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The Registrar
European Court of Human Rights
Council of Europe
Strasbourg
France

G.R.J. v Greece and A.A.J. and H.J. v Greece, Applications no. 15067/21 et 24982/21

20 July 2022

Dear Sir/Madam,

The above organisations, the AIRE Centre (Advice on Individual Rights in Europe), the Dutch Council for Refugees and the European Council on Refugees and Exiles (ECRE), are attaching their third-party intervention in the above case for the attention of the Court, Section I.

Yours faithfully,

On behalf of the interveners

Julia Zelvenska
Head of Legal Support & Litigation, ECRE

Avenue des Arts 7/8
1210, Brussels, Belgium
www.ecre.org,
Tel: +32 (0)2 234 3800
Fax: +32 2 5885676
Email: JZelvenska@ecre.org

BEFORE THE FIRST SECTION

OF THE EUROPEAN COURT OF HUMAN RIGHTS

Applications no. 15067/21 et 24982/21

G.R.J. v Greece

and

A.A.J. and H.J. v Greece

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS:

ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE CENTRE)
EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)

***pursuant to the Registrar's notification dated 4 July 2022 on the Court's permission to intervene
under Rule 44 § 3 of the Rules of the European Court of Human Rights***

20 July 2022

Summary:

I. The interveners submit that in light of well-established principles of international law and this Court's settled case law, an expulsion that exposes an applicant to the risk of *refoulement* and deprives them of protections under international and EU law is prohibited regardless of whether the decision was taken on the basis of a presumption of safety of a particular country or agreement between States.

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

III. Specific vulnerabilities of asylum seekers should be taken into account at all stages of expulsion proceedings in order to guarantee enhanced safeguards afforded to them under international and EU law. When children are involved, the determination of their best interests should be a primary consideration and must be carefully reflected in all actions and decisions affecting them. Furthermore, States must ensure that the country to which expulsion is sought offers sufficient guarantees to ensure adequate protection against the risk of ill-treatment.

IV. In light of the obligations of EU Member States under EU law and Article 53 ECHR, the interveners submit that the responsibility of EU States under the EU asylum *acquis* is engaged in relation to any individuals who may wish to seek international protection.

I. The nature and scope of non-refoulement obligations under Article 2 and 3 ECHR in cases involving return of vulnerable asylum seekers to another Contracting Party

1. Contracting Parties have an obligation to secure Convention rights to all those who fall within their jurisdiction under Article 1 ECHR. This general obligation applies most rigorously when arts 2 and 3 are engaged. It not only includes obligations of *non-refoulement* on the State, but also obligations to treat persons with the dignity consonant with Convention standards and in particular to allow individuals to effectively exercise their Convention rights wherever and whenever they are within their jurisdiction, lawfully or otherwise.¹ Distinct State obligations under the Convention in this respect arise when the individuals are seeking asylum, with additional obligations engaged when they are children.²

2. The obligation to respect the Convention rights of persons within a State's jurisdiction includes the obligation³ to refrain from transferring people to States where substantial grounds have been shown for believing that they face a real risk of a violation of their rights under Article 3 ECHR or other serious human rights violations, or are at risk of onward removal to other countries where they would face such risks.⁴ The *non-refoulement* principle is of an absolute nature⁵ and no derogations are permitted either in law or in practice.⁶

3. Under this Court's jurisprudence, applying the principle of *non-refoulement* requires the domestic authorities to examine the conditions in the receiving country in light of the standards of Article 3 of the Convention.⁷ Such assessment of whether there are substantial grounds for believing that the

¹ M.S.S. v. Belgium and Greece, App. no. 30696/09, (21 January 2011), paras 299-320.

² Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, App. no. 13178/03, (12 October 2006), para. 55; Popov v. France, App. nos. 39472/07 and 39474/07, (19 April 2012), para. 91; Tarakhel v. Switzerland, App. no. 29217/12, (4 November 2014), para. 99.

³ Hirsi Jamaa and Others v. Italy, no. 27765/09, (23 February 2012), paras. 157-158.

⁴ M.S.S. v. Belgium and Greece, App. no. 30696/09, (21 January 2011), para. 286; Sharifi and Others v. Italy and Greece, App. no. 16643/09, (21 October 2014), para. 166.

⁵ Chahal v. the United Kingdom, [GC], App. no. 22414/93, (15 November 1996), paras. 79-80.

⁶ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; Adel Tebourski v. France, UNCAT, CAT/C/38/D/300/2006, 11 May 2007, paras. 8.2 – 8.3. UN Human Rights Committee, General comment no. 31, *The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 12.

⁷ Mamatkulov and Askarov v. Turkey [GC], App. Nos. 46827/99 and 46951/99, (04 February 2005), para. 67; F.G. v. Sweden [GC], App. no. 43611/11, (23 March 2016), para. 112.

applicant will face prohibited ill-treatment in the destination country must be “*a rigorous one*”.⁸ It is in principle for the applicant to adduce evidence “*capable of proving*” the classic *Soering* test.⁹ But, ultimately, the decision-maker must “*assess the issue in the light of all the material placed before it and, if necessary, material obtained of its own motion*”.¹⁰ Where evidence “*capable of proving*” such risk is adduced by the applicant, “*it is for the Government to dispel any doubts about it*”.¹¹ Where the situation in the receiving state is such that the removing state can be deemed to have constructive knowledge of it, it is under a duty of enquiry to verify, before removal, that the person concerned will not face a real risk of prohibited treatment in the country of destination.¹² Where the alleged risk of being subjected to treatment contrary to Article 3 concerns living conditions for asylum seekers in a receiving third country, that risk is also to be assessed by the expelling State.¹³

