Third party intervention in *H.A.M. v. Denmark*, 105/2023

To the UN Committee on the Rights of Persons with Disabilities

Interveners: AIRE Centre (Advice on Individual Rights in Europe), ECRE (European Council on Refugees and Exiles) and the ICJ (International Commission of Jurists)

25 April 2025

I. Equality (non-discrimination) in procedures

a. The general obligation to ensure equality in administrative and judicial procedures for persons with disabilities

1. Access to administrative and judicial procedures for persons with disabilities is a prerequisite for the effective enjoyment of their human rights. As a general rule, States are obliged to provide procedures that allow individuals to assert and protect their human rights and to access an effective remedy when these are violated. The ability to access necessary procedures on equal terms with any other person is, therefore, paramount in administrative and judicial systems that uphold human rights and the rule of law.

2. Article 5 of the **Convention on the Rights of Persons with Disabilities** (the CRPD) establishes the right to equality for persons with disabilities and prohibits disability-based discrimination. The prohibited forms of discrimination include direct and indirect discrimination, denial of reasonable accommodation and harassment.[1] If the application of even ostensibly neutral and otherwise seemingly well-designed procedures produces discriminatory effects on the basis of an individual's disability, then such procedures will violate the prohibition of discrimination on the ground of disability. Indeed, the Committee has clarified that the neutral application of a law "[…] *may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration*."[2]

3. Similarly, discrimination may occur where "[…] *an opportunity that appears accessible in reality excludes certain persons owing to the fact that their status does not allow them to benefit from the opportunity itself* […]."[3] In *Iuliia Domina and Max Bendtsen v. Denmark,* for example, the Committee examined the rejection of an application for family reunification because the author did not meet the requirement under domestic law that such a person must not have received social benefits in the three years before their application. The Committee noted that the social benefits in question were provided on the basis of the author's disability and found that the rejection of the application on that basis was indirectly discriminatory because it "[…] *had the effect of impairing or nullifying the authors' enjoyment and exercise of the right to family life on an equal basis with others*."[4]

4. In addition to procedural flexibility in the application of laws, the Committee has also recognised the need for adaptable assessment methods/procedures where these are a precondition for the realization of rights under the Convention. In *García Vara v. Mexico* the Committee examined the conditions pertaining to access to tertiary education and reiterated that *"[s]tandardised assessment systems, including entry examinations, that directly or indirectly exclude students with disabilities are discriminatory and in contravention of articles 5 and 24*."[5]

5. The interveners consider that standardised processes may be inappropriate and discriminatory if they do not take into account the particular circumstances of a given case. Processes for the individualised assessment of an asylum claim should be sufficiently adaptable, including by providing for assessment methods that do not discriminate against persons with disabiltiies. Methods to assess any aspect of an asylum case, such as the available evidence or the credibility of an applicant, must, therefore, be flexible enough to properly – and on an individual basis – consider an person's disability.

6. Under Article 5(3), the Convention enshrines the obligation to provide reasonable accommodation. This obligation requires States to take relevant measures, including by making adjustments to the physical environments, activities and procedures. The obligation to provide reasonable accommodation is limited only to the extent that the State or a private actor, as the case may be, can show that its provision would

[1] CRPD, General Comment no. 6 on equality and non-discrimination , para. 18.
[2] CRPD, *H.M. v. Sweden*, Communication no. 3/2011, 19 April 2012, para. 8.3.
[3] CRPD, *S.K. v. Finland*, Communication no. 46/2018, 24 March 2022, para. 9.5.
[4] CRPD, *Iuliia Domina, Max Bendtsen v. Denmark*, Communication no. 39/2017, 31 Aug 2018, para. 8.6.
[5] CRPD, *García Vara v. Mexico*, Communication no. 70/2019, 23 March 2023, para.10.9.

constitute a disproportionate or undue burden.[6] However, the Committee has clarified that reasonable accommodation is an *ex nunc* duty. This duty must be fulfilled when a person requests it but may also arise even in the absence of such a request if the duty bearer is or should have been aware of the needs of such an individual.[7] Any decision not to provide reasonable accommodation must be based on a thorough and objective analysis that takes into account all the relevant factors and circumstances.[8]

7. In addition to the robust framework on equality and non-discrimination provided by the CRPD Convention and this Committee's General Comments and jurisprudence, the interveners invite the Committee to consider the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR), to which this Committee has previously referred during its examination of individual communications.[9] In addition, the interveners underscore that European Union (EU) law guarantees, as interpreted by the European Court of Justice (CJEU), are relevant in the context of the present case as Denmark is bound by EU primary law, which comprises the constituent treaties of the European Union and the Charter of Fundamental Rights of the EU (the Charter or CFREU).[10] The interveners will refer to those standards throughout the intervention.

