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

Application Nos 4034/21 and 15783/21, A.D. against Greece and A.E. against Greece

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

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BEFORE THE FIRST SECTION

OF THE EUROPEAN COURT OF HUMAN RIGHTS

Applications no. 4034/21 et 15783/21

A.D. v Greece

and

A.E. v Greece

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS:

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

***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 applicants to the risk of *refoulement* and deprives them of protection 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, the Convention and 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. 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.

IV. The use of force that does not respect the principles of proportionality and necessity when effecting a measure of deprivation of liberty, or a measure restricting freedom of movement, in order to carry out an expulsion is an infringement of Article 3 ECHR.

I. The nature and scope of non-refoulement obligations under Article 2 and 3 ECHR in cases involving return of 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 Articles 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 exercise their Convention rights effectively 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.²

2. The obligation to respect the Convention rights of persons within a state's jurisdiction includes the obligation 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.³ The *non-refoulement* principle is of an absolute nature⁴ and no derogations are permitted either in law or in practice.⁵

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.⁶ Such assessment of whether there are substantial grounds for believing that the applicant will face prohibited ill-treatment in the destination country must be "*a rigorous one*".⁷ It is in

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

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

³ Hirsi Jamaa and Others v. Italy, no. 27765/09, (23 February 2012), paras. 157-158; M.S.S. v. Belgium and Greece, no. 30696/09, (21 January 2011), para. 286; Sharifi and Others v. Italy and Greece, no. 16643/09, (21 October 2014), para. 166.

⁴ Chahal v. the United Kingdom, [GC], no. 22414/93, (15 November 1996), paras. 79-80.

⁵ 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.

⁶ Mamatkulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, (04 February 2005), para. 67; F.G. v. Sweden [GC], no. 43611/11, (23 March 2016), para. 112.

⁷ Sufi and Elmi v. the United Kingdom, nos. 8319/07 and 11449/07, (28 June 2011), para. 214; Chahal v. the United Kingdom, op. cit., para. 96; Saadi v. Italy, no. 37201/06, (28 February 2008), para. 128.

principle for the applicant to adduce evidence “capable of proving” the classic *Soering* test.⁸ 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”.⁹ Where evidence “capable of proving” such risk is adduced by the applicant, “it is for the Government to dispel any doubts about it”.¹⁰ 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.¹¹ 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.¹²

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

4. 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 the time though information coming to light at a later date may be relevant.¹³ In *F.G. v. Sweden*, the Grand Chamber of this Court held that the competent domestic authorities should investigate ‘of their own motion’ the circumstances which present ‘a well-known general risk’ in relation to which “information [...] is freely ascertainable from a wide number of sources.”¹⁴

5. Therefore, when investigating the extent to which a specific country such as Turkey is generally considered “safe” as a country of destination, it is relevant to note country of origin information which outlines that there have been recent restrictions on fundamental freedoms and compromises made to the rule of law.¹⁵ Specific groups such as the LGBTQI community, human rights activists, lawyers and presumed ethnic and religious minorities including Kurdish people or members of the Gülen movement are particularly affected by these human rights abuses.¹⁶ This Court has previously noted country of origin information in this respect in several cases concerning the human rights situation in Turkey. For example, in the case of *Shenturk and others v. Azerbaijan*, this Court found a violation of Article 3 for the lack of assessment of the risk of treatment the applicants would be exposed to on removal to Turkey.¹⁷ In *Sabuncu and others v. Turkey* and *Kavala v. Turkey* the Court recognised the lack of a right to liberty and insufficient assessments prior to trial and detention in Turkey in relation to the applicants, which included journalists and human rights defenders accused in supporting the coup d’état.¹⁸ Similarly, the recent relinquishment to the Grand Chamber in the case of *Yalcinkaya v. Turkey* suggests the importance of a robust assessment of country information when assessing whether a particular country is safe as a country of destination for removal.¹⁹

⁸ *Sufi and Elmi v. the United Kingdom*, op. cit., para. 214.

⁹ *N v. Finland*, 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.

¹⁰ *N. v. Sweden*, no. 23505/09, (20 July 2010), para. 53; *R.C. v. Sweden*, no. 41827/07, (9 June 2010), para. 50.

¹¹ *Mamatkulov and Askarov v. Turkey* [GC], op. cit., para. 69.

