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The absolute prohibition of refoulement and exceptional circumstances

Third Party Intervention in the case of C.O.C.G. and Others v Lithuania before the European Court of Human Rights

UNIVERSITY OF OXFORD

FACULTY OF LAW

Bonavero Institute of Human Rights

Public Law & Human Rights

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This report has been created in collaboration with the **Chair of Public Law and Human Rights at the University of Münster.** Professor Nora Markard led the effort on the Third Party Intervention in the case of *C.O.C.G. v Lithuania* (App No 17764/22, GC) before the European Court of Human Rights, which this report reproduces. Her Chair, which forms part of the Institute for International and Comparative Public Law, is dedicated to interdisciplinary scholarship in constitutional, European and international law on issues of autonomy, equality and participation, especially relating to rights at the border and social rights.

The Chair regularly receives guest researchers and collaborates with human rights practitioners in drafting reports or briefs, and with law clinics in pro-bono projects on pressing human rights and migration law issues.

Authors

This Bonavero Report, which reproduces the Third Party Intervention in in the case of *C.O.C.G. v Lithuania* (App No 17764/22, GC) before the European Court of Human Rights, has been written jointly by twenty-two academics listed below.

Prof Dr Başak Çalı, University of Oxford
Prof Dr Cathryn Costello, University College Dublin
Prof Dr Joyce De Coninck, New York University
Prof Dr Pauline Endres de Oliveira, Humboldt University Berlin
Prof Dr Anuscheh Farahat, University of Vienna
Prof Dr Thomas Gammeltoft-Hansen, University of Copenhagen
Prof Dr Francesco Luigi Gatta, Tuscia University, Université Catholique de Louvain
Prof Dr James C. Hathaway, University of Michigan
Prof Dr Nora Markard, University of Münster
Prof Dr Violeta Moreno-Lax, Queen Mary University of London
Prof Dr Andrea Romano, University of Barcelona
Prof Dr Janna Wessels, Vrije Universiteit Amsterdam
Alison Beuscher, Heinrich Heine University Düsseldorf
Johanna Bücker, Max Planck Institute for the Study of Crime, Security and Law, Freiburg
Laura Goller, Justus Liebig University Giessen
Dr Julia Kienast, University of Vienna
Isabel Kienzle, FAU University of Nuremberg-Erlangen
Jonathan Kiessling, FAU University of Nuremberg-Erlangen
Lina Sophie Möller, University of Freiburg
Sarah Isabel Pfeiffer, University of Münster
Marlene Stiller, University of Münster
Pia Lotta Storf, University of Münster

The Introduction and Summary of this report have been co-written by Konrad Ksiazek, DPhil Student, University of Oxford; and Professor Başak Çalı, Head of Research at the Bonavero Institute of Human Rights, University of Oxford.

Introduction

In 2021, the UN Special Rapporteur on Human Rights of Migrants defined pushbacks as 'various measures taken by states which result in migrants, including applicants for international protection, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of non-refoulement'.[1] Pushbacks at Europe's land and sea borders have been well documented in the last decade.[2] The violations of the prohibition of refoulement, enshrined both in international refugee law and international human rights law (as well as many constitutions), brought about by pushbacks in Europe's borders have also given rise to important litigation and accountability efforts before domestic and international courts, including the European Court of Human Rights ('ECtHR'), UN human rights treaty bodies and UN Special Procedures.

This report contributes to these efforts by laying out the Council of Europe states' obligations under international law and EU law in the context of pushbacks undertaken with a 'hybrid attack' rationale. This rationale has been asserted by various European governments and the European Union, referring to the facilitation of the movement of migrants and refugees across the EU's external borders by Belarus and the Russian Federation since 2015. The facilitation of cross-border movement by Russia to Finland was initially reported following the introduction of sanctions in the aftermath of the 2014 annexation of Crimea and the start of the war against Ukraine in Donbas. Today, multiple countries in European Unions' eastern borders identify as being subject to similar tactics. Belarus reportedly started facilitating border crossings of this nature in May 2021,[3] and they have intensified following the war of aggression and invasion of Ukraine by the Russian Federation from 24 February 2022.

This rationale has also started to inform declarations of state of emergency and domestic legislative efforts cross Europe. In 2021, Lithuania declared a state of emergency across the entire border zone at the Lithuania-Belarus border, and five kilometres extending from the border zone deep into the country. In June 2024, Finland passed a law enabling its border forces to undertake summary returns of asylum seekers

[1] Special Rapporteur on the human rights of migrants, 'Report on means to address the human rights impact of pushbacks of migrants on land and at sea' (12 May 2021), A/HRC/47/30 para 34, available at https://documents.un.org/doc/undoc/gen/g21/106/33/pdf/g2110633.pdf

[2] Katren Luyten, 'Addressing pushbacks at EU's external borders', European Parliament Research Service Briefing (October 2022), available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/738191/EPRS_BRI(2022)738191_EN.pdf

[3] Congressional Research Service, 'Migrant crisis on the Belarus-Poland border' (updated 13 December 2021), available at https://crsreports.congress.gov/product/pdf/IF/IF11983

found alongside parts of its border[4] without affording them the opportunity to formally apply for international protection. Analogous plans have recently been announced by Poland, and they have reportedly been met with the approval of the majority of EU leaders.[5] Similar practices have persisted across the region for some time, and they are the subject of ongoing litigation before the ECtHR.[6]

Supporters of these practices defend them as a justified response to 'hybrid attacks' which attempt to destabilise the domestic situation across several EU states. However, pushbacks, regardless of the rationale, remain contrary to the prohibition of refoulement codified in Article 33 of the 1951 Convention relating to the Status of Refugees ('1951 Convention'), as well as non-refoulement under international human rights law. They are also capable of giving rise to further human rights violations. The UN Special Procedures' mandate holders in 2021 pointed out the dire conditions individuals subject to pushbacks face and underlined that leaving people stranded in border areas without adequate shelter and food, clean water, sanitation facilities and medical care may amount to cruel, inhuman or degrading treatment.[7] The Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) further held that 'pushbacks impede the detection of victims of trafficking in human rights amongst irregular migrants and asylum seekers'.[8]

Given the recent trends in states' responses to the facilitation of border crossings, framed as 'hybrid attacks' and an 'instrumentalisation' of migrants, we are publishing this Bonavero Report with an aim to provide an authoritative statement of what the international law on non-refoulement obligations requires from states, even under difficult political circumstances. This report reproduces the Third Party Intervention submitted to the ECtHR in the case of *C.O.C.G. and Others v Lithuania,*[9] currently pending before the Grand Chamber. It was jointly drafted by twenty-two academics, led by Professor Nora Markard at the Chair for Public Law and Human Rights at the University of Münster. Professor Başak Çalı, the Head of Research at the Bonavero Institute of Human Rights, is one of academics contributing to the intervention.

