Summary:

I. The absolute obligation to respect the principle of non-refoulement imposes a duty on States to examine the risk of treatment contrary to Article 3 that the applicants will encounter in the country of removal. Domestic legislation precluding the authorities of the removing state from carrying out such an examination and preventing protection seekers from making applications for international protection will violate Article 3 of the Convention. A Contracting Party retains its obligations under that provision at all times and difficulties associated with migration flows cannot justify recourse to practices incompatible with the Contracting Parties' obligations under the Convention.

II. To comply with *non-refoulement* obligations under Articles 3 and 13 ECHR, international law requires, *inter alia,* a rigorous scrutiny of the applicant's claim of potentially prohibited treatment, access to an effective remedy, and access to the rights protected under Articles 2-34 of the 1951 Geneva Convention, where the applicant may be entitled to those rights.

III. The interveners further submit that to meet the standards of Article 5 ECHR, detention must comply with the requirements of legality, be free from arbitrariness and comply with a provision prescribed by law both substantively and in procedure. Detention, which is a measure of last resort, may be imposed if following an individualised and thorough examination it is concluded that less severe measures cannot be applied effectively.

IV. The interveners reiterate that the EU asylum acquis interpreted in light of EU fundamental rights and principles, applicable to the Contracting Parties that are Members of the European Union, envisages effective access for all who may wish to apply for international protection to the appropriate procedures contained therein. Emergency measures adopted at the domestic level in violation of the obligations under the EU asylum acquis interpreted in light of the EU Charter on Fundamental Rights will violate EU law, as no derogation from the right to apply for asylum is envisaged by the legislators.

I. The relevant obligations of Contracting Parties under Articles 3 and 13 of the ECHR

A. Positive and negative obligations of Contracting Parties in respect of Article 3 ECHR

1. This Court has reiterated on numerous occasions that the prohibition of inhuman or degrading treatment, enshrined in Article 3 of the Convention, '*is one of the most fundamental values of democratic societies', 'a value of civilisation closely bound up with respect for human dignity, part of the very essence of the Convention*'.[1] Under the ECHR and other international human rights law instruments applicable to Contracting Parties, this principle entails an obligation not to transfer (*refouler*) people where there are substantial grounds for believing that they would face a real risk of serious human rights violations - including of Article 3[2] - in the event of their removal, in any manner whatsoever, from the State's jurisdiction. The *non-refoulement* principle is absolute, permitting no derogations either in law or in practice.[3]

2. Contracting Parties will violate Article 3 by removing an individual '*where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country*' under the classic *Soering* test.[4] Article 3 *non-refoulement* obligations apply both to transfers to States where the person will be at risk (direct *refoulement*), and to transfers to States where there is a risk of onward transfer to a third country where the person will be at risk (indirect *refoulement*).[5] Article 3 obligations also protect

[1] *M.K and others v Poland*, no. 40503/17, 23 July 2020 § 166- 167; *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011, § 286; *M.A. v. Cyprus*, no. 41872/10, 23 July 2013, § 133.
[2] Othman (Abu Qatada) v. the United Kingdom, no. 8139/09, 17 January 2012, § 233, 258 -261; N.A. v. the United Kingdom, no. 25904/07, 17 July 2008; Soering v. the United Kingdom, App. No. 14038/88, 7 July 1989.
[3] Saadi v Italy, op. cit, § 127; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; Adel Trebourski v. France, UNCAT, CAT/C/38/D/300/2006, 11 May 2007, § 8.2 – 8.3. UN Human Rights Committee, General comment no. 31 [80]. The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, § 12. This is unlike in refugee law, where the principle is not absolute.
[4] Soering v. the United Kingdom, no. 14038/88, 7 July 1989, § 90-91, Series A no. 161; Vilvarajah and Others v. the United Kingdom, nos. 13163/87 13164/87 13165/87 13447/87 13448/87, 30 October 1991, § 103, Series A no. 125; H.L.R. v. France, no. 24573/94, 29 April 1997, § 34, Reports 1997-III; Jabari v Turkey, no. 40035/98, 11 July 2000, § 38; Salah Sheekh v. the Netherlands, no. 1948/04, 11 January 2007, § 135; and Saadi v Italy, no. 37201/06, 28 February 2008, § 152; M.S.S. v. Belgium and Greece [GC], no. 30696/09, 21 January 2011, § 365.
[5] Salah Sheekh v. the Netherlands, para. 141; M.S.S. v. Belgium and Greece, para. 342.

individuals against both deliberate harm by State agents and non-State actors[6] and removal to face living conditions amounting to serious ill-treatment contrary to the Convention.[7]

3. In this respect, Contracting Parties have an obligation to secure Convention rights to all those who fall within their jurisdiction within the meaning of Article 1 ECHR. This general obligation not only includes obligations on the State of *non-refoulement*, but also obligations to treat persons with the dignity consonant with Convention standards and, in particular, to enable individuals to effectively exercise their Convention rights wherever and whenever they are within their jurisdiction, whether regularly present on their territory or otherwise.[8] Treating all individuals in accordance with the Convention includes the obligation to identify and pay special attention to the needs of people in a vulnerable situation, such as asylum seekers.[9] States have an obligation **to enable those who wish to identify themselves as seeking asylum to do so[10] and to permit them access to determination procedures with all the procedural safeguards required by law**,[11] including access to information, legal assistance and access to effective remedies.[12]