8. Under Article 14 of **the ECHR**, the ECtHR has held that both direct and indirect discrimination are prohibited.[11] Prohibited discrimination may result from a *de facto* situation or from an ostensibly neutral policy that in reality disproportionately and adversely affects a particular group of persons.[12] In addition to limiting differential treatment and impact, Article 14 ECHR may also require States to treat groups differently in certain cases in order "*to correct factual inequalities*" among them.[13] Where States fail to treat differently persons whose situations are significantly different, they are required to prove the existence of an objective and reasonable justification for the lack of such differential treatment.[14] States may enjoy a certain degree of discretion in assessing "[…] *whether and to what extent differences in otherwise similar situations justify a different treatment* […]," and the scope of their discretion may vary depending on the circumstances, the subject matter and the background of the case.[15] When the ECtHR examines a case of different legal treatment of persons with disabilities, it considers that the discretion States may enjoy is "*considerably reduced*."[16]

9. **The interveners submit that, to ensure accessible judicial and administrative procedures for persons with disabilities on an equal basis with others, the authorities must act in an inclusive manner and facilitate access to and use of such procedures for everyone. Particular attention should be paid to procedures that while appearing neutral can produce discriminatory effects and impede access to rights when applied without necessary adaptations and flexibility. Differences in treatment may be justified only following a thorough, objective and comprehensive assessment of an individual case and where the assessment reveals very weighty reasons for such differences.**

b. Displaced persons with disabilities: intersectional discrimination and particular circumstances of vulnerability

10. The interveners draw the Committee's attention to the intersectional discrimination that displaced persons with disabilities may experience and the enhanced risk of human rights violations such discrimination may create. As this Committee has already clarified, intersectional discrimination occurs when a person with disability suffers discrimination due to their disability in combination with other intersecting characteristics,

[6] CRPD, General Comment no. 6, paras. 24.3
[7] CRPD, General Comment no. 6, paras. 23 and 24 (b). See also, García Vara v. Mexico, 70/2019, 23 Mar 2023, para. 10.8.
[8] CRPD, *Marie-Louise Jüngelin v. Sweden*, 5/2011, 2 October 2014, para. 10.6.
[9] See, for example, CRPD, *Bellini v. Italy*, 51/2018, 26 Aug 2022, para. 7.9.
[10] European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012.
[11] ECtHR, *Sampanis and others v. Greece*, 32526/05, 5 June 2008, para. 67.
[12] ECtHR, *D.H. and others v. the Czech Republic*, 57325/00, 13 November 2007, para. 175.
[13] *Ibid*; see also, ECtHR, Stec and Others v. the United Kingdom [GC], 65731/01, 12 April 2006, para. 51.
[14] ECtHR, *Thlimmenos v. Greece* [GC], 34369/97, 6 April 2000, para. 44.
[15] ECtHR, *Andrejeva v. Latvia*, 55707/00, 18 February 2009, para. 82.
[16] ECtHR, *Glor v. Switzerland*, 13444/04, 30 april 2009, para. 84.

including language, ethnic or other status.[17] The obligation to protect persons against this unique, combined and compounded form of discrimination requires consideration of the intersection of different grounds of prohibited discrimination, including those relating to the status of the individual concerned as a migrant, a refugee or an asylum-seeker, or "*a combination of any of those grounds or characteristics associated with any of those grounds.*"[18]

11. Other UN Treaty Bodies have addressed the plight of individuals subjected to multiple discrimination by recognising the cumulative effects of circumstances or characteristics in a given case. The Human Rights Committee (CCPR) has found that "*individual circumstances include factors that increase the vulnerability of such persons and that could transform a situation that is tolerable for most into an intolerable one for others*."[19] The "vulnerability-increasing factors", according to the CCPR, include age,[20] medical conditions,[21] or being a victim of trafficking.[22] The CCPR has considered the "cumulative effect" of specific "vulnerability-increasing" circumstances and has authoritatively opined that the International Covenant on Civil and Political Rights (ICCPR) requires national authorities to do the same.[23]

12. Under **the ECHR**, the obligation to treat all individuals compatibly with the Convention guarantees includes the obligation to identify and give special consideration to the needs of people who may be at greater risk of human rights violations. Although the concept of intersectional discrimination has not been consolidated in ECtHR jurisprudence, the Court frequently applies a logic that is analogous to the one relied upon by the CCPR and refers to the "*particular vulnerability*" that may be inherent in the situation of an applicant.[24] The ECtHR has recognised the particular vulnerability of persons with disabilities and has underlined that the authorities must "[…] *take great care with the choices they make in this sphere, in view of the impact of those choices on persons with disabilities* […]."[25] Similarly, it has accepted that asylum-seekers are members of a "*particularly underprivileged and vulnerable population*"[26] and emphasised that Contracting Parties must "*exercise particular care to avoid situations which may reproduce the plight that forced these persons to flee in the first place*."[27]

13. The ECtHR also considers the impact of discrimination from a systemic point of view and regards "vulnerability" as a product of specific group-based experiences, such as social, economic, political and historical circumstances.[28] The Court has identified a number of "particularly vulnerable" groups that have suffered a history of prejudice and social exclusion on account of their sex,[29] sexual orientation,[30] race or ethnicity,[31] mental faculties,[32] and disability.[33] Accordingly, if a restriction on fundamental rights applies to such a "vulnerable group", then the Contracting Party must have "very weighty reasons" for the restrictions before the Court can find the difference in treatment as compatible with the Convention.[34]