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[4] Amnesty International, 'Finland: Emergency law on migration is a "green light for violence and pushbacks at the border"' (10 June 2024), available at https://www.amnesty.org/en/latest/news/2024/06/finland-emergency-law-on-migration-is-a-green-light-for-violence-and-pushbacks-at-the-border/

[5] Nicholas Vinocur et al, 'Poland wins after EU backs its proposed asylum ban for Russia, Belarus', *Politico* (17 October 2024), available at https://www.politico.eu/article/poland-prime-minister-donald-tusk-eu-asylum-ban-russia-belarus-migration-security/

[6] *C.O.C.G. and Others v Lithuania*, App No 17764/22 (GC)

[7] Communication from the Special Procedures' mandate holders pointed out the dire conditions without adequate shelter and food, clean water, sanitation facilities and medical care, may amount to cruel, inhuman or degrading treatment (25 November 2021), available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26829

[8] GRETA, 'Evaluation report, Belarus' (27 October 2022), GRETA(2022)10, at [104]

[9] App No 17764/22 (GC)

Summary

The purpose of this report is to comprehensively set out the rules that are relevant to the interpretation and the application of the prohibition of non-refoulement under European Convention on Human Rights, in the context of difficult political circumstances, such as facilitation of the cross-border movement of migrants and refugees by one group of states into the territory of another. The report identifies and analyses four set of relevant legal regimes: (a) the derogation regime and the absolute nature of non-refoulement under the European Convention on Human Rights ('ECHR'); (b) non-refoulement exceptions under the 1951 Convention relating to the Status of Refugees ('1951 Convention'); (c) circumstances precluding wrongfulness under international law of state responsibility; and (d) the European Union ('EU') derogation regime and its relationship with the ECHR and public international law.

The first part of the report sets out the obligations relating to non-refoulement in situations of 'hybrid threats' and 'mass influx' under the derogation provision provided for in Article 15 ECHR. The issue of non-refoulement engages at least two ECHR articles – the prohibition of inhuman or degrading treatment in Article 3 and the prohibition of the collective expulsion of aliens in Article 4 Protocol 4. The scope of Article 15 explicitly excludes Article 3 as a non-derogable right, and the Report stresses that derogations from Article 4 Protocol 4 are also likely to place Article 3 entitlements at risk. The report further emphasises that the five cumulative conditions for the use of Article 15 ECHR place stringent requirements on any derogation. They require conditions of 'war or other public emergency threatening the life of the nation',[10] and any measures taken under Article 15 must be 'strictly required by the exigencies of the situation';[11] the Secretary General of the Council of Europe must be informed promptly of any derogations; they cannot concern non-derogable rights; and they cannot be in conflict with other obligations of the member state concerned under international law.[12]

Part B of the report focuses on the 1951 Convention, which only permits exceptions from non-refoulement under two narrow conditions listed in Article 33(2). Only one of them, applicable if a refugee can reasonably be regarded 'as a danger to the security of the country in which he is', can plausibly be argued to be related to the issue of pushbacks. However, the report clarifies that this exception requires individualised assessment grounded in evidence, and it is subject to a very significant threshold of severity.[13] The report further highlights that the Executive Committee of the Programme of the UNHCR

[10] ECHR, art 15(1)
[11] Ibid
[12] Ibid
[13] This Report, at [10]

has rejected the view that the exception in Article 33(2) may be applicable in cases of 'mass influx'.[14]

Part C of the report examines the scope for non-refoulement exceptions under the Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA') which, although they have not been adopted as a treaty, have been endorsed by the UN General Assembly[15] and mostly reflect customary international law. The report highlights that the *force majeure* exception in Article 32 ARSIWA only covers cases where the circumstances render it impossible for states to comply with their obligations under international law. Accordingly, it is inapplicable in the context of pushbacks, which are intentional acts.[16] The Article 24 ARSIWA exception of distress is only applicable in sufficiently individualised circumstances not present in the scenarios at hand.[17] Thirdly, the exception of necessity in Article 25 ARSIWA is only available if the action in question is strictly required 'to safeguard an essential interest against a grave and imminent peril'[18] and, *inter alia*, if it 'does not seriously impair an essential interest … of the international community as a whole'.[19] The report stresses that this exception must be interpreted narrowly, as an alternative approach would create a risk of abuse.[20] It also highlights that ARSIWA exceptions are subject to various limits. Notably, they do not apply in the context of breaches of peremptory norms of international law;[21] many jurists and scholars recognise non-refoulement as such a peremptory norm.[22]

In Part D of the report examines the law of the European Union and its interactions with the ECHR obligations. It sets out the scope for derogations under Articles 72 and 78 of the Treaty on the Functioning of the European Union and under the so-called Crisis Regulation, which will enter into force in mid-2026. The report concludes that any such derogations under the EU law must comply with the Charter of Fundamental Rights ('CFR') and the ECHR, and that any such derogations must therefore respect the absolute prohibition of refoulement. It concludes that, 'should this Court be inclined to permit summary returns in emergency situations, the CFR and other international legal obligations of the Member States would still prohibit such summary returns as incompatible with non-refoulement.'[23]

[14] UNHCR ExCom Conclusion No. 100 (LV), 'Conclusion on international cooperation and burden and responsibility sharing in mass influx situations' (2004), para (a); see this Report, at [12]
[15] This Report, at [16]
[16] Ibid [17]
[17] Ibid [18]
[18] ARSIWA, art 25(a)
[19] ARSIWA, art 25(b)
[20] This Report, at [19]
[21] ARSIWA, art 26
[22] This Report, at [24]
[23] This Report, at [39]

Written Submissions in the Case *of C.O.C.G. and Others v Lithuania* (App No 17764/22) on behalf of the Chair for Public Law and Human Rights at the University of Münster and 22 Academics

30 September 2024

1 The Interveners submit these observations pursuant to the President of the Grand Chamber's decision of 13 September 2024. The purpose of this intervention is to comprehensively present the derogation regime and the absolute nature of non-refoulement under the European Convention on Human Rights ('the Convention', 'ECHR') (A.), non-refoulement exceptions under the 1951 Convention relating to the Status of Refugees ('1951 Convention') (B.), circumstances precluding wrongfulness under international law of state responsibility (C.) and the relationship between the European Union ('EU') derogation regime and the Convention and public international law (D.).

2 While this Court only interprets the ECHR, it does so 'in the light of relevant international treaties that are applicable in the particular sphere'.[24] The Interveners submit that none of the legal regimes examined below allows for derogations or exceptions from the obligation of non-refoulement in situations of 'hybrid threats' in the context of a 'mass influx' of migrants, while establishing stringent conditions for any derogations or exceptions from other obligations.

A. The Convention's derogation regime and the absolute nature of non-refoulement

3 Article 15 of the Convention provides for a deviation from the Contracting States' obligations by way of derogation, for which there are five cumulative conditions: (1) there must be a war or other public emergency threatening the life of the nation; (2) the measures must be strictly required by the exigencies of the situation; (3) they must not concern non-derogable rights; (4) they must not be inconsistent with other obligations under international law; (5) the State must inform the Council of Europe's Secretary General of the measures and the reasons thereof.

