Beyond Derogation: Context-Driven Interpretation of Migrants' Rights as a Novel Justification under the ECHR

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Abstract

This article examines how European states have responded to the so-called 'instrumentalisation' of migration at the Belarus-European Union border by advancing a novel, context-driven justification for restricting migrants' rights under the European Court of Human Rights. Rather than formally derogating under Art. 15 European Convention on Human Rights (ECHR), Poland, Latvia, and Lithuania contend that exceptional geopolitical circumstances justify balancing national security against human rights obligations. The article analyses whether such reasoning – which, if accepted by the Court, could extend to other alleged crisis situations – can be grounded in existing ECHR doctrines, particularly the *Hassan* ruling and the living instrument doctrine, and finds that neither supports this approach. Accepting an unwritten, context-based justification would erode the Convention's limitation and derogation framework, weaken legal safeguards, and enable states to dilute human rights protection under the guise of necessity.

Keywords

ECHR – derogations – state of emergency – instrumentalisation – migration – hybrid attack

I. Introduction

In recent times, European states have responded to instances of 'instrumentalised migration' with large-scale pushbacks and increasingly rigid border policies. Such measures affect the human rights protected by the European Convention on Human Rights.[1] A recent example, currently before the European Court of Human Rights (hereinafter ECtHR or the Court), is the reaction of Poland, Latvia, and Lithuania to Belarus's attempt to exert political pressure by facilitating large numbers of border crossings into the European Union (EU).[2] The states justify their strict border management by invoking the alleged severe threat to national security posed by this instrumentalisation. While the governments ask the Court to find no violation, it

1 European Convention on Human Rights of 4 November 1950, ETS No. 5.

2 ECtHR (Grand Chamber), *R. A. and Others v. Poland*, no. 42120 (pending); ECtHR (Grand Chamber), *H. M. M. and Others v. Latvia*, no. 42165/21 (pending); ECtHR (Grand Chamber), *C. O. C. G. and Others v. Lithuania*, no. 177764/22 (pending); see also the proceeding initiated by Lithuania in May 2025 before the ICJ, *Alleged Smuggling of Migrants* (Lithuania v. Belarus) (pending).

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remains unclear on which legal grounds their arguments are based. As this article argues, the states appear to propose a novel justification allowing for a balancing of migrants' rights against national security. This new justification is detached from existing grounds for justification and grounded solely in the threatening context of the situation.

Such a justification risks undermining the Convention's differentiated system, which already equips states with options to restrict rights through limitation and derogation clauses. General limitation clauses are provided by paragraph two of Art. 8-11 ECHR and permit restrictions in specified circumstances.[3] In emergencies, Art. 15 ECHR allows states to derogate from certain human rights guarantees under clearly defined conditions.[4] By refusing to derogate formally, states erode the legal safeguards enshrined in Art. 15 ECHR – safeguards designed to prevent the abuse of emergency measures and uphold the rule of law. Introducing a justification outside those expressly provided for by the Convention could open Pandora's box and legalise far-reaching interferences with Convention rights. If the ECtHR were to accept such a context-driven justification, it could be transplanted from migration law to other legal fields and alleged crisis contexts, becoming part of a broader strategy to informally lower human rights obligations.

This article addresses the fundamental doctrinal questions raised by this approach: Does it have any basis in the Court's previous case law and interpretive practice? What risks does it pose to the Convention system – in particular, what are the implications of informal deviations beyond Art. 15 ECHR?

This article argues that such an approach is unsupported by the Convention system and instead poses a significant threat to the effective protection of human rights. First, the analysis outlines the three cases currently pending before the Court that form the starting point for this examination (Section II. 1.). It then attempts to translate the governments' somewhat ambiguous pleas (Section II. 2.) into legal terms (Section II. 3.). The article next considers whether the proposed approach could be grounded in the Court's case law (Section III. 1.) or

3 E. g. in Art. 8(2) ECHR 'in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others', Art. 9(2) ECHR 'in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others', Art. 10(2) ECHR 'in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary' and Art. 11(2) ECHR 'in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.'

4 See below Section IV. 2.

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in the 'living instrument' doctrine (Section III. 2.). Finally, it assesses the risks of a context-driven justification. As the states' proposal risks circumventing Art. 15 ECHR in particular, that provision sits at the centre of the analysis (Section IV.). After setting out the difficulties in assessing emergency situations (Section IV. 1.), the article focuses on several safeguards of the derogation clause that would be jeopardised if courts accepted a balancing of national security concerns against individual rights as an alternative to the formal derogation procedure (Section V. 2.). The paper concludes by summarising the dangerous implications of informal derogations (Section V.)

II. Three Cases Under Scrutiny by the ECtHR

The present discussion is prompted by three cases that are currently pending before the ECtHR.[5] In defending their pushback practices, the respondent governments have proposed an approach that, if accepted by the Court, could profoundly affect the protection of migrants' rights and human rights more generally.

The three cases, *R. A. and Others v. Poland*, *H. M. M. v. Latvia* and *C. O. C. G. v. Lithuania*,[6] concern asylum seekers who were repeatedly pushed back at the EU's external border with Belarus and shuttled back and forth between European and Belarusian border authorities.[7] Beginning in 2021, Belarus eased entry requirements for foreigners, facilitated transport to the border and stopped preventing irregular entry into the EU.[8] The bordering EU states responded to rising numbers of arrivals[9] with national emergency legislation that enabled border guards (to varying degrees) to reject

5 ECtHR, *R. A. and Others* (n. 2); ECtHR, *H. M. M. and Others* (n. 2); ECtHR, *C. O. C. G. and Others* (n. 2).

6 ECtHR, *R. A. and Others* (n. 2); ECtHR, *H. M. M. and Others* (n. 2); ECtHR, *C. O. C. G. and Others* (n. 2).

7 ECtHR, *R. A. and Others* (n. 2), Statement of Facts, assuming a one-time pushback onto Belarusian territory and a subsequent stranding in a makeshift camp on the Belarusian-Polish border; ECtHR, *H. M. M. and Others* (n. 2), Statement of Facts; ECtHR, *C. O. C. G. and Others* (n. 2), Statements of Facts.

8 Sarah Ganty, Aleksandra Ancite-Jepifánova and Dimitry V. Kochenov, 'EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by "Instrumentalisation"', Hague Journal on the Rule of Law 16 (2024), 739-774 (745), also illustrating the disastrous conditions in which the migrants were placed.

9 However, the numbers remain relatively low compared to other migration routes to Europe. In 2022, the Polish Border Guard reported 15.000 attempts of illegal border crossings from Belarus on its social media; other reliable statistics only counted about 5.500 arrivals, see Ganty, Ancite-Jepifánova and Kochenov (n. 8), 751. In contrast, in the same year, over 200,000 migrants arrived in Italy via the Mediterranean Sea, UN Data Operational Portal, 'Europe Sea Arrivals – Italy', available at: <https://data.unhcr.org/en/situations/europe-sea-arrivals/location/24521>, last access 11 March 2026.

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requests for asylum, thereby narrowing legal pathways of entry.[10] Although the migrants explicitly sought protection, they were detained in precarious camp conditions or transported to remote areas far from official border crossings. These actions effectively denied the migrants access to asylum procedures.[11]

Before the ECtHR, the applicants in all three cases claim that the push-backs violated their rights under Art. 2 ECHR (right to life), Art. 3 ECHR (prohibition of inhuman and degrading treatment), Art. 4 of Additional Protocol (AP) No. 4 (AP 4 ECHR, prohibition of collective expulsion of aliens) and Art. 13 ECHR (right to an effective remedy) taken together with Art. 3 ECHR and Art. 4 AP 4 ECHR.[12] The applicants in the Latvian case further complained under Art. 5(1) and (4) ECHR, and in the Lithuanian case under Art. 5(1), (2) and (4) ECHR about a violation of their right to liberty and security due to detention in accommodation centres.[13]

1. Arguments Raised by the Governments

At the oral hearings,[14] the respondent governments advanced multiple lines of argument. They disputed jurisdiction,[15] claimed inadmissibility,[16] contested the facts[17] and stressed the availability of legal entry.[18] On this last

10 Aleksandra Ancite-Jepifánova, 'The EU's Eastern Border and Inconvenient Truths', Verfassungsblog, 27 February 2024, doi: 10.59704/15981f9a81fb92a1.

11 Ganty, Ancite-Jepifánova and Kochenov (n. 8), 745 f.

12 Registrar ECtHR, Press Release, 'Grand Chamber hearing concerning alleged "push-backs" at the Latvian-Belarusian border', ECHR 041 (2025), 12 February 2025; Registrar ECtHR, Press Release, 'Grand Chamber hearing concerning alleged "pushbacks" at the Polish-Belarusian border', ECHR 040 (2025), 12 February 2025; Registrar ECtHR, Press Release, 'Grand Chamber hearing concerning alleged "pushbacks" at the Lithuanian-Belarusian border', ECHR 042 (2025), 12 February 2025.

13 Press Release Lithuania (n. 12); Press Release Latvia (n. 12); Press Release Poland (n. 12).

14 For a critical report see: Ancite-Jepifánova, 'EU's Eastern Border' (n. 10).

15 Grand Chamber Hearing, *R. A. and Others v. Poland*, 7:36, <https://www.echr.coe.int/w/r. a.-and-others-v.-poland-no.-42120/21->, last access 11 March 2026; Grand Chamber Hearing, *H. M. M. and Others v. Latvia*, 14:15, <https://www.echr.coe.int/w/h. m. m.-and-others-v.-latvia-no.-42165/21->, last access 11 March 2026.

