European Court of Human Rights

Application N° 52137/22 – Obaidi v. Belgium and 19 other applications
Application N°51761/22 – Al Farj v. Belgium and 19 other applications

Third Party intervention by the Human Rights Centre of Ghent University[1]

In this intervention, we discuss some features relating to the 'post-Camara' context in which the applications of *Obaidi v. Belgium*, *Al Farj v. Belgium* and many others are to be situated.
In the **first section** of our intervention, we emphasize the seriousness and scale of the Camara-type **rule of law** violations, that have continued and worsened, and for which no serious perspective of improvement is in sight. For that reason, we submit that it is crucial that the Court should rule on the merits of the article 6§1 and 13 ECHR violations, which clear and strong language that names the violations and their causes.

As the inexecution of judgments leads to the exposure of asylum seekers to very dire situations, we consider it highly desirable for the Court to examine this type of cases also under article 3. In our view, the reasoning that led the Court not to do so in *Camara*, based on a finding of **non-exhaustion** of domestic remedies, is highly problematic, both in principle, and in the concrete circumstances of this type of cases in Belgium. In the **second section** of our intervention, we explain why.

1. Normalization of Rule of Law Departure

Since January 2022, the Belgian government and Fedasil, the Belgian reception agency, in charge of the management and coordination of the reception network (collective and individual places) are systematically departing from the Rule of Law, not only because they do not abide by the Belgian Reception Law,[2] but also because they systematically do not implement the *thousands* of convictions by domestic courts to provide asylum seekers with material support and shelter. Since the *Camara* judgment[3] the situation has worsened on both aspects to the point that the departure from the Rule of Law and the subsequent humanitarian crisis are slowly getting normalized in the Belgian legal system.[4]

1.1. A worsening situation

More asylum seekers on the waiting list since the *Camara* judgment. Firstly, the situation has aggravated since the *Camara* case. As of 21 August 2024, more than 3.900 asylum seekers (mainly single men) are on the Fedasil waiting list,[5] while the Belgian authorities have not been confronted with a drastic rise in asylum applications in 2023-2024 (in fact applications were lower in 2023 than in 2022).[6] The Belgian State has an obligation of results when it comes to asylum seekers reception[7] and no *force majeure* excuse is admissible,[8] even more so since the situation is ongoing for three years. In this context, the very fact that the situation has not improved, but worsened since the *Camara* case shows that the Belgian government and Fedasil continue to

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[1] This intervention is authored by Dr. Sarah Ganty and Prof. Eva Brems
[2] Belgian Reception Act of 2 January 2007 on the reception of asylum seekers and certain other categories of foreign nationals, M.B., 5 May 2007.Ciré asbl, 'Politique de non-accueil: État des lieux Avril 2023 - September 2023', available at https://bit.ly/3tZFZSi; Ciré, 'Politique de non-accueil, Etat des lieux, Octobre 2023 à fin Mars 2024', June 2024, available at : https://shorturl.at/aNGaP.
[3] ECtHR, Camara v. Belgium, Appl. No. 49255/22*,* 18 July 2023
[4] *See* S. Ganty and E. Sevrin, "Rule of Law Abnegated", 17 January 2023, https://bit.ly/48XurOh.
[5] See Fedasil, 'Quid sont les demandeurs d'asile', 21 August 2024. Available at https://www.fedasil.be/fr/actualites/accueil-des-demandeurs-dasile/qui-sont-les-demandeurs-dasile-3.
[6] 35.507 for 2023 while 36.871 for 2022. See, https://dofi.ibz.be/sites/default/files/2024-08/STAT_IB-DPI_FR_2014-2023.pdf.
[7] ECJ, *Saciri and Others v. Belgium*, C-79/13, 27 February 2014.
[8] Civil Court of Brussels, 29 June 2023, no. 2022/4618/A, available at https://bit.ly/3Ub27UB.

systematically violate the right to reception enshrined in EU law[9] and Belgian law, that they do not contest either, constituting an obvious breach of the Rule of Law.

More non-executed judgments and abusive practices since the *Camara* judgment. Secondly, the *Camara* judgment found a violation of article 6 §1 ECHR on account of 'a blatant refusal to comply with the injunctions of the domestic court, which undermined the very substance of the right protected by Article 6§1 of the Convention'.[10] Since the *Camara* judgment, the Rule of Law crisis regarding the reception of asylum seekers in Belgium has deepened, as non-compliance extended to a larger number of judgments, even beyond the labour courts' rulings.

- **Labour courts' rulings**: Asylum seekers who were refused accommodation and assistance continue to go before the labour court. Fedasil had been convicted more than 11.500 times by May 2024 (and since January 2022).[11] The situation has not changed since *Camara*, as more than 3000 of convictions happened after it.[12] There is still a systematic refusal to execute such rulings.[13]

- **Council of State judgment:** In its judgment nr. 257.300 of 13 September 2023, the Council of State ordered the suspension of the Minister's 'instruction'[14] excluding single men seeking asylum from accommodation and material assistance.[15] In a reaction to the judgment, Minister De Moor communicated that she did not intend to change her policy of reserving accommodation and material assistance only to families, unaccompanied minors and women. As late as 19 December, Ms De Moor formally confirmed that the illegal practice remains in place.[16] The applicants have brought an action for annulment before the Council of State (currently pending) and the instruction is still applied as of today.