4 When a Contracting State wishes to derogate from its obligations under the Convention, it must *inform the Secretary General* of the derogation.[25] This need not be done before the derogation, but within a reasonable time; this Court has considered a notification

[24] See e.g. *Demir and Baykara v. Turkey* [GC], no. 34503/97, 12 November 2008, § 69.
[25] See the list of declarations, available at https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=005&codeNature=0 (all links last visited 25 September 2024).

within twelve days timely,[26] and a notification within four months too late.[27] A declaration of a state of emergency only under national law is thus not enough. A derogation may only limit a State's obligations under the Convention following a notification and when the State relies on the derogation before the Court.[28]

5 Measures must not concern *a non-derogable right*. This category includes the right not to be returned to a country where the individual faces a real risk of torture or inhuman or degrading treatment (non-refoulement), which flows from Article 3 of the Convention.[29] This Court has consistently affirmed that Article 3 'makes no provisions for exceptions and no derogation from it is possible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation',[30] and that it is therefore absolute. This is true 'even in the most difficult of circumstances, such as the fight against organised terrorism and crime'.[31] While this Court has not made similar findings for the prohibition of collective expulsion in Article 4 of Additional Protocol No. 4 ('AP 4'), this guarantee of an individualised examination is closely connected to the procedural obligations flowing from the absolute prohibition of non-refoulement under Article 3 of the Convention.[32] For that reason, a derogation from Article 4 AP 4 would create a severe risk of abuse in relation to Article 3 of the Convention (see *infra* § 7).

6 States enjoy a wide margin of appreciation in assessing the *threat to the life of the nation*. This Court has only once rejected a State's declaration of such a threat, but it has thereby clarified that not every 'serious public-order situation'[33] qualifies. In this case, it took account of the fact that the acts leading to the purported threat were themselves protected by Convention rights. Thus, it did not consider that 'opposition protests, protected under Article 11 of the Convention, even if massive and at times accompanied by violence' justified a derogation,[34] noting also that the necessity of the state of emergency and of the specific measures had never been subject to judicial scrutiny by a domestic court.[35] Beginning with *Lawless v. Ireland*, this Court has consistently required 'an exceptional situation of crisis or emergency which affects the whole population and

[26] *Lawless v. Ireland*, no. 332/57, 1 July 1961, § 47.
[27] Report of the Commission*, Denmark, Norway, Sweden, Netherlands v. Greece* [Pl.], nos. 3321/67, 3322/67, 3323/67, 3344/67, 5 November 1969.
[28] *Khlebik v. Ukraine*, no. 2945/16, 25 July 2017, § 82.
[29] Starting with *Soering v. The United Kingdom* [Pl.], no. 14038/88, 7 July 1989, § 88.
[30] See e.g. *Aksoy v. Turkey*, no. 21987/93, 18 December 1996, § 62, citing *Ireland v. The United Kingdom* [Pl.], no. 5310/71, 18 January 1978, § 163; *Soering v. The United Kingdom* (n 29), § 88; *Chahal v. The United Kingdom* [GC], no. 22414/93, 15 November 1996, § 79.
[31] *Aksoy v. Turkey* (n 30), § 62.
[32] *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012, §§ 113 et seq.; see also *N.D. and N.T. v. Spain* [GC], no. 8675/15 and 8697/15, 13 February 2020, § 171; *Sharifi and Others v. Italy and Greece*, no. 16643/09, 21 October 2014, § 211.
[33] *Dareskizb Ltd v. Armenia*, no. 61737/08, 21 September 2021, § 62.
[34] Ibid.
[35] Ibid., § 58; contrasting this with *A. and Others v. The United Kingdom* [GC], no. 3455/05, 19 February 2009, § 177, and *Mehmet Hasan Altan v. Turkey*, no. 132327/17, 20 March 2018, § 93.

constitutes a threat to the organised life of the community of which the State is composed'.[36]

7 Even when it has accepted the existence of such a threat, this Court has consistently conducted a close examination of whether the measures adopted are *strictly required by the exigencies of the situation*. The criteria it has applied include the nature of the concerned right, the circumstances leading to the derogation and the duration of the emergency, any safeguards against abuse of emergency measures, a regular review of the emergency law and derogation, whether the derogation constitutes a genuine response to the emergency and whether the measures are discriminatory and therefore disproportionate.[37] In relation to Article 4 AP 4, this Court has taken into account whether the non-application of an individualised assessment is attributable to migrants' own 'culpable conduct',[38] a concept which does not include claims of 'instrumentalisation' of migrants by other States. Irrespective of this, in light of the nature of the concerned rights, contained not only in Article 4 AP 4 but also in Article 3 of the Convention, which is an absolute right (see *supra* § 6), it is doubtful whether 'hybrid threats' strictly require systematic pushbacks at the border, rather than individual case-by-case examinations of asylum claims in an accelerated procedure, which EU law permits.[39] This Court has also required sufficient safeguards within national law to prevent an abuse of the emergency legislation.[40] In cases of border closures, this would require safeguards to prevent breaches of the prohibition of non-refoulement, specifically a possibility to file an asylum claim, which requires effective means of legal entry and the possibility to contact a lawyer.[41] In lack of any such safeguards, the derogation would be disproportionate.

8 Derogation measures resulting in refoulement and collective expulsions under the Convention would also be *inconsistent with other obligations under international law*. Both refoulement and collective expulsions are prohibited by other treaties ratified by Contracting States. Thus, Article 3 of the Convention against Torture ('CAT') sets out a prohibition of refoulement in relation to risks of torture which is absolute.[42] The Committee against Torture has explained that Article 3 CAT requires that: 'Each case should be examined individually, impartially and independently by the State party

[36] *Lawless v. Ireland* (n 26), § 28.
[37] *Brannigan and McBride v. The United Kingdom* [Pl.], nos. 14553/89, 14554/89, 26 May 1993, §§ 43, 64 et seq.; *A. and Others v. The United Kingdom* [GC] (n 35), § 190.
[38] *N.D. and N.T. v. Spain* [GC] (n 32), § 200.
[39] Art. 31(8)(j) APD permits accelerated procedures in cases of threats to national security. The same is provided in Art. 42(1)(f) APR, which will replace the APD from June 2026 onward. See 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 L180/60 ('Asylum Procedures Directive', 'APD') and Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2024] OJ L, 2024/1348, 22.05.2024 ('Asylum Procedures Regulation', 'APR').
[40] *Brannigan and McBride v. The United Kingdom* [Pl.] (n 37), §§ 64 et seq.
[41] *N.D. and N.T. v. Spain* [GC] (n 32), § 201; *Shahzad v. Hungary*, no. 12625/17, 8 July 2021, § 65; *M.K. and Others v. Poland*, nos. 40503/17, 42902/17, 43643/17, 23 July 2020, § 206.
[42] See Committee against Torture, *Paez v. Sweden* [1997], no. 39/1996, § 14.5; *Tebourski v. France* [2007], no. 300/2006, §§ 8.2–8.3; *Singh Sogi v. Canada* [2007], no. 297/2006, § 10.2; *Abdussamatov v. Kazahstan* [2012], no. 444/2010, § 13.7.

through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards, notably the guarantee of a prompt and transparent process, a review of the deportation decision and a suspensive effect of the appeal. […] Collective deportation, without an objective examination of the individual cases with regard to personal risk, should be considered as a violation of the principle of non-refoulement.'[43] An absolute prohibition of refoulement also results from Articles 6 and 7 of the International Covenant on Civil and Political Rights ('ICCPR'),[44] while Article 13 ICCPR implies a prohibition of collective expulsions.[45] Sections B and D below address further international obligations that such measures would be inconsistent with, meaning they do not comply with the conditions of Article 15 of the Convention.