¹² *Ilias and Ahmed v Hungary*, no. 47287/15 [GC], (21 November 2019), para 131.

¹³ *Ilias and Ahmed v. Hungary*, no. 47287/15, (14 March 2017), para. 105, cross-referencing: *Muminov v. Russia*, no. 42502/06, (11 December 2008), paras. 91-92. See also: *F.G. v. Sweden*, op. cit., para. 115, cross-referencing *Chahal v. the United Kingdom*, op. cit., para. 86.

¹⁴ *F.G. v. Sweden* [GC], 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.

¹⁵ US Department of State, 2021 Country Reports on Human Rights Practices: Turkey, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/turkey/>

¹⁶ Amnesty International, Turkey Report 2021, <https://www.amnesty.org/en/location/europe-and-central-asia/turkey/report-turkey/>

¹⁷ *Shenturk and others v. Azerbaijan*, no. 41326/17, (10 March 2022), paras 112-117.

¹⁸ *Sabuncu and others v Turkey*, no. 23199/17, (10 November 2020), paras 180-185; *Kavala v. Turkey*, no. 28749/18, (10 December 2019), paras 154-160; ECHR Press Release, Infringement procedure to be applied by Court in *Kavala v. Turkey*, 23 February 2022, <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22%3A%22003-7267811-9898066%22%7D>

¹⁹ ECHR Press Release, Relinquishment *Yalcinkaya v. Turkey* concerning FETO/PDY trial in Turkey, 6 May 2022, <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22%3A%22003-7328424-10000365%22%7D>

6. The interveners note that there is evidence indicating that Turkish nationals belonging to minority groups, as well as those accused of supporting the coup d'état or linked to the Gülen movement, face numerous difficulties when imprisoned in Turkey. Since 2017 Human Rights Watch has investigated high levels of physical and sexual assault, undocumented detention and abductions in Turkish prisons,²⁰ while its 2021 World Report referred to an increase of reports of torture and ill-treatment in prisons, as well as enforced disappearances.²¹ According to the Minister of Interior, of the 622,646 people originally processed with regard to their links to FETO/Gülen movement, 301,932 were detained and 96,782 were released under judicial control last year.²² Human Rights Watch furthermore reported that individuals linked to the July 2016 attempted coup were at risk of torture and ill-treatment in police custody, and that the highest number of detentions concerned those suspected of links to the Turkish defined FETO group.²³ Developments since the report confirmed a resurgence of police torture and ill-treatment in the years since the 2016 coup attempt with no evidence of justice for many victims of abuse and torture.²⁴ Moreover, the Council of Europe's Committee against Torture found in their 2019 visit to Turkey numerous credible allegations of excessive force and police-inflicted ill-treatment, overcrowding and poor material conditions in Turkish prisons.²⁵ The execution of the judgment in the aforementioned case *Kavala v Turkey*²⁶ highlights the ongoing issues faced by those who have faced accusations linked to the July 2016 coup, which can be seen through the Committee of Minister's referral of the case back to the Court,²⁷ and the Council of Europe's recent reaction to the applicant's life sentence despite the prior ECHR ruling to the contrary.²⁸

7. The situation is increasingly difficult for women in Turkish prisons. Generally, women in Turkey face high levels of assault and abuse²⁹ and similarly in the prison system reports have outlined testimonies of sexual abuse, poor conditions and limited access to healthcare.³⁰ According to a local newspaper, in November 2021 there were over 17,000 women and 500 children in Turkish prisons, most of whom had links to the Gülen movement.³¹ Gebze women's prison has been particularly criticised, for allegations of unexplained deaths, suicides and torture.³²

8. This Court has also affirmed the importance of international and national NGOs in monitoring, reporting and providing evidence of the actual human rights situation in a particular country,³³

²⁰ Human Rights Watch, In Custody: Police torture and abductions in Turkey, October 2017, <https://www.hrw.org/report/2017/10/12/custody/police-torture-and-abductions-turkey>.

