling of inferiority and anxiety amounting to degrading treatment contrary to Article 3.⁸⁹ 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*”.⁹⁰ In *B.G v. France*, this Court has observed that when assessing whether material conditions of reception are of such a gravity as to reach the threshold required to find a violation of Article 3 ECHR, it will take into account evidence of the specific material conditions *as well as* the measures taken by a Contracting Parties’ authorities to improve these material conditions.⁹¹

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

36. 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 expulsion took place.⁹² In addition, this Court has reiterated that the remedy available must have suspensive effect to meet the requirements of Article 13 of the Convention.⁹³
37. **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, 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.⁹⁴
38. 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 so⁹⁵ and to permit them access to determination procedures with all the procedural safeguards required by national law,⁹⁶ including access to information, legal aid and access to effective remedies.
39. **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.**⁹⁷ 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.⁹⁸

⁸⁶ Ibid., § 251.

⁸⁷ Ibid., § 250-251.

⁸⁸ *O.M. v. Hungary*, No. 9912/15, 5 July 2016, § 53.

⁸⁹ *M.S.S. v. Belgium and Greece*, [GC], op. cit., § 233.

⁹⁰ *B.G and Others v. France*, op. cit., § 81.

⁹¹ Ibid., § 89.

⁹² *De Souza Ribeiro v. France*, no. 22689/07, 13 December 2012, § 82; *Hirsi Jamaa and Others v. Italy*, op. cit. § 206; *Mohammed v. Austria*, no 2283/12, 6 June 2013, § 80.

⁹³ *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

⁹⁴ 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: resolution/adopted by the General Assembly, 21 March 2006, A/RES/60/147, part II (3) A, B and C.

⁹⁵ *Hirsi Jamaa and Others v. Italy*, op. cit.

⁹⁶ *Kebe and Others v. Ukraine*, No. 12552/12, 12 January 2017, § 104.

⁹⁷ *M.S.S. v. Belgium and Greece*, [GC], op. cit., § 233.

⁹⁸ *Ibid.*; *Thimotheaews v. Belgium*, no. 39061/11, 4 April 2017, § 73.