

EUROPEAN COURT OF HUMAN RIGHTS

Application No. 34331/22

BETWEEN:

Salman Muhammad

Applicant

v.

Greece

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS

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

pursuant to the Registrar's notification dated 8th October on the Court's permission to intervene under Rule 44 § 3 of the Rules of the European Court of Human Rights

29th October 2024

I. Article 2 ECHR – the substantive obligations

1. Article 2 § 1 of the Convention imposes an obligation on States (i) to refrain from the intentional and unlawful taking of life and (ii) to take the necessary measures to safeguard the lives of individuals within their jurisdiction.¹ For a positive obligation to arise it must be established that the authorities knew, or ought to have known, at the time of the existence of a real and immediate risk to the life of an individual and that they did not take measures which, judged reasonably, they might have been expected to take to avoid that risk.² A conclusion on this point can only be reached after an assessment of the particular circumstances of each case.³ The Court has clarified that the authorities' positive obligation is one of means,⁴ and that the choice of means falls within the State's margin of appreciation.⁵
2. The case of *Bişar Ayhan and Others v. Turkey* also concerned the use of lethal force resulting in death in border control operations. This Court found "[i]n cases concerning the use of force by State agents, it must take into consideration not only the actions of the agents of the State... but also all the surrounding circumstances, including such matters as the relevant legal or regulatory framework in place and the planning and control of the actions under examination."⁶ The Court also stated that Article 2 implies a primary duty on the State to put in place "an appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use force and firearms, in the light of the relevant international standards."⁷ The State must ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is **properly implemented**.⁸
3. In respect of State obligations regarding planning, organisation and training, the case of *McCann, Savage and Farrell v UK* has long established that a Contracting Party will be in breach of Article 2 if there has been a lack of appropriate care in the control and organisation of an operation involving, or likely to involve, the use of lethal force:

“...it is not clear whether they had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest. Their reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society ... This failure by the authorities also suggests **a lack of appropriate care in the control and organisation** of the arrest operation”⁹ (emphasis added).
4. In *Makaratzis*,¹⁰ this Court repeated the importance of training and instructions for law enforcement in relation to operations occasioning the use of lethal force. Without the benefit of adequate training and instructions, the Court may conclude that the relevant

¹ *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, Reports of Judgments and Decisions 1998-III; *Osman v. the United Kingdom*, 28 October 1998, § 115, Reports of Judgments and Decisions 1998-VIII; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 130, ECHR 2014, 17 July 2014; *Safi and Others v. Greece*, no. 5418/15, § 149, 7 July 2022.

² *Osman v. the United Kingdom*, 28 October 1998, § 116 and 121, Reports of Judgments and Decisions 1998-VIII; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 55, ECHR 2002-II; *Amaç and Okkan v. Turkey*, nos. 54179/00 and 54176/00, § 46, 20 November 2007.

³ *Opuz v. Turkey*, no. 33401/02, § 130, ECHR 2009.

⁴ *Safi and Others v. Greece*, no. 5418/15, § 157, 7 July 2022.

⁵ *Ciechońska v. Poland*, no. 19776/04, § 65, 14 June 2011.

⁶ *Bişar Ayhan and Others v. Turkey*, nos. 42329/11 and 47319/11, § 48, 18 May 2021.

⁷ *Ibid.*, § 49.

⁸ *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 230, 30 March 2016.

⁹ *McCann and Others v. the United Kingdom*, 27 September 1995, § 212, Series A no. 324.

¹⁰ *Makaratzis v. Greece* [GC], no. 50385/99, § 70, ECHR 2004-XI.