16 Grand Chamber Hearing *Latvia* (n. 15), 19:25 in light of non-exhaustion of local remedies; Grand Chamber Hearing *Poland* (n. 15) 11:29 in light of non-exhaustion of local remedies, an actio popularis, and the lack of power of attorney.

17 Grand Chamber Hearing *Latvia* (n. 15), 15:59 whether the applicants had requested asylum, 18:30 on the pushbacks to Belarus, 23:28 on the ill-treatment having taken place, 29:50 on the detention in tents; this strategy is being used increasingly by states, see Isabell Kienzle and Melina Riemer, 'Feeble Recognition of a Systematic Pushback Practice', Verfassungsblog, 30 January 2025, doi: 10.59704/b9710904afb91ed5.

18 Grand Chamber Hearing *Poland* (n. 15), 20:54; Grand Chamber Hearing *Latvia* (n. 15), 24:02.

point, they further asked the Court to apply the 'own culpable conduct' exception developed in *N. D. and N. T. v. Spain*,[19] despite the absence of violence employed by the migrants.[20]

One argument, however, stood out. All three states relied heavily on militarised rhetoric, asserting that the pushbacks were necessary responses to the 'hybrid attacks'[21] by Belarus characterised by the instrumentalisation of migration flows.[22] 'Hybridity' refers to the integrated use of multiple tools, such as cyber warfare, disinformation campaigns, economic pressure, and other non-military means,[23] below the threshold of formal warfare, designed to exploit systemic vulnerabilities (e. g. of critical infrastructure).[24] The term has often been used to describe Russian operations that seek to destabilise

19 ECtHR (Grand Chamber), *N. D. and N. T. v. Spain,* judgment of 13 February 2020, nos 8675/15 and 8697/15, paras 201, 208. In *N.D and N. T. v. Spain* the Grand Chamber had built this exception on the cumulative requirements of the use of force and the existence of legal entry points, see below Section III. 2. a).

20 See only Grand Chamber Hearing *Latvia* (n. 15) at 31:59: 'While Latvia takes note that the applicant did not act aggressively, the principal established in the cases of *N. D. and N. T.* as well as *A. A. and Others* should in identical terms apply to situations where migrants attempt to unlawfully cross a border during a hybrid operation orchestrated by a third state.' For a critique of this approach, see Alison Beuscher, Johanna Bücker, Laura Goller, Lina Möller, Marlene Stiller and Sarah Pfeiffer, 'The Claim of Hybrid Attacks', Verfassungsblog, 21 February 2025, doi: 10.59704/e85da74bfcc4e06d.

21 Grand Chamber Hearing *Latvia*, (n. 15) 10:15 'hybrid attack'; 17:39 'hybrid warfare'; Grand Chamber Hearing *Poland* (n. 15), 29:00 'hybrid attack', 24:38 'hybrid war'; Grand Chamber Hearing, *C. O. C. G. and Others v. Lithuania*, 13:03 and 36:00 'hybrid attack', <https://www.echr.coe.int/w/c. o. c. g.-and-others-v.-lithuania-no.-17764/22->, last access 11 March 2026.

22 Ganty, Ancite-Jepifánova and Kochenov (n. 8), 746. The states' argumentation feeds into a general shift from allegedly 'natural' migration flows to 'artificial' ones. For an overview of different instrumentalisation strategies by e. g. Türkiye, Belarus or Morocco, see Lucas Rasche, 'The Instrumentalisation of Migration – How Should the EU Respond?', Hertie School Jacques Dolors Center, 16 December 2022, 2 f.; also the EU Commission's statement reproduced state terminology on 'hybrid attacks' and approved 'serious interferences with fundamental rights' given the circumstances; European Commission, 'Communication on Countering Hybrid Threats from the Weaponisation of Migration and Strengthening Security at the EU's External Borders', 11 December 2024, COM(2024) 570 final, 6; Marlene Stiller, 'How the EU Commission Backs up Pushbacks at the EU-Belarussian Border', Verfassungsblog, 7 January 2025, doi: 10.59704/0c39891676fe2392.

23 The toolbox of hybrid attacks encompasses i. e. the usage of propaganda, fake news, pressure on media, strategic funding of organisations and parties, cyber tools, and economic leverage, Gregory Treverton et al., *Addressing Hybrid Threats* (Swedish Defence University 2018).

24 Fundamental Rights Agency (FRA), Countering the Instrumentalisation of Migrants and Refugees and Respecting Fundamental Rights, 23 July 2025. FRA Position Paper 2/2025, doi: 10.2811/6262541, para. 20; Aurel Sari, 'Metaphors, Rules and War: Making Sense of Hybrid Threats and Grey Zone Conflicts', EJIL:Talk, 31 January 2025; see also Peter Kempees, *'Hard Power' and the European Convention on Human Rights* (Brill Nijhoff 2021), 79. Note that there is no settled legal definition of the concept.

Western politics;[25] more recently, states have applied it to the facilitation of migratory movements.[26] In 2024, the EU Commission adopted the 'hybrid threats' terminology for the Belarus border situation,[27] followed by the Fundamental Rights Agency,[28] lending the claim a certain institutional legitimacy. Striking the same chord, the Lithuanian government agent argued:

> 'Indeed, this case is about threats arising from the autocratic forces across the border of the Convention geography, undermining our European fundamental values, using the Convention as a tool, as a weapon against our democracies.'[29]

Notably, the states dedicated a considerable amount of time of their oral pleadings, to describing this threat and urging the Court to factor the geopolitical context into its assessment. Yet they did not explain analytically under which legal provision or justificatory ground this context should be considered.

2. Translating the Governments' Plea into Legal Terms

It remains ambiguous how the context of the proclaimed hybrid attacks informs the legal analysis. This section therefore attempts to translate the governments' pleas into legal terms and outline their legal implications.[30]

The common standard to justify state measures are the ECHR's limitation clauses. However, in the present cases the states are confronted with the difficulty that several of the rights invoked either do not include limitation clauses or list no exceptions that would cover the measures taken. Art. 3 ECHR is absolute; it does not permit deviation. Art. 4 AP 4 ECHR simply provides that 'Collective expulsion of aliens is prohibited', without a limitation clause.[31] The same holds for Art. 13 ECHR.[32] As for Art. 2 ECHR and Art. 5 ECHR, they

25 Treverton et al. (n. 23), 11. Prominent examples are the Russian intervention in the 2016 US election and Russian interventions in Crimea and Ukraine.

26 Aleksandra Ancite-Jepifánova, Unpacking the "Migrant Instrumentalisation" Narrative: Law and Politics of Refugee Exclusion at the EU-Belarus Border. Democracy Institute (DI) Working Papers 2025/32, 10.

27 European Commission, Communication on Countering Hybrid Threats (n. 22); see also European Commission, Communication on ProtectEU: a European Internal Security Strategy, COM(2025) 148, 1 April 2025, 8.

28 FRA (n. 24), para. 113.

29 Grand Chamber Hearing *Lithuania* (n. 21), 10:29.

30 Similarly, Grazyna Baranowska, 'What – If Any – Are the Consequences of the "Instrumentalization of Migration" for Human Rights Protection Under the ECHR? A look at the Arguments Raised at the ECtHR Grand Chamber Hearing on Pushbacks to Belarus', Strasbourg Observers, 4 March 2025.

31 On the limited exclusion from the scope of protection developed in *N. D. and N. T.* (n. 19) see below III. 2. a).

32 Art. 13 ECHR: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

do not contain general, balancing-type limitation clauses; rather, they stipulate exhaustive lists of permissible exceptions which could justify an interference.[33] Art. 2(2) ECHR justifies deprivations of life only in narrowly defined situations (self-defence, lawful arrest or prevention of escape, quelling a riot or insurrection).[34] Yet no such conduct by the migrants is discernible in the respective cases. In addition, a state relying on Art. 2(2) ECHR must prove 'beyond reasonable doubt' that the use of force was 'absolutely necessary'.[35] Regarding the claims under Art. 5 ECHR, detention of the migrants might actually be based on Art. 5(1)(f) ECHR, which allows lawful arrest or detention to prevent unauthorised entry into a country or to facilitate deportation or extradition. But the applicants also invoke Art. 5(2) and (4) ECHR, which contain procedural guarantees not subject to limitation clauses. In short, most interferences alleged here cannot be justified under limitation clauses or listed exceptions.

Given the war-like rhetoric of the state representatives in the oral hearings signalling a state of emergency, one might also think of Art. 15 ECHR as a justification ground.[36] Yet none of the states formally notified the Secretary General of a derogation, a prerequisite for relying on the derogation clause.[37] Even if the states had done so, it is questionable whether the pushbacks could be justified under Art. 15 ECHR. These issues will be assessed in further detail below.

If neither limitation clauses nor Art. 15 ECHR are available, on what legal mechanism do the governments rely to defend their rights interferences? Translated into legal terms, they appear to effectively request a new justification grounded in a context-driven interpretation of the Convention, one that takes into account the existential circumstances states face.[38] Such an approach aims for a general balancing of serious security concerns against the rights of migrants and thereby permits far-reaching restrictions. The following discussion explores whether such a context-driven justification aligns with existing Convention doctrine.

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33 William Schabas, *The European Convention on Human Rights – A Commentary* (Oxford University Press 2015), 226; Lewis Graham, 'Liberty and Its exceptions', ICLQ 72 (2023), 277-308 (277 f.).