- **Court of first instance judgment:** organizations have lodged collective actions before the Court of First Instance, claiming that the Belgian government should ensure access to the asylum procedure and provide accommodation. The Brussels Court of first instance found that Belgium is neglecting these obligations and is civilly liable, resulting in a new enforcement penalty.[17] However, the Belgian authorities systematically refuse to implement the judgments, as well as to pay the penalties. [18]

- **Refusal to comply with the order to pay enforcement penalty:** labour and civil court orders are for most of them accompanied by 'enforcement penalties' ('astreintes').[19] For instance, the cumulative periodic penalties ordered by the labour tribunals amounted to 35,524,200 euros in November 2023.[20] Not a single cent was paid by the Belgian government and Fedasil out of their own volition and the

[9] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), *OJ* L 180, 29 June 2013, p. 96–116.
[10] ECtHR, *Camara v. Belgium*, Appl. No. 49255/22*,* 18 July 2023, § 121.Own translation.
[11] Myria and IFDH, Communication conformément à la règle 9.2 - Camara c. Belgique (requête n° 49255/22), 10 July 2024, p.20, Available at: https://rm.coe.int/0900001680b101ef (Hereafter: 'Rule 9 Submission by Myria and IFDH'). See also: Myria, PV réunion de contact protection internationale (provisoire), 19 june2024, available at https://www.myria.be/files/20240619_PV_r%C3%A9union_provisoire_-_voorlopig_verslag_contactvergadering.pdf (Hereafter: Myria PV June 2024).
[12] Rule 9 Submission by Myria and IFDH, p. 20.
[13] Id.
[14] European Migration Network, "Nicole de Moor suspends the reception of single male asylum seekers", 29 August 2023, available at https://bit.ly/3U6B50y.
[15] Belgian Council of State, case No. 257.300 of 13 September 2023, available at https://bit.ly/3Hpah40.
[16] Belgian Chamber of Representatives, CRIV 55 PLEN 278, 19 December 2023 [evening], available at https://bit.ly/3HmFJQk, p. 91.
[17] Civil Tribunal of Brussels, 29 June 2023, 2022/4618/A, available at https://bit.ly/3Ub27U. See also previous judgments by the Civil Tribunal of Brussels, 19 January 2022, n° 2021/164/C and Civil Tribunal of Brussels, 25 March 2022 (upheld by Appeal Court of Brussels, 31 October 2022).
[18] Belgian Chamber of Representatives, QRVA 55 123, 19 November 2023, at https://bit.ly/3tUkoe3. Rule 9 Submission by Myria and IFDH. See also: Ciré, 'Politique de non-accueil, Etat des lieux, Octobre 2023 à fin Mars 2024', June 2024, available at : https://shorturl.at/aNGaP.
[19] These enforcement penalties are pressure measures consisting in a sum of money due per day of non-compliance.
[20] Belgian Chamber of Representatives, QRVA 55 123, 19 November 2023, at https://bit.ly/3tUkoe3.

government made clear that it would never pay such penalty,[21] which is against the law,[22] while it is extremely difficult to obtain 'forced execution' of such penalty.

The main procedure that exists for the execution of a Court judgment that is not implemented is the 'forced excecution' procedure for the financial penalty.[23] However, it is very difficult if not impossible to implement such procedure against the State because of the principle of unseizability of State-owned assets. [24] Only goods which are not manifestly necessary for the exercise of the State missions can be forcibly seized, but the proof that these goods are not unseizable goods rests on the applicants.[25] These procedures are extremely lengthy and difficult. Myria and FIDH explain that: 'With regard to asylum, in particular, several associations and applicants have testified to the ineffectiveness of these procedures in responding to the reception crisis'.[26]

- **Not complying with alternative measures imposed by courts**: Some asylum seekers who are deprived of accommodation in reception centers found refuge in squats (occupied buildings belonging to the State or private companies). Several actions before courts were launched to ask the Courts to order the Belgian State to provide for these occupations all the material support. On 29 June 2023, the Brussels Labour Tribunal ruled that the Belgian State (together with Fedasil) had to provide such material support (showers, clothing, beddings, meals, urgent medical care etc.) to 80 asylum seekers occupying a building in rue de la Loi in Brussels.[27] However, the Belgian State ignored this conviction as well and, a few weeks later, media,[28] lawyers[29] and activists[30] reported that the 80 asylum seekers were forced to leave the squats.

The pattern of non-execution of domestic rulings shows that the situation has not improved since the *Camara* case, and that not enough is done to remedy to a situation that breaches the Rule of Law to its core.