4. This Court's case law does not permit states to evade their ECHR responsibilities regardless of whether the non-compliance with Convention standards is made with reference to other legal obligations. In *Bosphorus v. Ireland*, the Court stated that "*a Contracting Party is responsible under Art. 1 ... for all acts and omissions of its organs regardless of whether the act or omission... was a consequence of domestic law or of the necessity to comply with international legal obligations*".[13]

5. Under this Court's jurisprudence, diligent application of the principle of *non-refoulement* requires the domestic authorities to examine the conditions in the country of removal in light of the standards of Article 3 of the Convention.[14] Such assessment must be "*a rigorous one"*.[15] It is in principle for the applicant to adduce evidence "*capable of proving*" the classic *Soering* test.[16] But, ultimately, the decision-maker must "*assess the issue in the light of all the material placed before it and, if necessary, material obtained of its own motion*".[17] Where evidence "*capable of proving*" such risk is adduced by the applicant, "*it is for the Government to dispel any doubts about it*".[18] **Where the situation in the receiving state is such that the removing state can be deemed to have constructive knowledge of it, it is under a duty of enquiry to verify, before removal, that the person concerned will not face a real risk of prohibited treatment in the country of destination**.[19]

6. Reiterating the absolute nature of the right guaranteed under Article 3, this Court held that the scope of that obligation was not dependent on whether the applicants had been carrying documents authorising them to cross the Contracting State's border or whether they had been legally admitted to their territory on other grounds. [20]

7. According to generally available information, on 2 March 2020 the President of the Hellenic Republic enacted under Article 44 (1) of the Greek Constitution, the Act of legislative content "On the suspension of the submissions of asylum applications", with effect as of 1 March 2020[21], which

[6] J.K and others v Sweden [GC], no.59166/12, 23 August 2016.
[7] M.S.S. v. Belgium and Greece, no. 30696/09, 21 January 2011, § 367.
[8] M.S.S. v. Belgium and Greece, no. 30696/09, 21 January 2011, §§ 299-320.
[9] Rahimi v. Greece, No. 8687/08, 5 April 2011; Thimothawes v. Belgium, No. 39061/11, 4 April 2017; Abdi Mahamud v. Malta, No. 56796/13, 3 May 2016
[10] Hirsi Jamaa and Others v. Italy, no. 27765/09, 23 February 2012.
[11] Kebe and Others v. Ukraine, App. No. 12552/12, 12 January 2017, § 104.
[12] M.S.S. v. Belgium and Greece, no. 30696/09, 21 January 2011, § 293, and M.K. and Others v. Poland, §§ 142-148 and 212-220,
[13] United Communist Party of Turkey and Others v. Turkey, (30 January 1998), Reports 1998-I, pp. 17-18, § 29 in Bosphorus v. Ireland, No. 45036/98 (30 June 2005), § 153.
[14] Mamatkulov and Askarov v. Turkey [GC], App. Nos. 46827/99 and 46951/99, (04 February 2005), para. 67; F.G. v. Sweden [GC], App. no. 43611/11, (23 March 2016), para. 112
[15] Sufi and Elmi v. the United Kingdom, App. Nos. 8319/07 and 11449/07, (28 June 2011), para. 214; Chahal v. the United Kingdom, op. cit., para. 96; Saadi v. Italy, App. No. 37201/06, (28 February 2008), para. 128.
[16] Sufi and Elmi v. the United Kingdom, op. cit., para. 214.
[17] N v. Finland, App. No. 38885/02, (26 July 2005), para. 160; Hilal v. the United Kingdom, op cit., para. 60; Vilvarajah and Others v. the United Kingdom, op. cit., para. 107.
[18] N. v. Sweden, App. No. 23505/09, (20 July 2010), para. 53; R.C. v. Sweden, App. No. 41827/07, (9 June 2010), para. 50.
[19] Mamatkulov and Askarov v. Turkey [GC], op. cit., para. 69.
[20] D.A. and others v Poland, para. 64, M.K. and others v Poland, para. 178
[21] Act of legislative content on the 'Suspension of the submission of asylum applications', 2 March 2020, in Greek at:

suspended the registration of asylum claims for a month for people entering irregularly and established their "*immediate deportation without registration, where possible, to their countries of origin or transit*." No asylum applications were registered in the month of March.[22] Multiple international organizations including UNHCR reacted to the Act demanding access to asylum for the persons arriving in the month of March.[23] The suspension of the right to apply for asylum was also found contrary to the principle of non-refoulement and not permitted under both the Geneva Convention and EU law by the Council of Europe Special Representative of the Secretary General on migration and refugees.[24]

8. Additionally, the package of infringement decisions released in January 2023 reveals that the European Commission has issued several letters of formal notice to Greece over failure to comply with EU law including in relation to reception and detention of asylum seekers and refugees.[25]

9. **The interveners submit that this Court has made it clear that the absolute obligation to respect the principle of *non-refoulement* imposes a duty on States to examine the situation that the applicants will encounter in the country of removal. Since protection against the treatment prohibited by Article 3 is absolute, there can be no derogation from that rule.**[26]

10. **The interveners stress that domestic legislation precluding the authorities of the removing state to carry out such an examination and preventing asylum seekers from making applications for international protection will violate Article 3 of the Convention. Migratory pressure faced by the Contracting Party cannot justify migration management allowing for derogations from non-derogable rights under the Convention.**[27]

B. Procedural guarantees under Articles 3 and 13 ECHR concerning removal

11. Articles 3 and 13 require the Contracting Parties, *inter alia*, to assess all evidence at the core of a *non-refoulement* claim,[28] including, where necessary: to obtain such evidence *proprio motu* and to avoid imposing an unrealistic burden of proof on applicants or requiring them to bear the entire burden of proof.[29] National authorities must thoroughly assess the risk of ill-treatment and the foreseeable consequences of removal to the receiving country in light of the general situation there, as well as the applicant's personal circumstances.[30] It is the duty of those authorities to seek all relevant, up-to-date and generally available information.[31]