34 Schabas (n. 33), 146 f.

35 Schabas (n. 33), 123.

36 In the oral hearings, the judges likewise raised the question whether it had made any difference if the States had made a declaration of derogation, Grand Chamber Hearing *Lithuania* (n. 15), Judge Bårdsen at 1:11:30.

37 European Commission of Human Rights (EComHR), *Cyprus v. Turkey*, report of 4 October 1983, no. 8007/77, para. 67; ECtHR, *Isayeva v. Russia*, judgment of 24 February 2005, no. 57950/00, para. 191.

38 See further possible interpretations of the governments' arguments in Baranowska (n. 30).

III. Does a Context-Driven Justification Build on Existing Doctrines?

To assess whether an unwritten justification of this kind could be based on existing Court case law and is compatible with the Convention's doctrine, we first consider the case of *Hassan v. the United Kingdom*, where the Court took account of the context of armed conflict when determining the applicable law and effectively extended the list in Art. 5(1) ECHR. *Hassan v. the United Kingdom* might be read as a precedent for context-driven justification in emergency situations. In a second step, we analyse the living instrument doctrine,[39] invoked by some respondent governments at the oral hearings,[40] who argued that a flexible interpretation responsive to new threats may warrant lowering state obligations.[41]

1. *Hassan v. the United Kingdom* as Context-Driven Interpretation

Hassan v. the United Kingdom is often cited as a prominent example of the Court's willingness to accommodate deviations from Convention guarantees in specific contexts.[42] The approach that the Court took in this case could be read as a context-driven interpretation that permits deviations from Convention rights in situations that would otherwise constitute a violation.[43]

39 ECtHR, *Tyrer v. United Kingdom*, judgment of 25 April 1978, no. 5856/72, para. 31; Rachael Ita and David Hicks, 'Beyond Expansion or Restriction? Models of Interaction Between the Living Instrument and Margin of Appreciation Doctrines and the Scope of the ECHR', International Human Rights Law Review 10 (2021), 40-74 (46 f.).

40 Explicitly, Grand Chamber Hearing *Lithuania* (n. 15), 11:24.

41 For a critical account of this argument see: Beuscher et al. (n. 20).

42 ECtHR (Grand Chamber), *Hassan v. the United Kingdom*, judgment of 16 September 2014, no. 29750/09, paras 99, 103. While there is a number of cases in which the ECtHR adjusted human rights obligations in light of an armed conflict, *Hassan v. the United Kingdom* stands out as the most far-reaching, since it not only lowered obligations but invented an unwritten ground of justification. But see also ECtHR, *Hanan v. Germany*, judgment of 16 February 2021, no. 4871/16 para. 223 in which the Court lowered the demands of an effective investigation; ECtHR, *Ukraine and the Netherlands v. Russia*, judgment of 9 July 2025, nos 8019/16, 43800/14, 28525/20 and 11055/22 where the Court recites *Hassan* in para. 427. However, it remains unclear whether the Court intends to depart from *Hassan*, para. 430. Ultimately, it leaves the question unanswered because no conflict between IHRL and IHL arises, para. 461.

43 Critically assessing the extension of the *Hassan* approach to Covid-19: Marie Laur, *The Aporia of Adjudicating Emergencies in Liberal Democracies* (Doctoral Thesis, Central European University 2024), 242.

The case concerned an Iraqi national detained by British forces who later died in unclear circumstances. The detention complied with the Geneva Conventions, but the United Kingdom had not derogated under the ECHR and was accused, inter alia, of violating Art. 5(1) ECHR. The Court held that the Convention was applicable to the facts[44] and that the detention did not fall within Art. 5(1) ECHR's enumerated grounds.[45] It then asked whether compliance with the Third and Fourth Geneva Convention could nonetheless preclude a violation. The ECtHR adopted a rather innovative but questionable approach: It based its argumentation on Art. 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT)[46] that allows to take the subsequent practice of the parties into account when interpreting a treaty provision.[47] Consequently, the Court ruled that the practice of the Member States did not indicate a need to derogate, since states had not done so in comparable situations in the past.[48] It further adopted a systemic approach (Art. 31(3)(c) VCLT[49]) by interpreting the Convention in light of the Geneva Conventions, ruling that the detention grounds contained in the Third and Fourth Geneva Conventions had to be read into Art. 5(1) ECHR.[50] Through this judgment, the Court thus allowed the United Kingdom to depart from its obligations even though it had not formally derogated.

This approach can, and should, be criticised for several reasons.[51] Systemic integration permits interpreting a treaty provision in light of other treaties, particularly where they address a similar subject matter.[52] While systemic integration is to be welcomed as a means of countering the fragmentation of law,[53] it remains a method of interpretation under Art. 31(3)(c) VCLT . As

44 ECtHR, *Hassan* (n. 42), paras 77 f.

45 ECtHR, *Hassan* (n. 42), paras 97 f.

46 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

47 Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2015), 34; Oliver Dörr, 'Art. 31' in: Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties – A Commentary* (2nd edn, Springer 2018), paras 77 f.; see for a critique Luigi Crema, 'Subsequent Practice in Hassan v. United Kingdom: When Things Seem to Go Wrong in the Life of a Living Instrument', Quest. Int'l L. 3 (2015), 3-22 (8-9); Lawrence Hill-Cawthorne, 'The Grand Chamber Judgment in Hassan v. UK', EJIL:Talk!, 16 September 2014.

48 ECtHR, *Hassan* (n. 42), para. 101.

49 Dörr (n. 47), paras 92 f.

50 ECtHR, *Hassan* (n. 42), para. 107.

51 See also Johanna Bücker and Maya Hertig Randall, 'Art. 15 EMRK' in: Maya Hertig Randall and Helen Keller (eds), *Basler Kommentar zur EMRK* (Helbing Lichtenhahn 2025), para. 13.

52 Dörr (n. 47), para. 96.

53 ILC, fifty-eighth Session, 'Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', finalised by Marti Koskenniemi, 13 April 2006, A/CN.4/L.682, para. 414; Dörr (n. 47), para. 98.

the International Law Commission (ILC) stated early on, 'it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain'.[54] The judgment also prompted dissenting opinions from some of the Grand Chamber judges. As Judges Spano, Nicolaou, Bianku, and Kalaydjieva pointed out, any deprivation of liberty must either fall within the grounds for detention stipulated in Art. 5 (1) ECHR or be based on a valid derogation.[55] Following a thorough examination of the majority's reasoning, they conclude that:

> 'This method of "accommodation" of Convention rights is a novelty in the Court's case-law. Its scope is ambiguous and its content wholly uncertain, at least as a legitimate method of interpretation of a legal text. […] It effectively disapplies or displaces the fundamental safeguards underlying the exhaustive and narrowly interpreted grounds for permissible detention under the Convention by judicially creating a new, unwritten ground for a deprivation of liberty and, hence, incorporating norms from another and distinct regime of international law, in direct conflict with the Convention provision.'[56]

Such a practice would also allow 'the respondent state to choose ex post facto the legal standard by which it will be judged',[57] a result that would be detrimental to the rule of law.

Hassan v. the United Kingdom has been widely criticised for permitting a form of *de facto* derogation, serving as a model for an unwritten derogation in a case that could have – and arguably should have – fallen within the scope of Art. 15 ECHR.[58] Importantly, however, the Court allowed this informal derogation in *Hassan v. the United Kingdom* only because other applicable norms of international law – namely, International Humanitarian Law (IHL) – provided an alternative framework that included additional grounds for detention. In effect, by adopting a systemic reading, the ECtHR sought to

54 ILC, 'Draft Articles on the Law of Treaties', ILCYB (1966), Vol. II, Part Two, 220 f.

55 ECtHR, *Hassan* (n. 42), Partly Dissenting Opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, para. 7 and para. 4: The United Kingdom '[…] invites the Court to "disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law" […].' In the same direction see also: ECtHR (Grand Chamber), *Georgia v. Russia (II),* judgment of 21 January 2021, no. 38263/08, Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia, para. 18 and Partly Dissenting Opinion of Judge Chanturia, para. 18.

56 ECtHR, *Hassan* (n. 42), Partly Dissenting Opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, para. 18.

57 ECtHR, *Georgia v. Russia (II)* (n. 55), Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia, para. 20.

58 For an overview of the scholarly response see Kempees (n. 24), 58 f.

prevent human rights guarantees from being rendered meaningless in situations of conflict with IHL.[59]

The relationship between IHL and human rights law has been subject to a long-standing debate.[60] At its core lies the question whether, in the event of a conflict, IHL takes precedence over human rights rules as *lex specialis*.[61] In *Hassan v. the United Kingdom*, the Court opted for a reconciliatory approach, consistent with the predominant view in scholarship, that treats both regimes as simultaneously applicable.[62] However, safeguarding the relevance of human rights while accommodating IHL could equally have been achieved by emphasising the importance of Art. 15 ECHR. After all, that provision already anticipates the need for modifications to respond to the particular standards applicable in armed conflict – but only if the conditions of Art. 15 ECHR are satisfied.[63]

In the migration cases, however, a context-driven justification modelled on *Hassan v. the United Kingdom* would fail. After all, the preconditions for systemic integration are not met. No alternative set of international rules, such as the IHL provision invoked in *Hassan v. the United Kingdom*, exists that could justify the states' measures. Neither the exceptions allowed under the 1951 Refugee Convention nor those under EU law (Art. 72 and Art. 78 Treaty on the Functioning of the European Union [TFEU]), nor any circumstances precluding wrongfulness under the international law of state responsibility, would permit such actions.[64] Lithuania has also instituted proceedings against Belarus before the International Court of Justice (ICJ), alleging violations of the Protocol against the Smuggling of Migrants by Land, Sea and Air.[65] How-

59 Paulina Starski, '§ 20 Einsatzrecht' in: Sebastian von Kielmansegg, Jörg Philipp Terhechte and Dieter Weingärtner (eds), *Handbuch Recht der Streitkräfte* (C. H. Beck 2025), para. 237.

