EUROPEAN COURT OF HUMAN RIGHTS

Nahhas and Hadri v. Belgium

Application no. 3599/18

WRITTEN SUBMISSIONS ON BEHALF OF THE AIRE CENTRE(ADVICE ON INDIVIDUAL RIGHTS IN EUROPE), THE DUTCH REFUGEE COUNCIL (DCR), THE EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) AND THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENERS

pursuant to the Section Registrar's notification dated 23 August 2018 that the President of the Section had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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27 September 2018

I. Jurisdiction under Article 1 ECHR and other international instruments

1. It is well established in this Court's case law that individuals fall within a State's jurisdiction, for purposes of the protection of the Convention, when they are on a State's territory, lawfully or otherwise.[1] In addition, the Court has recognised that in a number of situations, jurisdiction under Article 1 of the Convention may extend to **actions by a State** or **the effects produced as a result** when they occur outside the national territory.[2] Such extra-territorial application of the Convention may be engaged in a number of situations. First, this Court has held that jurisdiction, is also established where a State, acting through its agents, organs, officials, army or local administration exercises **authority or effective control over** territory or **control over individuals** outside its territory.[3] As such, the acts or omissions of agents or organs of the State operating outside a State's territory and affecting individuals have been considered to bring the affected individuals under their authority or control, thus triggering the jurisdiction of the State.[4] For instance, the existence of extra-territorial jurisdiction has been recognised when State agents have subjected individuals to checkpoint controls outside the territory of the Contracting State.[5] Extra-territorial jurisdiction, under this Court's case law, is not considered to be limited to the territory of Member States of the Council of Europe, but has been applied, for instance, in Iraq.[6]
2. The extra-territorial exercise of jurisdiction has also been recognised, including in the Grand Chamber judgements in *Bankovic* and *Al Skeini*, in cases involving the **activities** of a State's **diplomatic or consular agents** abroad, whether or not there has been any effective control over territory or control over individuals, as long as they are exercising State **authority**.[7] In the *Al Skeini* judgment the Court, with reference to its previous case law as well as the decisions of the European Commission of Human Rights (the Commission), held: "firstly it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others [...]".[8] According to Article 5 (d) of the Vienna Convention on Consular Relations consular functions consist of, *inter alia*, **issuing visas** or other appropriate documents to individuals wishing to travel to the sending State.[9] The decision of consular staff to issue or deny to issue a visa is an example of the State exercising authority. Whilst there is no right for a non-national to enter or remain in a State, immigration applications made by individuals outside a Contracting State's territory have been found to trigger the jurisdiction of the relevant Contracting State.[10] Moreover the State's control over immigration has to be exercised consistently with Convention obligations.[11] In *East African Asians (British protected persons) v. the United Kingdom* the Commission implicitly accepted that the jurisdiction of a State could be exercised through the denial of entry to individuals outside the State's territory arguing that the effects or repercussions of denying entry to individuals to a State may, depending on the circumstances of the case, cause an interference with the rights protected under the Convention.[12] Furthermore the Commission concluded as early as 1965, that jurisdiction of a State existed within

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1 See e.g. *Louzidou v. Turkey (Preliminary Objections)* App. no. 15318/89 (ECtHR 23 March 1995), para 62; *Issa and Others v. Turkey* App. no. 31821//96 (ECtHR, 16 November 2004), para 71; *Al-Skeini and Others v. the United Kingdom* App. no. 55721/07 (ECtHR,7 July 2011), para 131; *Hirsi Jamaa and Others v. Italy* App. no. 27765/09 (ECtHR, 23 February 2012), para 73.

2 *Pad v. Turkey*, App. no. 60167/00, (ECtHR, 28 June 2007), para. 53; *Al-Skeini and Others v. the United Kingdom, App. no. 55721/07 (ECtHR, 7 July 2011), para 133.*

3 *Bankovic and Others v Belgium and Others,* App. no. 52207/99 (ECtHR, 12 December 2001), para 73; *Al-Skeini and Others v. the United Kingdom, App. no. 55721/07 (ECtHR, 7 July 2011), para 138 Treska v Albania and Italy*, App. no. 26937/04 (EctHR, 29 June 2006) para 101; l*ascu and Others v Moldova and Russia,* App. no. 48787/99, (EctHR, 8 July 2004), para 317.

4 *Turkey v. Cyprus*, App. no. 25781/94, (ECtHR, 10 May 2001).

5 *Jaloud v. the Netherlands,* App. no. 47708/08 (ECtHR, 20 November 2014).

6 *Al-Skeini and Others v. the United Kingdom,* App. no 55721/07 (ECtHR, 7 July 2011), Para 142.

7 *Bankovic and Others v Belgium and Others,* App. no. 52207/99 (ECtHR, 12 December 2001), para 73; *Al-Skeini and Others v. the United Kingdom, App. no. 55721/07 (ECtHR, 7 July 2011), para 134; Loizidou v. Turkey (*preliminaryobjections), App. no. 15318/89 (ECtHR, 23 March 1995, para 62; *Drozd and Janousek v. France and Spain, app. no. 12747/87* (ECtHR, 26 June 1992), para 91.

8 *Al-Skeini and Others v. the United Kingdom.* App. no 55721/07 (ECtHR, 7 July 2011), para 134.

9 Vienna Convention on Consular Relations, 1963

10 *East African Asians (British protected persons) v. the United Kingdom, App. no. 440370, (*Commission, *14 December 1973)* paras 185-186.