Absence of an effective remedy. Thirdly, the result is that asylum seekers are left without effective remedies to execute the Labour Court judgments and the enforcement penalties ('astreintes'). We submit that this situation is not only in breach of Article 6§1 ECHR, but also of Article 13 ECHR (in combination with articls 6 and 3). The Court has made clear that Article 13 would be meaningless if the competent authorities do not enforce remedies when granted. The Grand Chamber found in *Iatridis v. Greece* that 'the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State'.[31] It concluded that 'in the light of the Minister of Finance's refusal to comply with the judgment of the Court of First Instance in this case, the remedy in question cannot be regarded as "effective" under Article 13 of the Convention'.[32] It further found that 'It would be inconceivable if Article 13 secured the right to a remedy, and provided for it to be effective, but did not guarantee the implementation of remedies used successfully. To hold the contrary would lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention'.[33]

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[21] Ch. Rep., Question de Mme Barbara Pas à la Secrétaire d'État à l'Asile et la Migration sur les condamnations liées aux manquements de la politique de l'asile, *Doc. Parl.*, *Questions et réponses écrites n° 1065*, 10 octobre 2023. As explained by Myria and IFDH, 'Fedasil was recently found to have made no provision in its accounts for the payment of these penalty payments, a fact for which it has been criticized by the Cour des Comptes' (Rule 9 Submission by Myria and IFDH, at 21)
[22] Id. p. 21.
[23] Art. 1412*bis*, Code judiciaire.
[24] Rule 9 Submission by Myria and IFDH.
[25] Id. *E.g.* C.A., Bruxelles (17e chambre), 11 juin 2024, R.G. n° 2024/AR/423.
[26] Id. at 20. Own translation.
[27] Brussels Labour Tribunal, Judgment of 29 June 2023.
[28] See for example: VRT news, 'Activisten kraakpand Wetstraat plaatsen nieuw tentenkamp voor asielzoekers aan Flagey', available at: https://www.vrt.be/vrtnws/nl/2023/09/15/activisten-kraakpand-wetstraat-plaatsen-nieuw-tentenkamp-voor-as/; VRT news, Maand na aangekondigde ontruiming blijkt kraakpand in Wetstraat in Brussel nog bewoond, available at: https://www.vrt.be/vrtnws/nl/2023/10/04/maand-na-aangekondigde-ontruiming-blijkt-kraakpand-in-wetstraat/.
[29] This was confirmed to us by the lawyer Hélène Crockart on 17 November 2023.
[30] This information was reported by the ADES network, available at https://bit.ly/4b1AYsT.
[31] ECtHR [GC], *Iatridis v. Greece*, Appl. no. 31107/96, 25 March 1999, § 66.
[32] Id.
[33] ECtHR, *Kenedi v. Hungary*, Appl. No. 31475/05, 26 May 2009 § 47; ECtHR, *Kaić and Others v. Croatia*, Appl. No. 22014/04, 17 July 2008, § 40. See also ECtHR, *Sharxhi and others v. Albania*, 28 May 2018, Appl. No. 10613/16, §84.

1.2. Insufficient steps and commitment to implementing Camara

Steps taken to implement the *Camara* judgment are manifestly insufficient. In September 2024, the Committee of Ministers in charge of supervising the execution of the *Camara* judgment noted the 'insufficiency' of the steps taken by the Belgian government to implement it. It invited the Belgian authorities 'to act as soon as possible, taking into account the recommendations made by competent international and national organisations' and ; 'in particular, to increase their efforts as in 2015, using all the means at their disposal', and 'to significantly and sustainably increase the capacity of their reception network as quickly as possible in order to resolve the current crisis, thereby eradicating the problem of non-enforcement of judicial decisions at its source and to enable them to cope in the future with the flows of applicants, inherent to any asylum system'.[34]

Three main shortcomings need to be emphasized.[35]
Firstly, the **increase of the reception network capacity is not enough**. It has increased by more or less 6000 slots in three years from 29.000 in 2021 to 35.385 mid-2024. This is insufficient. Almost 4.000 asylum seekers still do not benefit from reception. Moreover, these figures seem extremely low in comparison to 2015 when Belgium was confronted to an increase of asylum applications reaching 44.000: that year the Belgian government created 15.000 slots.[36] Moreover, since the Camara judgment, only 1.765 additional slots were made available in a year.[37]

Secondly, certain **measures provided for by the law in the event of saturation of the reception network are deliberately neglected**. This includes the activation of a dispatch plan between municipalities, as provided for by Belgian law in the event of saturation of the reception network.[38]

Thirdly, there is **no perspective of improvement.** Not only there is no perspective of an opening of a significant number of slots in centers, but also there is no other reasonable alternative on the table. Moreover, there is no plan for the long term in order to avoid such situation in the future, including stabilizing the reception network capacity with a sufficient number of structural places as well as a sufficient number of buffer slots to cope with fluctuations in arrivals. Furthermore, the parties that are currently negotiating to form the next Belgian government do not plan to increase the reception network capacity, quite the opposite***, a radical decrease of 11.000 slots in the reception network is on the table*** to save '469 million euros by 2029'.[39]

1.3. *Impact of the non-execution of judgments*

It remains important to point out the **indivisibility between this rule of law crisis and a humanitarian crisis.** The direct consequences of the violation of Article 6 §1 ECHR – and subsequently, the non-execution of the *Camara* judgment, directly generate a serious ongoing humanitarian crisis in Belgium.[40] The humanitarian crisis mainly relates to health and shelter.[41] Amnesty International emphasised that many of those denied accommodation have to resort to sleeping in the streets or in makeshift tents in dire circumstances.[42] Since the *Camara* judgment, the situation on the ground has not improved and even worsened. In December 2023, 2697 asylum seekers were placed on the waiting list of Fedasil and as of August 2024, almost 4.000 of them were

