

EUROPEAN COURT OF HUMAN RIGHTS

Application Nos 35090/22 and 38444/22

BETWEEN:

K.A. and Others

Applicant

v.

Greece

and

Türkiye

Respondents

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENORS

The AIRE Centre (Advice on Individual Rights in Europe) and ECRE (the European Council on Refugees and Exiles) and the Dutch Council for Refugees

pursuant to the Registrar's notification dated 30 August 2023 on the Court's permission to intervene under Rule 44 § 3 of the Rules of the European Court of Human Rights

29th September 2023

General obligations under Articles 2 and 3 ECHR

1. This Court has found in many cases that “*any unwarranted use of physical force by law enforcement officers on an individual under their control is regarded as diminishing human dignity*”.¹ States have particular obligations under the procedural limb of both articles both to take the necessary measures **to prevent such ill-treatment** occurring and **to conduct an effective investigation** when arguable claims are made that it has occurred. The Court has examined this obligation in many cases² generally finding that the victim had been subjected to inhuman or degrading ill-treatment. However, in the case of *Cestaro v. Italy*³ the Court concluded that the apparently gratuitous violence inflicted in that case on the elderly applicant by the police went so far as to constitute “torture” because of its seriousness.
2. The Court’s findings of fact will also determine which article of the Convention may have been engaged or violated by the respondent states’ *omissions*. The absence of any *direct* State action responsible for the death of an individual does not exclude the applicability of Article 2.⁴ The same principle applies *mutatis mutandis* to alleged violations of Article 3. Absent any applicable *lex specialis* relating to only one or other article, the Court has often conflated the positive obligations it identified under Article 2 in *Osman v. the United Kingdom*⁵ (see §12 of this intervention) as applying to cases falling under Article 3 ECHR.⁶
3. This Court has also indicated that “*State responsibility under Article 3 could arise for ‘treatment’ where an applicant, in circumstances wholly dependent on State support, found him of herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity*”.⁷
4. In *Z and others v. UK* the Court found a violation of Article 3 because of the failure of the State to act.⁸ In *M.S.S. v. Belgium and Greece*, the Court found that Greece was in violation of Article 3 because of both the detention and living conditions of asylum seekers. The Grand Chamber paid particular attention to Greece’s obligations under EU law⁹ and noted the considerable importance of the applicant’s status as “*a member of a particularly underprivileged and vulnerable population group in need of special protection*”.¹⁰ The Grand Chamber went on to find that Belgium was in violation of Article 3 for sending asylum seekers to Greece to face those same conditions.¹¹
5. The intervenors submit that Article 3 not only requires that especially in relation to enhanced vulnerable individuals such as elderly or pregnant women or young children¹² are not exposed to risks of this severity, but also, where it is within the power of the state(s) to do so, it also requires rescuing such vulnerable individuals from an offending situation of which they knew or ought to have known, or otherwise bringing it to an end.¹³ Member

¹ Bouyid v. Belgium [GC], no. 23380/09, § 88, 28 September 2015.

² Safi and Others v. Greece, no. 5418/15, 7 July 2022; Alhowais v. Hungary, no. 59435/17, 2 February 2023; M.H. and Others v. Croatia, nos. 15670/18 and 43115/18, 18 November 2021.

³ Cestaro v. Italy, no. 6884/11, § 177-190, 7 April 2015.

⁴ Angelova and Iliev v. Bulgaria, no. 55523/00, § 93, 26 July 2007.

⁵ Osman v. the United Kingdom, 28 October 1998, Reports of Judgments and Decisions 1998-VIII.

⁶ For example, Mahmut Kaya v. Turkey, no. 22535/93, § 115, 28 March 2000.

⁷ R.R. and Others v. Hungary, no. 36037/17, § 50, 2 March 2021.

⁸ Z and Others v. the United Kingdom [GC], no. 29392/95, § 74, 10 May 2001.

⁹ M.S.S. v. Belgium and Greece [GC], no. 30696/09, § 250, 21 January 2011.

¹⁰ M.S.S. v. Belgium and Greece [GC], no. 30696/09, § 251, 21 January 2011.

¹¹ M.S.S. v. Belgium and Greece [GC], no. 30696/09, § 250 and §367, 21 January 2011.

¹² For example, see the recent judgment in M.A. v. Italy, no. 70583/17, 47-48, 31 August 2023; R.R. and Others v. Hungary, no. 36037/17, 2 March 2021.

¹³ Z and Others v. the United Kingdom [GC], no. 29392/95, § 73, 10 May 2001.