- authorities had not taken all reasonable steps that could be expected, to afford its citizens and persons within its jurisdiction safeguards to avoid an immediate risk to life.¹¹
5. The intervenors note that *McCann*, *Makaratzis*, *Bişar* and *Bubbins* were all cases which involved law enforcement officers confronted with perceived threats of terrorist acts or threats to their own lives, **and not routine border control management**.¹²
 6. In *Bişar*, the Court found that Contracting States may put arrangements in place at their borders to prevent unauthorised entry and may also use force necessary to prevent illegal entry, but “the need for border control **cannot justify recourse to practices which are not compatible with the Convention** or the Protocols thereto”.¹³ When Contracting States resort to physical force in the context of border control, “the use of such force, assessed in the specific circumstances of the case, has to be “absolutely necessary” and “strictly proportionate.”¹⁴ **In the context of sea borders and rescue at sea, this Court established that although the captain and crew members involved in a rescue operation at sea must often take difficult decisions which fall under the discretion of the captain, these measures must be inspired by the objective to safeguard the right to life of the individuals at risk, under Article 2 ECHR.**¹⁵
 7. In *Nika v. Albania*, the fact that a political protest had degenerated into violence was not enough to render the use of lethal force absolutely necessary and proportionate.¹⁶ Similarly, in *Nachova and others v Bulgaria*, the Grand Chamber confirmed that the lethal force used by a military police officer could not be considered necessary despite the purpose to arrest the victims and their escape from detention.¹⁷ Moreover, in *Kakoulli v Turkey*, the Court found relevant in its analysis of an Article 2 violation that the applicant who was shot and killed by a Turkish soldier in the Cyprus buffer zone was visibly unarmed and that the unrest at the border did not give soldiers the right to open fire on people they deemed to be suspicious.¹⁸
 8. **Therefore, in the context of border operations, the measures taken by the Member State or Member States must be examined in light of the specific circumstances of the operation in question, having regard to the requirements of absolute necessity and strict proportionality.**¹⁹
 9. When a substantive violation of Article 2 has been alleged, the Court in *Yukhymovych v. Ukraine* underlined that “**beyond reasonable doubt**” is the applicable standard of proof.²⁰ However, it emphasised that “such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact” and that where it cannot establish the circumstances of the case due to “reasons objectively attributable to the State authorities”, the respondent Government must explain “in a satisfactory and convincing manner, the sequence of events and [...] exhibit solid evidence that can refute the applicant’s allegations”.²¹ If the Government fails to do so, the Court may then draw strong inferences.²² In *Pârvu v. Romania*, the Court found that, when confronted with conflicting accounts of the facts, the Court is not bound by the findings of domestic jurisdictions and may conduct its own assessment of the facts.²³

¹¹ *Makaratzis v. Greece* [GC], no. 50385/99, § 71, ECHR 2004-XI.

¹² For example, *Alkhatib and Others v. Greece*, no. 3566/16, 16 January 2024.

¹³ *Bişar Aghan and Others v. Turkey*, nos. 42329/11 and 47319/11, § 65, 18 May 2021.

¹⁴ *Ibid.*

¹⁵ *Safi and Others v. Greece*, no. 5418/15, § 158, 7 July 2022.

¹⁶ *Nika v. Albania*, no. 1049/17, §§ 151 - 171, 14 November 2023.

¹⁷ *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 107, ECHR 2005-VII.

¹⁸ *Kakoulli v. Turkey*, no. 38595/97, §§ 118-121, 22 November 2005.

¹⁹ *Safi and Others v. Greece*, no. 5418/15, § 157, 7 July 2022.

²⁰ *Yukhymovych v. Ukraine*, no. 11464/12, § 74, 17 December 2020.

²¹ *Ibid.*

²² *Ibid.*

²³ *Pârvu v. Romania*, no. 13326/18, § 82, 30 August 2022.

10. As regards the appropriate burden of proof in cases of evidentiary difficulties, the Court has repeatedly stated that in cases of alleged violations of Article 2 by State agents, the Government bears the burden of providing a satisfactory and convincing explanation of the events²⁴ and proving that the force used was justified, necessary, and proportionate.²⁵
11. This Court has established that “where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention”.²⁶ Bearing “in mind the difficulties associated with obtaining the evidence and the fact that, often, little evidence could be submitted by the applicants in support of their applications”,²⁷ it has extended this principle to situations where individuals were found injured or dead, or disappeared, in areas of the State under the exclusive control of the authorities, and where there was *prima facie* evidence, such as eye-witness accounts,²⁸ that State agents could be involved.²⁹ A Government's statement that its investigators had not found any evidence to support the involvement of State agents in the incident is insufficient to discharge them from the above-mentioned burden of proof.³⁰ If the Government failed to discharge its burden of proof, this may entail a violation of Article 2 of the Convention **in its substantive part**.³¹ Where the investigative authorities are confronted with conflicting alternative versions of the events, they need to make sufficient effort to verify on the ground whether the ‘official’ version of events could have taken place and is plausible.³²
12. In other contexts, the Court has indicated that strong inferences may be drawn where authorities fail to disclose crucial documents to enable the Court to establish the facts³³ and that the failure to provide information capable of confirming facts may enable the Court to draw conclusions on the merits.³⁴ The intervenors further note the requirement that alleged violations of Article 2 must be subject to “the most careful scrutiny”.³⁵
13. **The intervenors submit that respect for Article 2 ECHR in the context of border operations means that all measures undertaken by Member States must be examined in light of the specific circumstances of the operation in question, having regard to the requirements of absolute necessity and strict proportionality, especially if the operations involve the use of potentially lethal force. When injuries and deaths allegedly caused by State agent involvement occur in an area under exclusive Government control, such as border strips, it is incumbent upon the Government to establish and verify on the ground its version of events. Failing to do so, this Court may infer substantive Article 2 violations.**

²⁴ *Tanli v. Turkey*, no. 26129/95, §143-147, ECHR 2001-III (extracts).