4. This Court found that the exact content of the expelling State’s duties under the Convention may differ depending on whether it removes applicants to their country of origin or to a third country.¹⁴ Removal to a third country must be preceded by a thorough examination of whether the intermediate country’s asylum procedure affords sufficient guarantees to prevent an asylum seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks they face from the standpoint of Article 3.¹⁵ In such cases, authorities are precluded from removing individuals merely on the basis of assumptions regarding a certain country’s asylum system, but must conduct a *proprio motu* assessment of “*the accessibility and functioning of the receiving country’s asylum system and the safeguards it affords in practice*” based on up-to-date information available at the time of the assessment.¹⁶

5. Access to a fair and efficient national asylum system, and the requirement of rigorous scrutiny of claims alleging potential breaches of Convention rights, would be undermined in case of a schematic reliance by domestic authorities on a national law or agreement between States considering a particular country as “safe”. This Court has affirmed that, where the applicant is also an asylum seeker, the expelling State must not simply assume that the person will be treated in the receiving country in conformity with the Convention standards, but rather must verify whether and how national authorities apply asylum legislation in practice.¹⁷ In this regard, the Court has recently made clear that “*in order for the State’s obligation under Article 3 of the Convention to be effectively fulfilled, a person seeking international protection must be provided with safeguards against having to return to his or her country of origin before such time as his or her allegations are thoroughly examined.*”¹⁸

a) Nature and content of the duty to ensure that the third country is “safe”

6. In assessing the compatibility with Article 3 of a removal that has already taken place, this Court considers the information and the facts that were known or that ought to have been known to exist at the time of removal and assesses whether or not a violation has occurred primarily in the light of the information known at that time though information coming to light at a later date may be relevant.¹⁹ In *F.G. v. Sweden*, the Grand Chamber of this Court held that the competent domestic authorities should investigate, ‘of their own motion’, not only circumstances presenting ‘a well-known general risk’ in relation to which “*information [...] is freely ascertainable from a wide number of sources.*”²⁰

⁸ *Sufi and Elmi v. the United Kingdom*, App. Nos. 8319/07 and 11449/07, (28 June 2011), para. 214; *Chahal v. the United Kingdom*, op. cit., para. 96; *Saadi v. Italy*, App. No. 37201/06, (28 February 2008), para. 128.

⁹ *Sufi and Elmi v. the United Kingdom*, op. cit., para. 214.

¹⁰ *N v. Finland*, App. No. 38885/02, (26 July 2005), para. 160; *Hilal v. the United Kingdom*, op. cit., para. 60; *Vilvarajah and Others v. the United Kingdom*, op. cit., para. 107.

¹¹ *N. v. Sweden*, App. No. 23505/09, (20 July 2010), para. 53; *R.C. v. Sweden*, App. No. 41827/07, (9 June 2010), para. 50.

¹² *Mamatkulov and Askarov v. Turkey* [GC], op. cit., para. 69.

¹³ *Ilias and Ahmed v. Hungary*, App. No. 47287/15 [GC], (21 November 2019), para. 131

¹⁴ *Ibid*, para. 128

¹⁵ *Ibid*, para. 137.

¹⁶ *Ibid*, § 141.

¹⁷ *Idem*, para. 141.

¹⁸ *M.K. and Others v. Poland*, App. Nos. 40503/17, 42902/17, 43643/17, (23 July 2020), para. 179

¹⁹ *Ilias and Ahmed v. Hungary*, App. No. 47287/15, (14 March 2017), para. 105, cross-referencing: *Muminov v. Russia*, App. No. 42502/06, (11 December 2008), paras. 91-92. *F.G. v. Sweden*, op. cit., para. 115, cross-referencing *Chahal v. the United Kingdom*, op. cit., para. 86.

²⁰ *F.G. v. Sweden* [GC], App. No. 43611/11, (23 March 2016), paras. 126 and 157; *Hirsi Jamaa and Others v. Italy*, op. cit., paras. 131-133; *M.S.S. v. Belgium and Greece*, op. cit., para. 366.

7. This Court has also affirmed the importance of international and national NGOs in monitoring, reporting and providing evidence²¹ of the actual human rights situation in a particular country, and specifically, in relation to the contemplated removal of people - or the risk of onward removal to the country of origin - raising a risk of Article 3 violations.²² According to this Court, in order to evaluate a country's 'safety', due consideration must be given to the range of the publications available and the consistency of the nature of the information reported.²³ *“General deficiencies well documented in authoritative reports, [such as] by UNHCR, Council of Europe and EU bodies, are in principle considered to have been known to the authorities.”*²⁴

8. According to the latest data of UNHCR,²⁵ 116.403 Afghan asylum seekers and 980 Afghan refugees are residing in Turkey.²⁶ Roughly 4.400 Afghans in an irregular situation were arrested by Turkish authorities in January-February 2021.²⁷ 6.000 Afghans were deported from Turkey to Afghanistan from January to December 2020.²⁸ *“This data makes them the second larger refugee group in the country just after Syrian refugees. Afghan refugees are generally considered to be “irregular migrants” since they crossed borders without official documents.”*

9. Afghan refugees' also face many registration problems, which directly affect their access to the services such as health and education. Due to the registration problem and the difficulty of obtaining International Protection status, non-registered Afghan refugees cannot benefit from health services covered by public health insurance.²⁹ The General Directorate of Migration Management has stopped insurance as of February 2020, except for those under the age of 18 and over the age of 65. Therefore, adult Afghan refugees, whether male or female, were directly affected by this decision.³⁰

