

BEFORE THE THIRD SECTION,
EUROPEAN COURT OF HUMAN RIGHTS

Application No. 38203/20 and 7 others¹

Between

A.A.N. and Others

Applicant

v.

Greece

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENORS

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

pursuant to the Registrar's notification dated February 24, 2025, on the Court's
permission to intervene under Rule 44 § 3 of the Rules of the European Court of
Human Rights

17 March 2025

¹ Application Nos. 42830/20, 42840/20, 4201/22, 4203/22, 4205/22, 4207/22, and 4208/22.

Contracting Parties' obligations under Article 2 of the European Convention on Human Rights (ECHR)

1. The Contracting Parties are obliged under Article 1 ECHR to ensure the practical and effective protection of the rights and freedoms enshrined in the Convention, including Article 2. Since the latter, as set out by the Grand Chamber of this Court, is of fundamental importance to the Convention scheme, any overly "rigid" standard of assessment under Article 2, which requires, for example, "gross negligence or wilful disregard of the duty to protect", will conflict with Article 1 ECHR.²
2. Considering the fundamental importance of the rights protected by Article 2 ECHR, this Court will subject allegations of a breach "to the most careful scrutiny" and examine not only the actions of the operating agents but all surrounding circumstances such as the planning and control, or lack thereof, of the actions.³ It is well-established by this Court that 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.⁴
3. As held by the Grand Chamber in *Makaratzis v. Greece*, the fact that force used by the respondent Government was not lethal does not exclude an examination of the complaint under Article 2. The Court will determine whether it was "potentially lethal and what kind of impact the conduct of the officials concerned had not only on his physical integrity but also on the interest the right to life is intended to protect".⁵ Article 2 is therefore fully applicable where the applicant is subjected to conduct which, "by its very nature, put his life at risk, even though, in the event, he survived".⁶
4. As to the negative obligation to refrain from intentional acts that endanger an individual's life, the intervenors submit that several practices that are systemically applied in the context of irregular removals are potentially lethal and, by their very nature, can put a person's life at risk, within the meaning of the Grand Chamber's ruling in *Makaratzis*.
5. A positive obligation to take necessary measures to safeguard life arises when it is established that (a) 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 (b) that they did not take measures which, judged reasonably, they might have been expected to take to avoid that risk.⁷ A conclusion on this point can only be reached after an assessment of the particular circumstances of each case.⁸ The Court has clarified that the authorities' positive obligation is one of means,⁹ and that the choice of means falls within the State's margin of appreciation.¹⁰
6. This Court has held that law enforcement operations, "in addition to being authorised by national law, must be sufficiently limited by that law, within a framework of adequate and effective safeguards against arbitrariness and abuse of force, as well as against

² *Osman v the United Kingdom [GC]*, No. 23452/94 (28 October 1998) para 116.

³ *McCann and Others v the United Kingdom [GC]*, No. 18984/91 (27 September 1995) para 150; *Makaratzis v Greece [GC]*, No. 50385/99 (20 December 2004) para 59.

⁴ *L.C.B. v. the United Kingdom*, No. 23413/94 (9 June 1998) para 36; *Osman v. the UK*, op. cit., para. 115; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC]*, No. 47848/08 (17 July 2014) para. 130; *Safi and Others v. Greece*, No. 5418/15 (7 July 2022) para. 149.

⁵ *Makaratzis v Greece [GC]*, op. cit., para. 52.

⁶ *Makaratzis v Greece [GC]*, op. cit., para. 55.

⁷ *Osman v. the UK*, op. cit., para. 116 and 121; *Paul and Audrey Edwards v. the United Kingdom*, No. 46477/99 (14 March 2002) para. 55; *Amaç and Okkan v. Turkey*, No. 54179/00 (20 November 2007) para. 46.

⁸ *Opuz v. Turkey*, No. 33401/02 (9 June 2009) para. 130.

⁹ *Safi and Others v. Greece*, op. cit., para. 157.

¹⁰ *Ciechońska v. Poland*, No. 19776/04 (14 June 2011) para. 65.