14. **The interveners submit that persons that experience both displacement and disability simultaneously are at greater risk of intersectional discrimination and face increased difficulties in accessing**

[17] General Comment no. 6 on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018, para. 19.
[18] *Ibid*, para. 21.
[19] CCPR, *Bayush Alemseged Araya v. Denmark*, 2575/2015, 13 July 2018 para. 9.7.
[20] CCPR, *O.A. v. Denmark*, 2770/2016, 11 December 2017, para. 8.11.
[21] CCPR, *R.A.A. and Z.N. v. Denmark*, 2608/2015, 29 December 2016, para. 7.8.
[22] CCPR, *Osayi Omo-Amenaghawon v. Denmark*, 2288/2013, 23 July 2015, para. 7.5.
[23] CCPR, *A.A.S. v. Denmark*, 2464/2014, 16 September 2016, 7.7; X. v. Denmark, 2389/2014, 21 October 2015, para. 7.7.
[24] ECtHR, *B.S. v. Spain*, 47159/08, 24 July 2012, para. 62.
[25] ECtHR, *Enver Şahin v. Turkey*, 23065/12, 30 January 2018, para. 68.
[26] ECtHR, *M.S.S. v. Belgium and Greece*, 30696/09, 21 January 2011, para. 251.
[27] ECtHR, *O.M. v. Hungary*, 9912/15,5 July 2016, para.53.
[28] *M.S.S. v. Belgium and Greece*, *op cit*., paras. 232, 251.
[29] ECtHR, *Abdulaziz, Cabales and Balkandali v. the UK*, 9214/80, 9473/81 & 9474/81, 28 May 1985, para. 78, and *Burghartz v. Switzerland*, 16213/90,22 February 1994, para. 27.
[30] ECtHR, *Schalk and Kopf v. Austria*, 30141/04, 22 November 2010, para. 97.
[31] ECtHR, *D.H. and Others v. the Czech Republic* [GC], 57325/00,13 November 2007, para. 182; *Timishev v. Russia*, 55762/00 and 55974/00,13 March 2006, para. 56.
[32] ECtHR, *Alajos Kiss v. Hungary*, no. 38832/06,20 August 2010, para. 42; *mutatis mutandis*, *Shtukaturov v. Russia*, no. 44009/05, 27 June 2008, para. 95.
[33] ECtHR, Glor v. Switzerland, 13444/04,6 November 2009, para. 80.
[34] ECtHR, *Kiyutin v. Russia*, 2700/10, 15 September 2011, para. 63.

administrative and judicial procedures. The authorities must be particularly attentive to intersectional discrimination and its effects at every stage of the asylum procedure and adjust their conduct accordingly. The starting point should be the identification of any particular and aggravated "vulnerability" and should be followed by the provision of effective and *ad hoc* procedural adjustments and an overall flexible application of the relevant procedural and substantive asylum/immigration rules to ensure that rights are not rendered illusory.

c. The link between equality in procedures and access to justice

15. The interveners wish to underscore the right of access to justice as a specific expression of the obligation to provide equal access to necessary procedures and to safeguard human rights. The interveners invite the Committee to employ a holistic interpretation of the Convention, particularly in light of Article 3 (f) of the CRPD, which establishes accessibility as a general principle. This Committee has underlined that accessibility is "*a vital precondition for the effective and equal enjoyment*" of the rights of persons with disabilities.[35] Moreover, the Committee has clarified that, to ensure equality under Article 5, "*States Parties must eliminate barriers to gaining access to all of the protections of the law and the benefits of equal access to the law and justice to assert rights*."[36]

16. The right enshrined in Article 13 of the CRPD requires States to ensure that persons with disabilities can access all legal proceedings on an equal basis with others, including through the provision of procedural accommodations. A failure to provide procedural accommodations to ensure access to justice, pursuant to Article 13, cannot be justified by claiming that such accommodations would give rise to a disproportionate or undue burden.[37] According to this Committee's jurisprudence, although States Parties have a certain discretion to determine the procedural arrangements required under Article 13, they must respect the rights of the person concerned.[38]

17. The Special Rapporteur on the rights of persons with disabilities (SR) has emphasised the role of access to justice in ensuring equality and preventing exclusion. The International Principles and Guidelines on Access to Justice for Persons with Disabilities underline the important role of procedural accommodations in this respect.[39] Principle no. 1 requires States to provide justice intermediaries or facilitators to enable communication and engagement between persons with disabilities and the authorities in charge of legal procedures. Principle no. 3 guarantees the right to appropriate procedural accommodations, which includes, *"(m)odifications to the method of questioning in appropriate circumstances, such as allowing leading questions, avoiding compound questions, finding alternatives to complex hypothetical questions, providing extra time to answer, permitting breaks as needed and using plain language*."