²⁵ *Yukhymovych v. Ukraine*, no. 11464/12, § 75, 17 December 2020.

²⁶ *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; see also *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, §§ 183 and 184, ECHR 2009; *Matayeva and Dadayeva v. Russia*, no. 49076/06, § 85, 19 April 2011.

²⁷ *Aslakhanova and Others v. Russia*, nos. 2944/06 and 4 others, § 99, 18 December 2012.

²⁸ For eye-witness accounts reaching the threshold of *prima facie* evidence for State responsibility for injuries, death or disappearance in cases under the exclusive control of the Government, see for example *Khadzhialiyev and Others v. Russia*, no. 3013/04, §§ 86 – 89, 6 November 2008; *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, §§ 22 – 64, ECHR 2009.

²⁹ *Akkum and Others v. Turkey*, no. 21894/93, § 211, ECHR 2005-II (extracts); *Aslakhanova and Others v. Russia*, nos. 2944/06 and 4 others, § 97, 18 December 2012.

³⁰ *Utsayeva and Others v. Russia*, no. 29133/03, § 160, 29 May 2008.

³¹ *Aslakhanova and Others v. Russia*, nos. 2944/06 and 4 others, § 99, 18 December 2012; *Utsayeva and Others v. Russia*, no. 29133/03, §§ 159-160, 29 May 2008; *Khutsayev and Others v. Russia*, no. 16622/05, §§ 104-105, 27 May 2010.

³² *Mukhtarli v. Azerbaijan and Georgia*, no. 39503/17, § 160, 5 September 2024.

³³ *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, §§ 184, ECHR 2009.

³⁴ *Rupa v. Romania (no. 1)*, no. 58478/00, § 97, 16 December 2008.

³⁵ *Yusupova and Zaurbekov v. Russia*, no. 22057/02, § 52, 9 October 2008.

II. Article 2 ECHR – procedural obligations

14. The procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous obligation.³⁶ It is an obligation capable of binding a Contracting Party even when the actual death occurred outside its jurisdiction.³⁷ Article 2(1) provides that “everyone’s right to life shall be protected by law”. It imposes multiple duties on states³⁸ whose authorities are required to conduct an effective investigation when an individual has sustained life-threatening injuries, died or disappeared in violent or suspicious circumstances, regardless of whether those allegedly responsible are State agents or private individuals or are unknown or even self-inflicted.³⁹ For an investigation to be deemed effective it must also be adequate. This *inter alia* means that it must be capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances.⁴⁰ In *Safi*, the Court confirmed that in case of serious, potentially fatal, injury, or loss of human life which may give rise to State responsibility, States must ensure, by all means at their disposal, an adequate response - judicial or other – which effectively implements the domestic legislative and administrative framework protecting the right to life, sanctions the violations of the right,⁴¹ and offers appropriate redress for the victims, including an effective investigation into the circumstances and prosecution of those responsible.⁴²
15. Where the investigative authorities are confronted with conflicting alternative versions of the events, they need to make sufficient effort to verify on the ground whether the official version of events could have taken place and is plausible.⁴³
16. The Grand Chamber of this Court has affirmed that during investigations into violent incidents, State authorities have the duty to take all reasonable steps to unmask racist motives and establish whether ethnic prejudice may have played a role in the events.⁴⁴
17. For an investigation to be “effective” under Article 2 of the Convention, it must be able to lead to the identification of those responsible and, where appropriate, their prosecution. As stressed in *Safi*, since the obligation is of means and not of result, State authorities must take all reasonable measures to ensure that they can obtain the necessary evidence.⁴⁵ Conclusions should be based on a thorough, objective and impartial analysis of all relevant aspects.⁴⁶ Any deficiency in the investigation which precludes the identification of those responsible will risk a breach of Article 2.⁴⁷ The Court found in

³⁶ *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, § 189, 29 January 2019.

³⁷ *Ibid.*

³⁸ To establish criminal law provisions to deter the commission of offences, as well as law-enforcement mechanisms that prevent, suppress and punish violations of substantive breaches of the right to life.

³⁹ *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 69, ECHR 2002-II; *Maiorano and Others v. Italy*, no. 28634/06, § 123-126, 15 December 2009; *Kolevi v. Bulgaria*, no. 1108/02, §§ 191, 5 November 2009; *Opuz v. Turkey*, no. 33401/02, § 150, ECHR 2009; *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 226, ECHR 2004-III.

⁴⁰ *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 301, ECHR 2011 (extracts); *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 172, 14 April 2015.