[34] Committee of Ministers, H46-6 Camara v. Belgium (Application No. 49255/22), Supervision of the execution of the European Court's judgments, 1507th meeting, 17-19 September 2024 (DH), CM/Notes/1507/H46-6, Available at: https://shorturl.at/PjC8X.
[35] A more extensive analysis can be found in the 'Rule 9' submissions by the Human Rights Centre of Ghent University and by the national human rights institutions IFDH and Myria, both available at HUDOC-EXEC.
[36] Rule 9 submission by Myria and FIDH, p. 10.
[37] Id.
[38] According to Article 57ter/1 Organic Law of 8 July 1976 on Public Centres for Social Action. See also: Royal decree determining the criteria for a balanced distribution among municipalities of reception places for asylum seekers, available at https://bit.ly/48yeTRc.
[39] Kasper Goethals, De Wever wilde 25.000 opvangplekken voor asielzoekers schrappen, *De Standaard*, 25 August 2024, available at: https://www.standaard.be/cnt/dmf20240825_97482544.
[40] Rule 9 submission by Human Rights Center.
[41] See Ciré asbl, 'Politique de non-accueil: État des lieux Avril 2023 - September 2023', p. 8, available at https://bit.ly/3tZFZSi; Ciré, 'Politique de non-accueil, Etat des lieux, Octobre 2023 à fin Mars 2024', available at : https://shorturl.at/aNGaP.
[42] Amnesty International, 'Belgium: Urgent Action Needed To End Human Rights Violations Against Asylum Seekers', 31 October 2023, https://bit.ly/3O8LrJz.

placed on such a list. Applicants are generally placed on a waiting list for several months – last December, in the middle of the winter, it was 4 to 5 months –,[43] creating a long period where they are left to fend for themselves. Fedasil is incapable to provide information as to how long the wait has been recently,[44] but NGOs spoke of a delay of 6 to 9 months in June 2024, almost doubling in comparison to a few months before.[45]

Due to the lack of reception facilities, health problems remain underdetected and undertreated. The Humanitarian Hub, a civil society-organized day centre for medical, legal and material assistance collected data on applicants for international protection. This data shows a clear need for accommodation, with a large number of patients having skin disorders such as scabies, digestive problems, joint problems and mental health issues.[46]

Other collateral Rule of law aspects need to be underlined. Firstly, the reception crisis also ***obstructs access to the asylum procedure.*** As UNHCR has stated in September 2023, adequate reception facilities are an essential aspect of fair and efficient asylum proceedings, and as such a prerequisite to guarantee access to international protection.[47] Secondly, it ***impacts the civil society organisations*** that try to address the resulting humanitarian crisis. The suffering of asylum seekers who are denied accommodation 'is only alleviated thanks to the invaluable work of Belgian NGOs'.[48] Organizations that used to focus on ensuring the basic needs of other categories of migrants, such as undocumented migrants, have systematically only been able to focus on the needs of asylum seekers. Thirdly, it resulted in the ***potential mistrust of asylum seekers in the judicial system***, as their rights even when recognised by a Court order are systematically denied. If there are today fewer procedures (more or less 250 convictions/month) lodged before the the Labour Court, it is not because the situation has improved, quite the opposite.[49] As explained by IFDH and Myria: 'On the contrary, the consultations carried out by IFDH and Myria emphasize that this drop in applications is linked to the weariness of applicants, their lawyers and associations due to the inefficiency of the judicial procedure. Convictions have no influence on priority in the waiting list managed by Fedasil. As a result, it is difficult to justify the continuation of these procedures'.[50]

In the light of all this, we submit that the systematic character and large scale of these rule of law violations, as well as the severity of their impact, urge the Court to continue to issue strong judgments on the merits, naming the violations of articles 6§1 and 13 and the actors and factors responsible for them.
In addition, because of the impact of the rule of law violations on the dire living conditions of vulnerable people, we submit that it would be appropriate to examine such cases also under article 3 ECHR. In the next section we explain that the requirement of exhaustion of domestic remedies should not stand in the way of this.

[43] This information was provided by Jessica Blommaert policy officer at Ciré Asbl.
[44] Myria PV June 2024, p. 34.
[45] Rule 9 Submission by Myria and IFDH, p. 6.
[46] Ciré, "Crise de l'accueil: Etat des lieux", May 2023, p. 9-12, available at https://bit.ly/46be1QI. See also "Artsen Zonder Grenzen bezorgd over medische toestand asielzoekers in Brussel", available at https://bit.ly/4b49QcM. "Politique de non-accueil: Etat des lieux Avril 2023 - September 2023", p. 8 and further, available at : https://bit.ly/3tZFZSi; Ciré, Politique de non-accueil, Etat des lieux, Octobre 2023 à fin Mars 2024, June 2024, available at : https://shorturl.at/aNGaP.
[47] UNHCR Belgium and Luxembourg, "UNHCR: opvancrisis in België is zorgwekkend, maar oplossingen zijn voorhanden", available at https://bit.ly/423dlMx.
[48] Amnesty International, Public Statement, "Belgium: Urgent Action Needed To End Human Rights Violations Against Asylum Seekers", 31 October 2023, https://bit.ly/3O8LrJz.
[49] Rule 9 Submission by Myria and IFDH
[50] Id. p. 20.