²¹ Human Rights Watch, 2021 World Report: Turkey, Chapter: Torture and Ill-Treatment in Custody, Enforced Disappearances, available at: <https://www.hrw.org/world-report/2021/country-chapters/turkey#8d3ef8>

²² Anadolu Agency, Interior Minister Soylu announces HDP deputy to Gara, 20 February 2021, <https://www.aa.com.tr/tr/turkiye/icisleri-bakani-soylu-garaya-giden-hdpli-vekili-acikladi/2151784#>

²³ Human Rights Watch, In Custody: Police torture and abductions in Turkey, October 2017, <https://www.hrw.org/report/2017/10/12/custody/police-torture-and-abductions-turkey>.

²⁴ Human Rights Watch, Turkey: Police, watchmen involved in torture, ill-treatment, 29 July 2020, <https://www.hrw.org/news/2020/07/29/turkey-police-watchmen-involved-torture-ill-treatment>.

²⁵ Council of Europe, Report to the Turkish government on the visit to Turkey carried out by the European Committee for the Prevention against Torture and Inhuman or Degrading Treatment or Punishment, 5 August 2020, <https://rm.coe.int/16809f20a1>.

²⁶ *Kavala v. Turkey*, no. 28749/18, (10 December 2019)

²⁷ Council of Europe, Council of Europe's Committee of Ministers refers the *Kavala v. Turkey* case to the ECHR, 3 February 2022, <https://www.coe.int/en/web/execution/-/council-of-europe-s-committee-of-ministers-refers-the-kavala-v-turkey-case-to-the-echr>

²⁸ Council of Europe, PACE President expresses shock at *Kavala* sentence and calls for his immediate release, 27 April 2022, <https://www.coe.int/en/web/portal/-/pace-president-expresses-shock-at-kavala-sentence-and-calls-for-his-immediate-release>

²⁹ Uzey Bulut, Turkey: Murder of women reaches epidemic proportions, 11 December 2019, The Gatestone Institute, <https://www.gatestoneinstitute.org/15246/turkey-murder-of-women>

³⁰ Advocates of Silenced Turkey, Persecution of Women in post-coup Turkey, 16 July 2019, https://silencedturkey.org/wp-content/uploads/2018/04/AST_presentation_Persecution-of-women-in-Turkey.pdf.

³¹ Turkey purge, Purge-victim social science teacher in Gebze prison since August 10, 11 November 2021, <https://turkeypurge.com/purge-victim-social-science-teacher-in-gebze-prison-since-august-10>

³² Stockholm Center for Freedom, 5 suspicious deaths at Gebze women's prison in 2nd half of 2016, 18 February 2017, <https://stockholmcf.org/5-suspicious-deaths-at-gebze-womens-prison-in-2nd-half-of-2016/>

³³ *Chahal*, op.cit., paras. 99-100; *Muslim 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. 6566, 20 February 2007; and *Saadi*, para.131.

specifically, in relation to the Article 3 risks of a contemplated removal of people to that country - or the risk of onward removal to their country of origin.³⁴ 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.³⁵ "*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.*"³⁶

9. 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 research carried out *ex proprio motu*.

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

10. To comply with Article 3 procedural safeguards, individuals must be told, in simple, non-technical language that they are capable of understanding, the reasons for their removal, and the process available for challenging the decision,³⁷ 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.³⁸ 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.³⁹ This remedy must be effective, existing in practice as well as in law, and must not be unjustifiably hindered by the acts or omissions of the authorities.⁴⁰ This Court has determined a remedy to be ineffective, *inter alia*, when removal takes place before the practical possibility of accessing the remedy;⁴¹ where there is a lack of automatic suspensive effect;⁴² where there are excessively short time limits for submitting the claim or an appeal;⁴³ where there is insufficient information on how to gain effective access to the relevant procedures and remedies;⁴⁴ where there are obstacles in physical access to or communication with the responsible authority;⁴⁵ where there is a lack of (free) legal assistance and access to a lawyer;⁴⁶ and/or where there is a lack of interpretation.⁴⁷ These safeguards are ineffective in a situation where no official procedure has taken place, which in itself entails having had prior access to information about the procedures in order to allow for a meaningful opportunity to raise objections.

³⁴ Mohammed v. Austria no. 2283/12 (6 June 2013), para.97-102; Sharifi v. Austria no 60104/08 (5 December 2013), para.46; Mohammadi v. Austria no. 71932/12 (3 July 2014) § 69; M.S.S. v. Belgium and Greece cited above § 346-353; F.G. v Sweden [GC] no. 43611/11 (23 March 2016), para 117, cross-referencing Safaai v Austria, no. 44689/09 (7 May 2014) § 44&46.