B. Non-refoulement exceptions under the 1951 Convention relating to the Status of Refugees

9 A prohibition of refoulement of a refugee 'to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion' is contained in Article 33(1) of the 1951 Convention. This obligation already applies at the border.[46] Article 33(2) of the 1951 Convention provides for two exceptions from this prohibition for any refugee for whom either 'there are reasonable grounds for regarding as a danger to the security of the country in which he is' or who, 'having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country'. Through these exceptions, the 1951 Convention seeks to balance both refugee and communal rights; it 'does not necessarily pursue its primary purpose at all costs'.[47] Only the first exception of a danger to the security of the country appears relevant to the context of this case (I.). In addition, obligations in situations of mass influx have been a recurring concern of States (II.). Article 9 of the 1951 Convention also allows for temporary measures essential to national security, pending refugee status determination (III.)

[43] Committee against Torture, General Comment No. 4 (2017) 'on the implementation of Article 3 of the Convention in the context of Article 22', para. 13.
[44] Human Rights Committee, General Comment No. 20 (1992): 'Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)', UN Doc. HRI/GEN/1/Rev.7, para. 3 (non-refoulement) and para. 9 (absolute nature); General Comment No. 31 (2004): 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. HRI/GEN/1/Rev.7, para. 12.
[45] Human Rights Committee, General Comment No. 15 (1986): 'Positions of Aliens under the Covenant', UN Doc. HRI/GEN/1/Rev.7, para. 10 (clarifying that art. 13 ICCPR also applies where the legality of the person's entry or stay is in dispute; ibid., para. 9); see also Human Rights Committee, *A.B. and B.D. v. Poland*, UN Doc. CCPR/C/135/D/3017/2017, 3 February 2023, § 9.6 (finding a violation in a push-back case).
[46] UNHCR ExCom Conclusion No. 6 (XXVIII), 'Non-Refoulement' (1977), para. (c); see also Hathaway, *The Rights of Refugees under International Law* (2nd ed. 2021), p. 355.
[47] See High Court of Australia, *Applicant A and Ano'r v. Minister for Immigration and Multicultural Affairs* [1997] 190 CLR 225, per Dawson J, adopted in House of Lords, *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport* [2003] EWCA Civ 666, § 36.

I. A danger to the security of the country

10 To be unable to claim non-refoulement under the 1951 Convention on security grounds, a refugee must pose '*a serious danger to the foundations or the very existence of the state*'.[48] A review of domestic jurisprudence reveals that States consider the invocation of this exception appropriate where a refugee's presence or actions 'give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions'.[49] Generally, serious acts are required that 'directly or indirectly endanger the constitution (Government), the territorial integrity, the independence or the external peace' of the State.[50] This is a very high threshold.

11 There must also be *reasonable grounds* for considering that the individual to be returned constitutes such a danger.[51] This means that the State cannot act arbitrarily or capriciously and that its assessment must be supported by evidence.[52] Article 33(2) of the 1951 Convention therefore requires an *individualised assessment*.[53] This is also confirmed by the systematic context of the alternative of a criminal conviction.

II. Situations of mass influx

12 The concept of 'situations of mass influx' is not defined in international law. For its own purposes, the Executive Committee of the Programme of the United Nations High Commissioner for Refugees ('ExCom') has defined such situations as having 'inter alia, […] some or all of the following characteristics: (1) considerable numbers of people arriving over an international border; (2) a rapid rate of arrival; (3) inadequate absorption or response capacity in host States, particularly during the emergency; (4) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers'.[54] ExCom is a subsidiary organ of the UN General Assembly consisting of 110 representatives from UN Member States,[55] elected 'on the

[48] Kälin, *Das Prinzip des Non-refoulement* (1982), p. 131 (unofficial trans.); see also UNHCR, 'Scope of the National Security Exception under Art. 32(2) of the 1951 Convention Relating to the Status of Refugees' (6 January 2006), p. 5, available at https://www.refworld.org/jurisprudence/amicus/unhcr/2006/en/11743.
[49] Hathaway (n 46), p. 408.
[50] Ibid.
[51] UNHCR (n 48), pp. 4 et seq.
[52] UNHCR (n 48), p. 6; see also Supreme Court of New Zealand, *Attorney General v. Zaoui* [2004], Dec. No. CA20/04, § 133; Lauterpacht & Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion', in Feller, Türk & Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), p. 135 para. 168; Zimmermann & Wennholz, in Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2011), Art. 33 para. 76.
[53] Zimmermann & Wennholz, ibid., Art. 33 para. 77.
[54] UNHCR ExCom Conclusion No. 100 (LV), 'Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations' (2004), para. (a).
[55] UNHCR, Executive Committee members and Standing Committee Observers for the period October 2023 – October 2024, available at https://www.unhcr.org/media/executive-committee-members-and-standing-committee-observers-period-october-2023-october-2024.

widest possible geographical basis from those States with a demonstrated interest in, and devotion to, the solution of the refugee problem'.[56]

13 Situations of mass influx were discussed during the drafting of Article 33 of the 1951 Convention, with some State parties taking the view that non-refoulement obligations would not apply in such cases.[57] This view has, however, been rejected by ExCom, whose positions enjoy 'considerable persuasive authority'.[58] Thus, ExCom Conclusion No. 22, passed in 1981 against the background of the mass flight of Vietnamese boat people and an increase in border closures, provides that even in situations of mass influx, 'the fundamental principle of non-refoulement – including non-rejection at the frontier – must be scrupulously observed'.[59]

14 Instead, ExCom has pointed to the duty of solidarity that is referenced in the Preamble of the 1951 Convention, in which the State Parties consider 'that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation'. Citing this, ExCom has stated that 'States shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which have admitted asylum-seekers in large-scale influx situations'.[60] In that sense, 'states genuinely unable to cope with refugee arrivals always retain the option under Art. 33 initially to redirect those refugees to other states where their acquired rights will be respected, and in which there is no direct or indirect risk of being persecuted'.[61] ExCom has cautioned that 'access to asylum and the meeting by all States of their international protection obligations should not be dependent on burden and responsibility sharing arrangements first being in place, particularly because respect for human rights and humanitarian principles is a responsibility for all members of the international community'.[62] Difficulties in realising such arrangements must not undermine legal obligations, and specifically non-refoulement.