⁴¹ *Safi and Others v. Greece*, no. 5418/15, § 115, 7 July 2022; *Öneryıldız v. Turkey* [GC], no. 48939/99, § 91, ECHR 2004-XII; *Dodov v. Bulgaria*, no. 59548/00, § 83, 17 January 2008; *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, ECHR 2008 (extracts); *Kalender v. Turkey*, no. 4314/02, § 51, 15 December 2009; *Banel v. Lithuania*, no. 14326/11, § 66, 18 June 2013.

⁴² *Ibid.* See also *Ciechońska v. Poland*, no. 19776/04, § 67, 14 June 2011; *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, no. 19986/06, § 39, 10 April 2012.

⁴³ *Mukhtarli v. Azerbaijan and Georgia*, no. 39503/17, § 160, 5 September 2024.

⁴⁴ *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII.

⁴⁵ *Safi and Others v. Greece*, no. 5418/15, § 117, 7 July 2022; *Anguelova v. Bulgaria*, no. 38361/97, § 139, ECHR 2002-IV; *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 113, ECHR 2005-VII; *Ognyanova and Choban v. Bulgaria*, no. 46317/99, § 105, 23 February 2006.

⁴⁶ *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 175, 14 April 2015.

⁴⁷ *Safi and Others v. Greece*, no. 5418/15, § 117, 7 July 2022; *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 223, ECHR 2004-III; *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 166, ECHR 2011; *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 175, 14 April 2015.

- Safi*, *inter alia*, that the failure to organise the search and rescue operation compromised the national authorities' ability to elucidate the circumstances of the events.⁴⁸
18. The authorities must act *ex officio* from the moment they become aware of the matter,⁴⁹ and cannot leave the initiative for any act of investigation on the next-of-kin.⁵⁰ The nature of the investigation must be assessed in light of all relevant facts.⁵¹ In *Pârnu v. Romania*, the Court found that particularly stringent scrutiny must be applied to the investigation where a suspicious death has been inflicted at the hands of a State agent.⁵²
 19. Where the alleged incident involves the use of a gun, an effective investigation may involve **commissioning ballistics reports and examination of the bullets which caused the injury**. In *Alkhatib And Others v. Greece*, the Court noted that the failure of the national authorities to obtain a ballistics report contributed to the ineffectiveness of the investigation.⁵³ In *Makaratzis v. Greece*, the Grand Chamber considered that the failure of the national authorities to recover all of the bullets which injured the applicant contributed to the ineffectiveness of the investigation.⁵⁴
 20. Reasonable steps in cases of suspicious deaths also include an **autopsy which provides a complete and accurate record of injury and cause of death** as held by this Court in the cases of *Armani Da Silver* and *Alkhatib and Others v Greece*.⁵⁵
 21. In the case of *Mukhtarli v Azerbaijan and Georgia*, this Court considered footage of video surveillance to constitute evidence that is crucial for establishing the circumstances of the relevant events, particularly from border crossing points. Not only should all relevant material be seized without delay, but the investigation file should disclose the exact method used to examine the evidence as well as the results of such examination.⁵⁶
 22. In the end the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria.⁵⁷
 23. **The intervenors submit that in order to comply with the procedural limb of Article 2 ECHR, the Member State must ensure that (i) national authorities start an investigation *ex officio* as soon as they become aware of an issue, that (ii) they take all reasonable measures to obtain evidence and that (iii) they follow obvious lines of investigation, this applies particularly in all border operations.**
 24. Investigations must be prompt and carried out with reasonable expedition. The Court confirms in *Safi* that the passage of time erodes the quantity and quality of the evidence available, and the appearance of a lack of diligence casts doubt on the good faith of the investigations and prolongs the suffering of the victims' families.⁵⁸ This Court pointed in the case of *Mukhtarli* to a delay of nine days in seizing relevant CCTV material as one of the major deficiencies of the investigation into an alleged abduction and removal.⁵⁹ Furthermore, the Court has previously considered that a prompt response by the

⁴⁸ *Safi and Others v. Greece*, no. 5418/15, § 127, 7 July 2022.

⁴⁹ *Ibid.*, § 119; *İlhan v. Turkey* [GC], no. 22277/93, § 63, ECHR 2000-VII; *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 111, ECHR 2005-VII.

⁵⁰ *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 165, ECHR 2011.

⁵¹ *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 147, ECHR 2014, 17 July 2014.

⁵² *Pârnu v. Romania*, no. 13326/18, § 91, 30 August 2022.

⁵³ *Alkhatib and Others v. Greece*, no. 3566/16, § 90, 16 January 2024.

⁵⁴ *Makaratzis v. Greece* [GC], no. 50385/99, § 76, ECHR 2004-XI.