2. Article 1382 of the Civil Code in relation to exhaustion of remedies and effective remedies under Article 3 ECHR

The present case constitutes an opportunity for the Court to clarify the issue of exhaustion of domestic remedies under Article 3 ECHR, especially in relation to Article 1382 of the Belgian Civil Code (hereafter: CC). Firstly, we respectfully submit that the procedure before the Belgian Labour Courts as regards the legal obligations of the Belgian Government to provide asylum seekers with material assistance and accommodation should be considered as exhausting remedies under Articles 35 §1 and 3 ECHR (2.1.). Secondly, we respectfully submit that 'the salami method' which consists in chopping the different claims of reparations into different remedies and timing renders the remedy before the ECtHR is ineffective (2.2.). Thirdly, we show that, in any case, the compensation remedy under Article 1382 CC is not effective, especially in light of the present legal and political context (2.3.).

2.1. Exhaustion of domestic remedies through the Labour Tribunal Procedure for Article 3 ECHR

The requirement of exhaustion of domestic remedies enshrined in Article 35 §1 ECHR rests on several principles that should conduct the Court to consider that procedures before the Labour Courts that lead to the systematic conviction of the Belgian government and Fedasil to provide asylum seekers with material support and accommodation exhaust such domestic remedies in light of Article 3 ECHR not only for the cessation of the violation, but also for the compensation.

The Court is not bound by the qualification. First, the aim of the Labour Court procedure is to cease the violation of domestic and international law as regards the breach of the reception rules for asylum seekers. This procedure is substantially about Article 3 ECHR. The reception legislation adopted at EU level and implemented in Belgian law was adopted to ensure that asylum seekers are treated with dignity, are not exposed to inhuman treatment abandoned to their fate in the street and can have an effective access to their asylum procedure according to international standards.[51] Whether or not applicants have explicitly raised Article 3 ECHR before the Labour court should not be the determining factor, as long as the right as stake was raised in substance before the domestic Courts. Launching a procedure before the Labour Court for the conviction of the Belgian government to provide material support and shelter to asylum seekers implies raising arguments 'to the same or like effect' of Article 3 ECHR:[52] the cessation of an inhumane treatment. As a consequence, **we submit that the procedure before the Labour Court should be understood as a remedy under Article 3 ECHR.**

Domestic remedies should be *effective at the relevant time*. Secondly, it is settled case-law that the exhaustion rule enshrined in Article 35 §1 ECHR aims to give the opportunity to domestic courts and national authorities in general, to 'put right the alleged violation of the convention'[53] because it is assumed that domestic remedies are effective. The Grand Chamber of the ECtHR found that an effective remedy should be 'available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success'.[54] We have explained in the previous section that no remedy can be considered as effective in relation to the claims of asylum seekers as there was no remedy which would ensure the execution of the Labour Court judgment. Should any remedy be considered as effective – *quod non* –, the procedure before the Labour Court should be considered as exhausting remedies. It is settled case-law that 'the requirement for the applicant to exhaust domestic remedies is normally determined with reference to the date on which the application was lodged with the Court'.[55] The most appropriate way to get a remedy under Article 3 ECHR in the case of asylum seekers being denied material support and accommodation was to launch a procedure before the Labour Court. More than 11.500 convictions followed the lodging of such procedure and the overwhelming majority of them were not executed. This has

[51] ECtHR [GC], *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011, §§250 and seq.
[52] ECtHR, *Gäfgen v. Germany* [GC], Appl. No. 22978/05, 1 June 2010, §§ 142-146.
[53] For a summary of the principles, see ECtHR, *Gherghina v. Romania* (dec.) [GC], Appl. No. 42219/07, 9 July 2015, §§ 84-89
[54] ECtHR [GC] S*ejdovic v. Italy,* Appl. No. 56581/00, 1 March 2006, § 46. Emphasis is ours. See also: ECtHR, *Scheszták v. Hungary*, Appl. No. 5769/11, 21 November 2017, § 46.
[55] ECtHR [GC], *Selahattin Demirtaş v. Turkey (n°2)*, Appl. n°14305/17, 22 December 2020, § 193.

been a pervasive practice. By not executing these thousands of judgments, the Belgian government aggravated the situation under Article 3 ECHR.

In this context, and as long as the judgments of the Labour Tribunal were not executed, a procedure in extracontractual responsibility under 1382 CC was not adequate and effective because 'it was not capable of preventing the alleged continuous situation' of non-execution of convictions.[56] In fact, the Court judged in several cases that the compensation procedure of Article 1382 CC is limited to financial compensation and as a consequence cannot be considered as an effective remedy in cases where applicants claim for the cessation of a violation of the Convention, such as bad detention conditions in prison.[57] Article 1382 CC is effective to redress for damages *a posteriori*, only if the situation causing the disadvantage (such as conditions of detention) has already *ended before the lodging of any procedure before your Cour*t.[58] Therefore, when seizing your court, asylum seekers had exhausted all the remedies before domestic courts.