- avoidable accidents”.¹¹ This Court highlighted that law enforcement officers “must not be left in a vacuum when carrying out their duties, whether in the context of a prepared operation or a spontaneous pursuit [...]”.¹² The Grand Chamber held that unregulated actions by State agents are incompatible with effective respect for human rights.¹³
7. In the case of *Kurt v Turkey*, this Court emphasised that, only when State measures are acknowledged and thus subject to judicial supervision, can life threatening measures or serious ill-treatment be detected or prevented.¹⁴ It emphasised that unacknowledged State operations contrary to Convention provisions are “a complete negation of these rights and disclose a very grave violation [...]”.¹⁵ The intervenors invite a reiteration of these findings in the context of unacknowledged border operations that are in direct violation of the right protected by Article 2: the mere fact that those operations remain unregulated and¹⁶ are carried out “in a vacuum”¹⁷ contravenes the Convention’s protection scheme and the rule of law, and places the victim beyond the protection of the law and judicial supervision. The intervenors submit that such unacknowledged operations may be considered ‘extrajudicial’.
 8. 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”.¹⁸ When Contracting States resort to physical force in the context of border control, its use, “assessed in the specific circumstances of the case, has to be ‘absolutely necessary’ and ‘strictly proportionate’”.¹⁹
 9. Further, such extrajudicial activities, which place individuals beyond the protection of the law, deprive applicants of access to an effective remedy in violation of Articles 2 and 3 ECHR. 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.²⁰ This Court’s jurisprudence highlights a number of obstacles that may render the remedy ineffective, including, *inter alia*, removing the individual before he or she had the practical possibility of accessing the remedy;²¹ insufficient information on how to gain effective access to the relevant procedures and remedies;²² obstacles in physical access to and/or communication with the responsible authority;²³ lack of (free) legal assistance and access to a lawyer;²⁴ and lack of interpretation.²⁵
 10. **The intervenors submit that Contracting States would fall below the required standard of both their positive and negative obligations if law enforcement officers would carry out activities in an unacknowledged and clandestine manner. Where State authorities conduct an extrajudicial operation placing the applicant beyond**

¹¹ *Alkhatib and Others v Greece*, No. 3566/16 (16 January 2024) para. 120 [translation by intervenors].

¹² *Alkhatib and Others v Greece*, op. cit., para. 120 [translation by intervenors].

¹³ *Makaratzis v Greece [GC]*, op. cit., para. 58.

¹⁴ *Kurt v Turkey*, op. cit., para 123; See also *Çiçek v. Turkey*, op. cit., para 165.

¹⁵ *Kurt v Turkey*, op. cit., para 124; See also *Çiçek v. Turkey*, No. 25704/94 (27 February 2001) para 164; *Luluyev and Others v Russia*, No. 69480/01 (9 November 2006) para. 122.

¹⁶ *Makaratzis v Greece [GC]*, op. cit., para 58.

¹⁷ *Alkhatib and Others v Greece*, op. cit., para. 120.

¹⁸ *Bişar Aghan and Others v. Turkey*, Nos. 42329/11 and 47319/11 (18 May 2021) para. 65.

¹⁹ *Bişar Aghan and Others v. Turkey*, op. cit., para. 65.

²⁰ *Čonka v. Belgium*, No. 51564/99 (5 February 2002), paras. 46, 75.

²¹ *Shamayev and Others v. Georgia and Russia*, No. 36378/02 (12 April 2005) para. 460.

²² *Hirsi Jamaa and Others v. Italy*, No. 27765/09 (23 February 2012) para. 204.

²³ *Gebremedhin v. France*, No. 25389/05 (26 April 2007) para. 54; *I.M. v. France*, No. 9152/09 (2 February 2012) para. 130; *M.S.S. v. Belgium and Greece [GC]*, No. 30696/09 (21 January 2011) paras. 301 - 313.

²⁴ *M.S.S. v. Belgium and Greece [GC]*, op. cit., para. 319; *mutatis mutandis N.D. and N.T. v. Spain [GC]*, Nos. 8675/15 and 8697/15 (3 October 2017) para. 118.

²⁵ *Hirsi Jamaa and Others v. Italy*, op. cit., para. 202.

the reach of the law – as well as when they use force beyond what must be considered necessary – this should be considered a violation of the rights protected by Article 2, both by directly endangering the applicant's life and by failing to put in place an effective system to prevent and control such operations.

Contracting Parties' obligations under Article 3 ECHR

The prohibition of non-refoulement

11. As this Court's case law firmly establishes,²⁶ the *non-refoulement* principle, enshrined under several Convention rights, including Article 3, is crucial to safeguarding "the fundamental values of democratic societies".²⁷
12. Contracting Parties 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".²⁸ Article 3 *non-refoulement* obligations apply both to removals to the State where the person will be at such risk (direct refoulement), and to transfers to States where there is a risk of onward removal to a third country where the person will similarly be at risk (indirect refoulement).²⁹ The *non-refoulement* principle is absolute: it permits no derogation either in law or practice, irrespective of the conduct of the person concerned, including during a "public emergency threatening the life of the nation".³⁰
13. Where persons presenting themselves at the border can arguably claim that their removal may violate Article 3, the respondent State is obliged to allow them to remain within its jurisdiction and cannot deny access to its territory while assessing their claim of risk.³¹ Removal to a third country must be preceded by a thorough examination of the "general situation" in that country³² and whether its asylum procedure affords sufficient guarantees to prevent an asylum seeker from being removed further, directly or indirectly, to their country of origin without a proper evaluation from the standpoint of Article 3.³³ Authorities are precluded from operating based on generalized assumptions regarding a certain country's asylum system but must conduct a *proprio motu* assessment of its "accessibility and functioning [...] and the safeguards it affords in practice" based on up-to-date information, including authoritative findings made by UNHCR, Council of Europe and reputable non-governmental organisations.³⁴
14. **The intervenors submit that the *non-refoulement* principle requires States to examine, *proprio motu*, the situation the applicants will encounter in the envisaged removal country, irrespective of whether they had an opportunity to raise concerns and whether the destination is a third country or a country of origin. Migratory pressure, national security concerns, the behaviour of third States, or the Contracting Party's capacity constraints can never justify infringements of non-derogable rights under the Convention.**³⁵