III. Provisional measures essential to the national security

15 Article 9 of the 1951 Convention provides: 'Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security

[56] United Nations General Assembly resolution 1166 (XII), 26 November 1957, para. 5.
[57] Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.35, 25 July 1951, p. 21; Statement of Mr. Larsen of Denmark, ibid.; Statement of Mr. Hoare of the United Kingdom, ibid.
[58] Refugee Status Appeals Authority (New Zealand), *Refugee Appeal No. 1/92 Re SA* [1992]; see also citations in support in House of Lords, *Shah & Islam* [1999] UKHL 20, per Lord Berwick.
[59] UNHCR ExCom Conclusion No. 22 (XXXII), 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981), para. II(A)(2).
[60] Ibid., para. IV(1).
[61] Hathaway (n 46), p. 832.
[62] UNHCR ExCom Conclusion No. 100 (2004) (n 54), Preamble.

in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.' This provision was meant to allow measures against 'enemy aliens' that Article 8 of the 1951 Convention (no exceptional measures against refugees solely on account of their nationality) would otherwise preclude, such as internment.[63] The wording not only explicitly requires an individuated assessment ('in the case of a particular person').[64] It also makes clear that such measures – which must not only be necessary but 'essential' for national security – *can never imply refoulement*, as they are meant to be temporary – which refoulement is not – and are to be taken '*pending a determination* by the Contracting State that the person is in fact a refugee'.[65] The drafters of the 1951 Convention had in mind measures such as the general internment of 'enemy aliens' or the restriction of access to cameras,[66] and intended to safeguard States' rights by allowing temporary control measures to make safe assumptions as to whether the person concerned poses a threat to national security (in the sense of Article 33(2) of the 1951 Convention).[67] By contrast, pushbacks are not an investigation of a potential threat with an open outcome, but the final enforcement of a decision already taken against a person, which thereby falls outside the scope of Article 9 of the 1951 Convention.[68]

C. Circumstances precluding wrongfulness under general international law

16 Under general international law, the responsibility of States for internationally wrongful acts is precluded *inter alia* in three circumstances: *force majeure*, distress and necessity. The conditions for these exceptions established under customary international law have been laid down in the non-binding Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA'), developed by the International Law Commission ('ILC') and adopted by the UN General Assembly.[69]

I. Force majeure

17 According to Article 23 ARSIWA, *force majeure* denotes 'the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation'. As the ILC explains, this might also cover 'certain situations of duress or coercion involving force imposed on the

[63] Davy, in Zimmermann (n 52), Article 9 para. 42.
[64] Hathaway (n 46), p. 427.
[65] Davy, in Zimmermann (n 68), para. 44; Hathaway (n 46), p. 427.
[66] Davy, in Zimmermann (n 68), para. 37.
[67] Ibid., paras. 21, 22, 32; Hathaway (n 46), p. 427.
[68] Davy, in Zimmermann (n 52), Article 9 para. 32 (noting that human rights obligations remain intact; ibid. at paras. 51, 55).
[69] Annex to General Assembly resolution 56/83 of 12 December 2001, corrected by UN Doc. A/56/49(Vol. I)/Corr.4.

State'.[70] However, unlike in the case of necessity, the situation must be such that the State has no choice of means. In the *Rainbow Warrior* arbitration, the tribunal clarified that the standard was one of 'absolute and material impossibility', whereas circumstances that would render the performance of an obligation merely 'more difficult or burdensome' would not suffice.[71] Even supposing a State is the target of 'hybrid threats' in the form of migration flows, denying migrants access and pushing them back remains an intentional act of choice, so that the justification of *force majeure* is inapplicable.

II. Distress

18 Distress applies 'if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care' (Article 24 ARSIWA). This is a scenario too individualised to include 'hybrid threats'; specifically, 'persons entrusted' do not include the population at large.

III. Necessity

19 According to Article 25(1) ARSIWA, necessity may only be invoked to preclude the wrongfulness of an act if that act: '(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole'. The International Court of Justice most prominently affirmed this concept as a customary justification for the non-performance of treaty obligations in the *Gabčíkovo-Nagymaros* case.[72] Due to the susceptibility to abuse, the concept is to be interpreted restrictively.[73]

20 Necessity presupposes a factual situation of (1) grave and imminent peril (2) for the essential interests of the State (Article 25(1)(a) ARSIWA). A peril is *imminent* if it is proximate; this is the case 'as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable'.[74] The invoking state carries the burden of proof.[75] Which *essential*

[70] Draft Articles on Responsibility for Internationally Wrongful Acts, with commentaries ('ARSIWA Commentary'), 2001 Yearbook of the International Law Commission vol. II, pt. 1, Art. 23 para. 3.
[71] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*[1990], Reports of International Arbitral Awards, Vol. XX pp. 215–284, para. 77.
[72] ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, §§ 48, 51–52; reaffirmed in ITLOS, *The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)* [1999] ITLOS Rep 10, § 133.
[73] Addendum to the Eighth Report on State Responsibility, by Mr. Roberto Ago, UN Doc. AICN.4/318/ADD.5-7, 1980 Yearbook of the International Law Commission vol. II, pt. 1, para. 76. Ago was the ILC's Special Rapporteur on state responsibility from 1961–1980; his eight reports, as well as this addendum, which was published after he had resigned from that post following his election to the International Court of Justice, shaped the ARSIWA.
[74] Ibid., para. 54.
[75] ITLOS, *The M/V 'SAIGA' (No. 2) Case* (n 72), § 135.

interests of the State may be affected depends on the specific circumstances.[76] As the former ILC Special Rapporteur Roberto Ago clarified, the peril must represent 'a grave danger to the existence of the State itself, its political or economic survival, the continued functioning of its essential services, [or] the maintenance of internal peace'.[77] Much international practice concerns investment disputes and thus interests such as economic and social stability or the prevention of social services,[78] while the *Gabčíkovo-Nagymaros* case concerned ecological damage.[79] This threshold is not very high, prompting some commentators to accept necessity with regard to a sudden mass influx of large numbers of migrants.[80] This might be the case when a State is overwhelmed by hundreds of thousands of refugees arriving in a very short time and there is an imminent prospect of additional refugee flows, as long as efforts are simultaneously made to secure international resources to protect refugees.[81]

21 Importantly, however, (3) the measure must be *the only available means* to address the situation of necessity; it is not enough that alternate means would be more costly or less convenient.[82] As indicated above (*supra* §§ 7, 14, 20), a request for solidarity in the international community would be a conceivable alternate means; so would accelerated border procedures. A State therefore acts unlawfully when it places itself in a situation where it is no longer administratively capable of responding to refugees, for example by ignoring genuine international offers of assistance.[83] As the 8th Colloquium on Challenges in International Refugee Law unanimously stated: 'Because derogation is necessary only if it is the least intrusive response capable of safeguarding the essential interest, the refoulement of refugees will almost invariably be impermissible. More generally, if and when a dependable system of burden and responsibility sharing as envisaged by the Convention's Preamble is implemented, the conditions precedent for lawful resort to necessity-based derogation are unlikely to be satisfied.'[84]