10. Afghans are increasingly becoming part of the many undocumented migrants and marginalized ethnic groups living in poverty in Istanbul. They have no official status that would allow them access to even the most basic forms of accommodation, nor do they have any legal position to make money by working regular jobs. Recently there have been reports indicating that many Afghans have taken to salvaging materials from trash, making less than the equivalent of \$10 daily, according to the *AFP* news agency.³¹

11. The interveners submit that in order to comply with *non-refoulement* obligations under the Convention the authorities of the transferring Contracting Party must conduct a real, effective and rigorous investigation into the conditions of asylum-seekers and refugees in the destination countries, including *proprio motu*. Schematic reliance on an agreement considering a particular third country safe can never be sufficient and is capable of breaching the obligations under the Convention particularly without an individualised and diligent assessment of all the facts and circumstances of a particular case, including when these were known or ought to have been known by the authorities, or when information publicly available from reputable sources at the time suggests otherwise.

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

²¹ Chahal, op.cit., paras. 99-100; *Müslim v. Turkey*, no. 53566/99, 26 April 2005, para. 67; *Said v. the Netherlands*, no. 2345/02, para. 54, ECHR 2005-VI; *Al-Moayad v. Germany* (dec.), no. 35865/03, paras. 65-66, 20 February 2007; and *Saadi*, para.131.

²² *Mohammed v. Austria*, App. no. 2283/12 (6 June 2013), para.97-102; *Sharifi v. Austria*, App. no. 60104/08 (5 December 2013), para.46; *Mohammadi v. Austria*, App. no. 71932/12 (3 July 2014) § 69; *M.S.S. v. Belgium and Greece* cited above § 346-353; *F.G. v Sweden* [GC], App. no. 43611/11 (23 March 2016), para 117, cross-referencing *Safaii v Austria*, App.no. 44689/09 (7 May 2014) § 44&46.

²³ *Safaii v. Austria*, op.cit., paras.46-47.

²⁴ *Ilias and Ahmed v Hungary*, App. No. 47287/15 [GC], (21 November 2019), para 141.

²⁵ UNHCR Refugee Statistics (2020)

²⁶ Republic of Turkey – Directorate General of Migration Management, Irregular Migration

²⁷ OCHA, Afghanistan Snapshot of Population Movements (January/December 2020), available at: <https://reliefweb.int/report/afghanistan/afghanistan-snapshot-population-movements-january-december-2020-23-jan-2021>

²⁸ Initial Assessment of the Current Situation of Afghan Refugees in Turkey International Blue Crescent Relief and Development Foundation, 18 August 2021.

²⁹ Voa News, *Undocumented Afghan Refugees in Turkey Struggle to Access COVID Treatments*, 10 January 2022, available at: <https://www.voanews.com/a/undocumented-afghan-refugees-in-turkey-struggle-to-access-covid-treatments-vaccines-/6390984.html>

³⁰ Initial Assessment of the Current Situation of Afghan Refugees in Turkey, International Blue Crescent Relief and Development Foundation, 18.08.2021

³¹ Infomigrants, *Afghan migrants in Turkey left to digging through trash to make money*, 16 December 2021, available at <https://www.infomigrants.net/en/post/37239/afghan-migrants-in-turkey-left-to-digging-through-trash-to-make-money>

12. To comply with Article 3 procedural safeguards, individuals must be told, in simple, non-technical language that they will be capable of understanding, the reasons for their removal, and the process available for challenging the decision,³² including when it is based on the presumption of safety of a particular country. Accessible legal advice and assistance may also be required for the individual to fully understand his or her circumstances.³³ Further, individuals asserting an arguable complaint that they are at risk of prohibited treatment under the Convention have the right to an effective remedy, which is not theoretical or illusory, and allows for the review and, if appropriate, for the reversal of the decision to remove.³⁴ This remedy must be practical and effective, existing in practice as well as in law, and must not be unjustifiably hindered by the acts or omissions of the authorities.³⁵ This Court has determined a remedy to be ineffective, *inter alia*, when removal takes place before the practical possibility of accessing the remedy;³⁶ where there is a lack of automatic suspensive effect;³⁷ where there are excessively short time limits for submitting the claim or an appeal;³⁸ where there is insufficient information on how to gain effective access to the relevant procedures and remedies;³⁹ where there are obstacles in physical access to or communication with the responsible authority;⁴⁰ where there is a lack of (free) legal assistance and access to a lawyer;⁴¹ and/or where there is a lack of interpretation.⁴² These safeguards are ineffective in a situation where no official procedure has taken place, allowing for a meaningful opportunity to raise objections, which in itself entails having had prior access to information about the procedures.

13. Articles 3 and 13 require the Contracting Parties, *inter alia*, to assess all evidence at the core of a *non-refoulement* claim,⁴³ including, where necessary: to obtain such evidence *proprio motu* and to avoid imposing an unrealistic burden of proof on applicants or require them to bear the entire burden of proof.⁴⁴ National authorities must thoroughly assess the risk of ill-treatment and the foreseeable consequences of removal to the receiving country in light of the general situation there as well as the applicant's personal circumstances.⁴⁵ It is the duty of those authorities to seek all relevant, up-to-date and generally available information.

14. UNHCR, domestic judiciaries, and scholars have expressed the view that a State may only send an asylum seeker to a country where he or she will be granted protection "comparable" or "equivalent" to that to which he or she is entitled to in the sending state, including **all obligations imposed by the RC under Articles 2 - 34**.⁴⁶ The sending State must also satisfy itself that the receiving state interprets

³² *Khlaifia and Others v. Italy* [GC], App. No. 16483/12, (15 December 2016), para. 115; *J.R. and Others v. Greece*, App. No. 22696/16, (25 May 2018), para. 123-124.