³⁵ Safaai v. Austria, op.cit., paras.46-47.

³⁶ Ilias and Ahmed v Hungary, No. 47287/15 [GC], (21 November 2019), para 141.

³⁷ Khlaifia and Others v. Italy [GC], No. 16483/12, (15 December 2016), para. 115; J.R. and Others v. Greece, No. 22696/16, (25 May 2018), para. 123-124.

³⁸ 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.

³⁹ Shamayev and Others v. Georgia and Russia, 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.

⁴⁰ 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.

⁴¹ Shamayev and Others v. Georgia and Russia, No. 36378/02, (12 April 2005), para.460; Labsi v. Slovakia, No. 33809/08, (15 May 2012), para. 139.

⁴² Gebremedhin v France, No. 25389/05 (26 July 2007) para 66-67; Baysakov and others v. Ukraine, No. 54131/08, (18 February 2010), para.74; M.A. v. Cyprus, no. 41872/10, (23 July 2013), para 133. D and Others v. Romania, no. 75953/16, (14 January 2020), paras. 128-130.

⁴³ I.M. v. France, No. 9152/09, (14 December 2010), para.144; M.S.S. v. Belgium and Greece, No. 30696/09, [GC] (21 January 2011), para. 306.

⁴⁴ Hirsi Jamaa and Others v. Italy, op. cit., para. 204.

⁴⁵ Gebremedhin v. France, no. 25389/05, (26 April 2007), para.54; I.M. v. France, no. 9152/09, (14 December 2010), para.130; M.S.S. v. Belgium and Greece, no. 30696/09, [GC] (21 January 2011), paras. 301 - 313.

⁴⁶ M.S.S. v. Belgium and Greece, no. 30696/09, [GC] (21 January 2011), para.319; *mutatis mutandis*, N.D. and N.T. v. Spain, nos. 8675/15 and 8697/15, (3 October 2017), para. 118.

⁴⁷ Hirsi Jamaa and Others v. Italy, no. 27765/09, [GC] (23 February 2012), para. 202.

11. Articles 3 and 13 require the Contracting Parties, *inter alia*, to assess all evidence at the core of a *non-refoulement* claim,⁴⁸ including, where necessary: to obtain such evidence *proprio motu* and to avoid imposing an unrealistic burden of proof on applicants or requiring them to bear the entire burden of proof.⁴⁹ 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.⁵⁰ It is the duty of those authorities to seek all relevant, up-to-date and generally available information.

12. Treating all individuals compatibly with the Convention includes the obligation to identify and pay special attention to the needs of people in a vulnerable situation. This includes asylum-seekers, irrespective of whether national authorisation to enter the territory has been granted.⁵¹ States have an obligation to enable those who wish to identify themselves as seeking asylum to do so⁵² and to permit them access to determination procedures with all the procedural safeguards required by national law,⁵³ including access to information, legal aid and access to effective remedies. 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*",⁵⁴ which merits special attention by public authorities to ensure their full and effective access to domestic remedies.

13. In Greece, the practice of expulsions at the Evros border is reported as arbitrary and systematic over many years. The practice of immediate expulsions and interceptions at the Greek border in general has occurred for many years but has been increasingly documented since 2017,⁵⁵ and across Europe the practice is similarly consistent, reaching 1,911 reported instances in the first quarter of 2022.⁵⁶ In 2019, 8,497 people were reported by police statistics as arrested for crossing the border at Evros irregularly, which are often followed by detention, transfer back to the border and expulsion to Turkey.⁵⁷ In 2020, this number almost halved with only 4,666 arrests recorded. Furthermore, 5,982 people were recorded as arriving at the Evros land border in 2020, while the Reception and Identification Service only recorded that 2,998 people were registered in the First Reception Service in the Reception and Identification Centre at Evros.⁵⁸ In 2021, the number of arrivals fell to 4,826 people and 3,787 recorded arrests. The constant discrepancies in numbers, particularly between arrivals and registrations, suggest that many of the arrivals could be subject to expulsions at the border. The Commissioner for Human Rights has expressed her concern over these border expulsions, noting the "*overwhelming evidence*" and "*numerous credible allegations of summary returns*" which would be "*incompatible with Greece's human rights obligations*".⁵⁹ This stance was upheld in a second recommendation this year where the Commissioner outlined that these expulsions result in a lack of effective remedies and safeguards for

⁴⁸ Jabari v. Turkey, no. 40035/98, (11 July 2000), paras.39-40; Singh and Others v. Belgium, no. 33210/11, (2 October 2012), para. 104.