12. Treating all individuals compatibly with the Convention includes the obligation to identify and pay special attention to the needs of people in a vulnerable situation. This includes asylum-seekers, irrespective of whether national authorisation to enter the territory has been granted.[32] States have an obligation to enable those who wish to identify themselves as seeking asylum to do so[33] and to permit them access to determination procedures with all the procedural safeguards required by national law,[34] including access to information, legal aid and access to effective remedies. A post-factum finding that the asylum seeker did not run a risk in his or her country of origin, cannot serve to absolve the State retrospectively of its procedural duties in this regard.[35]

---

http://www.immigration.gr/2020/03/pnp-anastolh-ths-ypovolis-aithseon-asylou.html?m=1.

[22] AIDA Country Report: Greece. Registration of the asylum application, 30 November 2020.Available at: https://asylumineurope.org/reports/country/greece/ asylum-procedure/access-procedure-and-registration/registration-asylum-application/

[23] UNHCR. UNHCR statement on the situation at the Turkey-EU border. 02 March 2020.Available at: https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcrstatement-situation-turkey-eu-border.html

[24] Opinion on the Greek Act of legislative content from 2 March 2020 on the suspension of the submission of asylum applications, 17 March 2020, available at: https://rm.coe.int/opinion-on-the-greek-act-of-legislative-content-from-2-march-2020-on-t/16809e0fff

[25] Letter of formal notice to Greece (INF(2022)2156), available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_23_142

[26] M.S.S v. Belgium and Greece [GC], Op. Cit., § 223.

[27] Hirsi Jamaa and Others, cited above, § 179

[28] Jabari v. Turkey, no. 40035/98, (11 July 2000), paras.39-40; Singh and Others v. Belgium, no. 33210/11, (2 October 2012), para. 104.

[29] M.S.S. v. Belgium and Greece, op. cit., paras. 344-359; Hirsi Jamaa and Others v. Italy, op. cit., paras. 122-158.

[30] Vilvarajah and Others v. United Kingdom, no. 13448/87, (30 October 1991), paara. 108; Tarakhel v. Switzerland, no. 29217/12, (4 November 2014), para. 104.

[31] Ilias and Ahmed, [GC], 21 November 2019, no. 47287/15, para 141.

[32] *Mutatis mutandis* Saadi v. the United Kingdom [GC], no. 13229/03 (29 January 2008), para. 66; Mohamad v. Greece, no. 70586/11, (11 December 2014), para. 44.

[33] Hirsi Jamaa and Others v. Italy, no. 27765/09 (23 February 2012), para. 204.

[34] Kebe and Others v. Ukraine, no. 12552/12, (12 January 2017), para. 104.

[35] Ilias and Ahmed, [GC], 21 November 2019, no. 47287/15, para 137

13. The interveners invite the Court to recall and apply the approach they have taken in previous cases where individuals are denied entry and/or threatened with return in situations where they have not been able to benefit – for whatever reason - from access to an asylum procedure which would provide a serious scrutiny of the claim that they would be exposed to the risk of prohibited ill-treatment.[36] The Court's approach was applied irrespective of whether there was found to be a violation of Article 3 *taken alone* because the applicant was no longer at risk of *refoulement* and thus not a "victim" for the purposes of Article 3.

14. The *dicta* in Kebe v Ukraine are particularly pertinent: "*However, the Court reiterates that, according to its case-law in the domain of extradition and removal of migrants, eventual loss of victim status under Article 3 of the Convention cannot automatically and retrospectively dispense the State from its obligations under Article 13, in particular where it can be demonstrated that an applicant had an "arguable" claim under Article 3 at a time he or she was under an imminent threat of removal".*[37]

15. To comply with Article 3's procedural safeguards, individuals must be told, in simple, non-technical language that they can understand, the reasons for their removal, and the process available for reviewing or challenging the decision.[38] Accessible legal advice and assistance may be required for the individual to fully understand their circumstances.[39] Further, individuals at an arguable risk of prohibited treatment under the Convention have the right to an effective remedy, which is not theoretical and illusory, which allows for the review and, if appropriate, for the reversal of the decision to remove.[40] This remedy must exist in practice as well as in law and must not be unjustifiably hindered by the acts or omissions of the authorities.[41]

16. This Court has determined a remedy to be ineffective, *inter alia*, **when removal takes place before the practical possibility of accessing the remedy**;[42] where there is a lack of automatic suspensive effect;[43] where there are excessively short time limits for submitting the claim or an appeal;[44] where there is insufficient information on how to gain effective access to the relevant procedures and remedies;[45] where there are obstacles in physical access to or communication with the responsible authority;[46] where there is a lack of (free) legal assistance and access to a lawyer;[47] and/or where there is a lack of interpretation.[48] **These safeguards are ineffective in a situation where no official procedure has taken place**, which in itself entails having had prior access to information about the procedures in order to allow for a meaningful opportunity to raise objections.

17. The interveners note that, in the light of the Court's case-law and the intended purpose of Article 13, asylum-seekers are deemed to be in "*an inherently vulnerable situation*",[49] which merits special attention by public authorities to ensure their full and effective access to domestic remedies.