The prohibition of ill-treatment during removal

²⁶ *Soering v. the United Kingdom*, No. 14038/88 (7 July 1989), para. 88-91.

²⁷ *Chahal v. the United Kingdom [GC]*, No. 22414/93 (15 November 1996) para. 96; *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87 and others (30 October 1991), para. 108.

²⁸ *Soering v. the United Kingdom*, op. cit., para. 90-91.

²⁹ *Salah Sheekh v. the Netherlands*, No. 1948/04 (11 January 2007) para. 141; *M.S.S. [GC]*, op. cit., para. 342.

³⁰ *Saadi v Italy [GC]*, No. 13229/03 (29 January 2008) para. 127.

³¹ *M.K. and Others v. Poland*, No. 40503/17 (23 July 2020) paras 178-179.

³² *J.K. and others v. Sweden [GC]*, No. 59166/12 (23 August 2016) para. 98.

³³ *Ilias and Ahmed v. Hungary [GC]*, No. 47287/15 (21 November 2019) para. 137.

³⁴ *Ilias and Ahmed v Hungary [GC]*, op. cit., para. 141, 235.

³⁵ *Hirsi Jamaa and Others v. Italy [GC]*, op. cit., para. 179.

15. It is well-established in the case law of this Court that to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the purpose of ill-treatment and the context in which it is inflicted, whether the victim is in a vulnerable situation³⁶; the duration of the treatment and its physical or mental effects, and the sex, age and state of health of the victim.³⁷
16. The Grand Chamber of this Court, in the case of *Labita v Italy*, interpreted treatment to be ‘inhuman’, *inter alia*, where it was premeditated, applied for hours at a stretch, caused actual bodily injury *or* intense physical and mental suffering. ‘Degrading’ was interpreted as arousing “feelings of fear, anguish and inferiority capable of humiliating and debasing” an applicant.³⁸
17. In the case that an individual finds themselves before law enforcement officers, the Grand Chamber of this Court previously emphasized that any recourse to physical force of those law enforcement officers, which has not been made strictly necessary by the person’s conduct, diminishes human dignity and may constitute a violation of Article 3 ECHR.³⁹ This Court has highlighted that acts of violence towards detainees is particularly serious given the ease with which State officials can abuse the vulnerability that detention creates.⁴⁰ In view of the fact that “any interference with human dignity strikes at the very essence of the Convention”, Article 3 will be infringed irrespective of what the impact on the person in question is or of the severity of the measure of force.⁴¹
18. Examples of treatment found by this Court to reach the threshold of treatment prohibited under Article 3 include restraining measures such as handcuffing or leashing, where those measures cannot reasonably be regarded as necessary or part of a lawful arrest, notwithstanding their relative brevity or absence of any physical harm;⁴² slapping of individuals entirely under the authorities control;⁴³ the use of batons to control applicants during an identity check of an unarmed individual regardless of the victim biting one of the police officers;⁴⁴ and in the context of legitimate police operations, the involvement of special agents wearing masks which heightened the feelings of fear and anxiety of the children witnessing their father’s arrest.⁴⁵
19. **The intervenors submit that, when individuals find themselves subject to the full control of State officers, any resort to physical violence by those officers that is not strictly necessary, as well as measures that may heighten feelings of fear and anguish, must, in light of the Court’s jurisprudence, be considered an attack on human dignity and prohibited under Article 3 ECHR.**

Contracting Parties’ procedural obligations to conduct an effective investigation under Articles 2 and 3 ECHR

20. Contracting Parties’ have the obligation to carry out an effective investigation, deriving from the converging principles under Articles 2 and 3 ECHR, where there are credible assertions of treatment contrary to these provisions.⁴⁶ As they are cast without possibility

³⁶ *Khlaifia and Others v Italy* [GC], No.16483/12 (15 December 2016) para. 160.

³⁷ *Kudła v Poland* [GC], No. 30210/96 (26 October 2000) para. 91; *M.S.S. v Belgium* [GC], op. cit., para 219.

³⁸ *Labita v Italy* [GC], No. 26772/95 (6 April 2000) para. 120.

³⁹ *Bouyid v Belgium* [GC], No. 23380/09 (28 September 2015) para 100.