18. Under EU law, the rights to an effective remedy and to a fair trial, as articulated in Article 47 of the Charter, require EU Member States to ensure effective judicial protection of rights.[40] All individuals enjoy a right to effective judicial protection under EU law, which includes the rights of the defence.[41] The CJEU has recognised the importance of ensuring that differential treatment does not interfere with the right to judicial protection. In *X (Absence de motifs de résiliation)*, the CJEU confirmed that a difference in treatment may undermine the fundamental right to an effective remedy under Article 47 of the CFREU.[42] When national courts are called to balance the various interests that the case involves, they must not do so at the expense

[35] CRPD, General comment No. 2 (2014), Article 9: Accessibility, CRPD/C/GC/2, 22 May 2014, para. 4.
[36] CRPD, General Comment no. 6, CRPD/C/GC/6, para. 16.
[37] *Idem*, para. 25 (d).
[38] CRPD, *Makarova v. Lithuania*, 30/2015, 18 August 2017, para. 7.6; *Marlon James Noble v. Australia*, 7/2012, 2 September 2016, para. 8.6.
[39] Special Rapporteur on the rights of persons with disabilities, International Principles and Guidelines on Access to Justice for Persons with Disabilities, Geneva, August 2020: https://bitly.ws/3ebeV
[40] CJEU, Judgment of 8 November 2022, *Staatssecretaris van Justitie en Veiligheid (Examen d'office de la rétention)*, Joined Cases C-704/20 and C-39/21, ECLI:EU:C:2022:858, para. 81.
[41] CJEU, Judgment of 6 November 2012, *Otis and Others*, C-199/11, EU:C:2012:684, para. 48.
[42] CJEU, Judgment of 20 February 2024, *X (Absence de motifs de résiliation)*, C-715/20, ECLI:EU:C:2024:139, para. 79.

of the judicial protection that Articles 21(non-discrimination) and 47 of the CFREU guarantee.[43] The rights of the defence, as a general principle of EU law,[44] guarantee to everyone an opportunity to submit their views during an administrative procedure, including by correcting errors, and oblige the authorities to "[…] *pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case*, […]."[45]

19. As noted above, access to justice is evidently linked with the manner of application of the relevant procedural rules. In this vein, the CJEU has found that national courts must "[…] *interpret the procedural rules governing actions brought before them, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under EU law* […]."[46] In its assessment of whether a national procedural provision renders the application of EU law impossible or excessively difficult, the CJEU analyses the role of the provision in the procedure, including with respect to the rights of the defence and the proper conduct of the procedure.[47] The obligation to ensure effective judicial protection may require adjustments to prevent the rigid application of procedural rules that would render Article 47 of the CFREU ineffective or illusory.[48]

20. **Where a person has a disability, any necessary procedural adjustments must be premised on a thorough understanding of that person's needs and rights ensuring appropriate case-management and effective communication. Examples of necessary modifications include the adjustment of the manner of conducting interviews, the flexible application of procedural rules and the provision of justice intermediaries to support and enhance communication. More specifically, in the assessment of the person's communication and statements, the authority that conducts the procedure must consider, *inter alia,* the possibility of confusion, poor memory, lack of clarity and precision in communication, particularly in the absence of the specific support to which such an individual is entitled. Where a decision must be taken mainly on the basis of a person's statements, authorities should refrain from unduly hindering an individual's ability and opportunity to communicate effectively, especially in the absence of the provision of appropriate support and without having assessed the person's case holistically. A procedure that is not able to meet the above standards violates Article 5 of the CRPD, interpreted in the light of the principle of accessibility enshrined in Articles 3 (f) of the CRPD and the right of access to justice, both as a rule of law principle under international law and as a specific obligation under Article 13 of the CRPD.**

II. Individualised assessment during expulsion proceedings involving persons with disabilities[49]

a. *Non-refoulement*: the obligation to assess the risk of ill-treatment in cases of expulsion

21. Under international human rights law, States must observe the principle of *non-refoulement*. The principle is of an absolute nature[50] and no derogations are permitted either in law or in practice.[51] UN Treaty Bodies have interpreted the *non-refoulement* principle as requiring the exercise and enjoyment of effective judicial and administrative guarantees. This Committee has clarified that "[…] *the removal by a State party of an individual to a jurisdiction where he or she would risk facing violations of the Convention may, under*

[43] CJEU, Judgment of 17 April 2018, *Egenberger*, C-414/16, ECLI:EU:C:2018:257, paras. 78-81.
[44] CJEU, Judgment of 11 December 2014, *Boudjlida*, C-249/12, ECLI:EU:C:2014:2431, paras. 32-34.
[45] CJEU, Judgment of 5 November 2014, *Mukarubega*, C-166/13, ECLI:EU:C:2014:2336, paras. 46-48.
[46] CJEU, Judgment of 21 November 2019, *Deutsche Lufthansa*, C-379/18, ECLI:EU:C:2019:1000, para. 63; See also, CJEU, Judgment of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paras. 33.
[47] CJEU, Judgment of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides*, C-651/19, ECLI:EU:C:2020:681, para 42.
[48] In this respect, see the Opinion of Advocate General Collins in C-18/21, *Uniqa Versicherungen* AG, delivered on 31 March 2022, ECLI:EU:C:2022:245, para. 47 and footnote n. 35.
[49] In the context of this intervention, the terms removal, expulsion, extradition and return are used interchangeably to describe the transfer of a person from the country of residence/presence to the country of origin or another third country following domestic asylum or immigration procedures.
[50] ECtHR, *Chahal v. the United Kingdom* [GC], 22414/93, 15 November 1996, paras. 79-80.
[51] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; CAT, Adel Tebourski v. France, 300/2006, 11 May 2007, paras. 8.2 – 8.3. CCPR, General Comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 12.