⁵⁵ *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 233, 30 March 2016; *Alkhatib and Others v. Greece*, no. 3566/16, § 85, 16 January 2024.

⁵⁶ *Mukhtarli v. Azerbaijan and Georgia*, no. 39503/17, § 162, 5 September 2024.

⁵⁷ *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 176, 14 April 2015.

⁵⁸ *Safi and Others v. Greece*, no. 5418/15, § 120, 7 July 2022; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 86, ECHR 2002-II.

⁵⁹ *Mukhtarli v. Azerbaijan and Georgia*, no. 39503/17, § 161, 5 September 2024.

- authorities is key in ensuring public confidence in their adherence to the rule of law and to avoid any appearance of tolerance of unlawful acts.⁶⁰
25. Article 2 requires that the persons carrying out the investigation must be independent from those involved in the incidents.⁶¹ The degree of independence required under Article 2 of the Convention is one of sufficient independence - as opposed to absolute independence - from the persons and entities whose responsibility might be engaged, and the adequacy of the level of independence shall be analysed in light of the circumstances of each case.⁶² When there are doubts about the independence, it should be assessed whether and to what extent the disputed factor has jeopardised the effectiveness of the investigation.⁶³ For instance, in *Bişar Ayhan*, the Court concluded that allowing soldiers from the same unit to take such an active part in the investigation tainted the independence of the entirety of the proceedings and entailed the risk that crucial evidence implicating the soldiers would be destroyed or ignored.⁶⁴
 26. This Court has interpreted specific actions of investigative bodies as indicating a lack of independence where undue and excessive weight was given to statements of the suspects;⁶⁵ to the denial of the crime by law-enforcement agents;⁶⁶ or to incident reports prepared by them.⁶⁷ Further deficiencies include not hearing all personnel involved in the operation;⁶⁸ not addressing discrepancies in police officers' statements while giving crucial importance to discrepancies in applicants' statements;⁶⁹ or hearing police officers who were not present about the sequence of events.⁷⁰ Similar, no undue weight may be given to the existence of applicable domestic policy that renders alleged incidents unlawful in establishing the events in question.⁷¹
 27. As this Court held in the case of *Mukhtarli*, the requirement that a criminal investigation be effective may in some circumstances include an obligation for the investigating authorities to cooperate with the authorities of another State. The nature and scope of these obligations depend on the circumstances of the case.⁷²
 28. **The intervenors submit that effective investigations into deaths must include identifying (i) the persons responsible and (ii) the sequence of events, (iii) all relevant evidence; and (iv) a thorough and objective analysis of that evidence and be conducted promptly by persons independent from those involved in incidents and, where indicated by the facts of the case, cooperate transnationally.**

III. Article 53 and other international obligations

⁶⁰ *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 167, ECHR 2011; *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 224, ECHR 2004-III; *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 237, 30 March 2016.

⁶¹ *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 232, 30 March 2016; *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 223, 14 April 2015; *Finucane v. the United Kingdom*, no. 29178/95, § 68, ECHR 2003-VIII; *Yukhymovych v. Ukraine*, no. 11464/12, § 64, 17 December 2020.

⁶² *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 223, 14 April 2015.

⁶³ *Ibid.*, § 224.

⁶⁴ *Bişar Ayhan and Others v. Turkey*, nos. 42329/11 and 47319/11, § 57, 18 May 2021.

⁶⁵ *Kaya v. Turkey*, 19 February 1998, § 89, Reports of Judgments and Decisions 1998-I; and for where the investigation showed a failure to explore obvious and necessary lines of inquiry, see *Oğur v. Turkey* [GC], no. 21594/93, §§ 90-91, ECHR 1999-III.

⁶⁶ *Razzakov v. Russia*, no. 57519/09, §§ 63-64, 5 February 2015; *Lyapin v. Russia*, no. 46956/09, §§ 128-40, 24 July 2014.

⁶⁷ *İkincişoy v. Turkey*, no. 26144/95, § 78, 27 July 2004.

⁶⁸ *Alhowais v. Hungary*, no. 59435/17, §§ 45, 48 and 91, 2 February 2023.

⁶⁹ *M.H. and Others v. Croatia*, nos. 15670/18 and 43115/18, §§ 152 – 153, 18 November 2021; *Shahzad v. Hungary (no. 2)*, no. 37967/18, § 62, 5 October 2023.

⁷⁰ *Alhowais v. Hungary*, no. 59435/17, § 48, 2 February 2023 (according to the applicant); *Shahzad v. Hungary (no. 2)*, no. 37967/18, § 63, 5 October 2023.

⁷¹ *Safi and Others v. Greece*, no. 5418/15, § 127, 7 July 2022.