⁴⁹ M.S.S. v. Belgium and Greece, op. cit., paras. 344-359; Hirsi Jamaa and Others v. Italy, op. cit., paras. 122-158.

⁵⁰ Vilvarajah and Others v. United Kingdom, no. 13448/87, (30 October 1991), para. 108; Tarakhel v. Switzerland, no. 29217/12, (4 November 2014), para. 104.

⁵¹ *Mutatis mutandis* Saadi v. the United Kingdom [GC], no. 13229/03 (29 January 2008), para. 66; Mohamad v. Greece, no. 70586/11, (11 December 2014), para. 44.

⁵² Hirsi Jamaa and Others v. Italy, no. 27765/09 (23 February 2012), para. 204.

⁵³ Kebe and Others v. Ukraine, no. 12552/12, (12 January 2017), para. 104.

⁵⁴ M.S.S. v. Belgium and Greece, op. cit., para 233.

⁵⁵ Mare Liberum, Pushback Report 2021, 21 April 2022, <https://daten.mare-liberum.org/s/c9F7fqHN7GaEDib>

⁵⁶ Protecting Rights at Borders, Quarterly Pushback Report January- March 2022, April 2022, <https://helsinki.hu/en/wp-content/uploads/sites/2/2022/05/PRAB-Report-January-to-March-2022.pdf>

⁵⁷ AIDA, Country Report: Greece 2019 Update, July 2020, https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_gr_2019update.pdf

⁵⁸ AIDA, Country Report Greece 2020, Update June 2021, https://asylumineurope.org/wp-content/uploads/2021/06/AIDA-GR_2020update.pdf

⁵⁹ Council of Europe, Commissioner for Human Rights, Letter to Greek Ministers: Greek authorities should investigate allegations of pushbacks and ill-treatment of migrants, ensure an enabling environment for NGOs and improve reception conditions, 12 May 2021, <https://www.coe.int/en/web/commissioner/-/greek-authorities-should-investigate-allegations-of-pushbacks-and-ill-treatment-of-migrants-ensure-an-enabling-environment-for-ngos-and-improve-recept>

those affected as they are unable to submit arguments against the expulsion.⁶⁰ Further cases of expulsions, specifically from Evros to Turkey, were documented in Human Rights Watch's 2021 World Report, which investigated 30 instances of summary returns between September 2021 and February 2022 where the individuals concerned did not receive information, advice or access to the asylum procedure during their detention and return.⁶¹

14. 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.

15. The interveners reiterate 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. Application of Convention rights in accordance with Article 53 and, in particular, obligations under EU law

16. 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.⁶² The EU Charter of Fundamental Rights (CFR)⁶³ enshrines guarantees fundamental to the issues under consideration, such as the right to asylum (Article 18), the protection of human dignity (Article 1), the prohibition of torture and inhuman and degrading treatment (Article 4), protection in the event of removal, expulsion or extradition (Article 19) and the right to an effective remedy and to a fair trial (Article 47).⁶⁴

17. EU law, including the EU asylum *acquis*,⁶⁵ is relevant to the present case as the principle of the rule of law runs like a golden thread through the Convention.⁶⁶ The Convention requires that all measures carried out by Contracting Parties that affect an individual's protected rights be "in accordance with the law".⁶⁷ 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

⁶⁰ Council of Europe, Commissioner for Human Rights, Recommendation: Pushed beyond the limits. Urgent action needed to stop pushbacks at Europe's borders, 7 April 2022, <https://rm.coe.int/pushed-beyond-the-limits-urgent-action-needed-to-end-human-rights-viol/1680a5a14d>

⁶¹ Human Rights Watch, "Their faces were covered" Greece uses migrants as police auxiliaries in pushbacks, 7 April 2022, <https://www.hrw.org/report/2022/04/07/their-faces-were-covered/greeces-use-migrants-police-auxiliaries-pushbacks>.

⁶² 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.