certain circumstances, engage the responsibility of the removing State under the Convention."[52] In *N.L. v. Sweden*, the Committee underlined that, under Article 15 of CRPD, State parties must ensure that they take all effective measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or other cruel, inhuman or degrading treatment or punishment.[53]

22. Other UN Treaty Bodies have affirmed the right to individualised procedures in cases involving a risk of *refoulement*. For the CCPR, the prohibition of torture under Article 7 of the ICCPR imposes an obligation to refrain from returning an individual to a country where they face a real risk of ill-treatment.[54] The UN Committee Against Torture (CAT) considers that Article 3 of the Convention against Torture requires "*access to all legal and/or administrative guarantees and safeguards provided by law*" in order for an adequate assessment of claims of ill-treatment to take place.[55] The CAT has emphasised that the "[…] *definitional threshold between ill-treatment and torture is often not clear* […]" and noted that additional "vulnerabilities" are important for the assessment of the torture threshold.[56] In *A.N. v. Switzerland*, the CAT recalled that "[…] *States parties should consider whether other forms of ill-treatment that a person facing deportation is at risk of experiencing might change so as to constitute torture before making a non-refoulement assessment*."[57]

23. Under Article 1 ECHR, States have an obligation to secure Convention rights to all those who fall within their jurisdiction. Contracting Parties are required to refrain from transferring people to places where, upon transfer, they would face a real risk of a violation of their rights under Article 3 ECHR or other serious human rights violations.[58] Article 3 protects individuals against both harm by State agents and non-State actors[59] and prevents removal to countries where the living conditions amount to ill-treatment contrary to the Convention.[60]

24. To reach the threshold of Article 3, the treatment concerned must attain a minimum level of severity, the assessment of which is "*relative, depending on all the circumstances of the case*", including its physical or mental effects, and the age, sex, vulnerability and state of health of the individual concerned.[61] The ECtHR has emphasised the particularly vulnerable situation of victims of torture[62] and has required compliance by the domestic authorities with procedural obligations in the assessment of the risk of ill-treatment upon removal. Prior to removal, States must verify whether the person concerned would be able to access health care in a manner that would preclude eventual exposure to ill-treatment.[63] The assessment must be made on a case-by-case basis.

25. In EU law, the *refoulement* prohibition and the duty to provide access to relevant procedures are enshrined in Article 78(1) of the TFEU and Article 18 and 19 of the CFREU; Article 4 of the Charter explicitly prohibits torture or inhuman or degrading treatment or punishment. Thus, EU law precludes the removal of a third-country national to a location where they would face a serious risk of being subjected to prohibited treatment in absolute terms and irrespective of the conduct of the person concerned.[64] An applicant's particular vulnerability may increase the risk of such treatment.[65]

26. In *MP*, the CJEU ruled that Article 4 prohibits the removal of a third country national with a particularly serious mental or physical illness "[…] *where such removal would result in a real and demonstrable risk of*

[52] CRPD, *O.O.J. v. Sweden*, 28/2015, 18 August 2017, para.10.3.
[53] CRPD, *N.L. v. Sweden*, 60/2019, 28 August 2020, para. 7.2.
[54] CCPR, General Comment no. 20 on Article 7 CCPR, 10 March 1992, para. 9.
[55] CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 49 (d).
[56] CAT, *A.N. v. Switzerland*, 742/2016, 3 August 2018, para. 8.9.
[57] *Ibid*, paras. 8.8 and 8.10.
[58] ECtHR, *Hirsi Jamaa and Others v. Italy*, 27765/09, 23 February 2012, paras. 157-158; S*harifi and Others v. Italy and Greece*, 16643/09, 21 October 201), para. 166.
[59] ECtHR, *J.K and others v Sweden [GC]*, 59166/12, 23 August 2016.
[60] ECtHR, *M.S.S. v. Belgium and Greece*, op.cit., para. 367.
[61] *Ibid*, para. 219; *Sufi and Elmi v. United Kingdom*,. 8319/07 and 11449/07,28 June 2011, para. 213.
[62] ECtHR, *Batı and Others v. Turkey*, 33097/96 et 57834/00, 3 September 2004, para. 133; *Gisayev v. Russia*, 14811/04, 20 June 2011, para. 116; *Aydın v. Turkey*, 57/1996/676/866,25 September 1997, para 103.
[63] EctHR, *Paposhvili v. Belgium*, 41738/10,17 April 2014, para. 189.
[64] CJEU, Judgment of 14 May 2019, Joined Cases C-391/16, C-77/17 and C-78/17, *M*, ECLI:EU:C:2019:403, para. 94.
[65] *Ibid*, para. 95.