⁷² *Mukhtarli v. Azerbaijan and Georgia*, no. 39503/17, § 155, 5 September 2024; *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 222-236, 29 January 2019.

29. Article 53 prohibits, *inter alia*, a construction of Convention rights which would limit the human rights and fundamental freedoms ensured under any other agreement to which the respondent State is a party. To ensure compliance with Article 53 ECHR, when construing the rights and freedoms which are defined in the Convention, this Court must guarantee at least the level of protection of those human rights and fundamental freedoms already guaranteed by other regional and international agreements to which the relevant Contracting State is a party.

Relevant European Union (EU) standards in relation to the obligation to protect the right to life and to investigate deaths and fatal incidents

30. EU law regulates the border control of persons crossing the external border of EU Member States (MS) per Article 1 of the Schengen Border Code (SBC). Article 6 SBC⁷³ specifically requires border guards to conduct border checks in such a way as to respect human dignity fully “in a professional and respectful manner” and be “proportionate to the objectives pursued”.⁷⁴ Article 4 of the SBC clarifies that EU MS must apply the SBC in compliance with the rights contained in the Charter of Fundamental Rights (CFR) of the EU (including the Right to Life in Article 2) and relevant international obligations related to access to international protection. **Article 17 specifically requires EU MS to provide “training on the rules for border control and on fundamental rights.”**
31. Article 3 of the recast Asylum Procedures Directive (rAPD) establishes that the border zone of an EU MS falls within the territorial scope of the EU Common European Asylum System (CEAS).⁷⁵ In situations analogous to *Hirsi*,⁷⁶ where the authorities had no means of knowing whether those persons crossing the external border were asylum seekers or otherwise migrants, obligations under the rAPD should be at the fore of the border guards’ minds and are therefore applicable in the present case.
32. When violence in any form is used to illegally push migrants back across borders into unsafe third countries, thereby denying them access to asylum procedures, this is a violation of the EU principle of non-refoulement (Article 78(1) TFEU) and the right to seek asylum (Article 18 of the CFR), operationalised through the CEAS. The use of violent force to prevent border crossings can discourage persons in need of international protection from accessing the border and requesting asylum, creating a de facto situation of inaccessible asylum procedures. Moreover, the Court of Justice of the European Union has ruled that the arrival of a large number of migrants does not allow EU MS to depart from their obligations under the EU asylum *acquis*.⁷⁷
33. EU MS’ duty to carry out effective investigations into allegations of fundamental rights violations stems from Article 19 of the Treaty on EU, which requires EU MS to provide remedies to ensure effective legal protection in the fields covered by EU law. This duty is also enshrined in Article 47 of the CFR.
34. If EU MS are not effectively investigating allegations of fundamental rights violations during border management, this is also a gap in implementing the Schengen borders *acquis*.⁷⁸ Under the Schengen evaluation and monitoring mechanism, the Council of the EU identified deficiencies in Greece’s implementation of the Schengen border rules and recommended that Greece **strengthen the fundamental rights component of its national border management governance structure** and:

⁷³ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

⁷⁴ *Ibid.*, Recital 7.

⁷⁵ 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).

⁷⁶ *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012

⁷⁷ CJEU (First Chamber) of 30 June 2022, *M.A. v Valstybės sienos apsaugos tarnyba*, C-72/22 PPU, § 75.

⁷⁸ EU Agency for Fundamental Rights, ‘Guidance on Investigating Alleged Ill-treatment at Borders’ (2024), p 9.

“carry out investigations that are thorough, prompt, expeditious and capable of leading to the identification and punishment of those responsible of all serious allegations of ill-treatment related to the Hellenic Police and the Hellenic Coast Guard at external borders”⁷⁹.

35. Directive 2012/29/EU (Victims’ Rights Directive), establishes that victims should be recognised and treated in a respectful, sensitive and professional manner without discrimination.⁸⁰ The Victims’ Rights Directive provides with a right to review a non-prosecution decision⁸¹ and stresses out the importance of EU MS cooperation in favour of victims’ rights.⁸²
36. The Court is further invited to consider FRONTEX’s assessment of the situation at Greek borders, identifying shortcomings and systematic violations regarding deaths at the Greek border. In reports to FRONTEX’s management board, the fundamental rights office recommended the suspension of operations due to serious violations of fundamental rights.⁸³

Relevant international standards in relation to the obligation to protect the right to life and to investigate deaths and fatal incidents, applicable under Art.53 ECHR