States are particularly obliged to provide accommodation and decent materials conditions for asylum seekers in order not to render them even more vulnerable.¹⁴

6. This Court has frequently recognised children’s “*extreme vulnerability*” and declared this vulnerability to be the “*decisive factor*” in the broader migration context.¹⁵ As far as reception conditions for children seeking asylum are concerned, this Court has stated that such conditions must not create “*a situation of stress and anxiety, with particularly traumatic consequences [...]. Otherwise, the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3*”.¹⁶ Subsequently, this Court has found a violation of Article 3, among others, based on the exposure to violent or dangerous environments¹⁷ and a lack of organised activities/entertainment facilities for children.¹⁸
7. The intervenors submit that in order to fully comply with their obligations under the Convention, **States must ensure that both the material conditions and the facilities of reception are adapted to asylum seeking children’s specific needs, in view of their age, condition of dependency and enhanced vulnerability.** To do otherwise, results in a failure by States to give full effect to their obligations under Article 3.
8. This is particularly so where the attention of the relevant authorities has been brought to the situation by the victims and *a fortiori* in any case where this Court has had recourse to a Rule 39 indication which has not been acted on.¹⁹ Similarly, in the recent case of *M.A. v. Italy*, the Court found a violation of Article 3 where the reception centre was “*not equipped to provide the applicant with appropriate psychological assistance, taken together with the national authorities’ prolonged inaction regarding her situation and needs as a particularly vulnerable minor*”.²⁰
9. The standards outlined above apply not only to detention or living conditions but to a broad range of situations affecting human dignity.²¹ In *Khlaifia*,²² the Court recapitulated its own jurisprudence on detention conditions,²³ with particular reference to a number of Greek cases. Given that in determining whether or not Article 3 is engaged or violated, the physical and mental effects, and the age, gender and state of health of the victim(s) are relevant factors,²⁴ States have a corresponding particular responsibility in situations where

¹⁴ *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 250, 21 January 2011; *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, no. 14165/16, § 61, 13 June 2019.

¹⁵ *Rahimi v. Greece*, no. 8687/08, § 87, 5 July 2011; *Popov v. France*, nos. 39472/07 and 39474/07, § 91, 19 April 2012; *Tarakhel v. Switzerland*, no. 29217/12, § 99, 4 November 2014; *Neulinger and Shuruk v. Switzerland*, no. 41615/07, § 135, 6 July 2010.

¹⁶ *Tarakhel v. Switzerland*, no. 29217/12, § 104, 4 November 2014.

¹⁷ *Rahimi v. Greece*, no. 8687/08, § 81-86, 5 July 2011.

¹⁸ *Popov v. France*, nos. 39472/07 and 39474/07, § 62, 19 April 2012.

¹⁹ See various examples at See GCR’s Information note on interventions and on interim measures granted by the ECtHR in cases regarding pushbacks, 19th April 2023, available at: <https://www.gcr.gr/en/news/press-releases-announcements/item/1984-information-note>

²⁰ *M.A. v. Italy*, no. 70583/17 § 48, 31 August 2023; *Mamatkulov and Askarov v. Turkey*, nos. 46827/99 and 46951/99, § 128, 4 February 2005.

²¹ See *Öneryıldız v. Turkey* [GC], no. 48939/99, 22 May 2001; *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, 20 March 2008 (extracts); *Ciechońska v. Poland*, no. 19776/04, 14 June 2011; *Banel v. Lithuania*, no. 14326/11, 18 June 2013.

²² *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 173-, 174, 175, 176, 15 December 2016.

²³ See *Guzzardi v Italy*, no. 7367/76, § 92, 6 November 1980; *M.A v Cyprus*, no. 41872/10, § 186, 23 July 2013.

²⁴ *Ireland v The United Kingdom*, no. 5310/17, § 162, 18 January 1978.

those who are exposed to risk are children, the elderly, women (particularly pregnant women)²⁵ and those who are sick, injured or disabled.²⁶

10. **In light of this cumulative jurisprudence on the inadequacy of both detention and living conditions and the consequent violations of Article 3, the intervenors recall the Court’s consistent case law according to which Article 3 would clearly be violated where vulnerable asylum seekers were found to have been abandoned without *any* shelter or provisions.**