⁴⁰ *Zontul v Greece*, No. 12294/07 (17 January 2012) para. 88.

⁴¹ *Bouyid v Belgium* [GC], op. cit., para. 101.

⁴² *H.M. and Others v Hungary*, No. 38967/17 (2 June 2022) para 24-26.

⁴³ *Bouyid v Belgium* [GC], op. cit., para. 103.

⁴⁴ *Dembele v Switzerland*, No. 74010/11 (24 September 2013) para 38.

⁴⁵ *Gutsanovi v Bulgaria*, No. 34529/10 (15 October 2013) para 134.

⁴⁶ *Mocanu and Others v Romania* [GC], No. 10865/09 (17 September 2014) para. 315, 317.

- of derogation under Article 15, the Grand Chamber of this Court has previously pointed out that the procedural obligations prevail even under the most difficult conditions.⁴⁷
21. This Court has held that in order to be ‘effective’, investigations must first be adequate, which means “capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible”.⁴⁸ The investigation must be assessed in light of all relevant facts.⁴⁹ Where the investigative authorities are confronted with conflicting versions of events, they need to make sufficient effort to verify on the ground whether the ‘official’ version is plausible.⁵⁰
 22. The Grand Chamber of this Court has affirmed that during investigations into violent incidents, States 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.⁵¹
 23. The authorities must act *ex officio* from the moment they become aware of the matter;⁵² and cannot leave the initiative for any act of investigation on the next-of-kin.⁵³ 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.⁵⁴
 24. As also stressed in *Safi*, State authorities must take all reasonable measures to ensure that they can obtain the necessary evidence.⁵⁵ This may include, *inter alia*, the immediate seizure of all relevant records such as surveillance footage⁵⁶ or GPS, the disclosure of the exact method used to examine the evidence, as well as the results of such examination.⁵⁷ As held in *Mukhtarli*, the requirement that an investigation be effective may in some circumstances include an obligation for the authorities to cooperate with the authorities of another State.⁵⁸ Particularly in cross-border cases, this may include steps to seek and afford assistance with securing relevant evidence.⁵⁹
 25. **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.**

Standard and burden of proof under Articles 2 and 3 for establishing case facts

26. With regard to the burden of proof, the Court has recognised that various circumstances may lead to particular evidentiary difficulties that would render access to justice disproportionately cumbersome if the burden of proof lay solely with the applicant.⁶⁰ The Grand Chamber of this Court has thus established that “where the events in issue lie wholly, or in large part, **within the exclusive knowledge** of the authorities [...] the

⁴⁷ *Mocanu and Others v. Romania [GC]*, op. cit., para. 319.

⁴⁸ See *Ramsahai and Others v. The Netherlands [GC]*, No. 52391/99 (15 May 2007) para. 324; *Güzelyurtlu and Others v. Cyprus and Turkey [GC]*, No. 36925/07 (29 January 2019) para. 219.

⁴⁹ *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC]*, op. cit., para. 147.

⁵⁰ *Mukhtarli v. Azerbaijan and Georgia*, No. 39503/17 (5 September 2024) para. 160.

⁵¹ *Nachova and Others v. Bulgaria [GC]*, Nos. 43577/98 and 43579/98 (6 July 2005) para. 160.

⁵² *İlhan v. Turkey [GC]*, No. 22277/93 (27 June 2000) para. 63; *Nachova and Others [GC]*, op. cit., para. 111.

⁵³ *Al-Skeini and Others v. the United Kingdom [GC]*, No. 55721/07 (7 July 2011) para. 165.

⁵⁴ *Safi and Others v. Greece*, op. cit., para. 120.

⁵⁵ *Safi and Others v. Greece*, op. cit., para. 117; *Anguelova v. Bulgaria*, No. 38361/97 (13 June 2002) para. 139; *Nachova and Others v. Bulgaria [GC]*, op. cit., para. 113.

⁵⁶ *Mukhtarli v. Azerbaijan and Georgia*, op. cit., para. 162.

⁵⁷ *Mukhtarli v. Azerbaijan and Georgia*, op. cit., para. 162.

⁵⁸ *Mukhtarli v. Azerbaijan and Georgia*, op. cit., para. 155; *Güzelyurtlu and Others*, op. cit., paras. 222-236.

⁵⁹ *Rantsev v. Cyprus and Russia*, No. 25965/04 (7 January 2010) paras. 241 and 245.