Article 35 needs to be applied with some degree of flexibility, '*given the context of protecting human rights'*.[59] Thirdly, it is settled case-law that the Court needs to apply Article 35 §1 ECHR with some degree of flexibility and should avoid excessive formalism, given the context of protecting human rights. We respectfully submit that the protection of human rights implies that this flexibility cannot be interpreted against the protection of the applicants claiming human rights violations. The case-law of the ECtHR calls for such interpretation.[60] This flexibility should also take into account the general legal and political context in which these remedies operate as well as the personal circumstances of the applicants.[61] Considering that a remedy emerges *once* the violation has ceased *after lodging the procedure before your Court*, constitutes a very flexible interpretation of Article 35 ECHR which goes against the protection of the applicants, in a context of systematic non-execution of judgments related to asylum seekers reception and where remedies are not effective. By seizing the Labour Court, the applicants did everything that could reasonably be expected of them to exhaust domestic remedies'.[62] Moreover, even if the remedy of Article 1382 CC was deemed effective – *quod non* –, it is settled case-law that 'in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose, for the purpose of fulfilling the requirement of exhaustion of domestic remedies, a remedy which addresses his or her essential grievance'.[63] The flexibility of Article 35 §1 CEDH cannot reasonably be interpreted as allowing domestic remedies to resurface once the violation has ceased after the lodging of the procedure before your Court: this 'salami method' explained in the next section goes against the protection system of the convention, even more so where there were no effective remedies in the first place (and the State did not do anything to resolve it) and the applicants did all they could to exhaust them despite the absence of effectivity.

To conclude, any asylum seekers who turned to the Labour Court to obtain shelter and material support, have exhausted domestic remedies in the sense of Article 35 §1 ECHR.

2.2. The 'salami method' is not compatible with effective remedies and access to justice

Under international human rights law, reparation of violation of fundamental rights can take several forms: restitution (restoring the victim to the original situation before the violation), compensation for or any economically assessable damage be it physical, moral, mental, material etc, rehabilitation (including medical and psychological care) as well as satisfaction (including effective measures aimed at the cessation of continuing violations and an official declaration or a judicial decision restoring the dignity, the reputation and the rights of

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[56] *E.g.* ECtHR, *Vasilescu c. Belgique*, No. 64682/12, 25 November 2014, § 75; ECtHR, *Clasens v. Belgium*, No. 26564/16, 21 November 2017.
[57] ECtHR, *W.D. v. Belgium*, Appl. No. 73548/13, 6 September 2016, § 153. See also ECtHR, *Torreggiani et al. v. Italy*, Appl. Nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013, § 50.
[58] ECtHR, *Lienhardt v. France* (dec.), Appl. No. 12139/10, 13 September 2011.
[59] ECtHR, *Gherghina v. Romania* (dec.) [GC], 9 July 2015, Appl. No. 42219/07, §87.
[60] Id.
[61] ECtHR, *Lehtinen v. Finland*, 14 October 1999, Appl. No. 39076/97; ECtHR, *Akdivar and Others v. Turkey*, Appl. No. 21893/93, 16 September 1996, §§ 65-68.
[62] ECtHR [GC], *D.H. and Others v. the Czech Republic*, Appl. No. 57325/00, 13 November 2007, §§ 116-122.
[63] ECtHR [GC], *Nicolae Virgiliu Tănase v. Romania,* Appl. No. 41720/13, 25 juin 2019, § 177.

the victim). One violation can generate different kinds of reparations, which is likely to be the case when the State, out of its own volition, does not execute a judgment ordering to provide accommodation and material support to asylum seekers: the reparation can take the form of just satisfaction implying the effective measures aimed at the cessation of continuing violations, an official declaration or a judicial decision restoring the dignity of the asylum seekers and, only once the violation has ceased, a reparation compensating asylum seekers for material, psychological and moral damages. [64]

In recent years, in a few cases, the Court has employed what we call the 'salami method' consisting in chopping a claim of reparations into different remedies and timings. In two decisions against France – *Yacine Bouhamla*[65] and *Dessources*[66] – which concerned the non-execution of a judicial order to provide housing to a families in Paris, the Court found the complaints under articles 3, 6 §1er, 8 and 13[67] inadmissible for non-exhaustion of domestic remedies for the compensation aspect of the case, even though the remedy only became available when the violation stopped after the lodging of the procedure before the Court.[68] *M.K. et al.* was about the non-execution of an ordinance convicting the State to provide accommodation and material support to families of asylum seekers. In this case, the Court took a provisional measure against the French government, asking it to ensure that the applicants were provided with emergency accommodation. The provisional measure was executed immediately. Your Court adopted the same reasoning as in *Bouhamla* and *Dessources*: the remedy which appeared once the violation has stopped after the lodging of the procedure was not exhausted. The Court only exempted the applicants of this remedy before the domestic courts as for article 6§1, otherwise it would be 'a disproportionate obstacle to the effective exercise of their right of individual petition, as defined in Article 34 of the Convention'.[69] It found the application under Article 3 ECHR inadmissible for non-exhaustion of domestic-remedies, without explaining the different outcome between Article 6 and Article 3. It found inadmissible the Article 3 (and 8) claim in *Camara v. Belgium* as well as *Ngegba and Attarzadeh v. Belgium*[70] for the same reasons.