The Osman²⁷ principle

11. Where agents of the State have or ought to have knowledge at the time of the existence of a real and immediate risk to the life or physical integrity of an identified individual or individuals, they must do all that could be reasonably expected of them to avoid said risk or physical integrity. This may include where the risk is due to wildlife or the topography of an area as made clear in *Alhowais v. Hungary*.²⁸ A conclusion on this point depends on an examination of all the particular circumstances of each case.
12. This Court has confirmed that the general obligation of Article 2 may be invoked not only in cases of violent acts, but also in situations caused by an activity or specific conduct, **whether by suffering life threatening injuries or loss of life.**²⁹ In such cases, this Court has considered, *inter alia*, whether the nature and intensity of the conduct was likely to endanger a person’s life.³⁰ Deprivations of life will be subject “*to the most careful scrutiny*” and the Court will take into consideration both the actions of the agents of the State and the surrounding circumstances leading to the loss of life, including consideration of the planning and control of the agents’ actions.³¹ In such circumstances, the Court will have regard for “*whether the operation was regulated and organised in such a way as to minimise to the greatest extent possible any risk*” to life.³² The intervenors submit that this principle applies *mutatis mutandis* to a risk of a situation engaging Article 3.³³

The use of summary expulsions

13. Such situations as outlined above would be compounded in the event that asylum seekers were additionally unable to make effective applications for international protection. In *M.A. v. Lithuania* this Court found, *inter alia*, that border guards did not accept such applications and did not make any mention of the wish to seek asylum, nor was there any assessment of whether it was safe to return the applicants.³⁴ The concurring opinion in *M.A. v. Lithuania* of Judge Pinto de Albuquerque is striking in this regard: “*To allow people to be rejected at land borders and returned without assessing their individual claims*

²⁵ The Court will wish to be aware that, in the context of Dublin Regulation returns, the CJEU held that the best interests of the unborn child could apply so as to require a state to examine the pregnant mother’s application for asylum in that state and not return her to another state under the broader criteria of the Dublin Regulation. (CJEU C-745/21, *L.G. v Staatsecretariat van Justitie*, 16 February 2023)

²⁶ See *Dodov v. Bulgaria*, no. 59548/00, 17 January 2008.

²⁷ *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII.

²⁸ *Alhowais v. Hungary*, no. 59435/17, §§ 127 and 129, 2 February 2023.

²⁹ *Tërshana v. Albania*, no. 48756/14, § 132, 4 August 2020.

³⁰ *Tërshana v. Albania*, no. 48756/14, § 132, 4 August 2020.

³¹ *McCann and Others v. the United Kingdom*, no. 18984/91, § 150, 27 September 1995, Series A no. 324; *Makaratzis v. Greece [GC]*, no. 50385/99, § 59, 20 December 2004.

³² *Makaratzis v. Greece [GC]*, no. 50385/99, § 60, 20 December 2004.

³³ See paragraph 2 above.

³⁴ *M.A. and Others v. Lithuania*, no. 59793/17, § 113-114, 11 December 2018.

amounts to treating them like animals. Migrants are not cattle that can be driven away like this".³⁵

14. The phenomenon of repeated summary returns is all the more of concern because it is not confined to one Contracting Party. Abundant evidence exists in reports by credible and independent organisations such as Human Rights Watch³⁶ of ongoing brutal summary returns at the Greek, Croatian, Polish, Lithuanian, and Bulgarian borders.³⁷ This Court has recently been required to use Rule 39 to intervene in numerous cases against Greece including *K.M.I. and others v. Greece* (19419/22) concerning a woman in need of haemodialysis who allegedly died on the islet.³⁸
15. The intervenors note that it is clear that summary expulsions are frequently also in breach of Article 4 Protocol No. 4 – the prohibition on collective expulsion.³⁹ In this context, the Court will be aware that neither Greece nor Türkiye has ratified Protocol No. 4. However, this prohibition will be applicable to Greece by virtue of Article 19 of the EU Charter of Fundamental Rights (CFR) as explained in § 35 below.⁴⁰

Article 13

16. The purpose of Article 13 ECHR is to enforce the substance of the rights the Convention enshrines. Accordingly, once an arguable complaint of Article 2 or 3 ECHR has been identified, it is incumbent upon the Contracting Party to demonstrate that they have provided guaranteed access to an effective remedy, as articulated under Article 13.⁴¹
17. Any remedy must be accessible in practice as well as in law, not theoretical and illusory, and cannot be unjustifiably hindered by the acts or omissions of the authorities.⁴² This Court's jurisprudence highlights a number of obstacles that may render the remedy against prohibited treatment under Article 3 ineffective, including, *inter alia*, removing the individual before he or she had the practical possibility of accessing the remedy;⁴³ the

³⁵ *M.A. and Others v. Lithuania*, op. cit., concurring opinion of Judge Pinto de Albuquerque at § 29.

