BEFORE THE GRAND CHAMBER
EUROPEAN COURT ON HUMAN RIGHTS

Ilias and Ahmed v Hungary

Application no. 47287/15

WRITTEN SUBMISSION ON BEHALF OF THE DUTCH COUNCIL FOR REFUGEES (DCR), THE EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) AND THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENERS

pursuant to the Registrar's notification dated 18 December 2017 that the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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8 January 2018

Summary.

I. The interveners submit that in light of well-established principles of international law and this Court's settled case law, a removal that exposes an applicant to the risk of *refoulement* and deprives them of protections under international and EU law, is prohibited regardless of whether the decision was taken on the basis of the safe third country concept or the country was included in a "safe third country" list by the removing Contracting Party.

II. International law requires, *inter alia,* a rigorous scrutiny of the applicant's arguable claim of potential prohibited treatment, access to an effective remedy following a negative decision, and access to the rights under Articles 2- 34 of the Refugee Convention, where the applicant is entitled to those rights.

III. Rigorous scrutiny of whether the country of removal can be considered as a safe third country in light of laws, systems and practices must entail (i) analysis and assessment of up-to-date reports of international and civil society organisations operating in that country and (ii) an assessment of the country's ability to provide procedural and reception guarantees to asylum seekers so that they can benefit from international protection there. There must be a detailed and individualised assessment of whether the country will be safe for those whose removal is contemplated and of any additional vulnerability that applies to them.

IV. Application of the safe third country concept for EU Member States is contingent on the applicant being admitted to the territory and having effective access to a fair asylum procedure in the safe third country. By virtue of EU law a meaningful connection must exist between the applicant and the third country making it reasonable for the applicant to go there and apply for international protection. Neither mere transit nor a simple entitlement to entry without actual previous presence constitutes a meaningful link. The applicant must also have an effective opportunity to rebut the presumption of safety in his or her individual circumstances, access to an effective remedy with automatic suspensive effect and access to free legal assistance and representation in accordance with Article 47 EU Charter of Fundamental Rights.

V. An assessment of whether restrictions on the freedom of movement of migrants, imposed in a border or international zone, amount to deprivation of liberty under Article 5 ECHR must be based on the impact of these measures on the individuals concerned. The existence of procedural safeguards, and migrants' particular dependence on support, information and legal advice should be taken into account in this assessment. The possibility of travel to another state, entailing a risk of serious violations of human rights either in that state or by onward *refoulement* from it, should not be considered relevant to the assessment.

VI. Lawful detention that provides protection from arbitrariness for the purposes of Article 5.1.f ECHR requires sufficiently precise and foreseeable provision in national law in conformity with EU law safeguards rather than a de facto arrangement based on "an elastically interpreted provision of the domestic law".[1] It requires a formal decision providing a legal basis for detention in the individual case, through a process which considers alternatives to detention, and due process safeguards, including access to a lawyer and to an effective remedy to challenge detention.

I. The principle of *non-refoulement* under international law, the absolute nature of Article 3 ECHR and the concept of a safe third country (STC).

1. The principle of *non-refoulement* under the ECHR and general international law entails an obligation not to transfer (*refouler*) people where there are substantial grounds for believing that they face a real risk of serious violations of human rights - including of the right to life, freedom from torture or ill-treatment, flagrant denial of justice or the right to liberty[2] - in the event of their removal, in any manner whatsoever, from the State's jurisdiction. It applies both to transfers to a State where the person will be at risk (direct *refoulement*), and to transfers to States where there is a risk of further transfer to a third country where the person will be at risk (*indirect refoulement*).[3] This principle is absolute and no derogations are permitted either in law or in practice.[4]
2. Convention jurisprudence has repeatedly affirmed that although the right to asylum under refugee law is not *per se* protected in the Convention or its Protocols,[5] the wider principle of *non-refoulement* is essential in