11 *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, App. no. 15/1983/71/107-109, (24 April 1985), paras 59 and 60. Also see *Haydarie v. The Netherlands,* App. no. 8876/04 (ECtHR, 20 October 2005)

12 *East African Asians (British protected persons) v. the United Kingdom, App. no. 440370, (*Commission, *14 December 1973)* paras 185-187.

the meaning of Article 1 ECHR, with regard to acts of diplomatic or consular agents in several cases.[13] In the case of *X. v Federal Republic Germany* the Commission held that diplomatic and consular representatives of their country of origin perform certain duties which may, in certain circumstances, make the country liable in respect to the Convention.[14] In addition, in the case of *X. v the United Kingdom,* which concerned a request of a mother residing in the United Kingdom to the British consular authorities in the Kingdom of Jordan to act in order to safeguard the well-being of her daughter, the Commission also concluded that jurisdiction was being exercised.[15]The Commission held: "[...]even though the alleged failure of the consular authorities to do all in their power to help the applicant occurred outside the territory of the United Kingdom, it was still 'within the jurisdiction', within the meaning of article 1 of the Convention" In the case of *M. v Denmark* the Commission expanded on the above and made it clear that: "[...]authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged."[16]

3. More than one State can have jurisdiction for Convention purposes in respect of situations taking place on the territory of the same State. It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 of the Convention to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense the Convention rights can be "divided and tailored".[17]

I.a. Jurisdiction under other international human rights and international law mechanisms

4. The International Court of Justice (ICJ) has repeatedly affirmed, that the body of international human rights treaties elaborated under UN auspices will have extraterritorial application for jurisdictional purposes.[18] In *Armed Activities on the Territory of the Congo* the ICJ held that: "international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", particularly in occupied territories".[19] In the *Provisional Measure in the case of Georgia v. Russian Federation* the ICJ held: "there is no restriction of a general nature in CERD relating to its territorial application […] the Court consequently finds that these provisions of CERD generally appear to apply **like other provisions of instruments of that nature,** to the actions of a State party when it acts beyond its territory."*(emphasis added)*[20] In view of Article 53 of the Convention, the jurisprudence in this regard of other international authorities is of relevance. International human rights bodies have also recognised extra-territorial jurisdiction on the basis of authority or control of either persons or territory, including in relation to consular assistance. The ICJ has also specifically endorsed the interpretation by the UN Human Rights Committee (HRC) that the International Covenant on Civil and Political Rights (ICCPR), applies extra-territorially. In its General Comment 31 the HRC has affirmed that: "[...]a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. [….] the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory **or subject to the jurisdiction of the State Party.** [...]". *(emphasis added)*

5. The HRC has held that a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations on the territory of another State. The risk of an extra-

13 *X. v Federal Republic Germany*, App. no 1611/62 (Commission, 25 September 1965).
14 *X. v Federal Republic Germany*, App no 1611/62 (Commission, 25 September 1965).
15 *X v. United Kingdom*, App no. 7547/76 (Commission, 15 December 1977).
16 *M. v. Denmark*, App. no. 17392/90 (Commission, 14 October 1992).
17 *Al-Skeini and Others v. the United Kingdom*, App. no. 55721/07 (ECtHR, 7 July 2011), para 137.
18 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para 111; it found the reading of the HRC in accordance with object and purpose of the treaty as well as the preparatory works, see paras 108–110; *Armed Activities on the Territory of the Congo* Judgment. 19 December 2005, para 216; See H. Battjes, ' Territoriality and Asylum Law: The Use of Territorial Jurisdiction to Circumvent Legal Obligations and Human Rights Law Responses, Netherlands Yearbook of International Law 2016 (2017).
19 *Armed Activities on the Territory of the Congo* Judgment, 19 December 2005, para 216.
20 *Provisional Measure in the case of Georgia v. Russian Federation*, No. 35/2008, (15 October 2018), para 109.

territorial violation must be a **necessary and foreseeable** consequence and must be judged on the **knowledge** the State party had at the time.[21]In this regard the HRC has also recognised extra-territorial jurisdiction with regard to diplomatic and consular personnel. In the case of *Samuel Lichtensztejn v Uruguay* for example, it stated that "the issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is 'subject to the jurisdiction' of Uruguay for that purpose".[22] Similarly other UN bodies have also recognised extra-territorial jurisdiction.[23]

6. In the advisory opinion on the environment and human rights the Inter-American Court of Human Rights (IACtHR) stated that the jurisdiction of the States, in relation to the protection of human rights under the American Convention on Human Rights, is not limited to its territory and includes situations beyond its territorial limits.[24] It concluded that "The concept of jurisdiction under Article 1(1) of the American Convention encompasses any situation in which a State exercises effective authority or control over an individual or individuals, either within or outside its territory". In reaching this conclusion the IACtHR relied on numerous decisions of the Inter-American Commission[25] as well as case law of this Court.[26] The Inter-American Commission in the case of *Victor Saldaño* for example referred to jurisdiction "[...]as a notion linked to authority and effective control, and not merely to territorial boundaries [...]".[27] Importantly, in a recent 'advisory opinion on the institution of asylum and its recognition as a human right in the Inter-American system of protection,' the IACtHR stressed that receiving States are under the obligations arising from article 1.1 of the [American] Convention, as long as they are exercising control, authority or responsibility over any person, regardless of whether he or she is on the territorial, fluvial, maritime or aerial territory of such State.[28] The obligations established under that Convention are thus applicable to the conduct of diplomatic personnel deployed in the territories of third States, whenever the nexus of personal jurisdiction can be established with the particular person.[29] In this regard the IACtHR recalled similar jurisprudence by the HRC and the Commission.[30]