³⁶ HRW, "Their Faces Were Covered" Greece's Use of Migrants as Police Auxiliaries in Pushbacks <https://www.hrw.org>; InfoMigrants, Greece: Reported pushbacks despite intervention of European court, <https://www.infomigrants.net>

³⁷ See also: The Border Violence Monitoring Network (2021, May 24) Response to the Greek Ombudsman Interim Report, <https://borderviolence.eu>; The Greek Council of Refugees (2023) At Europe's Borders: Between Impunity And Criminalization, <https://www.gcr.gr>; Amnesty International (2021) Greece: Violence, Lies, and Pushbacks. <https://www.amnesty.org/en/documents/eur25/4307/2021/en/>; I have Rights and the Border Violence Monitoring Network (2023, June 05) Policy Brief: Evidence of Aegean Pushbacks, <https://ihaverights.eu>

³⁸ See GCR's Information note on interventions and on interim measures granted by the ECtHR in cases regarding pushbacks, 19th April 2023, available at: <https://www.gcr.gr/en/news/press-releases-announcements/item/1984-information-note>

³⁹ The Court will recall that it found no violation of Article 4 Protocol 4 in the case of *N.D. and N.T. v. Spain* primarily because it found that there were legal avenues available to the applicants through which they could seek asylum. In the absence of such practical and effective legal avenues, A4 P4 is generally likely to be engaged.

⁴⁰ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, enshrines guarantees fundamental to the protection of human dignity (Article 1), the prohibition of torture and inhuman and degrading treatment (Article 4), the right to asylum (Article 18), protection in the event of removal, expulsion or extradition, including a prohibition on collective expulsions (Article 19), the protection of rights of the child (Article 24) and the rights of the elderly (Article 25) and the right to an effective remedy and to a fair trial (Article 47).

⁴¹ *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 288 and 289, 21 January 2011.

⁴² *Čonka v. Belgium*, no. 51564/99, §§. 46, 75, 5 February 2002.

⁴³ *Shamayev and Others v. Georgia and Russia*, no. 36378/02, 12 April 2005, § 460; *Labsi v. Slovakia*, No. 33809/08, § 139, 15 May 2012.

- absence of automatic suspensive effect of any available remedy;⁴⁴ excessively short time limits in law for submitting the claim or an appeal;⁴⁵ insufficient information on how to gain effective access to the relevant procedures and remedies;⁴⁶ obstacles in physical access to and/or communication with the responsible authority;⁴⁷ lack of (free) legal assistance and access to a lawyer;⁴⁸ lack of interpretation;⁴⁹ and limited access to transit zones.⁵⁰ Hasty procedures of removal have also been found to generally have the effect of rendering existing remedies inoperative in practice and thus unavailable.⁵¹
18. Promptness is as essential to an effective remedy as accessibility,⁵² and it includes the assurance that authorities will not unnecessarily hinder their remedial duties, either by action or by omission.⁵³ An effective remedy to an Article 3 complaint demands close, considered scrutiny by competent national authorities⁵⁴, an independent and rigorous assessment of any claims of real risk of ill-treatment⁵⁵, especially “swift action”⁵⁶, and an immediately or automatically suspensive effect.⁵⁷ A remedial process that fails to provide rapid relief and suspension of real risk is *de facto* ineffective.
 19. An effective remedy is guaranteed to all individuals who fall within the State’s jurisdiction. When individuals are on State territory, they are under the authority and within the jurisdiction of said State, whether or not they have arrived lawfully.⁵⁸ Jurisdiction also applies to individuals over whom the State exercises authority, even when those individuals are not located within the State’s geographic territory.⁵⁹
 20. To be compatible with the rights enshrined in the Convention, a remedy must consider the unique needs and risks to each individual in question.⁶⁰ The effectiveness of a specific remedy, and what procedural safeguards are demanded of it, are unique not only to

⁴⁴ Baysakov and Others v. Ukraine, no. 54131/08, § 74, 18 February 2010; M.A. v. Cyprus, no. 41872/10, § 133, 23 July 2013.

⁴⁵ I.M. v. France, no. 9152/09, § 144, 14 December 2010; M.S.S. v. Belgium and Greece, op. cit., § 306.

⁴⁶ Hirsi Jamaa and Others v. Italy, no. 27765/09, § 204, 23 February 2012.