[1] Ilias and Ahmed, App. No. 47287/15, paras. 67 – 68 Chamber judgment.
[2] Othman (Abu Qatada) v. the United Kingdom, App. No. 8139/09, (17 January 2012), paras. 233, 258 -261; N.A. v. the United Kingdom, App. No. 25904/07, (17 July 2008); Soering v. the United Kingdom, App. No. 14038/88, (7 July 1989), Series A. no. 161.
[3] 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.
[4] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 **(Annex 1)**; Adel Tebourski v. France, UNCAT, CAT/C/38/D/300/2006, 11 May 2007, paras. 8.2 – 8.3 **(Annex 2)**. UN Human Rights Committee, General comment no. 31 [80]. 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 **(Annex 3).**
[5] Salah Sheekh v. the Netherlands, op. cit., para. 135.

order to protect 'the fundamental values of democratic societies'[6] and is well established in the case-law of this Court.[7]

3. The Contracting Parties obligations under Article 3 ECHR are engaged in the migration context where substantial grounds have been shown for believing that the individual concerned would be exposed to a real risk of treatment contrary to Article 3 upon removal from the Contracting Parties' jurisdiction.[8]
4. The assessment of the risk entails seven elements. The first is an evaluation of the conditions in the receiving country against the standards of Article 3 of the Convention".[9] Second, the assessment must be rigorous.[10] Third, it is in principle for the applicant to adduce evidence capable of establishing the existence of a real risk under the classic Soering test.[11] Fourth, the decision-maker must assess the risk in light of all the material placed before it and, if necessary, material obtained *proprio motu*.[12] Fifth, where evidence capable of proving such risk is adduced, it is for the Government to dispel any doubts raised by it.[13] Sixth, where the situation in the receiving state is notorious so that the removing state has or ought to have constructive knowledge of it, the latter is under a duty of enquiry, to verify that a person will be safe before removal.[14] Seventh, the assessment must focus on the foreseeable consequences of the removal of the applicant to the country of destination, which must be considered in light of both the general situation and the applicant's personal circumstances.[15]
5. In order for prohibitions of *non-refoulement* to be practical and effective and not theoretical and illusory,[16] Contracting Parties must have effective systems for identifying people within their jurisdiction who need protection under the prohibition of *refoulement*.[17] They must also have a fair and efficient national asylum procedure in place which complies with the requirements of an effective remedy.[18]
6. The obligation of *non-refoulement* under Article 3 extends to both preventing deliberate harm by state agents and protecting against removal to face living conditions amounting to ill-treatment. As the Court put it in *Sufi and Elmi:*[19] "the responsibility of the state under Article 3 might be engaged in respect of treatment where an applicant, who was wholly dependent on state support, found himself faced with local indifference in a situation of serious deprivation or want incompatible with human dignity".
7. The obligation of *non-refoulement* also extends to removal to a state where there is a real risk of onward *refoulement* to face serious violations of Convention rights. This Court has reaffirmed that the fact that an applicant might fail to describe the risks faced, as a result of the lack of an asylum system in the country of removal, does not exempt the sending State from complying with its obligations under Article 3 of the ECHR.[20] It is the responsibility of the State in charge of the transfer to carry out a rigorous examination to ensure that the destination state complies with its international obligations in relation to the protection of refugees and the principle of *non-refoulement* in particular.[21]
8. In assessing obligations of *non-refoulement* relating to living and detention conditions and asylum system deficiencies in Greece in light of Article 3 the Grand Chamber in *MSS* found that the Belgian authorities knowingly exposed the applicant to conditions that amounted to degrading treatment when transferring him to Greece as the conditions in question were well known before his transfer and freely ascertainable from a number of sources.[22] The Grand Chamber reiterated that the applicant should not be expected to bear the