⁶⁰ Most recently in *A.R.E v. Greece*, No. 15783/21 (7 January 2025); See also *Aslakhanova and Others v. Russia*, No. 2944/06 and 4 others (18 December 2012) para. 99.

burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation”.⁶¹ This principle has been extended by the Court to events that take place “**in an area within the exclusive control of the authorities of the state**”.⁶² Similarly, the Grand Chamber has found the burden of proof to rest on the authorities “**where the absence of identification and personalised treatment by the authorities of the respondent State was at the very core of an applicant’s complaint**”.⁶³

27. It is in those circumstances for the applicant to make out a *prima facie* case, including evidence appropriate to that standard.⁶⁴ The threshold of what constitutes *prima facie* depends on the specificities of the case: Where the entire account of the applicant was contested by the respondent Government, this Court previously required detailed statements, corroborated by indirect evidence and authoritative reports and observations that reflected the applicants’ allegations.⁶⁵
28. Where parts of the allegations cannot be disputed, such as the presence of the applicant under the control of the authorities, for example when in detention⁶⁶ or on a vessel;⁶⁷ where the respondent Government acknowledged a large-scale collective expulsion but denied the applicant’s presence;⁶⁸ or the fact that the victim undeniably disappeared from the State’s jurisdiction in cases of enforced disappearance,⁶⁹ the threshold to make out a *prima facie* case lowers accordingly. In such circumstances, this Court has previously accepted eye-witness accounts,⁷⁰ or detailed and plausible statements of the applicants as reaching the threshold of *prima facie* evidence.⁷¹ This Court has explicitly highlighted its approach in *Zhebrailova and Others v Russia*, where the applicants alleged an abduction by State agents. It acknowledged the “difficulties for applicants in obtaining evidence” and held that the *prima facie* threshold was reached on the basis of witness statements – including the applicants’ submissions to the Court and the national authorities – and other indicators of the presence of military or security personnel in the area concerned for which it may rely “on relevant information about special operations, such as media and NGO reports”.⁷²
29. In assessing evidence, the Court’s well-established case law provides that there “are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment”.⁷³ Where the applicant’s version of events is corroborated by reports, statements, or observations from authoritative bodies, reputable NGO’s or media that attest to a systemic practice in that regard, the Court has held that this sheds light on the

⁶¹ *Salman v. Turkey [GC]*, op. cit., para. 100; See also *Varnava and Others v. Turkey [GC]*, Nos. 16064/90 and 8 others (18 September 2009) paras. 183-184.

⁶² *Varnava and Others v. Turkey*, op. cit., para. 184.

⁶³ *M.H. and Others v. Croatia*, Nos. 15670/18 and 43115/18 (18 November 2021) para. 268; *N.D. and N.T. v. Spain [GC]*, op. cit., para 85; *Shahzad v Hungary*, No. 12625/17 (8 July 2021) para 35.

⁶⁴ *M.H. v. Croatia*, op. cit., para. 268; *Aslakhanova and Others v. Russia*, op. cit., para. 97-99.

⁶⁵ See in this regard particularly the cases on clandestine rendition *El-Masri v. the Former Yugoslav Republic of Macedonia [GC]*, No. 39630/09 (13 December 2012) paras 156-161; *Al-Nashiri v. Poland*, No 28761/11 (24 July 2014) paras 397-400.

⁶⁶ See in this regard particularly cases of ill-treatment in detention such as *Sadretdinov v Russia*, No. 17564/06 (24 May 2016) para. 69-72; *Merabishvili v Georgia [GC]*, No. 72508/13 (28 November 2017) paras 335-337.

⁶⁷ See particularly the case of *M.A. and Z.R. v. Cyprus*, No. 39090/20 (8 October 2024) paras 135-137.

⁶⁸ See particularly the cases of *N.D. and N.T. v Spain [GC]*, op. cit., paras 86-87; And *A.A. and Others v. North Macedonia*, No. 55798/16 (5 April 2022) paras 55-56.

⁶⁹ See particularly case law on enforced disappearances such as *Khadzhaliyev and Others v. Russia*, No. 3013/04 (6 November 2008) paras 87-89; *Varnava and Others v Turkey*, op. cit., paras 22-64.

⁷⁰ *Khadzhaliyev and Others v. Russia*, op. cit., paras. 87-89; *Varnava and Others v Turkey*, op. cit., paras. 22-64; *Sadretdinov v. Russia*, op. cit., paras. 69-72; *Merabishvili v. Georgia*, op. cit., paras. 335-337.

⁷¹ In *M.A. and Z.R. v. Cyprus*, op. cit., paras. 135-137, the Court accepted that the authorities had failed to provide the applicants with sufficient water and food based on their allegations which remained unrefuted by the Government presenting unplausible receipts to evidence sufficient purchases in that regard.

⁷² *Zhebrailova and Others v. Russia*, No. 40166/07 (26 March 2015) para. 35.