significant and permanent deterioration in the state of health of the person concerned […]."[66] This deterioration would encompass both the consequences of physically transporting the person concerned to the country of removal and all the significant and permanent consequences that the removal may produce; in this respect, the CJEU has emphasised that "[…] *particular attention must be paid to the specific vulnerabilities of persons whose psychological suffering, which is likely to be exacerbated in the event of their removal, is a consequence of torture or inhuman or degrading treatment in their country of origin*."[67]

27. **The absolute prohibition of *refoulement* is at the core of every asylum claim. The interveners submit that where a person with a disability navigates an asylum procedure, the relevant analysis of the risk must cover both the potential ill-treatment due to specific or general factors that are unrelated to disability *and* the interplay of those factors with that person's disability.**

b. Substantive and procedural guarantees to ensure a rigorous examination of the claimant's situation

28. Substantive and procedural guarantees for evaluating claims of ill-treatment in asylum/immigration procedures are required under various international human rights treaties. This Committee has referred to CAT, CCPR and ECtHR jurisprudence with respect to the safeguards concerned.[68] The CCPR considers that the risk of harm must be assessed on the basis of the complainant's specific case, considering the context and particular circumstances,[69] as well as the general human rights situation in the country.[70] The CAT requires determination of whether the risk alleged is "*foreseeable, personal, present and real.*"[71]

29. Regarding the burden of proof, this Committee has reiterated that, where the complainant adduces evidence, "*it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised* […]" regarding the consequences of return.[72] According to the CCPR, "[…] *the burden of proof cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information.*" In *Osayi Omo-Amenaghawon v. Denmark*, the CCPR found that the assessment of country information was only made "*in a general fashion*" and the authorities placed undue reliance on the lack of concrete details in the applicant's allegations without considering their vulnerability.[73] For the CAT, although the burden of proof lies with the complainant, States remain under an obligation to make substantial efforts to identify *refoulement* risks.[74] Moreover, the burden shifts where the complainant is unable to provide a detailed account, such as when they are in detention, or they are otherwise able to demonstrate that they cannot obtain documentation.[75]

30. In assessing credibility, the UN Treaty Bodies weigh whether inconsistencies and lack of coherence are adequately explained. In this respect, the CCPR has found that, where there are credible sources to support the complainant's claim, the authorities should not have disregarded the applicant's valid inability to prove parts of their story.[76] Excessive focus on the assessment of credibility at the expense of analysing all the available statements and information has also been found to be inconsistent with the ICCPR.[77] In *E.U.R. v. Denmark*, the CCPR observed that, despite inconsistencies in the complainant's account, the State had not sufficiently assessed *refoulement* risks: the complainant was able to adequately explain why he had mixed

[66] CJEU, Judgment of 24 April 2018, *MP*, C-353/16, ECLI:EU:C:2018:276, para.41.
[67] *Ibid*, para. 42.
[68] CRPD, *N.L. v. Sweden*, 60/2019, 28 august 2020.
[69] CCPR, *Kaba v. Canada*, 1465/2006, 25 March 2010, para. 10.2
[70] CCPR, R.*M. and F.M. v. Denmark*, 2685/2015, 24 July 2019, 9.3; CCPR, *X. v. Denmark*, 2389/2014, 22 July 2015, 7.3; CCPR, *Pillai v. Canada*, 25 March 2011, para. 11.4.
[71] CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 11.
[72] CRPD, *N.L. v. Sweden*, op.cit., para. 7.5.
[73] CCPR, *Osayi Omo-Amenaghawon v. Denmark*, op.cit., para. 7.5
[74] CAT, *G.I. v. Denmark*, 625/2014, 10 August 2017, para. 8.8.
[75] CAT, *X. v. Switzerland*, 775/2016, 5 August 2019, 8.5; CAT, *A.M. v. Switzerland*, 841/2017, 15 November 2019, 7.4; CAT, *Ismet Bakay v. Morocco*, 826/2017, 20 Dec 2019, 7.4.
[76] CCPR, *X. v. Denmark*, 2389/2014, 22 July 2015, 9.3; CCPR, *M.K.H. v. Denmark*, 2462/2014, 12 July 2016, para. 8.8
[77] CCPR, *M.K.H. v. Denmark*, 2462/2014, 12 July 2016, para. 8.8.

up certain dates and his specific risk-related claims were rejected without thorough evaluation and only based on the adverse credibility findings.[78]

31. The CAT has established more specific and detailed standards in line with its special mandate to protect victims of torture. Recognising the frequent occurrence of post-traumatic stress disorder (PTSD) among victims of torture and other vulnerable persons, the Committee has emphasised that PTSD symptoms may affect the ability of a person to describe facts and provide details in a consistent manner.[79] Consequently, in order to ensure access to an effective remedy for persons with PTSD, States "[…] *should refrain from following a standardised credibility assessment process to determine the validity of a non-refoulement claim. With regard to potential factual contradictions and inconsistencies in the author's allegations, States parties should appreciate that complete accuracy can seldom be expected from victims of torture*." In every instance, the vulnerability of the person must be considered: in *M.F. v. Switzerland*, a case concerning the removal of a person with PTSD, the Committee noted, *inter alia*, that "[…] *the complainant's credibility should be assessed taking account of the vulnerable state of her mental health*."[80]