I.b. Nature and scope of a Contracting State's obligations under the ECHR within its jurisdiction, including extra-territorially

7. Contracting States are responsible for securing the Convention rights to all those who fall within their jurisdiction under Article 1 of the Convention. This requires States to take all reasonable steps to secure respect for the

21 *Mohammad Munaf v. Romania*, Com. No. 1539/2006 (CCPR 30 July 2009). *A.R.J. v. Australia*, Communication no. 692/1996, (CCPR 28 July 1997), *Judge v. Canada*, Communication no. 829/

22 *Samuel Lichtensztejn v Uruguay*, CCPR/C/OP/2, (CCPR, 31 March 1983), para. 6.1. Also see D*elia Saldias de Lopez v. Uruguay*, CCPR/C/13/D/52/1979, (CCPR, 19 July 1981) para 12.3.

23 General Comment 31, para 10. See: In the *J.H.A v Spain* decision the CAT held: "In particular, it considers that such jurisdiction must also include situations where a State party exercises, directly or indirectly, *de facto* or *de jure c*ontrol over persons in detention. This interpretation of the concept of jurisdiction is applicable in respect not only of article 2, but of all provisions of the Convention […], CAT/C/41/D/323/2007 (21 November 2008), para 8.2. In Joint General Comment No. 4 of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), and No. 23 (2017) of the Committee on the Rights of the Child these Committees pronounced: "Jurisdiction cannot be limited/excluded in zones or areas subjected to migration control operations, including international waters or other transit zones and can arise in presence of children 'attempting to enter its territory". (Para.12); Maastricht ETO principles on Extraterritorial Obligations of States in the Area of Economic,Social and Cultural Rights.

24 Inter-American Court of Human Rights, Environment and human rights, Advisory Opinion, OC-23/17, 15 November 2017 (published February 2018), requested by the Republic of Colombia, official summary issued by the Inter-American Court, p.3. In para 74: "De conformidad con las normas de interpretación de tratados, así como aquellas específicas de la Convención Americana (supra párrs. 40 a 42), el sentido corriente del término jurisdicción, interpretado de buena fe y teniendo en cuenta el contexto, fin y propósito de la Convención Americana señala que no está limitado al concepto de territorio nacional, sino que abarca un concepto más amplio que incluye ciertas formas de ejercicio de la jurisdicción fuera del territorio del Estado en cuestión."

25 Inter-American Court of Human Rights, Environment and human rights, Advisory Opinion, OC-23/17, 15 November 2017 (published February 2018), requested by the Republic of Colombia, para 75.

26 Inter-American Court of Human Rights, Environment and human rights, Advisory Opinion, OC-23/17, 15 November 2017 (published February 2018), requested by the Republic of Colombia, para 79.

27 Inter-American Commssion on Human Rights, Victor Saldaño v. Argentina, no 38/00 (11 March 1999).

28 Inter-American Court of Human Rights, Advisory opinion on the institution of asylum and its recognition as a human right in the Inter-American system of protection, 30 May 2018, OPINIÓN CONSULTIVA OC-25/18, para 177.

29 *Ibid, p*ara 176.

30 *Ibid, p*aras 174 and 175.

Convention rights and freedoms.[31] This encompasses both obligations to refrain from acting as well as obligation to act (positive obligations). Moreover the Court has stressed that even in the absence of effective control over a (part of its) territory, that State "still has a positive obligation under Article 1 of the Convention to take the **diplomatic, economic, judicial or other measures** that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention."[32] Thus jurisdiction, and indeed, a "State's responsibility may […] be engaged on account of acts which have **sufficiently proximate repercussion** of rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction."[33] In this regard the Court has held that States, operating through their agents or organs, can be held liable under the Convention where they do not take the necessary measures to prevent treatment incompatible with the Convention from occurring or have allowed, caused (directly or indirectly), contributed to, or actively facilitated the treatment through their action or inaction.[34]

8. **The interveners submit that it is well-established case law of the Court, under the ECHR, that jurisdiction exists in a number of extra-territorial situations, including where the State exercises authority or control over persons. This is also consistent with the jurisprudence of other international authorities addressing jurisdiction under universal and regional human rights treaties. The interveners submit that this includes decisions of diplomatic and consular personnel on the issuance of visas to third country nationals.**

II. Obligations under Article 3 ECHR and the principle of *non-refoulement* under international human rights law

9. At the outset it is important to note that the Court has consistently held that "the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective".[35] Such an interpretation of the Convention can been seen in the landmark *Soering* case where the Court stressed the absolute nature of Article 3 and its applicability in the context of extradition, when the person would suffer treatment contrary to that Article in the receiving State. The Court held: "It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture [...]."[36] While not explicitly referred to in the general wording of Article 3 the Court inferred from the prohibition contained therein a prohibition to extradite in the given circumstances.