18. **The interveners submit that summary expulsions of migrants without an official procedure, including an individual assessment and other due process safeguards constitutes a violation of the principle of *non-refoulement*. Furthermore, the lack of access to interpreters**

[36] M.K. and others v Poland, (Applications nos. 40503/17, 42902/17 and 43643/17), 23 July 2020, para. 178 and 179. A.B. and others v Poland, App. No. 42907/17, 30 June 2022, para. 38-39. See also, S. H. v Malta, App. No. 37241/21, 20 December 2022, para. 91 and 101.
[37] Kebe and Others v. Ukraine, App. No. 12552/12, 12 January 2017, § 89
[38] Hirsi Jamaa and Others v. Italy, op. cit., para.204; Čonka v. Belgium, App. No. 51564/99, (5 February 2002), para. 44.
[39] Guideline 5. Remedy against the removal order in CoE Committee of Ministers "Twenty Guidelines on forced return" adopted on 4 May 2005 as referenced by the ECtHR in De Souza Ribeiro v. France, App. No. 22689/07, para. 47.
[40] Shamayev and Others v. Georgia and Russia, App. No. 36378/02, (12 April 2005), para.460; M.S.S. v. Belgium and Greece, op. cit.; Čonka v. Belgium, op. cit., paras. 77-85.
[41] Čonka v. Belgium ECtHR, op. cit, para.46, 75.
[42] Shamayev and Others v. Georgia and Russia, No. 36378/02, (12 April 2005), para.460; Labsi v. Slovakia, No. 33809/08, (15 May 2012), para. 139.
[43] Gebremedhin v France, No. 25389/05 (26 July 2007) para 66-67; Baysakov and others v. Ukraine, No. 54131/08, (18 February 2010), para.74; M.A. v. Cyprus, no. 41872/10, (23 July 2013), para 133. D and Others v. Romania, no. 75953/16, (14 January 2020), paras. 128-130.
[44] I.M. v. France, No. 9152/09, (14 December 2010), para.144; M.S.S. v. Belgium and Greece, No. 30696/09, [GC] (21 January 2011), para. 306.
[45] Hirsi Jamaa and Others v. Italy, op. cit., para. 204.
[46] Gebremedhin v. France, no. 25389/05, (26 April 2007), para.54; I.M. v. France, no. 9152/09, (14 December 2010), para.130; M.S.S. v. Belgium and Greece, no. 30696/09, [GC] (21 January 2011), paras. 301 - 313.
[47] M.S.S. v. Belgium and Greece, no. 30696/09, [GC] (21 January 2011), para.319; mutatis mutandis, N.D. and N.T. v. Spain, nos. 8675/15 and 8697/15, (3 October 2017), para. 118.
[48] Hirsi Jamaa and Others v. Italy, no. 27765/09, [GC] (23 February 2012), para. 202.
[49] M.S.S. v. Belgium and Greece, op. cit., para 233.

allowing applicants to communicate in a language they understand; lack of access to clear information; lack of access to a lawyer; and lack of access to an effective remedy render access to rights under Articles 3 and 13 ineffective, theoretical and illusory.

II. Lawfulness of detention under Article 5 (1)

19. The interveners note that detention can only be considered lawful and meet the requirements of legality if it is *"in accordance with a provision prescribed by law*", and that the conditions for the deprivation of liberty are clearly defined in national law and therefore foreseeable in their application.[50]

20. The requirement of Article 5(1) that detention must be in accordance with the law has its foundation in principles of the rule of law, legality and protection against arbitrariness.[51] To be in accordance with the law, detention must both have a clear legal basis in national law, and must follow a procedure prescribed by law.[52] It must also conform to any applicable norms of international law.[53] This Court has held that a person's detention under any of the grounds of Article 5(1)[54] must be compatible with the overall purpose of Article 5, namely, to safeguard liberty and ensure that no person is deprived of their liberty in an arbitrary fashion.[55]

21. For detention to be free from arbitrariness, as required by Article 5(1), it must be carried out in good faith; be closely connected to a permitted ground; the place and conditions of detention must be appropriate; and the length of detention must not exceed what is reasonably required for the purpose pursued.[56]

22. The domestic authorities have an obligation to consider whether removal is a realistic prospect and whether detention with a view to removal is from the outset, or continues to be, justified.[57] Procedural safeguards must be in place and must be capable of preventing the risk of arbitrary detention pending expulsion.[58]

23. Furthermore, the Court has reiterated that when national law stipulated that detention is only justified as a last resort where alternative and less severe measures have been considered and deemed insufficient to safeguard an individual or public interest, it will be found to be arbitrary if alternatives have not explicitly been considered.[59] The need to consider less severe or alternative measures to detention has also been emphasised by this Court in cases relating to applicants with a particular vulnerability.[60]

24. The interveners note a clear ongoing trend and converging positions of international bodies that consider detention justified only as a measure of last resort and following the obligation to explore alternative and less severe measures before taking a decision to detain. Similar obligations stem from EU asylum law and are consolidated in CJEU jurisprudence highlighting that in view of the gravity of interference with the right to liberty enshrined in Article 6 of the Charter and of the importance of that right, the power of the competent national authorities to detain third-country nationals is strictly circumscribed by relevant safeguards under secondary law (as indicated above). As the Convention cannot be interpreted in a vacuum,[61] the Court has regard to relevant international instruments and reports, in particular those of other Council of Europe bodies, in order to interpret the guarantees of the Convention and to establish whether there is a common European standard in the field concerned.[62]