⁶³ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

⁶⁴ It should be noted that, as a matter of EU law the standards of Art 6 ECHR apply (through art 47 CFR) in situations where they would not apply as a matter of ECHR law simpliciter

⁶⁵ 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."

⁶⁶ The Convention's preamble recalls the rule of law.

⁶⁷ See Article 1 and 8 (2) ECHR

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.⁶⁸

18. 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). The recast Asylum Procedures Directive,⁶⁹ provides for effective access to the asylum procedure for all applicants without any exception.⁷⁰ Under the Directive, EU Member States' authorities shall facilitate the registration of asylum applications, including by providing interpretation and information at the border.⁷¹ In addition, Member States are obliged to ensure that any authorities likely to receive applications for international protection will receive the appropriate training to perform their task properly.⁷² The Directive does not further impose any formal requirements on applicants with regard to how an asylum application must be made.

19. In light of the CJEU's jurisprudence requiring EU law provisions to be interpreted so as to provide them with *effet utile*,⁷³ the EU asylum *acquis* requires Member States to provide information detailing the possibility of making an application for international protection available to all third country nationals, including those held in detention facilities, apprehended during surveillance operations or present at border crossings.⁷⁴ Construed in light of the obligations under the EU Charter, in particular Articles 18 and 19, such information must be provided pro-actively in order to make non-*refoulement* obligations and access to the right to asylum under the Charter available not only in law, but also in practice. Moreover, in order to be effective and useful, such information must be provided in a language the third country nationals concerned understand.⁷⁵ 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.⁷⁶

20. 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.⁷⁷ 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.

⁶⁸ *M.S.S. v. Belgium and Greece*, op. cit., paras 57-86 and 250. *Sufi and Elmi v. the United Kingdom*, nos 8319/07 and 11449/070 (ECtHR 28 November 2011), paras 30-32 and 219-226, where the Court had regard to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"), as well as to a preliminary ruling by the European Court of Justice in the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie* asking, *inter alia*, whether Article 15(c) of the Qualification Directive offered supplementary or other protection to Article 3 of the Convention. See also *M.A. and Others v. Lithuania*, cited above, para. 113, and *N.D. and N.T. v. Spain*, cited above, para. 180.

⁶⁹ 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.

⁷⁰ Recast Asylum Procedures Directive, Recital 25.

⁷¹ Recast Asylum Procedures Directive, Article 8.

⁷² CJEU, Judgment of 25 June 2020, *VL v. Ministerio Fiscal*, C-36/20 PPU, ECLI:EU:C:2020:495 para. 70.

⁷³ 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).

⁷⁴ See Recital 26 Recast Asylum Procedures Directive, as well as Article 6.1 para 3 and Article 8 of the same Directive.

⁷⁵ 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.

⁷⁶ CJEU, Judgment of 11 December 2014, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, C-249/13, ECLI:EU:C:2014:2431, para. 30.

⁷⁷ Asylum Procedures Directive, Recital 27 and Article 39; Recast Asylum Procedures Directive, Recitals 25, 30 and Article 46.

IV. Use of force in operations aimed at carrying out an expulsion

21. The main rules governing the use of force were first articulated in two UN instruments: the 1979 Code of Conduct for Law Enforcement Officials⁷⁸ and the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁷⁹ These instruments 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 the international rules governing the use of force in law enforcement.⁸⁰

22. In so far as it governs use of force, the law of law enforcement has three main components: necessity, proportionality, and precaution.⁸¹ 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 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.⁸² 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.⁸³

23. This Court has stated that Contracting Parties must not only abstain from any action that would prevent people from accessing procedures for determining their protection needs but they must also 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.⁸⁴ The Court has also reiterated the absolute nature of the prohibition of torture and inhuman and degrading treatment and punishment on multiple occasions.⁸⁵

24. 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.**⁸⁶ 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.**⁸⁷ The Court has also applied this strict proportionality test in situations where the individuals were already in the hands of law enforcement agencies.⁸⁸

⁷⁸ The 1979 Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly Resolution 34/169 of 17 December 1979.

⁷⁹ 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.

⁸⁰ 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 Human Rights Committee, General Comment 36, para 13.

⁸¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, A/HRC/26/36, 1 April 2014, paras. 59–73.

⁸² 1990 Basic Principles, Principle 4.