We respectfully submit that this line of case-law based on such 'salami method' is not reconcilable with Articles 34 and 35 read in conjunction with Article 13 ECHR. In this respect we follow the points made by Judge Krenc's separate opinion in *Camara*,[71] and add some of our own.

The salami method contradicts the case-law of your Court. Firstly, in Article 3 cases against Belgium about conditions of detention in prison where the violations ceased *after* the case was referred to the Court and the government raised the non-exhaustion of effective remedies based on Article 1382,[72] your Court found the Article 3 complaint admissible. In those cases, the Court *did not chop* the reparation complains into different remedies finding that 'if the applicant was still detained at the time of the lodging of the application, the remedy must be capable of preventing the alleged continuous situation in order for it to be effective'. [73] Neither it chopped the claim for reparations between different timings, concluding that Article 1382 was not effective in this context, as it allows only for compensation, appreciating the condition of exhaustion of domestic remedies at the moment when the claim was lodged. In all these cases, the Court ruled the Article 3 complaint on the merits. We respectfully submit that the conclusion should not be different for asylum seekers who were still not provided by the Belgian government with material support and accommodation at the time of the lodging of the

[64] General Assembly resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 15 December 2005, §§15-22 available at https://shorturl.at/HiR6cn
[65] ECtHR, *Bouhamla v. France*, Appl. No. 31798/16, 25 June 2019.
[66] ECtHR, *Dessources v. France*, Appl. No. 11125/15, 20 October 2020.
[67] *Dessources* only concerned articles 6 §1er and 13.
[68] In none of the two cases, the Court took a provisionary measure based on Article 39.
[69] ECtHR, *MK et al. v. France*, Appl. Nos. 34349/18, 34638/18 et 35047/18, 8 December 2022.
[70] ECtHR, *Ngegba and Attarzadeh v. Belgium*, 14 May 2024, Appl. Nos. 42874/22 et 45607/22.
[71] ECtHR, *Camara v. Belgium*, Appl. No. 49255/22, 18 July 2023, separate opinion of Judge Frédéric Krenc.
[72] ECtHR, *Clasens v. Belgium*, No. 26564/16, 21 November 2017.
[73] ECtHR, *Vasilescu c. Belgique*, No. 64682/12, 25 November 2014, §§ 71-75 ; ECtHR, *Clasens v. Belgium*, No. 26564/16, 21 November 2017, §28; ECtHR, *Sylla & Nollomont v. Belgium*, Appl. Nos. 37768/13 et 36467/14, 16 mai 2017, §21 ; ECtHR, *Torreggiani et al. v. Italy*, Appl. Nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 & 37818/10, 8 January 2013, § 50.

application: Article 1382 was not capable of preventing the alleged continuous situation, as explained in the first section.

The salami method goes against the principle that exhaustion of remedies is appreciated at the relevant time. Secondly, the moment when the violation ceased (before versus after lodging the procedure) has constituted one of the core elements of Articles 34, 35 and 13 and explains why temporality is so important in interpreting Article 35 ECHR not only in relation to the exhaustion of remedies, but also in relation to the principles that the effective remedy must exist at the date when the application is lodged with the Court[74] and that the effectiveness must be established in relation to the relevant period.[75] The salami method is likely to change this core principle as it implies that the moment when the violation ceased i.e. before or after the lodging of the procedure does not matter anymore.

The salami method turns Article 35 ECHR on its head. Thirdly, the salami method which implies 'chopping' the claim of reparations into different remedies and timings raises a question of principle under Article 35 ECHR, which is not dependent on the substance of the claims brought before the Court, including the right(s) it is based on. In fact, as in *MK*, it seems that the Court might apply it to any type of claims. Following the salami method would imply that *all* the cases involving a violation which ceased after lodging a complaint before the Court are likely to be declared inadmissible, should a compensation remedy exist. This is a revolution which has not been acknowledged yet due to the limited number of cases it has been applied to so far, but which is likely to have long-lasting (and detrimental) impact on human rights protection. Most human rights violations imply a possibility to ask for compensation in one way or another which is in many instances, subsidiary to the main claim of cessation. Therefore, hundreds of cases brought before your Court including cases related to detention conditions, expulsion and extradition, expropriation etc. are likely to be considered inadmissible simply because the violation has ceased in the meantime. Even if some special circumstances would allow the applicants to be 'exempted' of exhausting such a remedy such as in *MK*, the salami method is still turning on its head Article 35 ECHR and the rule that the exhaustion of an effective remedy should be appreciated when the complaint is lodged. What is important to understand is that by applying the salami method the Court does not apply an exception to this rule but changes the paradigm of it: the mere fact that the violation has stopped is likely to trigger a new remedy that needs to be exhausted by the applicants. We respectfully submit that the salami method is likely to have major potential detrimental consequence for the effectiveness of remedies, but also for the Rule of Law in general.