⁴⁷ Gebremedhin v. France, no. 25389/05, § 54, 26 April 2007; I.M. v. France, op. cit., § 130; M.S.S. v. Belgium and Greece, op. cit., §§ 301 - 313.

⁴⁸ M.S.S. v. Belgium and Greece, op. cit., § 319; *mutatis mutandis* N.D. and N.T. v. Spain, nos. 8675/15 and 8697/15, § 118, 3 October 2017.

⁴⁹ Hirsi Jamaa and Others v. Italy, op. cit., § 202.

⁵⁰ Shahzad v. Hungary, no. 12625/17, § 77, 8 July 2021.

⁵¹ D. v. Bulgaria, no. 29447/17, §§ 133-134, 20 July 2021.

⁵² M.S.S. v. Belgium and Greece, op. cit., § 292; Doran v. Ireland, no. 50389/99, §§ 65, 66, 31 July 2003.

⁵³ M.S.S. v. Belgium and Greece, op. cit., § 290, (Çakıcı v. Turkey [GC], no. 23657/94, 8 July 1999).

⁵⁴ De Souza Ribeiro v. France, no. 22689/07, § 82, 13 December 2012; Hirsi Jamaa and Others v. Italy, op. cit., § 206; Mohammed v. Austria, no. 2283/12, § 801, 6 June 2013; Shamayev and Others v. Georgia and Russia, no.36378/02, 12 April 2005; M.S.S. v. Belgium and Greece, op. cit., § 293.

⁵⁵ De Souza Ribeiro v. France, no. 22689/07, § 82, 13 December 2012; Hirsi Jamaa and Others v. Italy, op. cit., § 206; Mohammed v. Austria, op. cit., § 801; Shamayev and Others v. Georgia and Russia, op. cit.; M.S.S. v. Belgium and Greece, op. cit., § 293.

⁵⁶ M.S.S. v. Belgium and Greece, op. cit., §§ 293, 320; Batı and Others v. Turkey, nos. 33097/96 and 57834/00, 3 June 2004.

⁵⁷ M.S.S. v. Belgium and Greece, op. cit., § 293, Khlaifia and Others v. Italy, no. 16483/12, § 206, 15 December 2016; M.S.S. v. Belgium and Greece, op. cit., § 388; Hirsi Jamaa and Others, op. cit., § 206.

⁵⁸ Louzidou v. Turkey (Preliminary Objections), no. 15318/89, § 62, 23 March 1995; Issa and Others v. Turkey, no. 31821/96, § 71, 16 November 2004; Al-Skeini and Others v. the United Kingdom, no. 55721/07, § 131, 7 July 2011; Hirsi Jamaa and Others v. Italy, op. cit., § 73.

⁵⁹ Issa v. Turkey, no. 31821/96, § 72, 16 November 2005; Öcalan v Turkey [GC], no. 46221/99, § 91, 12 May 2005 .

⁶⁰ Khlaifia and Others v. Italy, op. cit.

individual circumstances but to the individual needs of people within those circumstances.⁶¹

21. Individualisation includes especial attention that effective access to domestic remedies be provided to those who are particularly vulnerable, including minors, those with mental or physical disabilities, those who are experiencing trauma or clinical distress, the ill, injured, medically vulnerable, pregnant, elderly, or otherwise infirm.⁶² Further, the Court has repeatedly affirmed that asylum seekers are in an inherently vulnerable situation.⁶³ The duties on the part of the State to provide an effective remedy are therefore only enhanced when otherwise vulnerable populations are among those seeking asylum.

Multiple Respondent States

22. Many human rights violations occur in the context of the acts or omissions of states in the context of carrying border control operations. Specific considerations arise where the border is between two Contracting Parties to the Convention, as opposed to a Contracting Party and a third country. The final recital of the preamble to the European Convention on Human Rights notes that the Convention is intended to “*take the first steps for the collective enforcement*” of the rights it promotes and protects. Accordingly, where the responsibility or accountability of more than one Party to the Convention is involved in a situation or successive situations, particular recognition should be given in appropriate cases to the **collective** enforcement of the rights which are at issue. This collective obligation exists in addition to the separate and discrete obligations of each Party to the ECHR. This duty means that not only must each Party refrain from exacerbating the consequences of the other’s human rights violations, but the duty of “*collective enforcement*” requires that Contracting States co-operate and collaborate in the protection of human rights and in the effective investigation of any cross-border violations that are alleged.
23. The Court has already adopted such an approach. In *Güzelyurtlu v Cyprus and Türkiye*⁶⁴ the Grand Chamber specifically examined the duty to co-operate. The duty was recognised as a **separate issue** from whether or not each State had, severally, complied with its own Convention obligations. The same collective duty in respect of Cyprus and Russia had been considered in *Rantsev v Cyprus and Russia* in relation to Article 2, 3, and 4.⁶⁵
24. In both *Rantsev* and *Guzelyurtlu*, the Court made its findings based on the specific facts before it in each of the cases. In the absence of special features, the Court found that Contracting States were responsible not only for their own acts and omissions but also for the consequences their acts or omissions produced in the other State.⁶⁶
25. The judgments of the Court serve to elucidate, safeguard, and develop rules under the Convention and States’ observance of the engagements undertaken to them. The Court has made clear that whilst the “*Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States*”.⁶⁷