---

[50] Enhorn v. Sweden, App No. 56529/00, (25 January 2005), para 36.
[51] Louled Massoud v Malta, App No. 24340/08, (27 July 2010), para.61; Medvedyev v. France [GC], App. No.3394/03, (29 March 2010), para.80.
[52] Louled Massoud v. Malta, op. cit., para.61, Khlaifia and others v. Italy [GC], App No. 16483/12, (15 December 2016), para 91.
[53] Medvedyev v France [GC], App. No.3394/03, (29 March 2010), paras.79 – 80.
[54] Nabil and others v. Hungary, App No. 62116/12, (22 September 2015), para. 18.
[55] Saadi v. the United Kingdom [GC] App No. 13229/03, (29 January 2008), para. 66; Khudoyorov v. Russia App No. 6847/02, (8 November 2005), para 137; Rahimi v. Greece, App No. 8687/08 (5 July 2011), para. 102.
[56] Saadi v UK, op. cit, para 74; Yoh-Ekale Mwanje v Belgium, App No. 10486/10, (20 December 2011) paras. 117-119.
[57] Al Husin v. Bosnia and Herzegovina (no. 2), App No. 10112/16 (25 June 2019), para. 98.
[58] Kim v. Russia, App No. 44260/132014, (17 July 2014), para. 53.
[59] Rusu v. Austria, App No. 34082/02, (2 October 2008), para 58.
[60] Yoh-Ekale Muanje v. Belgium, op. cit., para 124, Popov v. France, App No. 39472/07, (19 January 2012), para 119.
[61] Magyar Helsinki Bizottság v. Hungary [GC], no. 18030/11, § 123, 8 November 2016
[62] Case of Fedotova and Others V. Russia, App. no. 40792/10 30538/14 43439/14, 10 January 2023, para 174-178.

25. In this regard, other Council of Europe bodies have similarly noted the importance of alternative measures to detention and advocated for its consideration in all cases concerning detention.[63] Similarly, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has stated that deprivation of liberty "*should only be a measure of last resort, after a careful and individual examination of each case*." The CPT has emphasised that alternatives should be developed and used when possible and that detention without a time limit and with unclear prospects for release could be considered as amounting to inhuman treatment.[64] Furthermore, a Steering Committee for Human Rights (CDDH) publication underlined that under the principle of proportionality, States are obliged to examine alternatives to detention and that "*they should inter alia: respect the principle of necessity, proportionality and non-discrimination, never amount to deprivation of liberty or arbitrary restrictions on freedom of movement, always rely upon the least restrictive measure possible, be established in law and subject to judicial review, ensure human dignity and respect for other fundamental rights."*[65]

26. **The interveners thereby submit that detention must meet the requirements of legality, not be arbitrary and be in accordance with a provision prescribed by law. The consideration of less invasive alternatives to detention must form part of an individualised assessment, which takes into account all circumstances of the case and applicant concerned. The grounds of detention should be considered in this assessment, be mentioned in the decision ordering the detention and must be justified when a decision is made regarding an applicant's detention.**

III. Lawfulness of detention and guarantees under Article 5 (4)

27. The safeguards against arbitrariness contained in Article 5 (1), and the associated prohibitions contained in Article 3 ECHR are rendered ineffective unless the detained individual is able in law and in practice to take proceedings to establish whether the deprivation of liberty is lawful.[66] The right to challenge the lawfulness of detention judicially under Article 5 (4) is a fundamental and non-derogable protection against arbitrary detention, as well as against torture or ill-treatment in detention.[67]

28. It is a *lex specialis* over and above the general requirements of Article 13 ECHR. It requires that persons subject to any form of deprivation of liberty have effective access to an independent court or tribunal to establish the lawfulness of their detention while they are detained, and not just afterwards[68] and that they or their representative have the opportunity to be heard before the court.[69] Presence in court, either in person or through a representative, is an important safeguard against violations of Article 3. Article 5 (4) requires a specific remedy to protect the liberty of the detained individual rather than an opportunity to complain generally about the proceedings leading to their detention.[70]

29. The possibility to access such a procedure is an obligation and *cannot* be left to the discretion or '*good will'* of the detaining authority.[71] The remedy must also be "*sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision*".[72] To be practical and effective, detained persons must also be informed in

[63] For example, in the Commissioner for Human Right's Human Rights Comment "High time for states to invest in alternatives to migration detention" on 31 January 2017, the Commissioner for Human Rights at the time emphasised the importance of alternative measures to "safeguard the human rights of migrants" and that these alternatives apply to all forms of detention.
[64] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Factsheet: Immigration Detention, March 2017.
[65] Council of Europe, Practical Guide: Alternatives to immigration detention: Fostering effective results, 25 November 2019.
[66] Popov v. France, App Nos. 39472/07 and 39474/07, (19 January 2012).
[67] This is similarly the case with Article 9 (4) ICCPR of which the right to take proceedings against the lawfulness of detention has been clarified as non-derogable, see UN HRC, General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, para 67.
[68] G.B. and Others v. Turkey, App no. 4633/15, (17 October 2019) para 183; Mooren v. Germany [GC], App No. 11364/03, (9 July 2009) para 106; and Ilnseher v. Germany [GC], App Nos. 10211/12 and 27505/14, (4 December 2018) para 251.
[69] Al-Nashif v. Bulgaria, App No. 50963/99, (20 June 2022), para 92; De Wilde, Ooms and Versyp v. Belgium, App Nos. 2832/66; 2835/66; 2899/66, (18 June 1971) para. 73.
[70] Rakevich v. Russia, App No. 58973/00, (28 October 2003) paras 44 and 45; G.B. and Others v. Turkey, App No. 4633/15, (17 October 2019), para 178.
[71] Rakevich v. Russia, no. 58973/00, (28 October 2003), para 44.
[72] G.B. and Others v. Turkey, App No. 4633/15, (17 October 2019), para 163.