60 Starski (n. 59), paras 233 f.; different contributions in: Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law* (Elgar 2013) and Robert Kolb, Gloria Gaggioli and Pavle Kilibarda, *Research Handbook on Human Rights and Humanitarian Law* (Elgar 2022).

61 Starski (n. 59), para. 234; for an overview see Gloria Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie* (Editions A. Pedone 2013), 113 f.; Kempees (n. 24), 40 f.

62 ECtHR, *Hassan* (n. 42), para. 104; reiterated in ECtHR, *Ukraine and the Netherlands* (n. 42), para. 428; see also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, para. 25; Gaggioli (n. 61), 113 f.; Kempees (n. 24), 40 f.

63 See the reference to 'lawful acts of war' in Art. 15(1) ECHR; ECtHR, *Hassan* (n. 42), Partly Dissenting Opinion of Judge Spano joined by Judges Nicolaou, Bianku and Kalaydjieva, para. 16.

64 See also Başak Çalı et al., The Absolute Prohibition of Refoulement and Exceptional Circumstances (15 January 2025), Bonavero Institute of Human Rights Report 1/2025, available at: <https://www.law.ox.ac.uk/sites/default/files/2025-01/Bonavero%20Report%20-%20Non-refoulement_1.pdf>, last access 11 March 2026

65 ICJ, *Alleged Smuggling of Migrants* (n. 2).

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ever, even a positive finding in those proceedings would not provide a relevant justificatory basis, as the Protocol does not permit the denial of individuals' access to asylum.[66] Consequently, the prerequisite of 'other applicable legal rules' under Art. 31(3)(c) VCLT is lacking.

Therefore, *Hassan v. the United Kingdom* cannot provide a basis for a context-driven justification.

2. The Living Instrument Doctrine

The second avenue that could potentially serve as a basis for the governmental approach is the living instrument doctrine. The Court first articulated this principle in the landmark case *Tyrer v. the United Kingdom*[67], asserting that the ECHR is a 'living instrument' that must be interpreted in light of present-day conditions. Rather than being confined to the intentions of the Convention's drafters, the doctrine enables the ECtHR to interpret Convention rights in accordance with contemporary human rights standards shared among European states.[68] It functions as a safeguard to preserve the effectiveness of the Convention's guarantees over time.[69]

Throughout its case law, the Court has relied on this doctrine to progressively expand the scope of protection under the Convention, particularly in relation to discrimination, minority rights, privacy, and evolving conceptions of dignity.[70] The Court's case law illustrates its readiness to interpret the Convention dynamically to respond to contemporary human rights challenges.

As the following section will show, however, the Court's case law on migrants' rights has not developed in a consistently linear or expansionary manner (a). Some commentators argue that, in light of a shifting European consensus, which is also reflected in more recent restrictive judgments, the

66 Dana Schmalz, 'Migrant "Instrumentalisation" Before the ICJ', Verfassungsblog, 6 June 2025, doi: 10.59704/05429da5c5d2e2c4.

67 ECtHR, *Tyrer* (n. 39), para. 31.

68 George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in: Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013), 106-141 (108).

69 Başak Çalı, 'Specialized Rules of Treaty Interpretation: Human Rights' in: Duncan Hollis (ed.), *The Oxford Guide to Treaties* (2nd edn, Oxford University Press 2020), 504-523 (515).

70 Alastair Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd edn, Oxford University Press 2012), 227-228; ECtHR (Plenary), *Dudgeon v. United Kingdom*, judgment of 22 October 1981, no. 7525/76, para. 60; ECtHR (Grand Chamber), *Demir and Baykara v. Turkey*, judgment of 12 November 2008, no. 34503/97, para. 146.

living instrument doctrine could be invoked to justify a retrenchment of migrants' rights. Whether the doctrine indeed allows for such a setback, and whether it could potentially serve as a basis for a context-driven justification, will be discussed in the subsequent section (b).

a) The Dynamic Development of Migration Law

Originally, the ECtHR tended to expand the protection afforded in migration matters, often interpreting Convention guarantees in an increasingly generous manner to fill protection gaps experienced by migrants and asylum seekers.[71] Yet this evolution has by no means been linear[72]; in recent years, it has been followed by more nuanced and, at times, regressive developments.[73] At the same time, the Court has never questioned the sovereign right of states to control their borders.[74]

A landmark judgment that strongly influenced migration law is *Soering v. the United Kingdom*.[75] The case concerned a German national who had committed murder in the United States and was later arrested and indicted in the United Kingdom.[76] When the United States requested extradition, the question arose whether Soering was likely to face the 'death row phenomenon' there and whether this would amount to a violation of Art. 3 ECHR. Relying also on the living instrument doctrine,[77] the Court answered both questions in the affirmative.[78] Although the case did not deal explicitly with migration, the principle of non-refoulement established therein continues to apply across different contexts and prevents governments from returning

71 Lena Riemer, 'Law at the Border or New Borders of Law? The Role of the European Court of Human Rights in the Context of European Border Policy', Zeitschrift für Flüchtlingsforschung 7 (2023), 15-48 (17), with a particular focus on Art. 4 AP 4 ECHR.

72 Jens Theilen, 'Framing Migration in Human Rights: How the Reasoning of the European Court of Human Rights Legitimises Border Regimes', European Journal of Migration and Law 27 (2025), 66-93 (69), speaking of a 'back-and-forth'.

73 Witold Klaus and Magdalena Kmak, 'ECtHR Jurisprudence Amid Political Shifts: Rolling Back the Protection Against Pushbacks', International Journal of Human Rights 29 (2025), 1-20 (4 f.).

74 Theilen (n. 72), 72, referring to the early case of ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* judgment of 28 May 1985, nos 9214/80, 9473/81 and 9474/81, para. 67; see also Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015), 504.

75 ECtHR (Plenary), *Soering v. the United Kingdom*, judgment of 7 July 1989, no. 14038/88.

76 ECtHR, *Soering* (n. 75), paras 11-26.

77 ECtHR, *Soering* (n. 75), para. 102.

78 ECtHR, *Soering* (n. 75), para. 111.

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individuals to countries where they would face torture or inhuman or degrading treatment.[79]

In the early years of increased arrivals to the EU, numerous judgments of the Court revealed a rights-expanding approach towards migrants. In *M. S. S. v. Belgium and Greece*, the Court significantly enhanced the procedural safeguards required during asylum procedures, holding states to higher standards when assessing the risk of ill-treatment in cases involving return or transfer of asylum seekers – even within the EU.[80] The Court's decision in *Hirsi Jamaa and Others v. Italy*, praised by some as the 'peak' of its progressive development,[81] affirmed the Convention's applicability in extraterritorial cases.[82] Relying inter alia on the living instrument doctrine, the Court ruled that states' human rights obligations also applied on the high seas during interceptions of migrant boats.[83] Very recently, a Chamber of the Court lowered the burden of proof of the applicants where a practice of systematic pushbacks had been established.[84] These judgments are examples of a dynamic and protective interpretation of the scope and depth of migrants' rights.

However, over the past decade, several judgments have signalled a retreat from this previously expansive trajectory. Although the Court has never explicitly overruled judgments favourable for migrants – explicit overrulings have occurred only in order to expand rights[85] – scholars have noted a subtler

79 Extended from the *Soering* extradition situation to expulsions in ECtHR, *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, no. 15576/89, paras 69 f.; Marten den Heijer, 'Refoulement' in: André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017), 481-505 (484).

80 ECtHR, *M. S. S. v. Belgium and Greece*, judgment of 21 January 2011, no. 30696/09, para. 359, which did not, however, mention the living instrument doctrine. Dembour (n. 74), 405 f.

81 Riemer (n. 71), 24; see also Daniel Rietiker, 'Collective Expulsion of Aliens: The European Court of Human Rights (Strasbourg) as the Island of Hope in Stormy Times', Suffolk Transnat'l L. Rev. 39 (2016), 651-682.

82 But see the Court's recent refusal to adopt a functional approach to jurisdiction in ECtHR, *S. S. and Others v. Italy*, judgment of 12 June 2025, no. 21660/18, paras 50 f.

83 ECtHR, *Hirsi Jamaa and Others v. Italy*, judgment of 23 February 2012, no. 27765/09, regarding extraterritorial jurisdiction see paras 81 f., invoking explicitly the living instrument doctrine to sustain the applicability of Art. 4 AP 4 ECHR on expulsions at sea, see paras 175, 181.

84 ECtHR, *A. R. E. v. Greece*, judgment of 7 January 2025, no. 15783/21, para. 217; ECtHR, *G. R. J. v. Greece*, judgment of 7 January 2012, no. 15067/21, para. 182; endorsing with reservations: Isabell Kienzle and Melina Riemer, 'Evidencing Pushbacks in Light of a Systematic Practice', EHRLR 4 (2025), 506-514 (508 f.).