The 'salami method' is not compatible with the right to an effective remedy. Fourthly, the salami method consisting in chopping the claim of reparations into different remedies and timings leads to inflating the remedies for applicants at domestic and international levels, undermining the effectiveness of remedies. Requiring an applicant who has been denied for months the execution of domestic judgments to come back to domestic jurisdictions for a claim for compensation after the violation has ceased (months) after a provisional measure by your Court is neither realistic, nor effective. It means that in order to have access to a remedy in compensation *the passage before your Court becomes an indispensable trigger and condition*. We respectfully submit that a remedy cannot be considered as effective if it systematically needs a Rule 39 measure to become available. Requiring applicants to go before domestic courts to claim compensation and just satisfaction because the violation ceased after the lodging of the procedure, amounts to multiplying and protracting procedures for applicants in a way which is hardly reconcilable with the effective protection of human rights, especially in a context where the Belgian State systematically refuses to execute judgments by all domestic courts on this matter. Such a procedural detour makes access to justice a mirage.

3. Article 1382 CC is not an effective remedy

In any case, whether or not the salami method is applied, we respectfully submit that an Article 1382 CC claim cannot be considered as an effective remedy in the circumstances of asylum seekers which have been denied their right to accommodation and material receptions for months, despite judgments convicting the Belgian government and Fedasil to do so and despite provisional measures ordered by your Court.

[74] ECtHR, *Stoica et al. v. Romania*, Appl. No. 42722/02, 4 March 2008, § 104.
[75] ECtHR, *Khider v. France*, Appl. No. 39364/05, 9 July 2009, §§ 142-145.

Article 1382 does not imply reasonable delay and promptness. To be effective, a remedy should ensure guarantees of promptness.[76] The court has also found that 'the speed of the procedure for remedial action may also be relevant to whether it is practically effective in the particular circumstances of a given case for the purposes of Article 35 § 1 of the Convention'.[77] The remedy in compensation of Article 1382 C does not offer such guarantees, especially for the applicants who are in Brussels (most of them) due to the excessive length of civil proceedings before the courts of the judicial district of Brussels. This is a structural problem that your Court pointed out a year ago in the case *Van den Kerkhof v. Belgium* and which led to the conviction of Belgium more than 20 times since 2008.[78] In this context, there is little hope that the application for compensation will be ruled in a reasonable delay and even more so in the instance the case is appealed and in light of the already lengthy procedure before the Labour Court and your Court.

The remedy is futile given the political and legal context. Secondly, it is settled case-law that in appreciating whether a remedy has been exhausted in the sense of Article 35 §1 ECHR the Court must take into account 'the general legal and political context in which the remedies operate.[79] For instance, in *A.B. v. the Netherlands*, it took into account in appreciating the effectiveness 'the lack of adequate implementation by the Netherlands Antilles authorities of judicial orders to repair the unacceptable shortcomings of penitentiary facilities, as well as noting their failure to implement the urgent recommendations of the CPT.[80] The political and legal situation regarding asylum seekers should also be taken into account when assessing the effective character of the compensation procedure of Article 1382 CC, which appear to be futile. Indeed, the Belgian government has systematically refused to execute all the rulings related to the reception crisis be them by the Labour Court, the First instance Civil Court, the Appeal Court or the Council of State. It also categorically refused to pay all the enforcement penalties ('astreintes') which amount to more than EUR 35 million and made clear it would not pay them as explained above. In this context, there is a high chance that an action in compensation will be futile as there is a clear pattern consisting in acts incompatible with the Convention and obvious non-compliance by state authorities of domestic rulings.[81]

The remedy is inadequate given the situation of asylum seekers. In assessing the effectiveness of a remedy, the Court should also take into account the individual circumstances of the applicants, examining whether such a compensation procedure would not be practically possible. One can reasonably fear that many applicants will never lodge a 1382 CC complaint and be compensated through civil liability proceedings. Indeed, once they eventually receive a shelter after months, asylum seekers who have been shaken by the experience of being deprived of any material support for months, have to focus on recovering from it medically, psychologically, legally (they have to catch up on their asylum procedure …). Not only they have very little information in the reception center about the possibility of such a civil liability procedure (i.e. a lawyer would have to inform them and let them know about such an opening), but importantly they might have lost confidence in the system given the systematic refusal of the Belgian government to implement previous judgments about their situation. Because of many more other important concerns on their end i.e. the asylum procedure, they most likely will not give priority to an action in compensation before civil courts.

In the light of all this, we submit that asylum seekers who have obtained a judgment from the Labour Court concerning shelter and material support have exhausted domestic remedies. We submit furthermore that requiring applicants who were suffering from an ongoing violation at the time of submitting their ECtHR application, and which later ceased (most likely as a result of submitting that application or of provisional measures ordered by the Court), to exhaust an additional remedy in compensation before the civil courts, is highly problematic both in principle and in the specific circumstances of this type of cases.

[76] ECTHR, *Kadiķis v. Latvia (no. 2)*, Appl. No 62393/00, 4 May 2006, § 62.
[77] ECtHR, *Story and Others v. Malta*, Appl. Nos. 56854/13, 57005/13 and 57043/139 October 2015, § 80.
[78] ECtHR, *Van den Kerkhof v. Belgium,* Appl. No 13630/19, 5 September 2023, § 104.
[79] ECtHR, *Akdivar and Others v. Turkey*, Appl. No. 21893/93, 16 September 1996.
[80] ECtHR, *A.B. v. the Netherlands*, Appl. No 37328/97, 29 January 2002, § 98.
[81] ECtHR [GC], *Georgia v. Russia (II)*, Appl. No. 38263/08, 21 January 2021, §§ 98-99.