³³ Guideline 5. Remedy against the removal order in CoE Committee of Ministers "Twenty Guidelines on forced return" adopted on 4 May 2005 as referenced by the ECtHR in *De Souza Ribeiro v. France*, No. 22689/07, para. 47.

³⁴ *Shamayev and Others v. Georgia and Russia*, App. No. 36378/02, (12 April 2005), para.460; *M.S.S. v. Belgium and Greece*, op. cit., para 290; *Čonka v. Belgium*, op. cit., paras. 77-85.

³⁵ *Menteş and Others v. Turkey* 1997-VIII, para. 89; *İlhan v. Turkey* [GC], no. 22277/93, 2000, para. 97, *Aksoy v. Turkey*, 1996, para. 95 in fine; *Aydın v. Turkey*, 25 September 1997, para. 103; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, 2002, para. 96.

³⁶ *Shamayev and Others v. Georgia and Russia*, App. No. 36378/02, (12 April 2005), para.460; *Labsi v. Slovakia*, App. No. 33809/08, (15 May 2012), para. 139.

³⁷ *Gebremedhin v France*, App. No. 25389/05 (26 July 2007) para 66-67; *Baysakov and others v. Ukraine*, App. No. 54131/08, (18 February 2010), para.74; *M.A. v. Cyprus*, App. no. 41872/10, (23 July 2013), para 133. *D and Others v. Romania*, App. no. 75953/16, (14 January 2020), paras. 128-130.

³⁸ *I.M. v. France*, App. No. 9152/09, (14 December 2010), para.144; *M.S.S. v. Belgium and Greece*, App. No. 30696/09, [GC] (21 January 2011), para. 306.

³⁹ *Hirsi Jamaa and Others v. Italy*, op. cit., para. 204.

⁴⁰ *Gebremedhin v. France*, App. No. 25389/05, (26 April 2007), para.54; *I.M. v. France*, App. No. 9152/09, (14 December 2010), para.130; *M.S.S. v. Belgium and Greece*, op. cit., paras. 301 - 313.

⁴¹ *M.S.S. v. Belgium and Greece*, op. cit., para.319; *mutatis mutandis*, *N.D. and N.T. v. Spain*, Nos. 8675/15 and 8697/15, (3 October 2017), para. 118.

⁴² *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, [GC] (23 February 2012), para. 202.

⁴³ *Jabari v. Turkey*, App. No. 40035/98, (11 July 2000), paras.39-40; *Singh and Others v. Belgium*, App. No. 33210/11, (2 October 2012), para. 104.

⁴⁴ *M.S.S. v. Belgium and Greece*, op. cit., paras. 344-359; *Hirsi Jamaa and Others v. Italy*, op. cit., paras. 122-158.

⁴⁵ *Vilvarajah and Others v. United Kingdom*, App. no. 13448/87, (30 October 1991), para. 108; *Tarakhel v. Switzerland*, App. no. 29217/12, (4 November 2014), para. 104.

⁴⁶ UNHCR, *EXCOM Conclusions No. 15 (XXX) of 1979 on refugees without an asylum country and No. 58 (XL) of 1989 on the irregular movement of asylum-seekers*, in *Compilation of Conclusions Adopted by the Executive Committee on the International Protection of Refugees: 1975-2004*, available at: <http://www.unhcr.org/uk/publications/legal/41b041534/compilation-conclusions-adopted-executive-committee-international-protection.html>. Also, Michelle Foster, *Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State*, 28 Michigan Journal of International Law 233 (2007), available at: <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1175&context=mjil>, p. 264-5.

refugee status in a manner that respects the true and autonomous meaning of the refugee definition set by Article 1 of the Convention.⁴⁷

15. Treating all individuals compatibly with the Convention includes the obligation to identify and pay special attention to the needs of people in a vulnerable situation. This includes asylum-seekers, unaccompanied children and families with children,⁴⁸ irrespective of whether national authorisation to enter the territory has been granted.⁴⁹ States have an obligation to enable those who wish to identify themselves as seeking asylum to do so⁵⁰ and to permit them access to determination procedures with all the procedural safeguards required by national law,⁵¹ including access to information, legal aid and access to effective remedies.

16. Hence, the interveners note that, in the light of the Court's case-law and the intended purpose of Article 13, asylum-seekers are deemed to be in "*an inherently vulnerable situation*",⁵² which merits special attention by public authorities to ensure their full and effective access to domestic remedies. This must apply *a fortiori* to asylum-seekers who are specifically vulnerable due to additional factors (e.g. asylum-seekers who are also minors, psychologically distressed, or otherwise disadvantaged) and guarantees tailored to their specific needs (e.g. child-friendly justice, tailored information provision) must be complied with.

17. The interveners submit that summary expulsions of migrants without an official procedure, individual assessment or other due process safeguards constitutes a violation of the principle of *non-refoulement*. Furthermore, the lack of access to interpreters allowing applicants to communicate in a language they understand; lack of access to clear information; lack of access to a lawyer; and lack of access to an effective remedy render access to rights under Articles 3 and 13 ineffective, theoretical and illusory. In order to comply with the *non-refoulement* obligations, the authorities must conduct an effective investigation into the individual circumstances of the applicant and the real-time conditions in the receiving country, including the accessibility and reliability of the asylum system.