85 Laurence Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?', EJIL 31 (2020), 797-827 (813); see for example ECtHR, *M. S. S.* (n. 80), overruling to a degree ECtHR, *K. R. S. v. United Kingdom,* judgment of 2 December 2008, no. 32733/08, paras 347 f.

form of jurisprudential regression. By closely analysing dissenting opinions, *Helfer* and *Voeten* have demonstrated that the Court has, at times, reconciled earlier rights-expanding rulings with subsequent, more government-friendly judgments by way of implicit narrowing and differentiation.[86]

One of the first cases to illustrate this trend is *Khlaifia and Others v. Italy*.[87] In that case, the Court held that Art. 4 AP 4 ECHR does not encompass a right to a personal interview to assess protection status under all circumstances,[88] thereby limiting procedural guarantees during expulsions.[89] *N. D. and N. T. v. Spain* has likewise been received as an example of a contraction in rights protection.[90] In that case, the Court found that the immediate return of migrants without an individualised assessment was compatible with the prohibition of collective expulsion under Art. 4 AP 4 ECHR.[91] It reasoned that, since the applicants had stormed the border fence in large numbers despite the availability of effective legal entry points, the absence of an individual assessment was attributable to their 'own culpable conduct'.[92] The element of organised use of force was central to the Court's conclusion that Spain's immediate returns were justified.[93] The ECtHR concluded that where there is evidence of such culpable conduct, migrants

86 Helfer and Voeten (n. 85), 823.

87 Riemer (n. 71), 24.

88 ECtHR (Grand Chamber), *Khlaifia and Others v. Italy,* judgment of 15 December 2016, no. 16483/12, para. 248.

89 Riemer (n. 71), 24.

90 Daniel Thym, 'Menschenrechtliche Trendwende? Zu den EGMR-Entscheidungen über "heiße Zurückweisungen" an den EU-Außengrenzen und humanitäre Visa für Flüchtlinge', HJIL 80 (2020), 989-1020 (1010); similarly, Daniel Thym, 'The End of Human Rights Dynamism? Judgments of the ECtHR on "Hot Returns" and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy', IJRL 32 (2020), 569-596 (588). The judgment was criticised by many scholars. They argue, inter alia, that the Court's reasoning in *N. D. and N. T. v. Spain* (n. 19) was notably vague and its application of the facts to the newly introduced test not compelling, particularly regarding the factual assessment of whether genuine and lawful avenues for entry were realistically available. E. g. Sergio Carrera, The Strasbourg Court Judgement N. D. and N. T. v. Spain: A 'Carte Blanche' to Push Backs at EU External Borders? (March 2020). European University Institute (EUI) Working Paper RSCAS 2020/21, 1-26 (9 f.); Anuscheh Farahat, 'Human Rights and the Political: Assessing the Allegation of Human Rights Overreach in Migration Matters', NQHR 40 (2022), 180-201 (188); Hanaa Hakiki, 'N.D. and N. T. v. Spain: Defining Strasbourg's Position on Push Backs at Land Borders?', Strasbourg Observers, 26 March 2020; Carlos Oviedo Moreno, 'A Painful Slap from the ECtHR and an Urgent Opportunity for Spain', Verfassungsblog, 14 February 2020, doi: 10.17176/20200214-164222-0. For a trace-back of rights-diminishing rulings in general see: Helfer and Voeten (n. 85), 817.

91 ECtHR, *N. D. and N. T.* (n. 19), para. 231.

92 ECtHR, *N. D. and N. T.* (n. 19), para. 208.

93 ECtHR, *N. D. and N. T.* (n. 19), para. 201.

entering irregularly may forfeit substantial parts of their protection under the Convention.[94]

Subsequent case law, however, has been inconsistent, thus revoking the impression that *N. D. and N.T v. Spain* had established an exportable precedent.[95] In *A. A. and Others v. North Macedonia* – notably not a Grand Chamber judgment – the Court extended the 'own culpable conduct' exception to cases involving no use of force, focusing instead on the irregular nature of the entry.[96] Conversely, in *M. A. and Z. R. v. Cyprus*, a different Chamber of the Court interpreted the exception narrowly and refrained from its application.[97] Other recent judgments, particularly those addressing expulsions at the Belarusian border, have reaffirmed strong protections against refoulement and collective expulsion, indicating that the progressive trajectory of the ECtHR's case law on migrants' rights has not been uniformly reversed.[98] It should also be noted that in none of the regressive judgments did the Court refer to the living instrument doctrine.

b) The Living Instrument Doctrine as a Basis for a Context-Driven Justification

In the same way that the living instrument doctrine can support a protective interpretation of rights, some scholars maintain that it could equally

94 Reproduced and extended to situations without use of force in ECtHR, *A. A. and Others v. North Macedonia*, judgment of 5 April 2022, nos 55798/16, 55817/16, 55820/16 and 55823/16, para. 123.

95 Anuscheh Farahat and Jonathan Kießling, 'Von der staatlichen Souveränität zu den Menschenrechten – und zurück? Völkerrechtliche Perspektiven auf Migration am Beispiel des Kollektivausweisungsverbots der Europäischen Menschenrechtskonvention', HJIL 85 (2025), 363-398 (390 f.); underlining the crucial opportunity to revoke *N. D. and N. T.* in the instrumentalisation cases: Chiara Scissa and Francesso Luigi Gatta, 'Access to Asylum in Times of Crises, Force Majeure and Instrumentalization in the EU: Restrictive Trends in Asylum Law and in the Case-Law', Freedom Security Justice 3 (2024), 226-262 (247).

96 ECtHR, *A. A. and Others v. North Macedonia*, (n. 94), paras 114 f.; Vera Wriedt, 'Expanding Exceptions? AA and others v. North Macedonia, Systematic Pushbacks and the Fiction of Legal Pathways', Strasbourg Observers, 30 May 2022; according to *Thym* the Court remained ambiguous in *N. D. and N. T.* whether the mere illegal entry could suffice for a restriction of the migrants' rights under Art. 4 AP 4, see also Thym, *Trendwende?* (n. 90), 997.

97 ECtHR, *M. A. and Z. R. v. Cyprus*, judgment of 8 October 2024, no. 39090/20, paras 117 f.; Farahat and Kießling (n. 95), 390 f.

98 ECtHR, *M. K. and Others v. Poland*, judgment of 23 July 2020, nos 40503/17, 42902/17 and 43643/17, paras 178 f., 204 f.; ECtHR, *A. I. and Others v. Poland*, judgment of 30 June 2022, no. 39028/17, paras 37 f., 52 f.; see also with regard to the Serbian border: ECtHR, *Shahzad v. Hungary*, judgment of 8 July 2021, no. 12625/17; ECtHR, *H. K. v. Hungary,* judgment of 22 September 2022, no. 18531/17, para. 11.

justify a restrictive one.[99] In their opinion, the Court only dares to expand rights where it can identify a robust consensus among the Contracting States.[100] A general decline in the commitment to human rights among Member States could then also amount to such a consensus – one that would inhibit further expansion or even induce a rollback of rights.[101] In particular, *Thym* has argued that the living instrument doctrine is not a 'one-way street'.[102] Its adaptive nature does not necessarily favour a *pro homine* approach, but could equally take into account changing circumstances stemming from states' geopolitical interests and security concerns. Consequently, the living instrument doctrine could, under this reading, also justify setbacks if these better reflect the prevailing 'present-day conditions'.[103] Such criticism is often accompanied by the demand that human rights standards should not pre-empt the resolution of genuinely political issues.[104]

99 Whether the living instrument doctrine would allow also a regression of rights is not a topic of discussion exclusive to the field of migration law, but first emerged in the context of counter-terrorism, see Helfer and Voeten (n. 85), 803. Opinions on the matter remain divided, even among Court members themselves. For instance, Judge Casadevall, dissenting in *Gorou v. Greece (no. 2)*, maintained that 'once [the Court] has decided to extend individuals' rights […] it should not […] reverse its decision', see ECtHR, *Gorou v. Greece (no. 2)*, judgment of 20 March 2009, no. 12686/03, Partly Dissenting Opinion of Judge Casadevall, para. 8. His position was sharply criticised by Judge Wildhaber, see Luzius Wildhaber, 'The Old Court, the New Court, and Paul Mahoney', HRLJ 36 (2016), 292-297 (296). Their debate reflects a broader struggle: on the one hand, there is a call for human rights jurisprudence to remain responsive to prevailing public opinion and political realities in order to remain relevant, see Jeffrey Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', Columbia Journal of European Law 11 (2005), 113-150 (146). On the other hand, some insist that human rights protection should remain fundamentally insulated from government will and popular sentiment. Once certain rights have been recognised and protected, they should not be subject to retrenchment merely as a function of shifting consensus or state interests, see Alec Stone Sweet and Thomas L. Brunell, 'Trustee Courts and the Judicialization of International Regimes', Journal of Law and Courts 1 (2013), 61-88 (81).

100 Helfer and Voeten (n. 85), 801. Against this background, the inclusion of non-refoulement in Art. 3 of the ECHR was not without controversy. See ECtHR, *Soering* (n. 75), paras 90 f.; stating that neither the Court's reasoning, nor any 'of the possible legal bases identified in the academic commentary really offer a solid foundation upon which to base implicit non-refoulement obligations', Kathryn Greenman, 'A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law', IJRL 27 (2015), 264-296 (265).