⁷³ *Ukraine and the Netherlands v. Russia [GC]*, No. 8019/16 and Others (30 November 2022) para. 440.

facts,⁷⁴ and has accordingly “attached more weight” to the applicant’s version of events.⁷⁵ This is particularly the case for UNHCR observations corroborating an applicant’s submission.⁷⁶ In the case of *A.R.E. v Greece*, this Court recently concluded that there were serious indications that suggest the existence of a systemic practice of refoulement at the relevant time, indications that remained unrefuted by the Government.⁷⁷

30. Where this Court 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”.⁷⁸ The Court repeatedly held that “if the burden of proof is thus shifted to the Government and [...] they fail in their arguments, issues will arise under Article 2 and/or Article 3”.⁷⁹ 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.⁸⁰ 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 proof⁸¹, leading the Court to find a Convention violation **in its substantive part**.⁸² The Grand Chamber of this Court has highlighted that where *prima facie* evidence in favour of the applicant’s version of events is met with a failure to provide relevant explanations by the Government, it may consider the allegations **established beyond a reasonable doubt**.⁸³
31. The Court has further indicated that strong inferences may be drawn where authorities fail to disclose crucial documents to enable the Court to establish facts⁸⁴ and that the failure to provide information capable of confirming facts may enable the Court to draw conclusions on the merits.⁸⁵ The intervenors further note the requirement that alleged violations of Article 2 must be subject to “the most careful scrutiny”.⁸⁶ The intervenors would like to draw the Court’s attention to the case of *Ukraine v Russia (Re Crimea)* in which it sets out that Article 38 ECHR requires Contracting States to “furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of application”.⁸⁷
32. **The intervenors submit that where the events in question take place in an area under the exclusive control of State authorities, or where the lack of identification and personal treatment are at the core of the applicants’ allegations, they should only be required to establish a *prima facie* case in accordance with a threshold reflecting the evidential difficulties and vulnerability of applicants subjected to**

⁷⁴ *Merabishvili v. Georgia*, op. cit., para. 317; *Ukraine and the Netherlands v Russia [GC]*, op. cit., para 442.

⁷⁵ *M.K. and Others v. Poland*, op. cit., para. 174.

⁷⁶ *Kebe and Others v. Ukraine*, No. 12552/12 (12 January 2017) para. 105; *M.A. and Others v. Lithuania*, No. 59793/17 (12 December 2018) para. 112; *D.A. and Others v. Poland*, No. 51246/17 (8 July 2021) para. 60.

⁷⁷ *A.R.E. v. Greece*, No. 15783/21 (7 January 2025) para. 229.

⁷⁸ *Alhowais v. Hungary*, No. 59435/17 (2 February 2023) para. 107; *Carter v. Russia*, No. 20914/07 (21 September 2021) para. 152; *Tagayeva and Others v. Russia*, No. 26562/07 (13 April 2017) para. 586.

⁷⁹ *Khadzhialiyev and Others v. Russia*, op. cit., para. 86-89; *Akkum and Others v. Turkey*, No. 21894/93 (24 March 2005) para. 211; *Utsayeva and Others v. Russia*, No. 29133/03 (20 May 2008) para. 159-160.

⁸⁰ *Mukhtarli v. Azerbaijan and Georgia*, No. 39503/17 (5 September 2024) para. 160.

⁸¹ *Utsayeva and Others v. Russia*, op. cit., para. 160.

⁸² *Aslakhanova and Others v. Russia*, op. cit., 99; *Utsayeva and Others v. Russia*, op. cit., paras. 159-160; *Khutsayev and Others v. Russia*, No. 16622/05 (27 May 2010) paras. 104-105.

⁸³ *Ukraine v. Russia (Re Crimea) [GC]*, No. 20958/14 (25 June 2024) para 846; further citing *Ukraine and the Netherlands v. Russia*, op. cit., para. 437.

⁸⁴ *Varnava and Others v. Turkey [GC]*, op. cit., para. 184.

⁸⁵ *Rupa v. Romania (no. 1)*, No. 58478/00 (16 December 2008) para. 97.

⁸⁶ *Yusupova and Zaurbekov v. Russia*, No. 22057/02 (9 October 2008) para. 52.

⁸⁷ *Ukraine v Russia (re Crimea) [GC]*, op. cit., paras. 846-860.

clandestine border measures, such as unacknowledged detention and removal. Where the allegations are corroborated by public information testifying to a systemic practice in that regard, the respondent Government should, in turn, provide any evidence available to it to rebut the applicant's allegation. In the absence of sufficient explanations to refute the allegations, the latter must be considered established beyond reasonable doubt, leading to a finding of substantive violations of Article 2 and 3 of the Convention.