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[76] See e.g. ICSID, *LG & E Energy Corp, LG & E Capital Corp and LG & E International Inc v. Argentine Republic* [2006], Case No. ARB/02/1, § 257; ICSID, *Suez, Sociedad General* [2010], Case No. ARB/03/19, § 260; ICSID, *Total SA v. The Argentine Republic* [2010], Case No. ARB/04/01, §§ 345, 484; ICSID, *Impregilo SpA v. Argentine Republic* [2011], Case No. ARB/07/17, § 346.
[77] Addendum to the Eighth Report on State Responsibility, by Mr. Roberto Ago (1980) (n 73), para. 2.
[78] As established in relation to the Argentine Debt Crisis (2001–02), particularly with regard to Art. XI of the 1991 US-Argentina Bilateral Investment Treaty ('BIT'): ICSID, *CMS Gas Transmission Co v. Republic of Argentina* [2005], Case No. ARB/01/8, §§ 315, 331; ICSID, *El Paso Energy International Company v. The Argentine Republic* [2011], Case No. ARB/03/15 found it to be a general principle of the law in the sense of art. 31(3) Vienna Convention on the Law of Treaties, leading the interpretation of the 'emergency clause' in art. XI of the BIT, § 624; criticised in annulment proceedings.
[79] ICJ, *Gabčíkovo-Nagymaros* (n 72), § 40.
[80] Boed, 'State of Necessity as a Justification for Internationally Wrongful Conduct', Yale Human Rights and Development Law Journal 3 (2000), 1 (26).
[81] Hathaway (n 46), p. 435; see also Long, 'No entry! A review of UNHCR's response to border closures in situations of mass refugee influx', UNHCR PDES/2010/07 (2010), pp. 25–27.
[82] ARSIWA Commentary (n 70), Art. 25 para. 15; ICJ, *Gabčíkovo-Nagymaros* (n 72), §§ 55–57.
[83] Hathaway (n 46), p. 434. For example, this was the case with Thailand refusing the United States' offer to build new facilities to provide for the arriving refugees; see Helton, 'Asylum and Refugee Protection in Thailand', International Journal of Refugee Law 1 (1989), 20 (27–30).
[84] 'The Michigan Guidelines on Refugee Freedom of Movement', Michigan Journal of International Law 39 (2018), 1 (12–13).

22 In addition, Article 25(2)(b) ARSIWA demands (4) that the act '*does not seriously impair an essential interest […] of the international community as a whole*'. As the ILC Commentary points out,[85] the phrase 'of the international community as a whole' references the *Barcelona Traction* case, where the International Court of Justice ('ICJ') clarified that obligations owed *erga omnes* 'derive, for example, in contemporary international law, […] also from the principles and rules concerning the basic rights of the human person'.[86] Reliance on necessity therefore demands a balancing with human rights, which are today – in a departure from traditionally state-centred provisions of international law – considered to be such essential collective interests;[87] in the words of the ILC, 'the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective'.[88]

23 Finally, (5) necessity is not applicable if 'the international obligation in question excludes the possibility of invoking necessity' (Article 25(2)(a) ARSIWA). This exception specifically relates to the *violation of non-derogable rights*, such as Article 3 of the Convention.[89] If the drafters of a treaty had the clear intention to render a certain obligation absolute, a recourse to the general defence of necessity would be arbitrary.[90] Necessity therefore cannot justify refoulement.

IV. Limits

24 The defences are inapplicable to *breaches of peremptory norms* (Article 26 ARSIWA). This also is an effect of the non-derogable character of certain primary rules.[91] There is support for considering non-refoulement a peremptory norm.[92]

25 General rules on circumstances precluding wrongfulness also 'do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed

[85] ARSIWA Commentary (n 70), Art. 25 para. 18.
[86] ICJ, *Barcelona Traction Light and Power Company, Limited (Belgium v. Spain)* [1970], ICJ Rep 3, §§ 33–34.
[87] On their *erga omnes* character, see ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 19 July 2024, § 274: 'Among the obligations *erga omnes* violated by Israel are […] certain of its obligations under international humanitarian law and international human rights law.' For a broad conception, see Dinstein, 'The erga omnes Applicability of Human Rights', Archiv des Völkerrechts 30 (1992), 16 (17 et seq.).
[88] ARSIWA Commentary (n 70), Art. 25 para. 17.
[89] See also ARSIWA Commentary (n 70), Art. 25 para. 19 (pointing to examples from international humanitarian law).
[90] Boed (n 80), p. 34.
[91] Paddeu, 'Circumstances Precluding Wrongfulness', in *Max Planck Encyclopedia of Public International Law* (2023), para. 17.
[92] Concurring Opinion of Judge Pinto de Albuquerque, *Hirsi Jamaa and ors. v. Italy* [GC] (n 32); IACtHR, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion, OC-21/14 (2014), § 225; Allain, 'The jus cogens Nature of Non-refoulement', International Journal of Refugee Law 4 (2001), 533 (540); Orakhelashvili, *Peremptory Norms in International Law* (2006), p. 56; on the discussion: Costello & Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test', Netherlands Yearbook of International Law 46 (2015), 273 (309); but see: Hathaway, 'Leveraging Asylum', Texas International Law Journal 45 (2009), 503 (510).

by special rules of international law' (Article 55 ARSIWA).[93] This *lex specialis* rule applies if a specific norm (1) deals with the same subject matter[94] and (2) is in conflict with the general rule[95] or is to be read to be intended to apply autonomously.[96] As the ILC Commentary points out, by this mechanism 'a treaty might exclude a State from relying on force majeure or necessity'.[97] The ICJ has also considered the *lex specialis* rule with respect to human rights treaties that contain derogation clauses such as Article 4 ICCPR and thus 'already address considerations of this kind within their own provisions',[98] but did not decide the issue because the high requirements of necessity were not met anyway.[99]

26 Like Article 4 ICCPR, Article 15 of the Convention allows for a temporary deviation from a State's human rights obligation in cases of emergency (see supra §§ 3–8), leading to such a substantial overlap with necessity[100] that it in fact deals with the same subject matter as necessity.[101] However, its substantive and procedural requirements are more detailed, more exigent and demand more transparency than those of necessity.[102] If states could still also have recourse to necessity, this would effectively enable them to disregard the notification requirement (*supra* § 4) and the requirement that measures must be 'strictly required' and prevent abuse (*supra* § 7).[103] This would run counter to the purpose of Article 15 of the Convention. Its design as *lex specialis* rule[104] intended to 'govern States' mode and degree of compliance during situations of emergency'[105] circumscribes the invocation of necessity by States, given the great weight of the rights at risk.[106] Thus, recourse to necessity is excluded in the context of rights contained in the Convention.

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[93] ARSIWA Commentary (n 70), Art. 55 para. 2; Simma & Pukolwski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', European Journal of International Law 17 (2006), 483 (486).
[94] Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points', British Yearbook of International Law 33 (1957), 203 (237).
[95] Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis', Nordic Journal of International Law 74 (2005), 27 (44).
[96] ARSIWA Commentary (n 70), Art. 55 para. 4.
[97] Ibid., Art. 55 para. 3.
[98] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, p. 136, § 140.
[99] Ibid.
[100] Ergec, *Les droits de l'homme à l'epreuve des circonstances exceptionnelles. Etude sur l'article 15 de la Convention européenne des droits de l'homme* (1987), pp. 39–54; Oraá, *Human Rights in States of Emergency in International Law* (1992), p. 223.
[101] Ryngaert, 'State Responsibility, Necessity and Human Rights', Netherlands Yearbook of International Law 41 (2010), 79 (88).
[102] With regards to derogation clauses in human rights treaties in general: Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (2012), p. 261.
[103] Ibid. p. 266.
[104] Ibid. p. 252; Ryngaert (n 101), p. 88; framing it as 'distancing': Krasikov & Lipkina, 'Is All Fair in Distancing Human Rights from Customary International Law Rule on State of Necessity?', Mediterranean Journal of Social Sciences 11 (2020), 53 (54); implicitly by raising the question of necessity's applicability only to human rights treaties without derogation clauses: Meron, 'State Responsibility for Violations of Human Rights', Proceedings of the Annual Meeting (American Society of International Law) 83 (1989), 372 (373).
[105] Desierto (n 102), p. 240.
[106] Ryngaert (n 101), p. 88.