[6] Chahal v. the United Kingdom, App. No. 22414/93, [GC] (15 November 1996), para. 96; Vilvarajah and Others v. the United Kingdom, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, (30 October 1991), para. 108.
[7] Soering v. the United Kingdom, op.cit, paras. 35-36, 88-91.
[8] Hilal v. the United Kingdom, App. No. 45276/99, (6 March 2001), para. 59; Ahmed v. Austria, App. No. 29564/94, (17 December 1996), paras. 38-41.
[9] Sufi and Elmi v UK, App. Nos. 8319/07, 11449/07, (28 June 2011), para. 213; Mamatkulov and Askarov v Turkey, App. Nos. 46827/99, 46951/99, (4 February 2005), para. 67.
[10] Sufi and Elmi v UK, op. cit, para. 214; Chahal v UK, op. cit., para. 96; Saadi v Italy, App. No.37201/06, (28 February 2008), para.128.
[11] Sufi and Elmi v UK, op. cit., para. 214.
[12] N v Finland, App. No. 38885/02, (26 July 2005), para. 160; Hilal v UK, op. cit., para. 60; Vilvarajah and Others v UK, op. cit., para. 107; F.G. v Sweden, App. No. 43611/11, (23 March 2016), para. 117.
[13] F.G. v Sweden, op. cit., para. 120.
[14] Sufi and Elmi v UK, op.cit., para. 214.
[15] Sufi and Elmi v UK, op. cit., para. 216; Vilvarajah v UK, op. cit., para.108.
[16] Arctico v. Italy, App. No 6694/74, (13 May 1980), para. 33.
[17] Hirsi Jamaa and Others v. Italy, App. No. 27765/09, (23 February 2012), para. 202.
[18] Sharifi and Others v. Italy and Greece, App. No. 16643/09, (21 October 2014), para. 174.
[19] Ibid, para. 279.
[20] Hirsi Jamaa and Others v. Italy, App. No. 27765/09, (23 February 2012), para 157.
[21] Sharifi et Autres c. Italie et Grece, Requête No. 16643/09, (21 October 2014), para. 232
[22] M.S.S. v. Belgium and Greece [GC], op. cit., paras. 366 – 367.

entire burden of proof and it was up to the Belgian authorities not merely to assume that the applicant would be treated in conformity with the Convention standards but to verify how the Greek authorities applied their asylum legislation in practice.[23]

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

II. Serbia, FYROM and Greece as safe third countries.

10. An automatic application of the safe third country concept, including to **Serbia, FYROM** and **Greece,** pose risks capable of breaching *non-refoulement* obligations.
11. **Serbia**, a country with deficient asylum and reception systems,[24] automatically considers all its neighbouring countries safe except Albania.[25] This list, established by Governmental Decree in 2009,[26] has never been revised even in light of well-known case law such as the ECtHR's judgment in *MSS.*[27] The UN High Commissioner for Refugees (UNHCR)[28] will not consider Serbia safe for asylum seekers unless and until it, *inter alia*, puts in place appropriate mechanisms for the designation and review of safe third countries and applies the safe third country concept only when adequate safeguards are in place for every individual, ensuring that they would be readmitted to the territory of the safe third country and have their asylum claim examined in a fair and efficient procedure. The assessment of the Belgrade Centre for Human Rights (BCHR) is that these recommendations have not yet been fulfilled.[29]
12. Numerous and credible reports highlight routine returns from Serbia to the Former Yugoslav Republic of Macedonia and Bulgaria; refusals to issue certificates of having expressed the intention to seek asylum to persons whose certificate expired or was stolen; and denial of access to the asylum procedure to asylum seekers returned from Hungary.[30] Between September and December 2016, the BCHR received 13 complaints concerning collective expulsions or push-backs to FYROM involving approximately 750 persons. The Macedonian Young Lawyers' Association (MYLA) reported that more than 400 people had been pushed back from Serbia between 12 and 16 October 2016. In the first six months of 2016, 14 persons who were likely in need of international protection (from Afghanistan, Libya, Syria, Iran and Somalia) were returned to third countries such as Greece, Lebanon, United Arab Emirates (UAE), and Turkey.[31] Very recently, on 25 December 2017, the Serbian authorities extradited Kurdish political activist Cevdet Ayaz to Turkey, his country of origin, while his asylum proceedings in Serbia were still ongoing and despite an interim measure by the UN CAT.[32]
13. The situation in **FYROM** has also raised concerns regarding the adequacy of its asylum and reception systems. In 2015 UNHCR concluded that the FYROM had not been able to ensure that asylum seekers have access to a fair and efficient asylum procedure. Those who did manage to get access to the asylum procedure were confronted with a lack of (adequate) interpretation and systematic identification of persons with specific