Relevant regional and international standards on access to asylum, protection from ill-treatment and loss of life

Guarantees related to access to asylum under EU law

33. The intervenors note that under Article 53 ECHR, where Contracting Parties are also bound by EU law, the Court must ensure that the Convention rights are interpreted and applied in a manner that does not diminish the protection of rights guaranteed under applicable EU law.⁸⁸ EU law is relevant to the present case as the principle of the rule of law runs like a golden thread through the Convention.⁸⁹ The Convention requires that all measures carried out by Contracting Parties affecting an individual's rights be "in accordance with the law".⁹⁰ In some circumstances, the law will be EU law. 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 Court has considered the EU asylum *acquis* materially relevant when the respondent States are bound by that corpus of law.⁹¹
34. The EU asylum *acquis* comprises a number of legal instruments and their interpretation by the European Court of Justice (CJEU). The Asylum Procedures Directive (APD)⁹² provides for effective access to the asylum procedure for all applicants, without exception.⁹³ The CJEU has affirmed that one of the objectives pursued by the APD is to ensure the most effective access to the procedure for granting international protection.⁹⁴ In order to guarantee such access, Member States have an obligation under Article 6 APD to ensure that persons who have applied for international protection have the "concrete possibility to lodge an application as soon as possible". The CJEU has interpreted Article 6 and 7(1) APD to preclude emergency measures that effectively deprive applicants to access procedures for examining asylum claims.⁹⁵ An applicant should benefit from sufficient procedural guarantees at all procedural stages.⁹⁶
35. EU Member States must provide all non-nationals, including those apprehended at borders, with information on applying for international protection in a language they understand, to ensure compliance with the *non-refoulement* obligation and provide

⁸⁸ 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." In *M.S.S.*, op. cit., the Grand Chamber took into account Greece's obligations under the Reception Conditions Directive in finding a breach of Article 3 ECHR.

⁸⁹ The Convention's preamble recalls the rule of law.

⁹⁰ See Article 1 and 8 (2) ECHR.

⁹¹ See for example *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 (28 November 2011) paras. 30-32 and 219-226; *M.A. and Others v. Lithuania*, op. cit., para. 113, and *N.D. and N.T. v. Spain*, op. cit., para. 180.

⁹² 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').

⁹³ Recast Asylum Procedures Directive, Recital 25.

⁹⁴ CJEU, *VL v. Ministerio Fiscal*, C-36/20 PPU, ECLI:EU:C:2020:495 (25 June 2020) para. 63.

⁹⁵ CJEU, *M.A. C-72/22 PPU*, ECLI:EU:C:2022:505 (30 June 2022) para. 93.

⁹⁶ *VL v. Ministerio Fiscal*, op. cit., para. 63 - 64. See also AG Szpunar's opinion (30 April 2020) para. 61.

access to asylum.⁹⁷

36. **The intervenors emphasize that the EU asylum *acquis* and fundamental rights ensure effective access to asylum procedures for all who may wish to apply for international protection. The APD guarantees the right to an effective remedy against any asylum decision, including at borders and transit zones. This requires individual identification and a meaningful chance to raise objections, with prior access to information and legal assistance. National emergency measures that hinder access to procedures breach the Charter and asylum *acquis*.**

Guarantees related to protection from ill-treatment, loss of life and arbitrary deprivation of liberty under international law

37. The intervenors invite the Court to consider clandestine removals as acts of enforced disappearance as defined by Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.⁹⁸ The Committee's first General Comment examines the phenomenon of enforced disappearances in the context of migration.⁹⁹ The Committee notes that the prohibition of secret detention under Article 17(1) of the Convention is absolute, applies to migrants and encompasses any form of deprivation of liberty, including *incommunicado* detention and transfers to secret locations.¹⁰⁰ Article 17(3) entails an obligation for State Parties to record all information regarding the detention, transfer and release from detention of migrants. Further, the Committee has clarified that "[...] when pushbacks involve the deprivation of liberty of migrants and the concealment of their fate or whereabouts, they amount to enforced disappearance within the meaning of Article 2 of the Convention, regardless of the duration of the deprivation of liberty."¹⁰¹ Noting that pushbacks place migrants outside the protection of the law, the Committee has emphasised that such practices violate the obligations regarding the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right to liberty and the right to life.¹⁰²
38. Similarly, the Human Rights Committee (CCPR) has addressed the issue of enforced disappearances in the context of several ICCPR provisions, particularly the prohibition of torture or cruel, inhuman or degrading treatment or punishment (Art. 7), the right to life (Art. 6), liberty and security (Art. 9), and human dignity (Art. 10).¹⁰³ In its General Comment No. 36, the Committee elaborates that extreme forms of arbitrary detention, in particular enforced disappearances, are in themselves life-threatening and thus incompatible with the ICCPR.¹⁰⁴ It finds that an enforced disappearance "constitutes a unique and integrated series of acts and omissions representing a grave threat to life. The deprivation of liberty, followed by a refusal to acknowledge that deprivation [...] or by concealment of the fate of the disappeared person, removes that person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable".¹⁰⁵

⁹⁷ Recast Asylum Procedures Directive, Recital 26, Article 6.1(3) and Article 8(1) as interpreted in Case C-13/01, *Safalero Srl v. Prefetto di Genova* [2003] ECR I-8679, para. 49.