⁶¹ *Khlaifia and Others v. Italy*, op. cit.

⁶² *M.S.S. v Belgium and Greece*, op. cit., § 233; *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, 19 January 2010; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, 12 October 2006; *Saadi v. the United Kingdom* [GC], no. 13229/03, § 66, 29 January 2008; *Mohamad v. Greece*, no. 70586/11, § 44, 11 December 2014.

⁶³ *M.S.S. v. Belgium and Greece*, op. cit. § 233.

⁶⁴ *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 220-222, 29 January 2019.

⁶⁵ *Rantsev v. Cyprus and Russia*, no. 25965/04, § 245, ECHR 2010 (extracts).

⁶⁶ *Rantsev v. Cyprus and Russia*, no. 25965/04, § 243, ECHR 2010 (extracts); *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 222-228, 29 January 2019.

⁶⁷ (Emphasis added) *Paposhvili v. Belgium* [GC], no. 41738/10, § 130, 13 December 2016.

Article 53 and relevant provisions under international and EU law

26. Article 53 of the Convention provides for the safeguarding of existing human rights, ensuring that the Convention cannot limit or derogate from rights and fundamental freedoms ensured under laws of a Contracting Party or under an agreement to which the Contracting State is a party.

The UN Convention on the Rights of the Child (CRC) and UN International Covenant on Civil and Political Rights (CCPR)

27. Where Contracting Parties are bound by CRC,⁶⁸ Article 3 of the CRC requires that the best interests of the child shall be a primary consideration in any action taken by State parties. This obligation is elaborated on in the Committee's General Comment 14 which sets out that it should include consideration of the child's safety and the child's right to protection against degrading treatment.⁶⁹ Furthermore, the General Comment notes that children who are asylum seekers are in a situation of vulnerability⁷⁰, which follows the CRC's Article 22 providing that appropriate measures should be taken to ensure that children seeking refugee status receive appropriate protection. Moreover, it is relevant to note CRC General Comment No. 6 which highlights the necessity of assessing children's access to rights in light of their specific vulnerabilities.⁷¹
28. The Committee has recalled that the best interests of the child should be a primary consideration in decisions concerning the deportation of a child and that such decisions should ensure that the child will be safe and provided with proper care and enjoyment of rights.⁷² Respect for this principle requires the Contracting Parties to base any decision to remove a child "*on evidentiary considerations on a case-by-case basis and pursuant to a procedure with appropriate due process safeguards, including a robust individual assessment and determination of the best interests of the child [ensuring], inter alia, that the child, upon return, will be safe and provided with proper care and enjoyment of rights*".⁷³
29. The intervenors draw the Court's attention to the CRC's concluding observations on Türkiye of 2012⁷⁴ where it encouraged Türkiye to consider withdrawing the geographical limitation on the application of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol in order to allow non-European child refugees to be granted refugee status. However, the limitation is still in place. The Committee also recommended that Türkiye assesses the challenges experienced by asylum seeking and refugee children with regard to accessing health, education and social services, and urgently addresses such challenges. The Committee also recommended that Türkiye ensures that the principle of the best interests of the child is appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings. In this regard, Türkiye was encouraged to "*develop procedures and criteria to provide guidance for determining the best interests*

⁶⁸ UN Convention on the Rights of the Child, 20 November 1989.

⁶⁹ UN CRC General Comment No. 14, CRC/C/GC/14, 29 May 2013, § 73.

⁷⁰ UN CRC General Comment No. 14, § 75.

⁷¹ UN CRC General Comment No. 6, CRC/GC/2005/6, 17 May 2005, § 47.