[23] Ibid, paras. 352, 359.
[24] See ELENA/EDAL desk research on the procedural and reception system for asylum seekers in Serbia for the situation in Serbia in 2016 **(Annex 4);** ECRE, AIDA Reports 2016 and 2017 **(Annexes 5 and 6).**
[25] BCHR, Right to Asylum in the Republic of Serbia 2014, 2015, p. 33-37 **(Annex 7)**; BCHR, Right to Asylum in the Republic of Serbia 2016, 2017, Forthcoming **(Annex 8).**
[26] Decision Determining the List of Safe Countries of Origin and Safe Third Countries, Official Gazette of the Republic of Serbia, no. 67/2009 **(Annex 9)**.
[27] AIDA, Country Report, Serbia 2016, updated in 2017, p. 27 **(Annex 6).**
[28] UNHCR, Serbia as a country of asylum: Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia, August 2012, p. 12. (**Annex 10).**
[29] BHCR, Right to asylum in the Republic of Serbia – periodic report for July – September 2016, October 2016, p. 15-20 **(Annex 8).**
[30] Ibid **(Annex 8).**
[31] ECRE, AIDA, Country Report Serbia 2016, p. 16 **(Annex 6).**
[32] BHCR, Press Release, December 2017 **(Annex 11).**

needs, including children. Decisions were often inadequately reasoned and rarely based on the merits.[33] The European Commission criticized the quality of the asylum procedure and noted that "the asylum recognition rate remains low, and the Administrative Court continues to process asylum appeals largely on procedural rather than substantive grounds, leading to long delays and repeat appeals".[34] These findings[35] led UNHCR to conclude that FYROM does not meet international standards for the protection of refugees and does not qualify as a safe third country and that States should refrain from sending asylum seekers there until further improvements have been made, in accordance with international standards.[36]

14. The challenges in the asylum and reception system in **Greece** that led this Court to find violations of the Convention in *MSS* still remain. The Committee of Ministers of the Council of Europe in its decision of June 2017 relating to the status of the execution of the *MSS* group, six years after the delivery of the judgment, still invited the Greek authorities, *inter alia*, to improve conditions of detention in all facilities where irregular migrants and asylum seekers are detained, provide adequate health-care services and address the detention of children as a matter of priority. In its 'Recommendations for Greece in 2017', issued in February 2017, UNHCR stated that progress had been made but significant challenges relating to registration and asylum processing still had to be addressed by the authorities.[37] In addition, the number of available reception places needed to guarantee an adequate standard of living in line with EU and international law standards remains far short of meeting the accommodation needs of asylum seekers entering the country.[38]

III. *Non-refoulement* and procedural rights under Articles 3 and 13 ECHR and other international law provisions.

15. This Court has consistently held that the obligation of the State Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures to ensure that all individuals within their jurisdiction are not subjected to ill-treatment.[39] Positive obligations on the State include ensuring access to effective remedies and reparation for any violations. 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 including asylum seekers, unaccompanied children and families with children, the elderly, the sick and injured and persons with disabilities,[40] irrespective of whether national authorisation to enter the territory has been granted.[41] States have an obligation to enable those who wish to identify themselves as seeking asylum to do so[42] and to permit them access to determination procedures with all the procedural safeguards required by national law,[43] and by EU law where that law is applicable, including access to information, legal aid and access to effective remedies.
16. This Court has found a close and rigorous scrutiny of arguable[44] claims in *non-refoulement* cases to be an integral part of protecting an individual's rights under Articles 3 and 13 ECHR.[45] This requires the Contracting Parties, *inter alia,* to assess all evidence at the core of a *non-refoulement* claim,[46] including, where necessary, to obtain such evidence *proprio motu*; not to impose an unrealistic burden of proof on applicants or require