II.a. Positive obligations and the principle of non-refoulement

10. The principle of *non-refoulement* is part of general international law, rooted in both treaty and customary international law, with applications both in international human rights[37] and refugee law.[38] Under Article 3 of the Convention, the prohibition of *non-refoulement*, imposes certain positive and negative obligations on the State. In respect of negative obligations, Contracting States are primarily obliged to refrain from returning an individual to another State or taking any other measure whereby an individual is forced to return or be transferred to a country where he or she is at a real risk of being subjected to ill-treatment.[39] The principle of *non-refoulement* under

31 *Z and Others v. the United Kingdom* [GC], App. no. 29392/95, (ECtHR, 10 May 2001), para 73.
32 *Treska v Albania and Italy*, App. no. 26937/04 (EctHR, 29 June 2006), *Manoilescu, app. 60861/100* (ECtHR, 3 March 2005) para 101 *Ilascu and Others v Moldova and Russia*, App. no. 48787/99, (EctHR, 8 July 2004), para 331.
33 *lascu and Others v Moldova and Russia*, App. no. 48787/99, (EctHR, 8 July 2004), para 317.
34 *El-Masri v. "the former Yugoslav Republic of Macedonia"* [GC] – 39630/09, (ECtHR, 13 December 2012), para 211; *lascu and Others v Moldova and Russia*, App. no. 48787/99, (EctHR, 8 July 2004), para 317 and 318.
35 *Soering v. United Kingdo*m, App. no. 14038/88 (EctHR, 7 July 1989), para 87.
36 *Soering v. United Kingdom*, app. no. 14038/88 (ECtHR, 7 July 1989), para 88.
37 Article 3 ECHR; Article 7 of the International Convention on Civil and Political Rights (ICCPR), General Comment 31, CCPR/21/Rev1/add.13 para 12 ;Article 3 of the Convention against Torture (CAT).
38 Article 33 of the 1951 Refugee Convention; Guy S. Goodwin-Gill, The rights to Seek asylum: Interception at Sea and the principle of non-refoulement, 23, international Journal of Refugee Law, L. 443 (2011), p. 444; Ministerial Meeting of States Parties to the 1951 Convention and/ or its Protocol relating to the status of refugees, Declaration of States Parties to the 1951 Convention and/ or its Protocol relating to the status of refugees, HCR/MMSP/2001/09, (16 January 2002).
39 Wouters, International Legal Standards for the Protection from Refoulement, (2009) p. 29 and 316.

Article 3, as under international human rights and refugee law, applies both to transfers to a State where the individual will be directly at risk (direct *refoulement)*, and to transfers to States where there is a risk of further transfer to a third State where the individual will be at risk (indirect or chain *refoulement*).[40] In addition, Contracting Parties also have certain *positive obligations* in regard to *non-refoulement* under the Convention. Although the Court has consistently held that "Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens,[41] Contracting Parties' compliance with the principle of *non-refoulement* requires them to have in place effective systems for identifying people within their jurisdiction who are entitled to benefit from it.

11. As the Court has consistently held, under Article 1 read in conjunction with Article 3, States must "take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment", including by private persons.[42] State responsibility under Article 3 is therefore engaged when state authorities **fail to take preventive measures** to protect the individual from inhuman and degrading treatment. This includes, amongst others, all the steps that the State can reasonably be expected to take to protect individuals, in the case of a particular threat to an individual or a group, from harm to their physical integrity of which it knew or ought to have known.[43] In *Mahmut Kaya v. Turkey* the Court held: "State responsibility may therefore be engaged where the framework of law fails to provide adequate protection […] or where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known."[44]According to the Court in *E v. United Kingdom*, "a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State".[45]
12. In the case of *Hirsi Jamaa* the Court concluded that the Italian government knew or ought to have known of the treatment suffered by migrants in Libya. In this regard the Court noted how "that situation was well-known and easy to verify on the basis of multiple sources. It therefore considered that when the applicants were removed, the Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country."[46] Accordingly, asylum claims that are based on a well-known general risk in a country and information about such a risk is freely ascertainable from a wide number of sources, the State's obligations under Article 3 are understood by the Court as requiring States to assess that risk of their own motion.[47] The situation in Syria is also well known. In many Contracting States Syrians are granted international protection.[48] In May 2015, the Government of Lebanon notified UNHCR that registration of Syrians should be suspended.[49]
13. In the light of the well established responsibility for the extraterritorial violations of acts or omissions by States, the State also has a duty to take reasonable measures it has in its power to take to prevent foreseeable risks of torture or inhuman or degrading treatment by officials in other States or by non-State actors. As the Grand Chamber reaffirmed in *El Masri*, State responsibility may therefore be engaged under Article 3 when a State fails to take such measures and as a result of that, the individual is directly or indirectly exposed to a risk of treatment contrary to Article 3 of the Convention about which the State knew or ought to have known.[50] This includes, as

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40 *Salah Sheekh v. the Netherlands App. No. 1948/04*, (11 January 2007), para. 141*; M.S.S. v. Belgium and Greece*, [GC], App. No. 30696/09, (21 January 2011), para. 342.

41 *Hirsi Jamaa and Others v. Italy*, app no 27765/09 (ECtHR, 23 February 2012), para 113.

42 *Opuz v Turkey*, App, No. 33401/02, (ECtHR, 9 June 2009), para 159.

43 *M.S.S. v. Belgium and Greece, a*pp no 30696/09 (ECtHR, 21 January 2011); *Osman v. the United Kingdom* App no 23452/94 (ECtHR, 28 October 1998).

44 *Mahmut Kaya v Turkey*, App. No. 22535/93 (ECtHR, 28 March 2000), Para 115.

45 *E. and Others v United Kingdom*, Appl no 33218/96 (ECtHR, 26 November 2012), para 99.