⁷² S.H.K. v. Denmark (CRC/C/93/D/140/2021), § 7.7; S.M.F. v. Denmark (CRC/C/90/D/96/2019), § 8.7; Y.A.M. v. Denmark (CRC/C/86/D/83/2019), § 8.7; K.Y.M. v. Denmark (CRC/C/77/D/3/2016), § 11.8; and Joint General Comment No. 3 (2017) of the CMW and No. 22 (2017) of the CRC, §§ 29 and 33.

⁷³ Emphasis added: UN Joint General Comment No. 3 (2017) of the CMW and No. 22 (2017) of the CRC, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, § 33.

⁷⁴ CRC, Consideration of reports submitted by States parties under article 44 of the Convention, CRC/C/TUR/CO/2-3, § 61.

of the child in every area, and to disseminate them to public or private social welfare institutions, courts of law, administrative authorities and legislative bodies. The legal reasoning of all judicial and administrative judgments and decisions should also be based on this principle".⁷⁵

30. The CRC has provided observations of the situation of asylum seeking, refugee and migrant children in Greece and expressed concern over the “*numerous violations of the rights*”, particularly forced returns and the lack of safeguards protecting children’s rights.⁷⁶
31. The intervenors submit that where individuals belong to groups expressly recognised as vulnerable under international or regional standards applicable to the Contracting Party (such as being a child, a pregnant woman or an asylum seeker) there should be a presumption of vulnerability, shifting the burden of proof onto the Contracting Party, when it acts in a manner incompatible with such recognition. Contracting Parties’ positive obligations to protect the rights of asylum seeking children are furthermore emphasised in the Joint General Comment No.3 of the CMW and CRC.⁷⁷ The intervenors stress the guidance given in the CRC’s General Comment 14 that the best interests of the child principle requires assessing the risk of all harm, not only irreparable harm.⁷⁸ The assessment of a risk of *refoulement* should be conducted in an age and gender-sensitive manner and in compliance with the child-specific guarantees under international law.
32. Contracting Parties bound by the ICCPR,⁷⁹ shall comply with the Covenant’s obligations including Article 6, providing for every human being’s inherent right to life which is protected by law and shall not be arbitrarily deprived; Article 7, providing that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment; and Article 2(3), providing for State Parties to ensure that anyone whose rights or freedoms are violated has an effective remedy.
33. CCPR General Comment No. 15 highlights that State Parties often fail to recognise that rights must be ensured “*to all individuals within its territory and subject to its jurisdiction*”, therefore applying to everyone regardless of nationality or statelessness.⁸⁰ The Comment points out that although State Parties may control entry to their territory, in circumstances such as prohibition of inhuman treatment an alien may enjoy protection of the Covenant in relation to entry or residence.⁸¹
34. The Human Rights Committee (CCPR) substantiated these obligations in its General Comment No. 36⁸² and reaffirmed the corresponding obligations of States Parties to

⁷⁵ UN CRC, Consideration of reports submitted by States parties under article 44 of the Convention, CRC/C/TUR/CO/2-3, § 31. See also: UN Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23 § 17; UN Joint General Comment No. 3 (2017) of the CMW and No. 22 (2017) of the CRC, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, § 29.

⁷⁶ UN CRC, Concluding observations on the combined fourth to sixth periodic reports of Greece, CRC/C/GRC/CO/4-6, 28 June 2022, § 39.

⁷⁷ UN CRC and CMW Joint General Comment No. 3 on the general principles regarding the human rights of children in the context of international migration, § 42.

⁷⁸ UN CRC General Comment No. 14 on the rights of child to have his or her best interests taken as a primary consideration, CRC/C/GC/14, 29 May 2013, § 73- 74. The Comment also makes clear that both a best interests assessment and a best interests determination must always be conducted by the responsible authorities (§§ 46-47).

⁷⁹ UN International Covenant on Civil and Political Rights, 16 December 1966. The CCPR was acceded to by Greece on 5 May 1997 and ratified by Türkiye on 23 September 2003.

⁸⁰ UN CCPR General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, § 1.

⁸¹ UN CCPR General Comment No. 15, § 5.