101 Arguing that evolutive interpretation, although such rollbacks were extremely rare, does not in principle prevent the Court from restricting previously accepted scopes of protection, Kanstantsin Dzehtsiarou and Conor O'Mahony, 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U. S. Supreme Court', Colum. Hum. Rts. L. Rev. 44 (2013), 309-365 (339).

102 Thym, *Trendwende?* (n. 90), 1010.

103 Thym, *Trendwende?* (n. 90), 1016.

104 Thym, *Trendwende?* (n. 90), 1010, 1012; for a discussion see also Anuscheh Farahat and Ingrid Leijten, 'Human Rights Overreach?', NQHR 40 (2022), 83-97 (92); John Tasioulas, 'Saving Human Rights from Human Rights Law', Vand. J. Transnat'l L. 52 (2019), 1167-1207 (1205).

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By invoking the living instrument doctrine to legitimise a rollback of rights, however, these scholars overlook the fact that the very purpose of the living instrument doctrine is to adapt human rights protection to contemporary realities without undermining its core protective function.[105] In doing so, the Court does not only take account of the European consensus but also of broader developments in human rights law at the universal level.[106] The doctrine has always been guided by the aim of ensuring that Convention rights remain 'practical and effective, not theoretical and illusory'.[107] This expansive mode of interpretation is shared by other international and national tribunals and courts alike.[108]

Human rights treaties, as *Letsas* emphasises, operate within an inherently asymmetric power relationship: they protect individuals against the state, but also against the excesses of majority will.[109] If the scope of rights were to develop in line with majoritarian regressions, the Court could not fulfil its role of ensuring the effective enjoyment of rights.[110] A genuinely dynamic interpretation must therefore not merely mirror shifting state interests[111] but also safeguard the continuing relevance and substance of human rights in evolving contexts.[112]

Finally, the idea of a rollback of rights based on the living instrument doctrine cannot be reconciled with the case analysis presented above. To date, the Court's application of the doctrine in migration law has served only to strengthen human rights protection.[113] Recent restrictive judgments make no reference to the living instrument doctrine; instead, these developments

105 ECtHR, *Demir and Baykara v. Turkey* (n. 70), para. 146, according to which the doctrine's purpose was to 'reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies'; Luzius Wildhaber, 'Rethinking the European Court of Human Rights' in: Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights Between Law and Politics* (Oxford University Press 2011), 204-229 (214).

106 ECtHR, *Demir and Baykara* (n. 70), para. 68; Isak Nilsson, 'On the Path to Universalism? The Role of External Instruments in the European Court of Human Rights Jurisprudence', Nord. J. Int'l L. 92 (2023), 248-282 (259).

107 ECtHR, *Hirsi Jamaa and Others* (n. 83), para. 175; ECtHR (Grand Chamber), *Magyar Helsinki Bizottság v. Hungary*, judgment of 8 November 2016, no. 18030/11, para. 155.

108 Çalı (n. 69), 512.

109 Letsas (n. 68), 123.

110 Letsas (n. 68), 123.

111 See Judge Spano who relativises the interpretative significance of subsequent state practice which demands a restriction of human rights: ECtHR, *Hassan* (n. 42), Partly Dissenting Opinion of Judge Spano joined by Judges Nicolaou, Bianku and Kalaydjieva, para. 13.

112 Sonja Grover, *Judicial Activism and the Democratic Rule of Law: Selected Case Studies* (Springer 2020), 206.

113 Helfer and Voeten (n. 85), 801; admittedly, however, the rights expanding judgments of the past years have also refrained from directly citing the doctrine.

appear to reflect the growing influence of political pressure on the Court's decision-making.[114]

Overall, the arguments advanced in support of using the living instrument doctrine to justify a rollback of rights are unconvincing. Even if, for the sake of argument, one were to accept that such a setback could be based on the living instrument doctrine, it would certainly have to stop short of introducing entirely new justifications. If states wish to include further possibilities for restricting human rights, they could only do so by adopting an additional protocol to the Convention.

Strong arguments therefore speak against the governmental approach of introducing a context-driven justification grounded in the living instrument doctrine. However, if the Court were nevertheless to accept the states' proposal, the new justification should be subject to the same limits as the existing limitation and derogation clauses (in German doctrine known as *Schranken-Schranken*). These constraints on rights restrictions are essential to the practical and effective functioning of the Convention and should not be circumvented by a newly introduced justification. Yet applying the same limits to a context-driven justification would ultimately assimilate it to the existing limitation and derogation mechanisms and thus render it redundant.

3. Interim Conclusion

To conclude, the case law of the ECtHR provides no basis for the governments' proposal to justify human rights interferences with a context-driven interpretation. Even if one were to adopt the integrative approach of *Hassan v. the United Kingdom,* it could not substantiate the governmental plea, since there is no alternative legal framework that would permit pushbacks in the context of a mass influx of migrants and thereby justify the respective state measures. In addition, the living instrument doctrine likewise fails to provide a sufficient basis for the governments' argument. The proposed justification, rooted in a context-driven interpretation that seeks to balance migrants' rights against the security interests of the states thus finds no support in existing doctrine and would constitute an entirely novel element within the Convention system.

IV. Risks of a Context-Driven Justification

This prompts the question of which implications would follow from circumventing the limitation and derogation mechanisms through a context-driven interpretation. In short, there are two major risks.

114 Klaus and Kmak (n. 73), 14-15.

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First, it is difficult to determine whether the alleged threats to national security truly exceed a threshold of severity that would legitimise a different standard of review, namely one grounded in a context-driven justification (1.). Second, a justification based on such a context-driven interpretation would effectively bypass the balanced derogation mechanism set out in Art. 15 ECHR, which the Convention specifically foresees for emergency situations (2.).

1. The Risk of Abuse in Framing Security Threats

The governments' idea of a general justification which allows the balancing of migrants' rights against security threats primarily calls upon the Court to take the broader context into consideration. That context would, by implication, need to be one of extreme circumstances that place the state under significant pressure. Yet this very point – the determination of whether such extreme circumstances exist – can be very difficult for the Court to assess.

Art. 15(1) ECHR requires the existence of a 'war or other public emergency threatening the life of the nation'. While the Court has affirmed that it possesses the authority to review the emergency situation, states nonetheless enjoy a wide margin of appreciation in this respect. To date, the Court has rejected a government's assessment of an emergency situation only once: in the case of large-scale demonstrations following the 2008 presidential elections in Armenia.[115] Although the situation 'could be considered a serious public order situation', it did not qualify as a public emergency, and recourse to Art. 15 ECHR was thus barred.[116] In all other cases reviewed by the ECtHR, the Court has accepted that a public emergency existed.[117]

The case law on Art. 15 ECHR thus provides insight into how difficult it is to review governmental claims of emergency situations or security threats. Under Art. 15 ECHR, however, the broader discretion accorded to states is

115 ECtHR, *Dareskizb Ltd v. Armenia*, judgment of 21 September, no. 61737/08, para. 62.

116 ECtHR, *Dareskizb Ltd* (n. 115), para. 63.

117 In every one of them, the alleged emergency was 'terrorism': IRA in Northern Ireland, see ECtHR (Plenary), *Ireland v. the United Kingdom*, judgment of 18 January 1978, no. 5310/71, paras 11-33, 205; ECtHR (Plenary), *Brannigan and McBride v. the United Kingdom*, judgment of 25 May 1993, nos 14553/89 and 14554/89, para. 47; Al-Qaeda in the United Kingdom, see ECtHR (Grand Chamber), *A. and Others v. the United Kingdom*, judgment of 19 February 2009, no. 3455/05, para. 176; PKK in Türkiye, see ECtHR, *Aksoy v. Turkey*, judgment of 18 December 1996, no. 21987/93, para. 70; attempted coup d'Etat in Türkiye 2016, ECtHR (Grand Chamber), *Yüksel Yalçınkaya v. Türkiye*, judgment of 26 September 2023, no. 15669/20, para. 351; Islamist terrorist attacks in France 2015, ECtHR, *Domenjoud v. France*, judgment of 16 May 2024, nos 34749/16 and 79607/17, para. 150.

counterbalanced by further safeguards, such as the proportionality assessment, the protection of non-derogable rights and procedural requirements. No comparable criteria exist, at least for now, for the approach proposed by the governments.

A justification based on a context-driven interpretation of the Convention, as suggested by the state representatives, could moreover be invoked in other alleged crisis scenarios. It would lead to the circumvention of the existing mechanisms of limitation and, in particular, the derogation clauses, thereby bypassing the limits built into them. The danger inherent in such a development will be explored in the following section.

2. Circumvention of the Limits of Art. 15 ECHR

Art. 15 ECHR is specifically designed for emergency situations and seems to cover scenarios similar to those invoked under the proposed context-driven justification. While limitation clauses are supposed to regulate state measures in ordinary circumstances, the derogation clause in Art. 15 ECHR is tailored to emergency situations that threaten the life of the nation.[118]

To rightfully derogate from the Convention, states must satisfy five conditions. First, an emergency situation must genuinely exist. Second, the measures may not be disproportionate. Third, measures may not interfere with non-derogable rights. Fourth, they may not be inconsistent with the state's other obligations under international law. And finally, certain procedural requirements must be met.