46 *Hirsi Jamaa and Others v. Italy [GC]*, App no 27765/09 (ECtHR, 23 February 2012), para 131; M.S.S. v Belgium and Greece [GC], para 314.

47 F.G. v. Sweden, no. 43611/11, §126; Hirsi Jamaa and Others v. Italy, §§ 131-133, M.S.S. v. Belgium and Greece [GC], § 366

48 In 2016 in the EU on average 98,3% of the applications for international protection were granted. In 2017 this was 94,3%. In Be lgian this was 96%, in 2016 and in 2017 this was 92,3 % of the applications. Source EUROSTAT, accessed on 10 Augustus 2018.

49 UNHCR, Vulnerability Assessment of Syrians in Lebanon, 16 December 2016, p.13; Amnesty International, Lebanon: Amnesty International regrets Lebanon's decision to overturn its open border policy towards refugees and refusal to address discrimination against women and migrants, 17 March 2016, Index number: MDE 18/3658/2016;

50 *El Masri, v. "the former Yugoslav Republic of Macedonia" [GC], App. no. 39630/09 (ECtHR, 13 December 2012), para 198. Isaak v Turkey*, App. No. 44587/98, (24 June 2008), para. 119; *Ilascu and Others v Moldova and Russia*, App. no. 48787/99, (ECtHR, 8 juli 2004), para 331 and *a contrario Azemi v Serbia*, App. no. 11209/09, (ECtHR, 5 November 2013) para 47, Als see Wouter, p. 315 "[...] if the individual finds himself within the diplomatic mission of a State party, that State may have the

was the case in *El Masri*, when the State authorities hand over an individual who is within its jurisdiction, to the authorities of another state, knowing that the individual faces a real risk of ill-treatment following transfer. The Court concluded that "the Macedonian authorities knowingly exposed him to a real risk of ill-treatment and to conditions of detention contrary to Article 3 of the Convention" while Macedonia did not seek any assurances from the US to avert the risk of the applicant being ill-treated.

14. In this regard the Court has recognised asylum seekers as a "particularly underprivileged and vulnerable" group in society and has held that they require "special protection" under Article 3.[51]As such the Court has held that Contracting States are obliged to abstain from any action which would prevent people from accessing procedures for determining their protection needs.[52] Under Article 3 States are prohibited from rejecting a person in need of protection who finds himself at the State's border.
15. The HRC has also set out similar obligations, under the ICCPR, as it has stressed that there may be circumstances in which a failure to ensure Covenant rights as required by article 2 of the Covenant would give rise to violations by State Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures.[53] The HRC has stated that "the State party must not only refrain from violating an individual's rights itself, but it must also protect an individual from a violation of his or her rights by third parties, be they private individuals, corporations, or other non-State actors. This may well require positive action by the State party, for example by establishing an appropriate legislative and policy framework and devoting sufficient resources to their effective implementation."[54] In the *Mohammed Munaf* case the HRC affirmed that "a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction"[55] The key question was whether the risk itself could be considered "a necessary and foreseeable consequence […] judged on the knowledge the State party had at the time".[56]
16. The IACtHR has found that under the principle of *non-refoulement* the State has specific obligations towards individuals that have asked for protection at a diplomatic representation including the individualised assessment of the risk and the adequate means of protection.[57] In this regard, the IACtHR recalled that it is not sufficient that States abstain from causing a violation of the said principle, but it is imperative that they adopt positive measures and added that States must [undertake] all the necessary means to protect individuals in the event of a real risk to their life, integrity, liberty, or security if they were sent back.[58]
17. Furthermore, it is relevant that under the international law of state responsibility, as reflected in the International Law Commission (ILC) articles on State Responsibility[59], the responsibility of the States is engaged for wrongful conduct where it co-operates in situations of gross or systematic violations of norms of peremptory international law, and fails to take positive, co-operative action by lawful means to bring such situations to an end.[60] It is submitted that positive obligations under Article 3 of the Convention should be interpreted in light of these

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obligation to allow his presence or, in order to secure effective protection from refoulement, may even have the obligation to enable him to travel to the territory of the State party".

51 *Tarakhel v. Italy, App. no. 29217/12*, (ECtHR, 4 November 2014) Para 118. Also see *M.S.S. v. Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), para 251. *Jabari v. Turkey* no 40035/98 (ECtHR, 11 July 2000), para 50; *Abdolkhani and Karimnia v. Turkey*, App. no 30471/08 (ECtHR, 22 September 2009), para 108.

52 *Hirsi Jamaa and Others v. Italy [GC]*, App no 27765/09 (ECtHR, 23 February 2012).

53 General Comment 31, CCPR/21/Rev1/add.13, para 7: "Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations." and para 8: " There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

54 Human Rights Commitee, factsheet no 15.

55 Para.14.2

56 Para.14.2

57 The Court formulated it as: " host States under whose jurisdiction the person falls who had requested protection in diplomatic headquarters have the obligation to adopt positive measures regarding an individualized evaluation of risk, such as the opportunity of a personal interview or a preliminary evaluation of the risk of refoulement, as well as the obligation to adopt adequate means of protection, including those against arbitrary detention. Thus, States must arbitrate all the necessary means to protect persons in the event of a real risk to their life, integrity, liberty, or security if they were sent back. Similarly, since the legal status of the person cannot stay in limbo or be prolonged indefinitely, States must adopt measures which expedite suitable safe passage, which is why the Court recalled that the duty of cooperation between States in the promotion and observance of human rights is an erga omnes norm."