18. Furthermore, the interveners submit that, in order to treat all individuals compatibly with the Convention, special consideration should be given to the vulnerable condition of asylum-seekers in general and to the specific circumstances of each individual, in order to ensure that all asylum-seekers enjoy a full and effective access to domestic remedies.

III. Additional procedural guarantees required for migrant children

19. International, EU and Convention law⁵³ all recognise that the best interests of the child are a primary consideration in all state actions affecting children. Where children are also seeking asylum they are in a situation of enhanced and extreme vulnerability.⁵⁴ Respect for this enhanced vulnerability of child asylum seekers,⁵⁵ *qua* child and *qua* asylum seeker, must be a primary consideration, taking precedence over their irregular migration status.⁵⁶ The Court has recognised the right of children to have their best interests assessed and taken as a primary, and in some contexts,

⁴⁷ University of Michigan Law School, *The Michigan Guidelines on Protection Elsewhere*, Michigan Journal of International Law 209 (2007), available at: <http://www.refworld.org/docid/4ae9acd0d.html>, para 4 and UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23 March 2016, available at: <http://www.refworld.org/docid/56f3ee3f4.html>, pag. 2.

⁴⁸ *Muskhadzhiyeva and Others v. Belgium*, App. No. 41442/07, (19 January 2010); *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. No 13178/03, (12 October 2006).

⁴⁹ *Mutatis mutandis* *Saadi v. the United Kingdom* [GC], App. No 13229/03 (29 January 2008), para. 66; *Mohamad v. Greece*, App. No. 70586/11, (11 December 2014), para. 44.

⁵⁰ *Hirsi Jamaa and Others v. Italy*, App no. 27765/09 (23 February 2012), para. 204.

⁵¹ *Kebe and Others v. Ukraine*, App. No. 12552/12, (12 January 2017), para. 104.

⁵² *M.S.S. v. Belgium and Greece*, op. cit., para 233.

⁵³ Article 10(3) ICESCR, Article 24(1) ICCPR and General Comment No.17 Rights of the Child (Article 24), Council of Europe Conventions including the Convention on Action Against Trafficking in Human Beings Article 5, 10, 16(7), EU Charter Article 24, and see Convention caselaw, endnote 27.

⁵⁴ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. no. 13178/03 (12 January 2007) para. 55; *Popov v. France*, App. nos. 39472/07 and 39474/07 (19 April 2012) para. 91; *Tarakhel v. Switzerland* [GC], App. no. 29217/12 (4 November 2014) para. 99.

⁵⁵ *M.S.S. v. Belgium and Greece* [GC], op. cit., para. 232.

⁵⁶ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, op.cit., para. 55.

paramount consideration.⁵⁷ In *Rahimi v. Greece* it confirmed that in all actions relating to children, a best interests assessment must be undertaken separately and prior to any decision that will affect that child's life.⁵⁸

20. This Court has held that the ECHR does not exist in a vacuum and the Contracting Parties remain bound by their obligations under international law by virtue of Article 53 ECHR.⁵⁹ The overarching obligation is found in Art 3 UNCRC and elaborated on by the Committee on the Rights of the Child in its General Comment 14.⁶⁰ The particular vulnerability of a child seeking asylum is recognised by Article 22 CRC. To fully enjoy their CRC rights, children must be appropriately protected and assisted.⁶¹

21. On a procedural level, respect for this principle requires the Contracting Parties to ground 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.*"⁶²

22. In addition, as recognised by this Court and the Committee on the Rights of the Child (CRC), the principle that the best interests of the child must be a primary consideration in all actions concerning children is a fundamental general and interpretative legal principle, a substantive right and a rule of procedure.⁶³ In *Rahimi v. Greece*, this Court confirmed that, in all actions relating to children, a best interests assessment must be undertaken separately and prior to a decision that will affect the child's life.⁶⁴ Any such decisions must clearly reflect the assessment that has followed from this approach.⁶⁵ In procedural terms, the CRC clarified that adherence to this principle must be ensured "*explicitly through individual procedures as an integral part of decisions [on] the entry, residence or return of a child*".⁶⁶ The assessment must be carried out "systematically",⁶⁷ "by actors independent of the migration authorities" and ensure "meaningful participation" of the child, his/her representative and child protection authorities.⁶⁸

23. The best interests principle is aimed at ensuring the child's full, equal and effective enjoyment of human rights, including non-discrimination, the right to be heard,⁶⁹ protection from abuse, access to asylum, the receipt of appropriate protection and a standard of living adequate for the child's development.⁷⁰ It imposes an obligation to identify and evaluate in the specific factual context the relevant elements of a best interests assessment and to follow a procedure that ensures legal guarantees and the proper application of the right.⁷¹ For unaccompanied and separated children, it relies, as an initial step, on **children's prioritised identification** and **prompt registration** in a specific child sensitive asylum procedure.⁷² This Court has recently demonstrated that the Convention

⁵⁷ *Neulinger and Shuruk v. Switzerland*, App. no. 41615/07 (6 July 2010) para.135; *Yousef v. Netherlands*, App. no. 33711/96 (5 February 2003) para. 73; *Wagner and J.M.W.L. v. Luxembourg*, App. no.76240/01 (28 September 2007) para. 133.

For a commentary on this line of jurisprudence see C. Simmonds, *Paramountcy and the ECHR: A conflict resolved?* Cambridge Law Journal, Volume 71, Issue 3 November 2012, pp. 498-501.

⁵⁸ see also EASO *Practical Guide on the Best Interests of the Child in Asylum Procedures*, 2019, p.17 and 25.

⁵⁹ *Pini and Ors v. Romania*, no. 78028/01, (22 June 2004), para 138.