D. The interplay of EU Law with Convention obligations at the border

27 Recent instruments of EU law have begun to address 'hybrid threats', modifying the obligations relating to minimum standards for asylum procedures and returns under the Common European Asylum System. Articles 78 and 72 of the Treaty on the Functioning of the European Union ('TFEU') allow for derogations in cases of a 'sudden inflow' and in general (I.), while the 2024 'Crisis Regulation', which will apply from 1 July 2026,[107] specifically addresses 'instrumentalisation' and 'hybrid threats' (II.); any derogations must, however, be compliant with EU fundamental rights. In addition, EU law also requires compliance with international law, specifically with the Convention (III.).

I. Derogations from EU asylum law standards under the EU Treaties

28 Article 78(3) TFEU provides: 'In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.' So far, this provision was used twice in 2015 to introduce relocation mechanisms benefiting Italy and Greece.[108] In reaction to the increase of border-crossings from Belarus in 2021, the European Commission introduced such a proposal for a Council Decision in December 2021, according to which Latvia, Lithuania and Poland would have had discretion ('may decide') in not applying the Return Directive, but would still have to respect the principle of non-refoulement.[109] This proposal was not adopted, nor would it have allowed summary returns.

29 Article 72 TFEU provides that the treaty provisions on the Area of Freedom, Security and Justice, which include asylum, 'shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. However, in Commission v. Poland and in M.A. v. Lithuania the Court of Justice of the European Union ('CJEU') held that this does not allow Member States to implement measures that are entirely outside of the scope of EU law and the oversight of EU institutions, and that Article 72 TFEU does not constitute a general derogation clause.[110] Instead, the CJEU emphasised that this provision must be

[107] Art. 20 of Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 2024/1359 ('Crisis Regulation').
[108] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece; Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece; Wilderspin, in Kellerbauer et al., *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2019), Art. 78 TFEU para. 60.
[109] European Commission, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, 1 December 2021, COM(2021) 752 final, Art. 4 (2a).
[110] CJEU, *European Commission v. Republic of Poland and others* [2020], C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257, §§ 143–150; CJEU, *M.A. v. Lithuania*, C-72/22, ECLI:EU:C:2022:505, § 70.

interpreted strictly. The CJEU therefore requires that the national emergency measures (1) adhere to the aim of safeguarding law and order and internal security; (2) are necessary and (3) are proportionate to the threat.[111]

30 In *M.A. v. Lithuania*, Advocate General ('AG') Nicholas Emiliou posited that situations of 'mass influx' may require exceptional measures to safeguard law and order and internal security.[112] However, he noted that since Directive 2013/32 ('Asylum Procedure Directive') already provides for specific procedures at the border, recourse to Article 72 TFEU could justify derogations from restrictive time limits for such border procedures, but not from provisions guaranteeing the right access to the procedure – 'regardless of the nature and scale of the influx';[113] the CJEU agreed.[114] It concluded that 'Article 6 and Article 7(1) of Directive 2013/32 are to be interpreted as precluding legislation of a Member State under which, in the event of a declaration of martial law or of a state of emergency or in the event of a declaration of an emergency due to a mass influx of aliens, illegally staying third-country nationals are effectively deprived of the opportunity of access, in the territory of that Member State, to the procedure in which applications for international protection are examined.'[115]

31 The case of *M.A.* did not involve the charge of 'hybrid threats', which might suggest a different assessment. But AG Emiliou also recalled that derogations must respect the *fundamental rights* as contained in the Charter of Fundamental Rights of the European Union ('CFR'), in particular access to a procedure as the 'essence' of the right to asylum (Article 18 CFR), which therefore defies limitations (Article 52(1) CFR), and non-refoulement (Article 19(2) CFR), 'which is directly linked to […] Article 4 of the Charter and Article 3 ECHR [and] does not allow for any limitations'.[116]

32 In addition, Member States must always respect the *principle of sincere cooperation*.[117] Thus, according to Article 4(3) of the Treaty of the European Union ('TEU'), 'the Union and the member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties', and the Member States shall 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'. The principle of sincere cooperation not only requires adherence to written EU law but is regarded as a general 'enhanced obligation of good faith'.[118] AG Emiliou therefore deducts a duty of

[111] Nicolosi, 'Addressing a Crisis through Law: EU Emergency Legislation and its Limits in the Field of Asylum', Utrecht Law Review 17 (2021), 19 (25) citing: ECRE, 'Derogating from EU asylum law in the name of "emergencies": The legal limits under EU law' (2020), p. 4, available at https://ecre.org/wp-content/uploads/2020/06/LN_6-final.pdf.
[112] Opinion of Advocate General Emiliou in CJEU, *M.A. v. Lithuania*, C-72/22, ECLI:EU:C:2022:431, §§ 100–106.
[113] Ibid., §§ 131–133.
[114] CJEU, *M.A. v. Lithuania* (n 110), § 74.
[115] CJEU, *M.A. v. Lithuania* (n 110), § 75.
[116] Opinion of AG Emiliou in CJEU, *M.A. v. Lithuania* (n 112), § 136–143.
[117] Ibid., § 119.
[118] Opinion of AG Mazák in CJEU, *Hellenic Republic v. Commission of the European Communities (Project Abuja)*, C-203/07 P, ECLI:EU:C:2008:270, § 83.

Member States to consult the EU institutions prior to unilateral derogations under Article 72 TFEU.[119] In addition, Article 4(3) TEU may serve as lex generalis even in cases where the national measure does not explicitly fall under EU competencies but may touch upon the Union's overarching interests; according to Article 3 TEU, these include the respect for human rights.[120] This means that Member States must refrain from unilateral derogations under Article 72 TFEU which risk them violating the Union's general principles to protect human rights under the Charter for Fundamental Rights and under the Convention (Article 6(1) and (3) TEU).