58 Inter-American Court of Human Rights, Advisory opinion on the institution of asylum and its recognition as a human right in the Inter-American system of protection, 30 May 2018, OPINIÓN CONSULTIVA OC-25/18, para 194-197.

59 International Law Commission.

60 Articles 40 and 41 ILC Articles.

principles, and may therefore in certain circumstances imply an obligation to allow individuals within the extra-territorial jurisdiction of the state to access a procedure to obtain a visa in order to protect them from another State's gross or systemic failure to meet peremptory norms of international human rights law.

18. Article 14 of the Universal Declaration of Human Rights recognises the right "to seek and enjoy in other countries asylum from persecution". Article 33 of the 1951 Refugee Convention obliges States to desist from expelling or returning "a refugee in any matter whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular group or political opinion" *(emphasis added)*. The principle of *non-refoulement* contained in Article 33 has extraterritorial effect. Under this provision individuals will come within the jurisdiction of the State when individuals are under the effective control of a State or are affected by those acting on behalf of the State wherever this occurs.[61] Both Article 14 of the Universal Declaration of Human Rights and Article 33 of the 1951 Refugee Convention can entail a *de facto* duty to admit a refugee when this is the only means of avoiding an impermissible consequence of exposure to persecution.[62] It is exactly that act of exposing an individual to the risk of ill-treatment that engages the responsibility of the State under Article 3 of the Convention, within its jurisdiction, whether excised on the territory or extra-territorially.[63] Conduct of non-admittance of an individual in need of international protection without an effective opportunity given to apply for protection may thus constitute constructive *refoulement* under international law. A good faith understanding of the duty of *non-refoulement* requires states to provide reasonable access and opportunity for a protection claim to be made. In this regard it is noteworthy that at least sixteen European states have or have had schemes in place for the issuance of visa for asylum related purposes.[64] Such schemes generally do not entail access to a full fledged asylum-procedure outside the territory, but they do allow for a *prima facie* assessment of the international protection claim consequently permitting the applicant to travel to the territory of that State with the purpose of facilitating access to the asylum procedure in the territory of that State. Spain is one of the States that has such a scheme in law. The Court asked a number of questions about this scheme during the hearing in the *N.D and N.T.* case. The representative of the Spanish government suggested such a visa as a way to have in place a form of orderly migration.[65]

19. **The interveners submit State responsibility may thus be engaged when refusing treatment of a visa application, in circumstances where the State is or ought to be aware that applicant if returned faces a real risk of serious Convention human rights violations, in the absence of available alternatives that would prevent such outcome.**

II.b. Procedural guarantees

20. Under this Court's case law in application of the principle of *non-refoulement*, the assessment of whether there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment contrary to Article 3 in the destination country first requires the decision-maker to examine the conditions in that country in the light of the standards elaborated by the Court under Article 3 of the Convention.[66] Specifically, this should be done, through an "independent and rigorous scrutiny" of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3.[67] Initially it is in principle for the applicant to adduce evidence "capable of proving" that such substantial grounds exist.[68] It is however ultimately, the duty of the decision-maker to "assess the issue in the light of all the material placed before it and, if necessary, material obtained of its own motion".[69] Where evidence "capable of proving" such risk is adduced, "it is for the Government to dispel any

61 Lauterpacht and Bethlehem, . 'The scope and content of the principle of non-refoulement', (June 2003), p.111.
62 J. C. Hathaway, The rights of refugees under international law (2005), p. 301.
63 *Cruz Varas and Others v Sweden*, App. No. 15576/89, (ECtHR, 20 March 1991), para. 76.
64 *Ulla Iben Jensen*, Study for the Libe Committee, Humanitarian visas: option or obligation, p.41.
65 Article 38 of Organic Law 12 of 2009, amended 2014. The regulatory decree governing the more detailed conditions and procedures for such applications had not yet been implemented.
66 *Mamatkulov and Askarov v. Turkey* [GC], no 46827/99 and 46951/99 (ECtHR, 4 February 2005), para 67; *F.G. v Sweden* [GC] no. 43611/11, (ECtHR, 23 March 2016), para 112.
67 *Jabari v Turkey*, App. No 40035/98, (EctHR, 11 July 2000), para 39; S*ufi and Elmi v. UK*, App nos 8319/07 11449/07, (ECtHR, 28 June 2011) para 214; *Chahal v. UK* no. 22414/93 (ECtHR, 27 June 1995), para 96; *Saadi v. Italy*, App no. 37201/06 (ECtHR, 28 February 2008), para 128, *M.S.S. v. Belgium and Greece*, para 293; *Abdolkhani and Karimnia v. Turkey*, App. no. 30471/08 (ECtHR, 22 September 2009), para 108.
68 *Sufi and Elmi v UK*, App. nos 8319/07 11449/07, (ECtHR, 28 June 2011) para 214.
69 *N v. Finland*, App. no .38885/02 (ECtHR, 26 July 2005), para 160; *Hilal v. UK*, app. no 45276/99 (ECtHR, 6 March 2001), para 60; *Vilvarajah and Others v. UK* no. 45/1990/236/302-306 (ECtHR 26 September 1991), para107.