⁹⁸ UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance (CED), 20 December 2006, A/RES/61/177.

⁹⁹ CED, General Comment No. 1 on enforced disappearance in the context of migration, Adopted by the Committee at its twenty-fifth session (11–29 September 2023).

¹⁰⁰ CED, General Comment No. 1, para. 17.

¹⁰¹ CED, General Comment No. 1, para. 35.

¹⁰² CED, General Comment No. 1, para. 36.

¹⁰³ CCPR, *Bousroual v. Algeria*, Comm. No. 992/2001 (24 April 2006) CCPR/C/86/992/2001, para 9.2

¹⁰⁴ CCPR, General Comment (GC) No. 36 on article 6: right to life (3 September 2019) CCPR/C/GC/36.

¹⁰⁵ CCPR, General Comment No. 36, para 57-58.

39. That General Comment further notes that Article 6 ICCPR constitutes a fundamental right of crucial importance both for individuals and society, that its protection is a prerequisite for the enjoyment of all other rights and that it does not allow for any derogation.¹⁰⁶ It “concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death...”.¹⁰⁷ The intervenors submit that clandestine removals may not in every case lead to loss of life, but – depending on the facts of the case – may be considered a life-threatening situation that can result in loss of life.
40. The obligation to investigate unlawful (potential) deprivations of life is similarly elaborated on in General Comment No. 36. The duty to protect the right to life requires that States parties establish “by law adequate institutions and procedures for preventing deprivation of life, investigating and prosecuting potential cases of unlawful deprivation of life”.¹⁰⁸ The investigation must be independent; impartial; prompt; thorough; effective; credible; and transparent with the possibility that reparation be provided.¹⁰⁹ As is similarly indicated in the jurisprudence of this Court, the objective of the investigation should establish the truth surrounding the loss of life, including the procedures employed by State forces,¹¹⁰ and should be aimed at ensuring the persons responsible for the loss of life are brought to justice.¹¹¹
41. The main international rules governing the use of force in law enforcement were first articulated in two instruments: the 1979 Code of Conduct for Law Enforcement Officials¹¹² and the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.¹¹³ In so far as it governs the use of force, the law of law enforcement has three main components: necessity, proportionality, and precaution.¹¹⁴ The principle of necessity holds that force used for the purpose of law enforcement must be necessary in the circumstances. Article 3 of the Code of Conduct stipulates that law enforcement officials may use force ‘only when strictly necessary’. The official commentary to that Article emphasises that any use of force by officials should be ‘exceptional’.¹¹⁵ It follows that in many instances force will not be legally permissible and non-violent means should be used to ensure compliance.¹¹⁶ Proportionality only comes into play if the principle of necessity is respected. Thus, the use of force must already be necessary in the circumstances and the force actually used must be no more than the minimum necessary to achieve a legitimate law enforcement objective. The principle of proportionality may act to render such “necessary” force unlawful.¹¹⁷
42. **The intervenors submit that clandestine removals constitute an extreme form of arbitrary arrest and detention and, as such, an act of enforced disappearance, inherently life-threatening and in violation of several binding international norms. Under international law, Contracting States are prohibited to expose individuals to**

¹⁰⁶ CCPR, General Comment No. 36, para 2.

¹⁰⁷ CCPR, General Comment No. 36, para 3.

¹⁰⁸ CCPR, General Comment No. 36, para 19.

¹⁰⁹ CCPR, General Comment No. 36, para 28.

¹¹⁰ CCPR, General Comment No. 36, para 28.

¹¹¹ CCPR, General Comment No. 36, para 27.

¹¹² The 1979 Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly Resolution 34/169 of 17 December 1979.

¹¹³ The Basic Principles, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, Resolution 45/166. Many of the key norms set out in these texts are widely regarded as binding international law. See for example ECtHR, *Benzer v Turkey*, No. 23502/06, (12 November 2013) para. 90; Inter-American Court of Human Rights, *Cruz Sánchez et al v Peru*, (17 April 2015) para. 264; and CCPR, General Comment 36, op. cit., para. 13.

¹¹⁴ Report of the Special Rapporteur, Christof Heyns, A/HRC/26/36, 1 April 2014, paras. 59–73.

¹¹⁵ General Assembly resolution 34/169, Code of Conduct for Law Enforcement Officials, annex, 34 U.N. Doc. A/34/46 (1979), commentary to Art. 3.

¹¹⁶ 1990 Basic Principles, op. cit., Principle 4.

¹¹⁷ *Nachova and Others v. Bulgaria*, No. 43577/98 and 43579/98 (6 July 2005) para. 95.

life-threatening situations that can result in loss of life, and obliged to prevent foreseeable threats to life and to investigate potential deprivations of life along international standards. The main principles governing the use of force in law enforcement operations are necessity, proportionality and precaution.