[33] UNHCR, UNHCR observations: The former Yugoslav Republic of Macedonia as a country of asylum, August 2015 **(Annex 12).**
[34] EC staff working document for the Former Yugoslav Republic of Macedonia, report, 2015, 10 November 2015 **(Annex 13).**
[35] Also relevant in 2017: MYLA, On the Efficiency of the Legal Protection of Human Rights in FYROM, p. 30 – 36 **(Annex 14)**
[36] UNHCR, UNHCR observations: The former Yugoslav Republic of Macedonia as a country of asylum, August 2015, **(Annex 12)**; MYLA, Annual report on immigration detention in Macedonia 2016, January 2017 and mid-year report on immigration detention in Macedonia, January- June 2017 **(Annex 15)**; Helsinki Committee for Human Rights of the Republic of Macedonia, Refugees rights: National and International Standards Opposite the Situation on the Field, 16 January 2017, **(Annex 16).**
[37] CoE Committee of Ministers, 1288th meeting (June 2017) (DH), M.S.S: Status of Execution, **(Annex 17.)**
[38] Fifth Joint Submission of the ICJ and ECRE to the Committee of Ministers of the Council of Europe in the case of M.S.S. v. Belgium and Greece (Application no. 30696/09) and related cases, March 2016, **(Annex 18).**
[39] Hirsi Jamaa and Others v. Italy, App. No. 27765/09, (23 February 2012), paras. 70, 114.
[40] Muskhadzhiyeva and Others v. Belgium, App. No. 41442/07, (19 January 2010); Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, App. No 13178/03, (12 October 2006).
[41] *Mutatis mutandis* Saadi v. the United Kingdom [GC], App. No 13229/03 (29 January 2008), para.66; Mohamad v. Greece, App. No. 70586/11, (11 December 2014), para. 44.
[42] Hirsi Jamaa and Others v. Italy, op.cit.
[43] Kebe and Others v. Ukraine, App. No. 12552/12, (12 January 2017), para. 104.
[44] This Court has noted that in order to be arguable the right in question must not necessarily be violated and does not require certainty, but rather the claim must not be so weak that it would not be admissible under the ECtHR. Diallo v. Czech Republic, App. No 20493/07, (28 November 2011), paras. 59 -71.
[45] Jabari v. Turkey, App. No. 40035/98, (11 July 2000), paras. 39, 50.
[46] Ibid, paras. 39-40; Singh and Others v. Belgium, App. No. 33210/11, (2 October 2012), para. 104.

applicants to bear the entire burden of proof;[47] to take into account all relevant country of origin information materials originating from reliable and objective sources;[48] and to apply the principle of the benefit of the doubt in light of specific vulnerabilities of asylum seekers.[49]