⁸² UN CCPR General Comment No. 36, CCPR/C/GC/36, 3 September 2019, § 31.

provide special protection measures for persons in vulnerable situations, including children and asylum seekers.⁸³

EU Law

35. 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. The EU asylum *acquis* comprises of a number of legal instruments and their interpretation by the CJEU. The Court will recall that already in *M.S.S.*, the Grand Chamber took into account Greece's obligations under the Reception Conditions Directive, 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.⁸⁴ The EU Charter of Fundamental Rights (CFR),⁸⁵ including the prohibition of collective expulsion as enshrined in Article 19 CFR applies to situations governed by EU law. The EU Charter further envisages under Article 24 that in all actions relating to children the child's best interests must be a primary consideration and that children have the right to protection and care necessary for their well-being.
36. The recast Asylum Procedures Directive,⁸⁶ provides for effective access to the asylum procedure for all applicants without any exception.⁸⁷ Under the Directive, EU Member States' authorities shall facilitate the registration of asylum applications, including by providing interpretation and information at the border.⁸⁸ The Directive does not impose any formal requirements on applicants with regard to how an asylum application must be made.
37. In light of the CJEU's jurisprudence requiring EU law provisions to be interpreted so as to provide them with *effet utile*,⁸⁹ the EU asylum *acquis* requires Member States to provide information detailing the possibility of making an application for international protection available to all third country nationals, including those held in detention facilities, apprehended during surveillance operations or present at border crossings.⁹⁰ Construed in light of the obligations under Articles 18 and 19 CFR, 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 in law and in practice. The CJEU has emphasised that third country nationals have the right to make applications for international protection, including at the borders of a Member State, and that this right must be recognised including when the person concerned is staying irregularly on the territory and irrespective of the prospects of

⁸³ UN CCPR General Comment No. 36, § 23.

⁸⁴ *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 250, 21 January 2011.

⁸⁵ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, enshrines guarantees fundamental to the protection of human dignity (Article 1), the prohibition of torture and inhuman and degrading treatment (Article 4), the right to asylum (Article 18), protection in the event of removal, expulsion or extradition, including a prohibition on collective expulsions (Article 19), the protection of rights of the child (Article 24) and the rights of the elderly (Article 25) and the right to an effective remedy and to a fair trial (Article 47).

⁸⁶ 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').

⁸⁷ Recast Asylum Procedures Directive, Recital 25.

⁸⁸ Recast Asylum Procedures Directive, Article 8.

⁸⁹ CJEU, C-213/89, *Factortame and Others*, 19 June 1990, § 20; C-118/00 *Gervais Larys v. Institut national d'assurances sociales pour travailleur indépendants (Inasti)*, 28 June 2001, §§ 50-53; Recast Asylum Procedures Directive Article 8(1).

⁹⁰ See Recital 26 Recast Asylum Procedures Directive, as well as Article 6.1 § 3 and Article 8 of the same Directive.

success of their claim.⁹¹ Moreover, in order to be effective and useful, information must be provided in a language the third country nationals concerned understand.⁹²

38. Moreover, the Directive envisages the right to an effective remedy against any decision regarding an asylum application.⁹³ The CJEU has defined the scope of the right to an effective remedy in this Directive as meaning that Member States must ensure that a “*full and ex nunc examination of both facts and points of law*” has been carried out on applications for international protection.⁹⁴ This right to an effective remedy is only accessible after an individualised identification and a meaningful opportunity to raise objections, which itself requires having had prior access to information about the procedures and legal assistance.
39. The EU asylum *acquis* further envisages specific procedural and reception guarantees to children as a category of particularly vulnerable persons⁹⁵ in accordance with their special needs.⁹⁶ Article 23 rRCD and Article 24 CFR specifically require that the “*best interests of the child shall be a primary consideration for Member States when implementing the provisions of the Directive that involve children*”. Moreover, States must ensure that minors have access to leisure activities adapted to their age (Article 23(4) rRCD).
- 40. It is the intervenors’ submission that where children seeking asylum are concerned their best interests as protected by CFR and EU secondary law must be the driving force behind all decisions affecting them.**

⁹¹ CJEU, C-823/21, *European Commission v. Hungary* 22 June 2023 § 43.

⁹² Recast Asylum Procedures Directive, Article 12(1)(a) interpreted in light of the principle of effectiveness. C-651/19, *JP v Commissaire général aux réfugiés et aux apatrides*, 9 September 2020, § 31.

⁹³ Asylum Procedures Directive, Recital 27 and Article 39; Recast Asylum Procedures Directive, Recitals 25, 30 and Article 46.

⁹⁴ CJEU, C-556/17, *Alekszij Torubarov*, 29 July 2019, § 51.

⁹⁵ CJEU, C-648/11, *MA, BT and DA v Secretary of State of the Home Department*, 6 June 2013, § 55; C-233/18, *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers*, 12 November 2019, § 54.

⁹⁶ Articles 11, 17, 18, 21-24 Recast Reception Conditions Directive; Articles 7, 15, 25 and 31(7)(b) Recast Asylum Procedures Directive.