⁸³ *Nachova v. Bulgaria*, No. 43577/98, 2005, para. 95.

⁸⁴ *Mutatis mutandis* *Sharifi and Others v. Italy and Greece*, op. cit., paras. 217, 219, 223.

⁸⁵ 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.

⁸⁶ *Ivan Vasilev v. Bulgaria*, no. 48130/99, (12 April 2007), para. 63.

⁸⁷ *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.

⁸⁸ *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.

25. While the use of force which is unnecessary and excessive is not confined to any one CoE State Party, numerous reports on summary returns at the borders of Croatia and Hungary have underlined the link between such forms of expulsions and violence. For example, allegations of excessive use of force and violent expulsions at the Croatian borders have been well documented by numerous sources. Croatia's Ombudsperson⁸⁹ as well as the Council of Europe High Commissioner for Human Rights,⁹⁰ United Nations High Commissioner for Refugees (UNHCR) and a group of Members of European Parliament (MEPs)⁹¹ have all voiced concern over growing reports of systemic summary expulsions and violence and called on Croatia to investigate the allegations. Violence by the Croatian authorities has also been documented against children.⁹² Where reports of summary returns at the border have emerged, the use of violence has been particularly condemned by European and international actors. In a joint statement, the UN Special Rapporteurs noted the high numbers of physical violence and degrading treatment reported in more than 60 percent of recorded summary return cases from Croatia and highlighted that this treatment seemed designed to subject the migrants concerned to torture and other cruel, inhuman and degrading treatment prohibited under international law.⁹³ Similarly, in Hungary, violence is consistently reported in cases where border expulsions have been documented.⁹⁴ In many cases, asylum seekers who arrive at the border are either held in transit zones or are subject to summary dismissals of their asylum claims and removal to Serbia in an often violent, abusive and forceful way.⁹⁵ In 2019, the Commissioner for Human Rights visited the Member State and voiced her concerns on the “*excessive use of force and violence by the Hungarian police during forcible removals*”.⁹⁶ These concerns followed the Committee for the Prevention of Torture's visit to Hungary in 2017 which addressed allegations of ill-treatment and reiterated the applicability of Article 3 to any form of forcible removal and to the principle of *non-refoulement*.⁹⁷

The interveners invite the Court, in the context of these concerns to condemn the use of force by default in the context of border management. Force should only be employed exceptionally – subject to strict necessity and proportionality requirements. The absence of resistance by those subjected to border management processes will prima facie 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. 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.

⁸⁹ Novi list, “*Pravobraniteljica: Policija i dalje krši ljudska prava migranata. Krije kako ih tretiraju*” 18 October 2018.

⁹⁰ Council of Europe, Commissioner calls on Croatia to investigate allegations of collective expulsions of migrants and of violence by law enforcement officers, 5 October 2018.

⁹¹ InfoMigrants, “*EU Parliament members demand interrogation of Croatia's treatment of migrants*,” 11 September 2018.

⁹² Border Violence Monitoring Network, ‘*Report from the Centre for Peace Studies on the Pushback of Children*’, May 2020; Are You Syrious?, ‘*Illegal Push-backs and Border Violence from the EU External Borders to Bosnia*’, September 2018.

⁹³ Joint statement of Felipe González Morales, the Special Rapporteur on the human rights of migrants, and Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Geneva, 19 June 2020.

⁹⁴ AIDA, Country Report Hungary 2021, Update April 2022, <https://asylumineurope.org/reports/country/hungary/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/>

⁹⁵ Human Rights Watch, Hungary: Migrants abused at the border, 13 July 2016, <https://www.hrw.org/news/2016/07/13/hungary-migrants-abused-border>

⁹⁶ Council of Europe, Commissioner for Human Rights Report following visit to Hungary in February 2019, May 2019, [https://www.ecoi.net/en/file/local/2009128/CommDH\(2019\)13+-+Report+on+Hungary_EN.docx.pdf](https://www.ecoi.net/en/file/local/2009128/CommDH(2019)13+-+Report+on+Hungary_EN.docx.pdf)

⁹⁷ Council of Europe, Committee for the Prevention of Torture, Report to the Hungarian government on the visit to Hungary carried out by the CPT from 20 to 26 October 2022, <https://rm.coe.int/16808d6f12>