⁶⁰ UN CRC General Comment No. 14, paras 75-76; UN CRC Article 22.

⁶¹ UN CRC General Comment No. 7, para 32.

⁶² UN CRC General Comment No. 7, para 32., para. 33.

⁶³ *Rahimi v. Greece*, op. cit., para. 108.; UN CRC, General comment No. 14 (2013), op. cit. See also, *Neulinger and Shuruk v. Switzerland* [GC] no. 41615/07 (6 July 2010) para 135.

⁶⁴ *Rahimi v. Greece*, op. cit, para. 108.

⁶⁵ UN CRC, General comment No. 14, op. cit., paras 6(c) and 14(b).

⁶⁶ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22,

⁶⁷ CRC/CMW, Joint General Comment No. 22/3 (2017) op. cit., para. 31

⁶⁸ CRC/CMW, Joint General Comment No. 22/3 (2017) op. cit., para. 32(c)

⁶⁹ UN CRC, General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12.

⁷⁰ Articles 2, 5, 10, 12, 19, 22 and 27 Convention on the Rights of the Child; UN CRC General comment No. 14, paras. 4, 51, 82; UN CRC, General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, para. 12.

⁷¹ UN CRC General comment No. 14, para. 46; *N.Ts. v. Georgia*, No. 71776/12, (2 February 2016).

⁷² UN CRC General comment No. 6, para. 31. See further UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, February 1997, para 5.

will be violated when the authorities act with a view to speedily remove child applicants as opposed to acting in their best interests.⁷³

24. Specifically, in relation to Turkey, the CRC in its last concluding observations of 2012⁷⁴ has encouraged the State 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 the State party [Turkey] assess the challenges experienced by asylum-seeking and refugee children with regard to accessing health, education and social services, and urgently address such challenges. The Committee also recommended that Turkey ensure 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, Turkey was encouraged to *“develop procedures and criteria to provide guidance for determining the best interests 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

25. Further, by virtue of the principle of the benefit of the doubt on a child’s minor age, an individual should be treated as a child unless and until otherwise proven.⁷⁶ When such a doubt arises, it is on the state authorities to dispel it – prior to subjecting an individual to any treatment that may not be in line with the rights of the child and corresponding substantive and procedural obligations on the state authorities.⁷⁷

26. With regard to operational safeguards during removal, all possible measures must be taken that prevent child rights violations and to reduce harm to children in accordance to the best interests of the child.⁷⁸ Essential measures require that all actors implementing removal processes involving children should be trained and have knowledge about children’s rights, in particular about the principle of the best interests of the child and how to apply this principle in practice, as well as the general situation of children, including child-specific risks in the country to which removal is proposed. Any removal operation involving children should include a specialist in child protection among the escorts. All escorts in removal procedures should be in civilian clothing, identifiable, and also be trained in child rights and child protection.⁷⁹ Finally, removal should not involve the use of force or physical restraints or other forms of coercion against children or their family members.⁸⁰

27. The interveners 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) there should be a presumption of vulnerability, shifting the burden of proof onto the Contracting Party, when it wishes to refuse such recognition. The interveners stress that the best interests of the child principle requires assessing the risk of all harm, not only irreparable harm, should the child be removed. 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. An individual who may be a child, should be treated as a

⁷³ Moustahi v. France, no. 9347/14, (25 June 2020), paras. 68-70.

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

⁷⁵ CRC, *Consideration of reports submitted by States parties under article 44 of the Convention*, CRC/C/TUR/CO/2-3, para 31.

⁷⁶ Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, para 31.

⁷⁷ CRC GC 23 (joint GC with CRMW, GC4), paragraph 4: “To make an informed estimate of age, States should undertake a comprehensive assessment of the child’s physical and psychological development [...]. Such assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, including interviews of children and, as appropriate, accompanying adults, in a language the child understands. Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children and their parents or relatives must be considered. The benefit of the doubt should be given to the individual being assessed. [...]”

⁷⁸ Frontex, Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex, Art 4.1.

⁷⁹ European Commission (2017) Communication from the Commission to the European Parliament and the Council: The protection of children in migration, p 14-16; Committee on the Rights of the Child (2017) Joint General Comment No 22, paras 32(c) and 36; see also European Commission (2017) Return Handbook section 7.1, quoting Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EU on skills, training and code of conduct for escorts, related to all removals by air (not specifically related to children); Frontex (2016) Guide for Joint Return Operations coordinated by Frontex.

⁸⁰ Global Migration Group (2018) Principles and Guidelines, supported by practical guidance, on the protection of the human rights of migrants in vulnerable situations, Guideline 9.18 on the use of force.

child unless and until proven otherwise and must be granted access to relevant substantive and procedural safeguards. Accessibility to key protection measures is a crucial prerequisite to the subsequent procedures in order to comply with Article 3.

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

28. The interveners note that under Article 53 ECHR, where Contracting Parties to the ECHR are also bound by EU law, the Court must ensure that the Convention rights are interpreted and applied in a manner which does not diminish the rights guaranteed under the applicable EU law.⁸¹

29. The EU Charter of Fundamental Rights (CFR)⁸² enshrines guarantees fundamental to the issues under consideration, such as the right to asylum (Article 18), the protection of human dignity (Article 1), the prohibition of torture and inhuman and degrading treatment (Article 4), protection in the event of removal, expulsion or extradition (Article 19), the rights of the child (Article 24) and the right to an effective remedy and to a fair trial (Article 47).