32. In the jurisprudence of the ECtHR, the assessment of whether the applicant would face a real risk of prohibited ill-treatment upon removal must be "*a rigorous one"*.[81] National authorities must thoroughly assess the risk of ill-treatment and the foreseeable consequences of removal to the receiving country in light of the general situation there, as well as the applicant's personal circumstances.[82] It is the duty of those authorities to seek all relevant, up-to-date and generally available information.[83] Although the responsibility to initiate an asylum claim and to substantiate the risk of ill-treatment primarily lies with the applicant, the ECtHR has found that Articles 2 and 3 ECHR may entail an obligation for authorities to consider the existence of such risk *proprio motu*. [84] This obligation may arise where the asylum claim is based on "*a well-known general risk, when information regarding such a risk is freely ascertainable from a wide number of sources*", or where, having regard to the vulnerability of asylum-seekers, a State "*is made aware of facts relating to a specific individual that could expose him to a risk of ill-treatment*".[85]

33. The ECtHR has emphasised the critical role of international and national NGOs in monitoring, reporting and providing evidence of the actual human rights situation in a particular country.[86] According to the ECtHR, in order to evaluate a country's "safety", due consideration must be given to the range of sources available and the consistency of the nature of the information reported.[87] "*General deficiencies well documented in authoritative reports, [such as] by UNHCR, Council of Europe and EU bodies, are in principle considered to have been known to the authorities."*[88]

34. Articles 3 and 13 of the ECHR establish an obligation, *inter alia*, to assess all evidence at the core of a non-*refoulement* claim[89] and to avoid imposing an unrealistic burden of proof on applicants, including by requiring them to bear the entire burden of proof.[90] In cases of removal, the ECtHR has emphasised that "[…] *a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment* […]."[91] Moreover, the vulnerable psychological situation of the person concerned

[78] CCPR, *E.U.L. v. Denmark*, 2469/2014, 1 July 2016, paras. 9.8-9.10.
[79] CAT, General comment No. 4, 2017, on the implementation of article 3 of the Convention in the context of article 22, para. 42.
[80] CAT, *M.F. v. Switzerland*, 658/2015, 15 November 2016, 7.6.
[81] *Sufi and Elmi v. the United Kingdom*, 8319/07 and 11449/07, 28 June 2011, para. 214; *Chahal v. the United Kingdom*, *op. cit*., para. 96; *Saadi v. Italy*, no. 37201/06, 28 February 2008, para. 128.
[82] *Vilvarajah and Others v. United Kingdom*, 13448/87, 30 October 1991, para. 108; *Tarakhel v. Switzerland*, *op. cit*, , para. 104.
[83] *Ilias and Ahmed*, [GC], 21 November 2019, 47287/15, para 141.
[84] ECtHR, *J.K. and others v. Sweden* [GC], no. 59166/12, 23 August 2016, para. 98.
[85] ECtHR, *F.G. v. Sweden*, No. 43611/11, 23 March 2014, paras. 125-127.
[86] ECtHR, *Chahal*, *op.cit*., paras. 99-100; *Müslim v. Turkey*, no. 53566/99, 26 April 2005, para. 67; *Said v. the Netherlands*, no. 2345/02, para. 54, ECHR 2005-VI; *Al-Moayad v. Germany* (dec.), no. 35865/03, paras. 6566, 20 February 2007.
[87] ECtHR, *Safaii v. Austria*, 44689/09, 7 May 2014, paras.46-47.
[88] ECtHR, *Ilias and Ahmed v Hungary*, No. 47287/15 [GC], (21 November 2019), para 141.
[89] ECtHR, *Jabari v. Turkey*, 40035/98, 11 July 2000, paras.39-40; *Singh and ors v. Belgium*, no. 33210/11, 2 October 2012, para. 104.
[90] ECtHR, *M.S.S. v. Belgium and Greece*, op. cit., paras. 344-359; *Hirsi Jamaa and Others v. Italy*, op. cit., paras. 122-158.
[91] ECtHR, *Paposhvili v. Belgium*, no. 41738/10, 17 April 2014, para 186.

must carry a certain weight in the assessment of the claims. More than once, the Court has underlined that "[…] *the fact that after several years the applicants' statements differed in rather insignificant details in the recollection of an extremely traumatic and stressful event, does not in itself suffice to cast doubt on the overall veracity of their statements*."[92] It cannot be expected of asylum-seekers to give completely accurate and consistent statements, particularly where any innacuracies and inconsistencies are accompanied by a reasonable explanation.[93] Lastly, the Court has recognised that "[…] *owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof*."[94]