A justification of interferences based on a context-driven interpretation, however, risks circumventing these established limits of Art. 15 ECHR. In the pushback cases, this risk becomes particularly evident with regard to three of these limits, namely the protection of non-derogable rights under Art. 15(2) ECHR (a), the procedural requirements (b) and the mechanisms of judicial review (c).

a) The Absolute Character of Art. 3 ECHR in the Specific Context of Migration

As outlined above, the Convention prohibits derogation from certain rights under Art. 15(2) ECHR. One of the non-derogable rights is the

118 ECtHR, *Ireland v. the United Kingdom* (n. 117), para. 207; ECtHR, *Brannigan and McBride* (n. 117), para. 47; ECtHR, *Mehmet Hasan Altan v. Turkey*, judgment of 20 March 2018, no. 132327/17, paras 89-91.

prohibition of torture and inhuman or degrading treatment or punishment, which also encompasses the prohibition of refoulement under Art. 3 ECHR.[119]

A returning state is required to rigorously and individually assess whether a 'real risk'[120] of onward removal without adequate protection exists (so-called indirect or chain refoulement).[121] When returning an individual to a third country that is not their country of origin, states must evaluate not only the treatment that the person would face there, but also the availability and effectiveness of that country's asylum procedures.[122] This approach reflects the risk-based, rather than consequence-based, nature of the prohibition: the risk of ill-treatment does 'not have to meet the threshold of being highly probable or more likely than not, but [it] does need to go beyond a mere possibility'.[123]

In its review, the Court assesses several criteria, including 'whether the authorities of the removing state had taken into account the available general information about the receiving third country and its asylum system in an adequate manner and of their own initiative; and whether an applicant had been given a sufficient opportunity to demonstrate that the receiving state was not a safe third country in their particular case.' The Court also examines the detention and living conditions of asylum seekers in the receiving third country.[124]

To ensure the right enshrined in Art. 3 ECHR, asylum seekers must have access to an effective remedy according to Art. 13 ECHR to challenge any removal decision.[125] This requires 'adequate information about the asylum procedure […] and their entitlements in a language they understand, […] access to a reliable communication system with the authorities, […] the avail-

119 ECtHR, *Soering* (n. 75), para. 88.

120 ECtHR, *Soering* (n. 75), para. 91; ECtHR (Grand Chamber), *Saadi v. Italy*, judgment of 28 February 2008, no. 37201/06, para. 125; ECtHR (Grand Chamber), *Ilias and Ahmed v. Hungary*, judgment of 21 November 2019, no. 47287/15, para. 134; for a far-reaching interpretation of that judgment see Isabel Kienzle und Jonathan Kießling, 'Evidently Unlawful, Yet Difficult to Evidence: M. A. and Z. R. v. Cyprus advances Strasbourg's Case Law on Push-backs', Strasbourg Observers, 22 October 2024.

121 ECtHR (Grand Chamber), *F. G. v. Sweden*, judgment of 23 March 2016, no. 43611/11, para. 113; ECtHR (Grand Chamber), *Khasanov and Rakhmanov v. Russia*, judgment of 29 April 2022, nos 28492/15 and 49975/15, para. 109.

122 ECtHR, *M. S. S.* (n. 80), paras 300, 344-359, 365-368; ECtHR, *Ilias and Ahmed* (n. 120), para. 131.

123 den Heijer (n. 79), 499.

124 ECtHR Registrar, Guide on Case Law of the ECHR Concerning Immigration, 31 August 2024, 33 f., available at Refworld <https://www.refworld.org/jurisprudence/caselawcomp/echr/2024/en/124136>, last access 11 March 2026.

125 ECtHR, *M. S. S.* (n. 80), paras 286-322.

ability of interpreters, [that] the interviews are conducted by trained staff, […] access to legal aid, and [information about] the reasons for the decision.'[126] In addition, the Court has consistently held that Art. 3 ECHR is, under all circumstances, absolute: it can neither be balanced against considerations of national security[127] nor derogated from, not 'even in the most difficult of circumstances, such as the fight against organised terrorism and crime.'[128]

In light of these principles, a violation of Art. 3 ECHR is likely in push-back cases involving mass influxes of migrants. Any measures taken would therefore have to be fully compatible with Art. 3 ECHR, whenever derogating under Art. 15 ECHR. Thus, states are required to conduct a full assessment of the risk of torture or inhuman or degrading treatment, including a detailed evaluation of the third country's asylum system, regardless of how severe the security threat appears to be. This obligation could be lost if states were permitted to rely on the novel, context-driven justification that would allow the balancing of national security interests against the individual rights of migrants. The specific conditions and the established case law under Art. 15 ECHR therefore provide concrete standards that must continue to guide such situations.

b) The Radiating Effects of Art. 3 ECHR on Other Convention Rights

The significance of the non-derogability of Art. 3 ECHR in derogation procedures is not confined to direct infringements of that provision. It also plays a vital role in securing minimum standards for other Convention rights which, if derogated from, could lead indirectly to a violation of Art. 3 ECHR through the back door. This is why the Court has consistently required states to incorporate safeguards into their emergency measures to protect individuals against torture or ill-treatment in cases of extended detention.

In *Brannigan and McBride v. the United Kingdom*, two men were detained in the United Kingdom under the Prevention of Terrorism (Temporary Provisions) Act 1984.[129] In this case, the Court developed detailed safeguards and corresponding requirements for states when derogating from Art. 5(1) ECHR. Ever since, the Court has required states to enshrine minimum safe-

126 ECtHR Registrar (n. 124), 34.

127 ECtHR, *Saadi* (n. 120), paras 125 and 138; ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, judgment of 17 January 2012, no. 8139/09, paras 183-185.

128 ECtHR, *Aksoy* (n. 117), para. 62; see also ECtHR, *Ireland v. the United Kingdom* (n. 117), para. 163; ECtHR (Grand Chamber), *Chahal v. the United Kingdom*, judgment of 15 November 1996, no. 22414/93, para. 79.

129 Terrorism (Temporary Provisions) Act of 22 March 1984, United Kingdom 1984 c. 8. The first applicant was detained for six days and 14 hours (in which he was interrogated on forty-three occasions) and the second four days and six hours (with twenty-two interrogations).

guards in their national law.[130] The underlying aim is to ensure that detainees are protected from abuse under the emergency law regimes. Prolonged detention without adequate safeguards could facilitate the practice of torture, which might later be impossible to prove.[131] The Court therefore held that a detained person must have 'an absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest' – a right that may be delayed only on 'reasonable grounds'.[132] Moreover, there must be a 'realistic possibility of being brought before a court to test the legality of the detention.'[133] Detainees are further 'entitled to inform a relative or friend about their detention and to have access to a doctor.'[134] In addition, the national legislation forming the basis for the detention should be subject to regular independent review.[135] While these conditions were fulfilled in the case concerning the United Kingdom, several cases from Türkiye failed to satisfy the standards newly established by the Court.[136]

In accordance with the established case law, states must formally derogate from Art. 5(1) ECHR, if they wish to detain migrants in ways that would otherwise contravene that provision. This would of course presuppose the existence of an emergency situation.[137] In line with the ECtHR's case law, states must then establish minimum safeguards under their national law to meet the proportionality requirement. Consequently, a prolonged incommunicado detention would not be allowed.

130 ECtHR, *Brannigan and McBride* (n. 117), paras 61 f.

131 ECtHR, *Aksoy* (n. 117), para. 80.

132 ECtHR, *Brannigan and McBride* (n. 117), para. 64; ECtHR, *Aksoy* (n. 117), para. 81.

133 ECtHR, *Aksoy* (n. 117), paras 81, 83.

134 ECtHR, *Brannigan and McBride* (n. 117), para. 64; ECtHR, *Aksoy* (n. 117), para. 81.

135 ECtHR, *Brannigan and McBride* (n. 117), para. 64; ECtHR, *Aksoy* (n. 117), para. 81.

136 ECtHR, *Aksoy* (n. 117), para. 83; ECtHR, *Demir and Others v. Turkey*, judgment of 23 September 1998, nos 21380/93, 21381/93 and 21383/93, paras 54 f.

137 The ECtHR has defined an emergency situation under Art. 15 ECHR as 'refer[ing] to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed', ECtHR, *Lawless v. Ireland (No. 3)*, judgment of 1 July 1961, no. 332/57, para. 28. Its review of the emergency situation is, however, rather cursory, see Bücker and Hertig Randall (n. 51) para. 13. Whether the ECtHR would accept a mass influx in migration as an emergency situation according to Art. 15 ECHR remains uncertain. Interestingly, the ECJ rejected the reliance on the derogation clause in Art. 72 TFEU in a preliminary ruling that dealt with Lithuanian border closures in light of instrumentalised migration. The Court held that the provision must be interpreted strictly and did not allow to depart from EU law 'based on no more than reliance on […] the safeguarding of internal security […].' It concluded that 'the mass influx of third-country nationals provides no justification, by reference to Article 72 TFEU, for a provision, […], which causes third-country nationals staying illegally on the territory of a Member State to be deprived de facto of the right to submit an application for international protection on the territory of that Member State', ECJ, *M. A. v. Valstybės sienos apsaugos tarnyba*, judgment of 30 June 2022, case no. C-72/22, ECLI:EU:C:2022:505, paras 71 f.