37. Article 6 of the International Covenant on Civil and Political Rights (ICCPR),⁸⁴ to which Greece acceded in 1997, provides that no one shall be arbitrarily deprived of life and that this right shall be protected by law.⁸⁵ The Human Rights Committee (HRC) General Comment No. 36 (GC36) on the right to life indicates that the arbitrary deprivation of life should be interpreted “broadly to include elements of inappropriateness, injustice, lack of predictability and due process” as well as necessity and proportionality.⁸⁶ States are required to take all necessary measures to prevent the arbitrary deprivation of life by their law enforcement officials.⁸⁷
38. Investigations into potential cases of unlawful deprivations of life should establish the truth surrounding the loss of life, including the procedures employed by State forces⁸⁸ and should be aimed at ensuring the persons responsible for the loss of life are brought to justice.⁸⁹ An effective investigation requires the State to take appropriate measures to establish the truth of the events leading to the loss of life including the reasons, legal basis, and procedures employed by State forces during and after the incident.⁹⁰
39. Similarly, the CAT has developed specific standards relating to case examination and burden of proof where the harm has occurred under unclear circumstances. In *Francisco*

⁷⁹ Council of the EU, ‘Council Implementing Decision setting out a recommendation on addressing the deficiencies identified in the 2021 evaluation of Greece on the application of the Schengen acquis in the field of management of the external borders’ (2022) 2022/0059(NLE), Recommendations 2 and 24.

⁸⁰ Directive 2012/29/EU of the EU Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (Victims’ Rights Directive), Recital 9.

⁸¹ Ibid., Article 11 and Recital 43

⁸² Ibid., Article 26.

⁸³ See Statewatch, ‘Greek border deaths: Frontex management board knew about "systematic" violations’, 20 June 2024; Le Monde, ‘Frontex threatens to suspend its activities in Greece’, 24 June 2023.

⁸⁴ United Nations, *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, Article 6.

⁸⁵ UN Human Rights Committee, *General comment no. 36, Article 6 (Right to Life)*, CCPR/C/GC/35, § 3 and 4.

⁸⁶ Ibid., § 12.

⁸⁷ This includes introducing legislation to control the use of lethal force; procedures to ensure actions of state agents are adequately planned in a manner consistent to minimise the risk they pose to life; and the mandatory reporting and investigation into lethal incidents (GC36, § 12). GC36 emphasises that law enforcement officials should comply with the international standards under the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and be **appropriately trained** to fully comply with obligations to protect the right to life (GC36, § 13).

⁸⁸ UN Human Rights Committee, *General comment no. 36, Article 6 (Right to Life)*, CCPR/C/GC/35, § 28.

⁸⁹ Ibid., § 27.

⁹⁰ Ibid., § 28. Obligations extend to making public information about the investigation and its conclusions.

Larez v. Venezuela,⁹¹ the lack of rigorous investigations at the domestic level and the indifference of the authorities led the Committee to find violations of Articles 12 and 16 of the Convention against Torture. In *Barry v. Morocco*, the Committee gave due weight to the considerations of the complainant, inter alia, due to the lack of information on behalf of the State and the information contained in the Committee's Concluding Observations on Morocco.⁹² In the Concluding Observations on Greece, the CAT has expressed concern regarding the lack of investigation into the excessive use of force by the police, as well as the reportedly violent border operations in Greece's land border with Turkey.⁹³

40. The interveners invite the Court to consider the **UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials** which require Governments and State law enforcement agencies to adopt and implement relevant rules including, in so far as possible, non-violent means before resorting to the use of firearms. States shall ensure that effective reporting and review procedures are established in the event of death or injury by firearms. In such cases, a detailed report must be sent to competent authorities responsible for administrative review and judicial control.⁹⁴ Where an arbitrary or abusive use of force is found to have been used, this shall be punished as a criminal offence under domestic law.⁹⁵
41. **The United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions** also address the requirements of effective investigations into arbitrary or summary executions. Investigations shall be thorough, prompt and impartial and should "determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death". This requires, *inter alia*, that authorities collect and analyse all physical and documentary evidence as well as statements from witnesses.⁹⁶
42. Where concerns are raised regarding the inadequacy of an investigation, including a lack of expertise or impartiality, Governments shall pursue investigations through independent commission of inquiry with recognised competent, impartial and independent personnel. At the conclusion of the investigation, State authorities shall ensure transparency by producing a publicly available report detailing the findings of the investigation as well as the methods used to evaluate evidence and the procedures used.⁹⁷

IV. **The particular Convention obligations that arise in the context of events occurring in more than one jurisdiction**

43. Where there are credible allegations that the acts (or omissions) of the Respondent State have resulted in the death of an applicant in another jurisdiction, both the substantive and procedural obligations of the Respondent State under Article 2 are engaged. Where the impugned **acts** are alleged to have occurred in the Respondent State, it is immaterial that the resulting death occurred in another jurisdiction. The same goes for when the alleged acts, wherever occurring, are credibly attributable to the Respondent State's agents.⁹⁸ In *Alkhatib v Greece*, the impugned acts took place in Greece but the eventual death - which

⁹¹ CAT, *Francisco Larez v. Venezuela*, Communication no. 46/2011, 15 May 2015, CAT/C/54/D/456/2011, § 6.8-6.10.