30. EU law, including the EU asylum *acquis*,⁸³ is relevant to the present case as the principle of the rule of law runs like a golden thread through the Convention.⁸⁴ The Convention requires that all measures carried out by Contracting Parties that affect an individual's protected rights be "in accordance with the law".⁸⁵ In some circumstances the law will be EU law. In this context, in determining whether the Contracting Parties' obligations under the Convention are engaged in a particular case - and, if so, the scope and content of these obligations - this Court has considered the EU asylum *acquis* materially relevant when the Respondent States are legally bound by that *corpus* of law.⁸⁶

31. The EU asylum *acquis* is comprised of a number of legal instruments and their interpretation by the Court of Justice of the European Union (CJEU). Under the recast Asylum Procedures Directive,⁸⁷ which provides for effective access to the asylum procedure for all applicants, without any exception,⁸⁸ EU Member States' authorities shall facilitate the registration of asylum applications, including recording information or statements of the applicant or relating to the substance of their request for international protection, and obliges Member States to ensure that such authorities receive the relevant information and the appropriate training to perform their task properly.⁸⁹ The Directive does not further impose any formal requirements on applicants with regard to how an asylum application must be made.

32. In light of the CJEU's jurisprudence requiring EU law provisions to be interpreted so as to provide them with *effet utile*,⁹⁰ the EU asylum *acquis* requires Member States to provide information

⁸¹ As regards EU Member States, the ECHR must not be applied in such a way as to diminish human rights protection, "which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party." The Court will recall that in *MSS* the Grand Chamber took into account Greece's obligations under the Reception Conditions Directive, as part of its national law, to ensure adequate material reception conditions, finding that the situation of extreme poverty brought about by the inaction of the State was treatment contrary to Article 3 ECHR.

⁸² European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

⁸³ The EU asylum *acquis* is the *corpus* of law comprising all EU law adopted in the field of international protection claims. The EU asylum *acquis* is "a body of intergovernmental agreements, regulations and directives that governs almost all asylum-related matters in the EU."

⁸⁴ The Convention's preamble recalls the rule of law.

⁸⁵ See Article 1 and 8 (2) ECHR.

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

⁸⁷ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60 ('recast Asylum Procedures Directive'). In force on 20 July 2015 and had to be transposed by 20 July 2015) apart from Articles 31(3), (4) and (5) which must be transposed by 20 July 2018.

⁸⁸ Recast Asylum Procedures Directive, Recital 25.

⁸⁹ CJEU, Judgment of 25 June 2020, *VL v. Ministerio Fiscal*, C-36/20 PPU, ECLI:EU:C:2020:495 paras. 58 - 60

⁹⁰ CJEU, C-213/89 *Factortame and Others* [1990] ECR I-2433, para 20; Case C-118/00 *Gervais Larsy v. Institut national d'assurances sociales pour travailleur indépendants (Inasti)* [2001] ECR I-5063, paras 50-53; Recast Asylum Procedures Directive Article 8 (1).

detailing the possibility of making an application for international protection available to all non-nationals including those held in detention facilities, apprehended during the surveillance operations or present at border crossings.⁹¹ Construed in light of the obligations under the EU Charter, in particular Articles 18 and 19, such information must be provided pro-actively in order to make non-*refoulement* obligations and access to the right to asylum under the Charter available not only in law, but in practice. Moreover, in order to be effective and useful, such information must be provided in a language the non-nationals concerned understand.⁹² Similarly, observance of the rights of the defence is a fundamental principle of EU law, in which the right to be heard in all proceedings is inherent.⁹³

33. Additionally, Article 24(2) of the Charter provides that, in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. It follows that such a provision is itself worded in broad terms and applies to decisions which, like a return decision adopted against a third-country national who is the parent of a minor, are not addressed to that minor but have significant consequences for him or her. That finding is confirmed by Article 3(1) of the International Convention on the Rights of the Child, to which the explanations relating to Article 24 of the Charter expressly refer.⁹⁴ According to that Article 3(1), the best interests of the child are to be taken into account in all decisions concerning children. *"Therefore, such a provision covers, in general terms, all decisions and actions directly or indirectly affecting children, as was pointed out by the CRC in its General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration"*.⁹⁵

34. **The interveners submit that the EU asylum *acquis* interpreted in light of EU fundamental rights and principles envisages effective access for all who may wish to apply for international protection to the appropriate procedures contained in the Asylum Procedures Directive. Moreover, the Directive envisages the right to an effective remedy against any decision regarding an asylum application.⁹⁶ This is only possible 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. Furthermore, in light of the Charter, in all decisions and actions directly or indirectly affecting children, their best interests should be taken as a primary consideration.**

Use of force in operations aimed at carrying out an expulsion

35. The main rules governing the use of force were first articulated in two instruments: the 1979 Code of Conduct for Law Enforcement Officials⁹⁷ and the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁹⁸ These also clarified standards contained in international human rights law, including in relation to the right to life, freedom from torture or cruel, inhuman or degrading treatment and the right to humane treatment. Many of the key norms set out in these texts are widely regarded as binding international law. For instance, the European Court of Human Rights and the Inter-American Court of Human Rights as well as the Human Rights Committee, have cited the 1990 Basic Principles as authoritative statements of international rules governing use of force in law enforcement.⁹⁹

36. In so far as it governs use of force, the law of law enforcement has three main components: necessity, proportionality, and precaution.¹⁰⁰ The principle of necessity holds that force used for the purpose of law enforcement must be **necessary in the circumstances**. Article 3 of the 1979 Code of

⁹¹ See Recital 26 Recast Asylum Procedures Directive, as well as Article 6.1 para 3 and Article 8 of the same Directive.