doubts about it".[70] The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the contested act or omission. Where the situation in the receiving state is such that the responsible State can be deemed to have constructive knowledge of it, it is under a duty to act taking that information into account.[71] The assessment must focus on the foreseeable consequences of the return of the applicant to the country of destination and "[t]his in turn must be considered in the light of the general situation there as well as the applicant's personal circumstances".[72] It is the responsibility of the State whose action or omission results in the individual being exposed to a treatment contrary to Article 3, to ensure respect for the principle of *non-refoulement*.[73] It should be noted that when asylum seekers are involved, this Court recognises that the 'benefit of the doubt' on the credibility of statements and documents provided is often necessary "owing to the special situation in which [they] often find themselves".[74]

II.c. Absolute nature of Article 3 ECHR obligations

21. The Court has repeatedly emphasised the absolute nature of Article 3 of the Convention underlying that the seriousness of the prohibition provided therein. "[...] **does not allow for any exceptions or justifying factors or balancing of interests...**"(*emphasis added*).[75] In *Saadi v Italy* the Court specifically held that, with regard to the absolute nature of Article 3, it is incompatible with the Convention to draw a distinction between treatment inflicted "[….] directly by a signatory State and treatment that might be inflicted by the authorities of another State". It expressly rejected the argument "that protection against this later form of ill-treatment should be weighed against the interests of the community as a whole".[76] In the *Hirsi Jamaa* case the Court also reiterated that a situation of large influx of migrants as well as an economic crisis could not absolve Contracting States from discharging their obligations under Article 3. In the *M.S.S.* case the Court ruled that "States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions".[77] Considerations of the possible number of people that might avail of a means of protection thus cannot be used as a justification for limiting the protection of the Convention.
22. Other human rights organs have used similar reasoning. The HRC held that torture, cruel and inhuman or degrading treatment "can never be justified on the basis of a balance to be found between society's interest and the individual's rights under article 7 of the Covenant".[78]

23. **The interveners submit that to comply with their obligations under the Convention, Contracting States are prohibited from refusing to issue visas to travel to their territory when requested by those who have an arguable claim that he or she is at real risk of an Article 3 violation in a third State. This is particularly the case if no other legal route to safety exists and where if denied such visas, refusal would leave the applicants at a real risk of exposure (whether directly or indirectly) to violations of Article 3 in the third State and the Contracting State from which the visa is requested <u>has (or ought to have) knowledge</u> of the risks in question. The visas issued should allow the applicants to access the asylum determination procedure on the territory of the requested Contracting State.**

III. Specific guarantees with regard to children

24. Under the Court's established case law children and asylum seekers are recognised, each in its own right, as forming a vulnerable group. This Court has recognised in particular that children are among the "most vulnerable

70 *N. v. Sweden, App.* no. 23505/09 (ECtHR, 20 July 2010), para 53; *R.C. v. Sweden,* App. no. 41827/07 (ECtHR, 9 June 2010), para 50.
71 *Mamatkulov and Askarov v. Turkey* [GC], nos 46827/99 and 46951/99, para 69.
72 *Sufi and Elmi v UK,* App. Nos. 8319/07 11449/07, (ECtHR, 28 June 2011) para 216; *Vilvarajah v UK,* para 108.
73 *Sharifi and Others v. Italy and Greece, App.* no. 16643/09 (ECtHR, 21 October 2014), para 232, reminiscent of the principles of M.S.S. v. Belgium and Greece [GC], App. no 30696/09 (ECtHR, 21 January 2011), paras 338-343 and *Hirsi Jamaa and Others* [GC], paras 146-148.
74 *R.C. v. Sweden,* App. no. 41827/07, (EctHR, 9 March 2010), para 50.
75 *Gäfgen v. Germany*, App. No. 22978/05, (ECtHR, 1 June 2010), para. 107.
76 *Saadi v Italy [GC]*, App no 37201/06, (ECtHR, 28 February 2008), para 138.
77 *M.S.S. v. Belgium and Greece*, [GC], App. No. 30696/09, (ECtHR, 21 January 2011), para. 216.
78 HRC Concluding observations of the Human Rigths Committee, Canada, UN Doc. CCPR/C/CAN/CO/5, 20 April 2006, para 15.

persons in society."[79] Where children are also seeking asylum that vulnerability is thus necessarily heightened. The Court defines asylum-seeking children as being in a condition of extreme vulnerability.[80] Respect for this enhanced vulnerability must be a primary consideration, taking precedence over the irregular migration status of children and/ or of their parents.[81]

25. The Court considers that what constitutes prohibited treatment under Article 3 depends in some situations on the sex, age and health of the victim. In cases involving children the effects of certain acts or omissions can reach the threshold required for a breach of Article 3 of the Convention to arise even where in the same circumstances this threshold is not reached in the case of adults.[82] Moreover States are required to provide for heightened and targeted procedural obligations in relation to migrant and asylum seeking children.
26. The UN Convention on the Rights of the Child (UNCRC) and other international treaties[83] oblige States to provide specific safeguards and guarantees for the protection and care of children and acknowledge children's specific vulnerability and the extreme vulnerability of children in migration. In this regard the Court has consistently held that the Convention does not exist in a vacuum and States remain bound by their obligations under international law when implementing the Convention.[84] In this respect, particular importance should be given to the obligations stemming from the UNCRC when applying the Convention to children. Article 22 and 37 of the UNCRC both contain the principle of *non-refoulement*. The principle that the best interests of the child shall be a primary consideration in all actions concerning children is a fundamental interpretive legal principle, a substantive right and a rule of procedure under international law on the rights of the child.[85] This principle is established in Article 3(1) UNCRC and applies to public or private social welfare institutions, including migration authorities, who must assess and be guided by the principle in all their acts.[86] The Committee on the Rights of the Child (CRC) has stated that migrant children should be "treated first and foremost as children" and should be regarded as "individual rights holders".[87] The CRC together with Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) has stressed that States parties should: "[…] ensure that the principle of the best interests of the child is appropriately integrated, consistently interpreted and applied through robust, individualized procedures in all legislative, administrative and judicial proceedings and decisions, and in all migration policies and programmes that are relevant to and have an impact on children, including consular protection policies and services."[88]
27. In *Rahimi v. Greece,* when considering the situation of an unaccompanied asylum seeking child in detention, the Court recalled the best interest principle confirming that in all actions relating to children such assessment must be undertaken separately and prior to a decision that will affect that child's life.[89] Independently from the outcome, decisions must clearly reflect the fact that this approach has been followed and an assessment has been carried