a language they understand of the reasons for detention[73] and should have access to legal advice and interpretation.[74]

30. The Grand Chamber of this Court has affirmed that Article 5 (4) requires the lawfulness of detention to be determined by a speedy judicial decision.[75] In order to determine whether authorities complied with the '*speediness*' requirement, the Court will consider the circumstances of each individual case which includes the complexity of the proceedings, the conduct of domestic authorities and detainees, and what was at stake for the detained individuals.[76] This has been further illustrated in previous cases, such as *G.B. v. Switzerland* where the Court indicated that when considering the circumstances of the case, it would consider the reasons for detention, any requests for release, the lapse in time of detention, and the overall duration of proceedings.[77]

31. **The interveners emphasise that an effective judicial review of detention in accordance with Article 5 (4), clearly prescribed by law and accessible in practice, is an essential safeguard against arbitrary detention, including in the context of immigration control. Access to legal aid and advice is important in ensuring the accessibility and effectiveness of judicial review,[78] and the absence of provision for legal assistance in law or in practice should be taken into consideration in assessing both the arbitrariness of detention under Article 5 (1) and the adequacy of judicial review under Article 5 (4).[79]**

IV. Application of Convention rights in accordance with Article 53 and, in particular, obligations under EU law

32. The interveners note that under Article 53 ECHR, where Contracting Parties to the ECHR are also bound by EU law, the Court must ensure that the Convention rights are interpreted and applied in a manner which does not diminish the rights guaranteed under the applicable EU law.[80] The Convention requires that all measures carried out by Contracting Parties that affect an individual's protected rights be "*in accordance with the law*"[81], which in some circumstances will be EU law.

33. The EU Charter of Fundamental Rights (CFR)[82] enshrines guarantees fundamental to the issues under consideration, such as the right to asylum (Article 18), the protection of human dignity (Article 1), the prohibition of torture and inhuman and degrading treatment (Article 4), protection in the event of removal, expulsion or extradition (Article 19) and the right to an effective remedy and to a fair trial (Article 47).[83]

34. EU law, including the EU asylum *acquis*,[84] is relevant to the present case as the principle of the rule of law runs like a golden thread through the Convention.[85] The Convention requires that all measures carried out by Contracting Parties that affect an individual's protected rights be "in accordance with the law".[86] In this context, in determining whether the Contracting Parties' obligations under the Convention are engaged in a particular case - and, if so, the scope and content of these obligations - this

[73] M.S. v. Slovakia and Ukraine, App No. 17189/11, (11 June 2020), para 141.
[74] M.S. v. Slovakia and Ukraine, App No. 17189/11, (11 June 2020), para 143.
[75] Mooren v. Germany [GC], App No. 11364/03, (9 July 2009), para 106.
[76] Mooren v. Germany [GC], App No. 11364/03, (9 July 2009), para 106. See also G.B. v. Switzerland, App No. 27426/95, (30 November 2000), paras 33-39; Musiał v. Poland [GC], App No. 24557/94, (20 January 2009), para 43.
[77] G.B. v. Switzerland, op.cit., paras 34-35; Baranowski v. Poland, op. cit., paras 61, 63, 68.
[78] Louled Massoud v Malta, op. cit. para 61.
[79] Account should also be taken of the UNHCR Detention Guidelines which provide for a range of procedural safeguards, including access to legal advice and judicial review; Guideline 7.
[80] As regards EU Member States, the ECHR must not be applied in such a way as to diminish human rights protection, "which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party." The Court will recall that in *MSS* the Grand Chamber took into account Greece's obligations under the Reception Conditions Directive, as part of its national law, to ensure adequate material reception conditions, finding that the situation of extreme poverty brought about by the inaction of the State was treatment contrary to Article 3 ECHR.
[81] See Article 1 and 8 (2) ECHR
[82] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02
[83] It should be noted that, as a matter of EU law the standards of Art 6 ECHR apply (through art 47 CFR) in situations where they would not apply as a matter of ECHR law simpliciter
[84] The EU asylum *acquis* is the *corpus* of law comprising all EU law adopted in the field of international protection claims. The EU asylum *acquis* is "a body of intergovernmental agreements, regulations and directives that governs almost all asylum-related matters in the EU."
[85] The Convention's preamble recalls the rule of law.
[86] See Article 1 and 8 (2) ECHR

Court has considered the EU asylum *acquis* materially relevant when the Respondent States are legally bound by that *corpus* of law.[87]

35. The EU asylum *acquis* is comprised of a number of legal instruments and their interpretation by the Court of Justice of the European Union (CJEU). Under the recast Asylum Procedures Directive (APD),[88] which provides for effective access to the asylum procedure for all applicants without any exception,[89] border procedures shall ensure in particular that persons willing to apply for international protection: *"(a) have the right to remain at the border or transit zones of the Member State; (b) are immediately informed of their rights and obligations; (c) have access to interpretation; (d) are interviewed […] by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law; (e) can consult a legal adviser or counsellor*".[90]

36. Moreover, Article 6(1) of the APD obliges EU Member States' authorities to facilitate the registration of asylum applications, including recording information or statements of the applicant or relating to the substance of their request for international protection, and obliges Member States to ensure that such authorities receive the relevant information and the appropriate training to perform their task properly.[91] The Directive does not further impose any formal requirements on applicants with regard to how an asylum application must be made. [92] In fact, the CJEU has highlighted that *"any third-country national or stateless person has the right to make an application for international protection on the territory of a Member State, including at its borders or in its transit zones, even if he or she is staying illegally in that Member State*". [93] Furthermore, that right must be recognised, irrespective of the prospects of success of such an application.