⁹² CAT, *Barry v. Morocco*, Communication no. 372/2009, CAT/C/52/D/372/2009, 19 May 2014, § 7.1.

⁹³ CAT, Concluding observations on the seventh periodic report of Greece, CAT/C/GRC/CO/7, 3 September 2019, §16 and 27.

⁹⁴ United Nations, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (7 September 1990), General provision 22; see also 6 and 11.

⁹⁵ *Ibid.*, provision 7.

⁹⁶ United Nations, *Principles on the Effective Prevention & Investigation of Extra-legal, Arbitrary & Summary Executions* (24 May 1989), § 9.

⁹⁷ *Ibid.*, § 10 and 11.

⁹⁸ *Carter v. Russia*, no. 20914/07, § 125 – 129, 21 September 2021.

was a consequence of those acts - occurred in Sweden (albeit after diligent medical treatment in that jurisdiction).⁹⁹

44. The Grand Chamber noted in *Güzelyurtlu v Cyprus and Turkey*¹⁰⁰ that where a Contracting State institutes an investigation concerning a death which has occurred outside the jurisdiction of that State, that is sufficient to establish a jurisdictional link for the purposes of Article 1 between that State and the victim's relatives who later bring proceedings before the Court. The Court found that the procedural obligation under Article 2 will in principle only be triggered for the jurisdiction where the deceased was found dead, but "special features" in a given case will justify departure from this approach; these features will necessarily depend on the particular circumstances of each case and may vary considerably from one case to the other.¹⁰¹
45. The requirement that a criminal investigation be effective may in some circumstances include an obligation for the investigating authorities to cooperate with the authorities of another State, implying an obligation to seek or to afford assistance. The nature and scope of these obligations depend on the circumstances of the case. The States concerned must take whatever reasonable steps they can to cooperate with each other, exhausting in good faith the possibilities available to them under the applicable international instruments on mutual legal assistance and cooperation in criminal matters.¹⁰²
46. **The intervenors submit that: i) where the impugned wrongful acts are credibly attributable to the agents of the Respondent State; and/or ii) where the Respondent State's investigation into the impugned wrongful acts has been inadequate, a jurisdictional link arises irrespective of whether the death consequential to those acts occurred on the Respondent State's territory or not.**
47. Where the death occurred in a Contracting Party to the ECHR, that State is under an obligation under Article 38 ECHR, if asked, to furnish the Court with "all necessary facilities" to conduct its examination of the case. In *Carter v Russia*,¹⁰³ the Russian Federation objected to the admissibility of the UK's report of the inquiry into the death of Mr Litvinenko in the UK. The UK had not availed itself of the opportunity to intervene as a party in the case. This objection was rejected.¹⁰⁴ The Court ruled in *Carter* that it "is not bound, under the Convention or under the general principles applicable to international tribunals, by strict rules of evidence and there are no procedural barriers to the admissibility of evidence in the proceedings before it."¹⁰⁵ In *Rantsev v. Cyprus and Russia*, the Court found that "the corollary of the obligation on an investigating State to secure evidence located in other jurisdictions is a duty on the State where evidence is located to render any assistance within its competence and means sought under a legal assistance request".¹⁰⁶ State authorities investigating a violation of Article 2 have the duty and power to ask another State holding the evidence necessary to conduct an effective investigation to provide this evidence.
48. **The intervenors submit that where a jurisdictional link can be established between Member States, the latter must take whatever reasonable steps they can to cooperate with each other, and especially so, in light of Section I of this intervention, in cases involving Article 2 violations.**

⁹⁹ *Alkhatib and Others v. Greece*, no. 3566/16, § 90, 16 January 2024.

¹⁰⁰ *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 187 – 189, 29 January 2019.

¹⁰¹ *Ibid.*, § 190.

¹⁰² *Mukhtarli v. Azerbaijan and Georgia*, no. 39503/17, § 155, 5 September 2024; see, from the standpoint of Article 2 of the Convention, *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 222-236, 29 January 2019.

¹⁰³ *Carter v. Russia*, no. 20914/07, 21 September 2021.

¹⁰⁴ *Ibid.*, 110.

¹⁰⁵ *Carter v. Russia*, no. 20914/07, § 97, 21 September 2021.

¹⁰⁶ *Rantsev v. Cyprus and Russia*, no. 25965/04, § 245, ECHR 2010 (extracts).