35. In EU law, the remedy that allows an individual to submit reasons against their removal due to a real risk of ill-treatment must comply with Article 47 of the CFREU and the principle of *non-refoulement*.[95] The assessment of the risk of ill-treatment "[…] *must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union*."[96] The duty to conduct an individual assessment requires the specific evaluation of the person's claim in light of their personal circumstances.[97] When a judicial authority is assessing the risk of treatment that would violate Article 4 of the CFREU in the context of a removal procedure, they must rely on "[…] *information that is objective, reliable, specific and properly updated* […]" in order to verify whether the conditions in the country of removal reveal a risk of ill-treatment either due to their systemic nature or because they may affect certain groups of people.[98]

36. The CJEU has connected evidentiary requirements with the principle of effectiveness and has found that "[…] *if the national court finds that the fact of requiring a party to bear the burden of proof is likely to make it impossible or excessively difficult for such evidence to be adduced, since inter alia that evidence relates to information which that party will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry,* […]."[99] The CJEU has confirmed that the requirements of equivalence and effectiveness[100] "[…] *embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law* […]" and concern, *inter alia*, the definition of detailed procedural rules.[101]

37. The CJEU has recognised that the case-specific characteristics may necessitate different methods of evidence assessment. Thus, in *A, B and C*, which concerned asylum claims based on sexual orientation, the Court underlined that the authorities may need to "[…] *modify their methods of assessing statements and documentary or other evidence having regard to the specific features of each category of application for asylum, in observance of the rights guaranteed by the Charter*."[102] The Court stated that to find that an applicant is not credible merely because they did not reveal their same-sex sexual orientation earlier would be to fail to employ an individualised assessment that recognises the person's vulnerability.[103] The obligation of a holistic and case-specific assessment precludes hasty findings on credibility where factors related to the person's vulnerability may have affected their ability to communicate their claim effectively.

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[92] ECtHR, *Astamirova v. Russia*, 27256/03, 26 February 2009, para. 76; *Ustarkhanova v. Russia*, 35744/05, 26 November 2009, para. 67.
[93] ECtHR, *B v Sweden*, 16578/03, 26 October 2004.
[94] ECtHR, *R.H. v. Sweden*, 4601/14, 10 September 2015, para. 58; *JK and Others v Sweden*, 59166/12, 23 August 2016, para. 93.
[95] CJEU, Judgment of 30 September 2020, *LM* C-402/19, ECLI:EU:C:2020:759, para. 34.
[96] CJEU, Judgment of 2 March 2010, *Abdulla*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, para. 90.
[97] CJEU, Judgment of 5 September 2012, *Y and Z*, Joined Cases C-71/11 and C-99/11, EU:C:2012:518, paras. 72 and 77.
[98] CJEU, Judgment of 5 April 2016, *Aranyosi*, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 89.
[99] CJEU, Judgment of 9 July 2020, *Vueling Airlines* SA, C-86/19, ECLI:EU:C:2020:538, para. 43; Judgment of 7 September 2006, Laboratoires Boiron, C 526/04, EU:C:2006:528, para. 55.
[100] Although the cited jurisprudence concerns non-asylum matters, this general principle of EU law (i.e., effectiveness) is applicable to the question of the burden of proof requirements in asylum cases too. In light of this, the burden of proof may shift, requiring the authorities to produce evidence when they are better placed to do it.
[101] CJEU, Judgment of 29 October 2009, *Virginie Pontin v T-Comalux SA*,Case C-63/08, EU:C:2009:666, para. 44.
[102] CJEU, Judgment of 2 December 2014, *A, B and C*, Joined Cases C-148/13, C-149/13 and 150/13,EU:C:2014:2406, para. 54.
[103] *Ibid*, paras. 70-71.

38. The above considerations call for a nuanced approach to credibility and evidence assessment in the context of asylum and international protection proceedings, especially for persons with disabilities. In this regard, the UNHCR has drawn attention to various factors that can affect the perceived credibility of an applicant, including the impact of trauma on memory and the fear of and lack of trust towards authorities.[104]

39. **The interveners submit that the *non-refoulement* principle imposes a duty on States to thoroughly examine the situation the applicant will encounter upon removal. In order to comply with the guarantees of Article 15 of the CRPD, the assessment of available information, evidence and statements must be made with due consideration of the person's individual circumstances and particular vulnerability, especially when the latter include any disabilities. The specific safeguards identified above require a specialised and adaptable approach to the establishment of facts concerning the asylum claim of a person with a disability. Where the applicant is not in a position to explain their situation with clarity and accuracy, either due to psychological factors relating to flight trauma or a specific disability in the absence of specialised support, the authorities must adapt the application of procedural rules to ensure access to asylum in a fair and equal manner. The removal of a person with a disability without a thorough, disability-informed individualised assessment or other due process safeguards constitutes a violation of the non-*refoulement* principle. The absence of procedural adjustments to ensure that the person concerned is able to effectively put forward their claim effectively violates their rights under Article 15 of the CRPD, particularly in light of the principle of accessibility under Article 3 (f) and access to justice guarantees under Article 13.**

[104] UN High Commissioner for Refugees (UNHCR), Beyond Proof, Credibility Assessment in EU Asylum Systems : Full Report, May 2013, pp. 60-65.