⁹² Recast Asylum Procedures Directive, Article 8(1) interpreted in light of the principle of effectiveness. Case C-13/01 *Safalero Srl v. Prefetto di Genova* [2003] ECR I-8679, para 49.

⁹³ CJEU, Judgment of 11 December 2014, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, C-249/13, ECLI:EU:C:2014:2431, para. 30.

⁹⁴ CJEU Judgment of 11 March 2021, *M.A. v. État belge*, C-112/20, ECLI:EU:C:2021:197, para 36-38.

⁹⁵ *Ibid*, para 38; see also General Comment No. 14 (2013) of the Committee on the Rights of the Child, CRC/C/GC/14, para 19.

⁹⁶ Asylum Procedures Directive, Recital 27, Article 39; Recast Asylum Procedures Directive, Recitals 25, 30 and Article 46.

⁹⁷ The 1979 Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly Resolution 34/169 of 17 December 1979.

⁹⁸ 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.

⁹⁹ ECtHR, *Benzer v Turkey*, App. 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 Human Rights Committee, General Comment 36, para 13.

¹⁰⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014, paras. 59–73.

Conduct stipulates that law enforcement officials may use **force ‘only when strictly necessary’**. The accompanying official commentary emphasises that any use of force by law enforcement officials should be **‘exceptional’**. It follows that in many instances force will not be legally permissible and non-violent means should therefore be used to ensure compliance.¹⁰¹ 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.¹⁰²

37. This Court has stated that Contracting Parties must abstain from any action that would prevent people from accessing procedures for determining their protection needs and must refrain from using unnecessary or excessive force in operations aimed at imposing restrictions on freedom of movement or deprivation of liberty with a view to carrying out an expulsion.¹⁰³ The Court has also reiterated the absolute nature of the prohibition of torture and inhuman and degrading treatment and punishment.¹⁰⁴

38. According to the Court’s case law, Article 3 does not prohibit the use of force for effecting an arrest. Nevertheless, **such force may be used only if it is indispensable and it must never be excessive.**¹⁰⁵ Furthermore, **any recourse by agents of the State to physical force against a person which has not been made strictly necessary by his or her own conduct diminishes human dignity and in principle infringes the right set forth in Article 3.**¹⁰⁶ The Court has also applied this strict proportionality test in situations where the individuals were already in the hands of law enforcement agencies.¹⁰⁷

39. The allegations of excessive use of force and violent expulsions on Greek borders have been well documented by numerous sources. The United Nations High Commissioner for Refugees (UNHCR) and Civil society organizations have all voiced concern over growing reports of systemic summary expulsions and violence and called on Greece to investigate the allegations.¹⁰⁸ Recently, Human Rights Watch reported that: *“Greek authorities, including through proxies they use, are assaulting, robbing, and stripping Afghan asylum seekers and migrants, including children, before summarily pushing them back to Turkey via the Evros River”* and highlighted that *“the men and the boy interviewed by Human Rights Watch said Greek authorities beat them at various times: when they were detained; while they were in custody; or as they were being forced into the Evros River. Twenty-two of the 26 people interviewed said that at some point, Greek authorities forced them to strip down to their undershorts or totally naked. All said Greek authorities stole their money, mobile phones, or other belongings”*.¹⁰⁹

40. The interveners submit that force should not be used by default in the context of border management. Force should only be employed exceptionally – subject to strict necessity and proportionality requirements. Lack of resistance to the authorities during the border management processes will render the use of any force unnecessary. Any use of unnecessary or disproportionate force in effecting a deprivation of liberty or restricting freedom of movement to carry out an expulsion infringes Article 3. This is particularly so when such force is used against children. In particular, no additional force is lawful when the need has passed, including when an individual is safely and lawfully detained. Moreover, force must never be used vindictively or as a form of extrajudicial punishment.

¹⁰¹ 1990 Basic Principles, Principle 4.

¹⁰² Nachova v. Bulgaria, No. 43577/98, 2005, para. 95.

¹⁰³ *Mutatis mutandis* Sharifi and Others v. Italy and Greece, op. cit., paras. 217, 219, 223.

¹⁰⁴ See eg. Soering v. United Kingdom, no. 14038/88, (7 July 1989), para. 89; Tyrer v. United Kingdom, no. 5856/72, (25 April 1978), para. 30; Chahal v. United Kingdom, no. 22414/93, (15 November 1996), para. 79; and D v. United Kingdom, no. 30240/96, (2 May 1997), paras 46-54.

¹⁰⁵ Ivan Vasilev v. Bulgaria, no. 48130/99, (12 April 2007), para. 63.

¹⁰⁶ Rachwalski and Ferenc v. Poland, no. 47709/99, (28 July 2009), para. 59; Nalbandyan v. Armenia, nos. 9935/06 and 23339/06, (31 March 2015), para 96.

¹⁰⁷ Klaas v. Germany, 22 September 1993, para. 30, Series A no. 269; and Milan v. France, no. 7549/03, (24 January 2008), paras. 52-65.

¹⁰⁸ UNHCR calls on Greece to investigate pushbacks at sea and land borders with Turkey, 12 June 2020, available at <https://www.unhcr.org/news/briefing/2020/6/5ee33a6f4/unhcr-calls-greece-investigate-pushbacks-sea-land-borders-turkey.html>

¹⁰⁹ HRW Report “Their Faces Were Covered”, Greece’s Use of Migrants as Police Auxiliaries in Pushbacks, 7 April 2022, available at <https://www.hrw.org/report/2022/04/07/their-faces-were-covered/greeces-use-migrants-police-auxiliaries-pushbacks>