II. Derogations from EU asylum law standards under the Crisis Regulation

33 According to its recital (17), Regulation (EU) 2024/1359 addressing situations of crisis and *force majeure* in the field of migration and asylum ('Crisis Regulation')[121] serves 'to ensure an immediate and appropriate response to hybrid threats in accordance with Union law and international obligations, this Regulation focuses on the specific measures applicable in the area of migration aimed at addressing the situations of instrumentalisation'. In Article 1(4), it defines 'crisis' as '(a) *an exceptional situation of mass arrivals* of third-country nationals or stateless persons in a Member State by land, air or sea […] of such a scale and nature […] that it renders the Member State's well-prepared asylum, reception, including child protection services, or return system non-functional, including as a result of a situation at local or regional level, such that there could be serious consequences for the functioning of the Common European Asylum System; or (b) *a situation of instrumentalisation* where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security' (emphases added). Article 4(5) of the Crisis Regulation defines *force majeure* as 'abnormal and unforeseeable circumstances outside a Member State's control, the consequences of which could not have been avoided notwithstanding the exercise of all due care, which prevent that Member State from complying with obligations' under the Asylum Procedure Regulation[122] and the Asylum and Migration Management Regulation.[123]

34 Articles 2–4 of the Crisis Regulation provide for a procedure in which the situation of crisis or *force majeure* must be established by the European Commission, following a

[119] Ibid., §§ 119–120 (noting that Lithuania had done that in CJEU, *M.A. v. Lithuania* (n 110)).
[120] Klamert, in Kellerbauer (n 108), p. 47, para. 33.
[121] Crisis Regulation (n 107).
[122] Asylum Procedure Regulation (n 39).
[123] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, OJ L 2024/1351 ('Asylum and Migration Management Regulation').

reasoned request by the EU Member State, and any derogations from the relevant rules on the asylum procedure must be authorised by the EU Council. According to Article 1(3) of the Crisis Regulation, any measures adopted 'shall be applied only to the extent strictly required by the exigencies of the situation, in a temporary and limited manner and only in exceptional circumstances'. The principles developed by the CJEU in relation to Article 72 TFEU can be applied here.

35 Relevant derogations that Member States may ask for are contained in Articles 10 and 11 of the Crisis Regulation. Article 10 concerns time limits for the registration of applications for international protection. Article 11 allows for extensions of the duration of the border procedure and in cases of instrumentalisation for an assessment on the merits of the asylum claim in the border procedure. Neither allows for border closures, denial of access to a procedure or summary returns. Summary returns are therefore also not permitted under the derogation regime of the Crisis Regulation, the most recent instrument passed by the EU and specifically designed to respond to 'hybrid threats' and an 'instrumentalisation' of migrants. The Crisis Regulation will apply from 1 July 2026 and has therefore not yet been subject to any judicial review.

III. The relation of the EU derogation regime to the Convention and other international law

36 Both the Treaties and the Crisis Regulation provide for derogations from EU asylum law standards, but not from international law. Thus, Article 78(1) TFEU clarifies that the Common European Asylum System must be compliant with relevant international law. Article 11(10) of the Crisis Regulation clarifies in relation to derogations that 'the basic principles of the right to asylum and the respect of the principle of non-refoulement, as well as the guarantees provided for in Chapters I and II of [the Asylum Procedure Regulation] shall apply to ensure that the rights of those who seek international protection, including the right to an effective remedy, are protected'. Recital (8) affirms that 'This Regulation respects the fundamental rights of third-country nationals and stateless persons and observes the principles recognised by the Charter of Fundamental Rights of the European Union (the "Charter"), in particular the [...] prohibition of torture and inhuman or degrading treatment or punishment [...], the right to asylum and protection in the event of removal, expulsion or extradition, as well as the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967 (the "Geneva Convention"). This Regulation should be implemented in compliance with the Charter and general principles of Union law as well as with international law.' As AG Emiliou recalled in *M.A. v. Lithuania*, this also includes the protection standards of the Convention, pursuant to Article 6(3) TEU.

37 If an EU Member State did use one of the derogation regimes under EU law, this Court would be able to review its measures under the Convention. In *Bosphorus v. Ireland,* this

Court has clarified that EU Member States remain responsible under the Convention for all actions and omissions even if they transfer sovereign powers to an international organisation, such as the EU.[124] Even if the international organisation provides for an equivalent standard of protection of human rights (which this Court has repeatedly affirmed in the case of the EU), compliance with the Convention is only assumed if a Member State executes laws by the international organisation without discretion, and unless this presumption is rebutted by grave deficits of human rights protection in the individual case.[125] If the Member States have discretion in the implementation, this Court continues to exercise its full power of review.[126] Both under Article 78(3) TFEU and under Articles 10 and 11 of the Crisis Regulation, EU Member States exercise discretion. This Court would therefore be able to fully review their compliance with the Convention and its Protocols.

38 Both from the perspective of the Convention and of EU law, the Convention establishes a minimum standard of rights but does not prevent the application of higher standards. According to Article 53 of the Convention, the guarantees provided therein shall not be construed as 'limiting or derogating from any of the human rights and fundamental freedoms' guaranteed in national law or as a matter of international treaty obligations;[127] the highest human rights standard takes precedence.[128] Article 52(3) CFR confirms this role of the Convention as minimum standard,[129] raising the level of protection under the CFR to that of the Convention while allowing 'more extensive protection' in EU law. This has prompted AG Emiliou in *M.A. v. Lithuania* to clarify that if the recent case law of this Court were to be read as permitting the refoulement of asylum applicants entering illegally in a situation of mass influx under Article 3 of the Convention, 'it would simply follow that EU law therefore provides, in Article 18 and Article 19(2) of the Charter, more extensive protection than the ECHR, as is expressly permitted by Article 52(3) of the Charter.'[130] In addition, the CJEU has cautioned any application of higher standards under Article 53 of the Charter must not threaten the primacy, uniformity and effectiveness of Union law.[131]

39 This means two things: (1) any derogations applied by EU Member States in application of EU law as a matter of their discretion can be reviewed by this Court and must comply

[124] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, 30 June 2005.
[125] *Bosphorus v. Ireland* [GC] (n 124), § 165; *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011, § 340.
[126] *M.S.S. v. Belgium and Greece* [GC] (n 125), § 338.
[127] *Nersesyan v. Armenia* (admissibility), no. 15371/07, 19 January 2010, § 25; *Micallef v. Malta* (admissibility), no. 17056/06, 15 January 2008, § 44.
[128] Gerards, 'Article 53 ECHR and Minimum Protection by the European Court of Human Rights', ECHR Law Review 3 (2022), 451 (453) (cautioning that this Court has not considered Art. 53 of the Convention as a collision rule; id. at pp. 461–462).
[129] Fundamental Rights Agency, *CFR Explanations*, [2007] OJ C 303/02, Art. 53 (on the purpose of maintaining the current level of protection).
[130] Opinion of AG Emiliou in *M.A. v. Lithuania* (n 112), § 143.
[131] CJEU, *Stefano Melloni v. Ministerio Fiscal* [2013], C-399/11, ECLI:EU:C:2013:107, §§ 56–58; CJEU, *Åklagaren v. Hans Åkerberg Fransson* [2013], C-617/10, ECLI:EU:C:2013:105, § 29.

with the Convention, in particular with the right to non-refoulement (Article 3 of the Convention) and the prohibition of collective expulsion (Article 4 AP 4); (2) should this Court be inclined to permit summary returns in emergency situations, the CFR and other international legal obligations of the Member States would still prohibit such summary returns as incompatible with non-refoulement.

40 Hereby, we respectfully submit our Third Party Intervention and remain at your full disposal for any further information you may require.