79 *Rahimi v. Greece,* App. No.8687/080, (ECtHR, 5 July 2011), para. 87.

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

81 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. no. 13178/03, (ECtHR,12 October 2006), para. 55; *M.S.S. v. Belgium and Greece* [GC], App. No. 30696/09, (ECtHR, 21 January 2011), para. 232.

82 *Muskhadzhieyeva and Others v. Belgium*, App. no. 41442/07, (ECtHR, 19 January 2010), para. 58; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. no. 13178/03, (ECtHR, 12 October 2006), para. 50.

83 Convention on the Rights of the Child (CRC), 20 November 1989, United Nations, Articles 2(1), 22(1) and 39; International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 24; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 10.

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

85 *Rahimi v. Greece,* App. no.8687/080, (ECtHR, 5 July 2011), para. 108.

86 UN Committee on the Rights of the Child (UN CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, pp. 7-9

87 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 ,para 11 and 28-30. Also see Joint General Comment No. 4 of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), and No. 23 (2017) of the Committee on the Rights of the Child, CMW/C/GC/4-CRC/C/GC/23.

88 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 ,para 32.

89 *Rahimi v. Greece,* App. no. 8687/080, (ECtHR, 5 July 2010), para. 108.

out.[90] In the migration context, the principle of the best interest of the child requires the application of a special regime, distinct from that applicable to adults, whereby an assessment of all elements of a child's interests in a specific situation is undertaken.[91]

28. The CRC and CMW, in a joint General Comment, have also stressed that "Access to justice is a fundamental right in itself and a prerequisite for the protection and promotion of all other human rights, and as such it is of paramount importance that every child in the context of international migration is empowered to claim his/her rights. […] All children, including children accompanied by parents or other legal guardians, should be treated as individual rights holders, their child-specific needs considered equally and individually and their views appropriately heard and given due weight."[92]
29. It should finally be noted that the presence of children in migration bears relevance to State's position on the exercise of jurisdiction. Specifically, in its General Comment No. 6, the CRC makes clear that the CRC applies to "those children who come under the State's jurisdiction while attempting to enter the country's territory".
30. **The interveners submit that Article 3 of the Convention read in the light of Article 3, 22 and 37 of the UNCRC requires that the best interests of the child underpin all decisions taken by Contracting States with regard to children, and that Contracting states ensure the child's protection and give separate consideration to the child's interest. These standards apply to decisions on visa applications made by children and their parents at the embassy of a Contracting State.**

IV. The CJEU case of *X. and X* and EU law

31. The interveners submit that with regard to EU Member States responsibilities, the relevant Convention obligations must be interpreted by this Court in a manner consistent with the EU law obligations binding on those States, , as per Article 53 of the Convention.
32. The Court of Justice of the European Union (CJEU) held that issuing visas to a Syrian Christian family seeking to access a Schengen State legally for the purpose of claiming asylum was outside the scope of the Schengen system, thereby entrenching the absence not only in the Common European Asylum System (CEAS) itself but elsewhere in EU law of any legal route for asylum seekers to reach Europe.[93] It laid responsibility for any such access with the national authorities. The Schengen Visa Code being *inapplicable*, EU Member States are thus unconstrained by EU law when issuing or denying visas. The absence of an appropriate visa in EU law does not absolve States from the obligations set out above in the preceding sections. Indeed there is nothing in EU law that prohibits the issuing of a visa to come to seek asylum. Moreover States are bound by their obligations under international law, including international human rights law.
33. The AG *Mengozzi* Opinion, that was not upheld by the CJEU, as the CJEU did not undertake a human rights law assessment of the case, is relevant to the application of this framework, since it is based on an assessment of the EU Charter of Fundamental Rights (EU Charter) as interpreted in light of the Convention.[94] The AG *Mengozzi* made clear that States are required to issue a visa when in light of the specific circumstances of the case there are substantial grounds to believe that a refusal to issue the visa would have a direct consequence of exposing the individuals concerned to treatment prohibited by Article 4 of the EU Charter. An analysis of EU law in light of international law therefore supports the conclusion that States are prohibited from refusing to issue visas to travel to their territory when requested by those who have an arguable claim that he or she is at real risk of an Article 3 violation in a third State.

90 UN CRC, General comment No. 14, paras 6(c) and 14(b).
91 UN CRC, General comment No. 14, para 54.75 -76.
92 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23 (16 November 2017), paras 14 and 15.
93 *X and X v. Belgium*, C-638/16 PPU, (CJEU, 7 March 2017).
94 Opinion of Advocate General Mengozzi, C-638/16 PPU,7 February 2017, paras 139-140.