A similar radiating effect of Art. 3 ECHR can be observed in relation to Art. 4 AP 4 ECHR, which prohibits collective expulsion. Art. 4 AP 4 ECHR is comparable to Art. 5(1) ECHR on two counts. First, neither provision includes limitation clauses which provide for a balancing of interests, as found, for example, in paragraph two of Arts 8-11 ECHR. While Art. 4 AP 4 ECHR does not permit any limitation in 'normal times', Art. 5(1) ECHR stipulates an exhaustive list of exceptions. Both provisions are, however, derogable, since they are not mentioned in Art. 15(2) ECHR. Second, like Art. 5(1) ECHR, Art. 4 AP 4 ECHR closely intersects with Art. 3 ECHR whenever collective expulsion could expose individuals to torture or inhuman or degrading treatment upon return. As a consequence, state action under Art. 4 AP 4 ECHR that could normally be reconciled with the Convention could nonetheless constitute a violation of the Convention where Art. 3 ECHR is equally concerned.[138] For this reason, we argue for an analogy with the case law on Art. 5(1) ECHR, requiring states to provide minimum safeguards also when derogating from Art. 4 AP 4 ECHR.

If a state derogates from Art. 4 AP 4 ECHR, this would mean that migrants could be collectively expelled immediately at the border. Such a procedure risks undermining the procedural safeguards under Art. 3 ECHR outlined above. Even if the migrants were subsequently subjected to torture or inhuman treatment in the country to which they were expelled, it is unlikely that they would have any opportunity to bring their claim before the Court. The purpose of minimum safeguards under Art. 4 AP 4 ECHR is therefore identical to that under Art. 5(1) ECHR: the prevention of breaches of Art. 3 ECHR that would be difficult to review after the fact. These safeguards are necessary to preclude violations of Art. 3 ECHR in the case of derogations from Art. 4 AP 4 ECHR and must secure, at a minimum, the possibility to claim asylum. To this end, national law should provide for genuine and effective means of legal entry, access to legal counsel and interpreters, and the right to an effective remedy.[139]

138 This close connection is reflected for example in cases where a remedy against removal had no suspensive effect: While Art. 4 AP 4 ECHR (in conjunction with Art. 13 ECHR) was not automatically breached, the Court suggested that the conclusion would be a different one if the applicant also had an arguable claim under Art. 3 ECHR, see ECtHR, *Khlaifia and Others* (n. 88), para. 281; ECtHR, *M. K. and Others* (n. 98), para. 220.

139 ECtHR, *N. D. and N. T.* (n. 19), paras 201, 209, 211; ECtHR, *Shahzad* (n. 98), paras 62, 65; ECtHR, *M. K. and Others* (n. 98), paras 206, 212 f.; ECtHR, *Khlaifia and Others* (n. 88), para. 279; ECtHR, *Moustahi v. France*, judgment of 25 June 2020, no. 9347/14, paras 156-164; ECtHR, *M. D. and Others v. Hungary*, judgment of 19 September 2024, no. 60778/19, para. 40; ECtHR, *M. H. and Others v. Croatia*, judgment of 18 November 2021, nos 15670/18 and 43115/18, paras 295 f.

If the Court were to accept a justification based on a context-driven interpretation, it would not only bypass the explicit limits set out in the text of Art. 15 ECHR but also the additional safeguards developed in the Court's jurisprudence. These safeguards were developed over decades precisely to prevent abuse and must not be disregarded. Rather, they should remain the foundation for any meaningful judicial review.

c) Transparency and Review of Emergency Measures

As outlined above, states are obliged to notify the Secretary General of any derogations under the Convention according to Art. 15(3) ECHR. Transparency is indispensable in this regard because a state's reliance on Art. 15 ECHR alters the applicable standard of review – information applicants need to be aware of when preparing their cases. The importance of transparency was equally stressed by Judges Yudkivska, Pinto de Albuquerque and Chanturia in their partly dissenting opinion in *Georgia v. Russia (II)*. They observed that an *ex post facto* choice by a state to rely either on the limitation clauses or on (unwritten and ambiguous) standards of exceptionalism would constitute a serious interference with the rule of law.[140] The requirement to notify the Secretary General also serves to ensure publicity regarding which rights are affected and the duration of the derogation. As human rights are most vulnerable during states of emergency, the possibility of external review is imperative.[141]

If, however, states were permitted to invoke a justification based on a context-driven interpretation at any stage of the proceedings, applicants would be unable to determine in advance the legal standards applicable to their case.

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140 ECtHR, *Georgia v. Russia II* (n. 55), Joint Partly Dissenting Opinion of Judges Yudkivska, Pinto de Albuquerque and Chanturia, para. 20: 'Even worse, the Court's caveat allows the respondent State to choose ex post facto the legal standard by which it will be judged, in other words, to engage in the sheer manipulation of the applicable legal criterion.' In a similar direction ECtHR, *Georgia v. Russia (II)* (n. 55), Concurring Opinion by Judge Keller, para. 20; Maciej Grześkowiak, 'Pushbacks from Europe's Borders Enter the Mainstream', Verfassungsblog, 24 April 2024, doi: 10.59704/12d1449ffc376bad; on the interpretation of the ECHR in light of IHL see also ECtHR, *Ukraine and the Netherlands* (n. 42), para. 427; on the applicability of the ECHR during 'active hostilities' which the Court had denied in ECtHR, *Georgia v. Russia (II)* (n. 55), para. 133, see *Ukraine and the Netherlands v. Russia* (n. 42), paras 356 f.

141 Joan F. Hartman, 'Derogation from Human Rights Treaties in Public Emergencies – A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations', Harv. Int'l. L. J. 22 (1981), 1-52 (11).

V. Conclusion

Using the example of pushbacks at the Belarusian border, this article has stress-tested the approach advanced by government representatives at the oral hearings, namely that human rights interferences may be justified by overwhelming threats to national security. While the Convention system already provides mechanisms to restrict rights through limitation and derogation clauses, the governments appear to advocate for a balancing of migrants' rights against national security interests outside these established frameworks. In doctrinal terms, this closely resembles the introduction of an informal and novel ground of justification. As this article has demonstrated, such an approach finds no basis in the Court's existing case law or in its established interpretive framework.

Whether the ECtHR would classify the situation at the Belarusian border as an emergency within the meaning of Art. 15 ECHR remains an open question. The authors themselves assume that the stronger arguments speak against viewing the migration influx of 2021 and thereafter as an emergency.[142] If states could invoke Art. 15 ECHR, it would indeed permit them certain derogations from Convention rights; for example, shortened procedures at external borders could be conceivable in exceptional situations. However, a minimum level of guarantees remains inviolable, including Art. 3 ECHR, which also radiates to other Convention rights – in particular Art. 4 AP 4 ECHR – thereby narrowing governments' scope for action.

This clarification exposes the difficult challenge of responding to geopolitical pressure while upholding human rights nonetheless. From the perspective of the affected states, the obligation to admit migrants, conduct at least rudimentary procedures, and assess individual risks may appear to render them vulnerable to instrumentalisation by third states such as Belarus. In this sense, the pressure strategy may indeed 'work'. Yet this is not a flaw in the Convention system, but a reflection of its foundational premise, as agreed upon in 1950: that certain minimum standards of human rights apply even – and especially – under conditions of political coercion and crisis. If states stop to treat migrants as humans, they depart from the principles underpinning the ECHR if others act in bad faith.

The informal exceptionalism advocated by the governments carries alarming implications. It allows states to maintain the façade of legal continuity and human rights commitment while effectively hollowing out substantive protections. In the absence of a formal derogation notification, such practices attract less scrutiny, thereby contributing to the normalisation of exceptional

142 See above, n. 137.

measures within the Convention legal order.[143] This erosion of checks and balances and transparency risks undermining the rule of law far beyond the specific context of controlling migration flows.

Moreover, informal exceptionalism risks carving holes in guarantees of an absolute nature, with spill-over effects on rights that are, in principle, derogable. It would mark a shift towards a contingent conception of human rights, one dependent on security policy considerations that are hardly justiciable. Legal certainty would suffer accordingly, as applicants could no longer be confident that the established standard of human rights protection would not be lowered in judicial review through a state's invocation of national security. It would also deprive the Court of the opportunity to conduct a proper review of the measures according to the well-developed standards of Art. 15 ECHR, which include, among others, proportionality, respect for non-derogable rights and procedural safeguards.

We acknowledge the difficult position of the ECtHR in navigating the tension between responsiveness and restraint.[144] The authority and long-term viability of the Convention system depend on states perceiving the Court's judgments as both principled and realistic.[145] Yet responsiveness cannot come at the cost of abandoning clear legal boundaries. Excessive judicial accommodation would not only blur the normative contours of the Convention but also undermine the Court's authority and its capacity to function as a credible guardian of the system. Introducing a context-driven justification into the Convention system would open Pandora's box, paving the way for exceptionalism to spill over into other legal fields and crisis scenarios.

143 Corina Heri, 'Deference, Dignity and "Theoretical Crisis": Justifying ECtHR Rights Between Prudence and Protection', HRLR 24 (2024), 1-19 (3).

144 Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights', International Studies Quarterly 64 (2020), 770-784; Mikael Rask Madsen, 'Two-Level Politics and the Backlash Against International Courts: Evidence from the Politicisation of the European Court of Human Rights', British Journal of Political and International Relations 22 (2020), 728-738.

145 Particularly in the context of migration, governments are already exercising high political pressure and are questioning the authority of the Court, see only Press Release, Meeting of Ministers of the CoE, 10 December 2025, <https://www.coe.int/en/web/portal/-/migration-challenges-council-of-europe-ministers-call-for-political-declaration-on-rights>, last access 11 March 2026; see also Council of Europe Committee of Ministers, Chişinău Declaration, 15 May 2026, CM(2026)99-final, paras 21, 40, where the Council of Ministers emphasises the need to give special weight to the 'context'.