37. **The Directive does not permit suspensions of the asylum procedures based on the national security, migratory pressure or any other grounds. Neither does it provide for the possibility to derogate from its provisions on these grounds irrespective of the emergency or other measures adopted at the national level**.[94] The CJEU has recently explained that the reliance on threats to public order or internal security caused by the mass influx of third-country nationals provides no justification 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.[95] In this regard, a recent Advocate General's Opinion recalls that: *"the drafters of the Geneva Convention recognised that, in exercising their right to asylum, refugees often have to enter the territory of the States in which they seek protection illegally. Far from allowing States to deprive such persons of their right to seek asylum on this ground, those same drafters, on the contrary, have delimited, in Article 31, the power of States to impose criminal sanctions on them in the event of illegal entry or residence in their territory. **On the other hand, the obligations for States to comply with the principle of non-refoulement, as guaranteed in Article 19(2) of the Charter, are imposed irrespective of the conduct of the person concerned**".[96]*

[87] M.S.S. v. Belgium and Greece, op. cit., paras 57-86 and 250. Sufi and Elmi v. the United Kingdom, nos 8319/07 and 11449/070 (ECtHR 28 November 2011), paras 30-32 and 219-226, where the Court had regard to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"), as well as to a preliminary ruling by the European Court of Justice in the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie* asking, *inter alia*, whether Article 15(c) of the Qualification Directive offered supplementary or other protection to Article 3 of the Convention. See also M.A. and Others v. Lithuania, cited above, para. 113, and N.D. and N.T. v. Spain, cited above, para. 180.

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

[89] Recast Asylum Procedures Directive, Recital 25.

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

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

[92] CJEU, Judgment of 30 June 2022, M.A. v Valstybės sienos apsaugos tarnyba, C-72-22 PPU, ECLI:EU:C:2022:505, para. 58.

[93] CJEU, judgment of 16 November 2021, Commission v Hungary (Criminalisation of assistance to asylum seekers), C-821/19, EU:C:2021:930, paragraph 136.

[94] CJEU, Judgment of 30 June 2022, M.A. v Valstybės sienos apsaugos tarnyba, C-72-22 PPU, ECLI:EU:C:2022:505, para. 69-75.

[95] CJEU, Judgment of 30 June 2022, M.A. v Valstybės sienos apsaugos tarnyba, C-72-22 PPU, ECLI:EU:C:2022:505, para. 72.

[96] Conclusions de l'avocat Général M. Nicholas Emiliou in case M.A. v sienos apsaugos tarnyba, C-72-22 PPU, 2 June 2022, para. 142.

38. In light of the CJEU's jurisprudence requiring EU law provisions to be interpreted so as to provide them with *effet utile*,[97] the EU asylum *acquis* requires Member States to provide information detailing the possibility of making an application for international protection available to all non- nationals, including those held in detention facilities, apprehended during surveillance operations or present at border crossings.[98] Construed in light of the obligations under the EU Charter, in particular **Articles 18 and 19**, such information must be provided pro-actively in order to make non-*refoulement* obligations and access to the right to asylum under the Charter available not only in law, but also in practice. Moreover, in order to be effective and useful, such information must be provided in a language the third country nationals concerned understand.[99] Similarly, observance of the rights of the defence is a fundamental principle of EU law, in which the right to be heard and access to legal advice in all proceedings is inherent.[100]

39. **The interveners submit that the EU asylum *acquis* interpreted in light of EU fundamental rights and principles envisages effective access for all who may wish to apply for international protection to the appropriate procedures contained in the Asylum Procedures Directive. Moreover, the Directive envisages the right to an effective remedy against any decision regarding an asylum application.[101] This is only possible after an individualised identification and a meaningful opportunity to raise objections against a removal order, which itself requires having had prior access to information about the procedures and legal assistance. Emergency measures adopted at the domestic level in violation of the obligations under the EU asylum acquis interpreted in light of the Charter will violate EU law, as no derogation from the right to apply for asylum is envisaged under EU law.**

40. With regard to detention, Article 6 of the CFR provides that "*everyone has the right to liberty and security of person."* In this regard, the CJEU has recently noted that the detention of a third-country national constitutes a serious interference with the right to liberty under Article 6 of the Charter and thus requires a high level of judicial protection.[102]

41. Moreover, the recast Reception Condition Directive (RCD)[103] provides guarantees for detained applicants to the asylum procedure. The Court will recall that in *MSS v. Belgium and Greece*[104], the Grand Chamber considered Greece's obligations under the RCD, as part of its national law, to ensure adequate material reception conditions. Article 8 RCD reinforces that a Member State may only detain an applicant if it proves necessary on the basis of an individual assessment and if less coercive, alternative measures cannot be applied, which has been reiterated by the CJEU, namely in the case of *V.L. v. Ministerio Fiscal*.[105] The applicant raised questions as to the conditions in Article 8 RCD and whether Member States may hold a third-country national in detention if the conditions are not met, in a situation where the applicant has indicated their intention to apply for international protection.

42. Indeed, in *V.L. v. Ministerio Fiscal*, the CJEU highlighted that "*Articles 8 and 9 of that directive* [the RCD], *read in conjunction with recitals 15 and 20 thereof, place significant limitations on the Member State's power to hold a person in detention*". It subsequently emphasised that "*an applicant for international protection may be held in detention only where, following an assessment carried out on a case-by-case basis, that is necessary and where other less coercive measures cannot be applied effectively. It follows that national authorities may hold an applicant for international protection in detention only after having determined, on the basis of an individual assessment, whether such detention*

[97] CJEU, C-213/89 Factortame and Others [1990] ECR I-2433, para 20; Case C-118/00 *Gervais Larsy v. Institut national d'assurances sociales pour travailleur indépendants (Inasti)* [2001] ECR I-5063, paras 50-53; Recast Asylum Procedures Directive Article 8 (1).
[98] See Recital 26 Recast Asylum Procedures Directive, as well as Article 6.1 para 3 and Article 8 of the same Directive.
[99] Recast Asylum Procedures Directive, Article 8(1) interpreted in light of the principle Valstybės of effectiveness. Case C-13/01 *Safalero Srl v. Prefetto di Genova* [2003] ECR I-8679, para 49.
[100] CJEU, Judgment of 11 December 2014, Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques, C-249/13, ECLI:EU:C:2014:2431, para. 30.
[101] Asylum Procedures Directive, Recital 27 and Article 39; Recast Asylum Procedures Directive, Recitals 25, 30 and Article 46.
[102] CJEU judgment C, B and X (joined cases C-704/20 and C-39/21), ECLI:EU:C:2022:858, 8 November 2022, para. 72
[103] Directive 2013/33 of the European Parliament and the Council of 26 June 2013 on laying down standards for the reception of applicants of international protection (recast) [2013] OJ L 180/96
[104] MSS v. Belgium and Greece, [GC] App No. 30696/09, (21 January 2011).
[105] CJEU, Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495; CJEU, Judgment of 14 September 2017, K, C-18/16, ECLI:EU:C:2017:680.

is proportionate to the aims pursued by detention."[106] The CJEU, in *K v. Staatssecretaris van Veiligheid en Justitie*[107] and *FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóságup*[108] affirmed these limitations and obligations of Member States to undertake an individualised assessment, enforce detention as a last resort and ensure if used it is a proportionate measure for the objectives pursued.

43. **The circumstance that an applicant for international protection is staying irregularly on the territory of a Member State is not among the grounds which justify detention.** Consequently, a third-country national may not be made the subject of a detention measure for that reason alone.[109]

44. In addition, the Return Directive [110], which provides for the common procedures and standards for returning third country nationals, lays out the instances when detention is possible "*unless other sufficient but less coercive measures can be applied effectively*" and furthermore provides that "*any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence".*[111] The CJEU emphasised that "*it makes the use of coercive measures expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued."*[112] Similar arguments were subsequently used in *Bashir Mohamed Ali Mahdi*[113] to determine that less coercive measures must be considered in the decision as to an extension of detention.

45. The common EU rules on judicial protection regarding detention are Article 15(2) of the Returns Directive, Article 9 of Reception Conditions Directive and Article 28(4) of Dublin III Regulation. These provisions oblige the Member States to ensure the lawfulness of detention by a "speedy" judicial review, either of its own motion or at the request of the person concerned and require a periodic review for the maintenance of the detention. Therefore, the CJEU has held that common procedural rules in EU law were designed to enable the competent judicial authority to release the person concerned, where appropriate after an *ex officio* examination, as soon as it appears that the detention is not lawful.[114]

46. Article 53 ECHR is also applicable to provisions of international law. Article 9 of the International Covenant on Civil and Political Rights (ICCPR)[115] sets out that everyone has the right to liberty and security of person and must not be subject to arbitrary detention. Similarly, the ICCPR's General Comment No. 35, clarified that "*detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time*".[116]

47. **The interveners call attention to the relevant provisions of EU law, in particular rRCD.[117]According to the rRCD, detention can only be applied as a measure of last resort and applicants may only be detained for as short a period as possible and for as long as the detention grounds are relevant.[118]**

48. **The rRCD also requires that detainees shall have access to a speedy judicial review of the lawfulness of detention. Where applicants' detention is found to be unlawful, they should be released immediately.[119]**

---

[106] CJEU, Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495, paras 101-102. And CJEU judgment C, B and X (joined cases C-704/20 and C-39/21), ECLI:EU:C:2022:858, 8 November 2022, para. 78.
[107] CJEU Judgment of 14 September 2017, K v. Staatssecretaris van Veiligheid en Justitie, C-18/16, ECLI:EU:C:2017:680, para 48.
[108] CJEU Judgment of 14 May 2020, FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóságup, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, para 258.
[109] CJEU, Judgment of 30 June 2022, M.A. v Valstybės sienos apsaugos tarnyba, C-72-22 PPU, ECLI:EU:C:2022:505, para. 84.
[110] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2018 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98
[111] Directive 2008/115/EC (op cit) Chapter IV, Article 15 (1).
[112] CJEU, Judgment of 28 April 2011, Hassen El Dridi, alias Karim Soufi, C-61/11 PPU, ECLI:EU:C:2011:268.
[113] CJEU, Judgment of 5 June 2014, Bashir Mohamed Ali Mahdi, C-146/14 PPU, ECLI:EU:C:2014:1320.
[114] CJEU judgment C, B and X (joined cases C-704/20 and C-39/21), ECLI:EU:C:2022:858, 8 November 2022, para. 83.
[115] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, U N, Treaty Series, vol. 999, p. 171
[116] Shams & Ors v Australia, HRC, UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (11 September 2007); and UN HRC, General comment no. 35, Article 9 (Liberty and security of person*)*, 16 December 2014, CCPR/C/GC/35, para 18.
[117] Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).
[118] rRCD Article 9 (1) and (2).
[119] rRCD Article 9 (3).