17. To comply with Article 3 safeguards, individuals must be told, in simple, non-technical language that they can understand, the reasons for their expulsion, and the process available for reviewing or challenging the decision.[50] For the information to be accessible, it must be presented in a form that takes account of the individual's level of education. Accessible legal advice and aid may be required for the individual to fully understand his or her circumstances.
18. Individuals at risk of prohibited treatment under the Convention have a right to an effective remedy which is capable of reviewing and overturning the decision to expel,[51] including when it is based on the safe third country concept. Any remedy must be effective in practice as well as in law, rather than theoretical and illusory and cannot be unjustifiably hindered by the acts or omissions of the authorities.[52] This Court's jurisprudence highlights a number of obstacles that may render the remedy against prohibited treatment under Article 3 ineffective, *inter alia*, removing the individual before he or she had the practical possibility of accessing the remedy;[53] the obligation for a remedy to have suspensive effect;[54] excessively short time limits in law for submitting the claim or an appeal;[55] insufficient information on how to gain effective access to the relevant procedures and remedies;[56] obstacles in physical access to and/or communication with the responsible authority;[57] lack of (free) legal assistance and access to a lawyer;[58] and lack of interpretation.[59]
19. Similarly, under the *International Covenant of Civil and Political Rights* (ICCPR)[60] and the *UN Convention agaist Torture* (UNCAT),[61] States have an obligation to follow procedural safeguards to ensure that the right to a remedy remains effective in practice. These include the possibility to independently review and scrutinise any complaint made by a person where there are substantial grounds for fearing a real risk of torture, inhuman or degrading treatment or punishment.[62] In cases of *non-refoulement* to a risk of torture or ill-treatment, the absolute nature of the rights engaged further strengthens the right to an effective remedy and means that the decision to expel must be subject to close and rigorous scrutiny.[63]
20. *The UN Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* affirm that States should take appropriate legislative, administrative and other measures to prevent violations and to investigate them effectively, promptly, thoroughly and impartially.[64] States also have an obligation to provide available, adequate, effective, prompt and appropriate remedies to victims of violations of international human rights law and international humanitarian law, including reparation.
21. The Committee against Torture has observed that the right to an effective remedy for a breach of the Convention underpins the entire Convention, otherwise its protections would be rendered largely illusory. In the Committee's view, the prohibition on *refoulement* contained in Article 3 should be interpreted as

[47] M.S.S. v. Belgium and Greece, op.cit., paras. 344-359; Hirsi Jamaa and Others v. Italy, op.cit., paras. 122-158.
[48] Salah Sheekh v. the Netherlands, No. 1948/04, Judgment of 11 January 2007, para. 136.
[49] M.A. v. Switzerland, App. No. 52589/13, (18 November 2014), para.55.
[50] Hirsi Jamaa and Others v. Italy, op. cit., para. 204; Čonka v. Belgium, App. No. 51564/99, (5 February 2002), para. 44.
[51] Shamayev and Others v. Georgia and Russia, App. No. 36378/02, (12 April 2005), para. 460; M.S.S. v. Belgium and Greece, op. cit.; Čonka v. Belgium, op. cit., paras.77-85.
[52] Čonka v. Belgium ECtHR, op. cit, para. 46, 75.
[53] Shamayev and Others v. Georgia and Russia, App. No. 36378/02, (12 April 2005), para. 460; Labsi v. Slovakia, App. No. 33809/08, (15 May 2012), para. 139.
[54] Baysakov and others v. Ukraine, App. No. 54131/08, (18 February 2010), para. 74; M.A. v. Cyprus, ECtHR, Application no. 41872/10, (23 July 2013), para 133.
[55] I.M. v. France, App. No. 9152/09, (14 December 2010), para. 144; M.S.S. v. Belgium and Greece, App. No. 30696/09, [GC] (21 January 2011), para. 306.
[56]Hirsi Jamaa and Others v. Italy, op. cit., para. 204.
[57] Gebremedhin v. France, App. No. 25389/05, (26 April 2007), para. 54; I.M. v. France, App. No. 9152/09, (14 December 2010), para. 130; M.S.S. v. Belgium and Greece, App. No. 30696/09, [GC] (21 January 2011), paras. 301 - 313.
[58] M.S.S. v. Belgium and Greece, App. No. 30696/09, [GC] (21 January 2011), para. 319; *mutatis mutandis* N.D. and N.T. v. Spain App. Nos. 8675/15 and 8697/15, (3 October 2017), para. 118.
[59] Hirsi Jamaa and Others v. Italy, App. No. 27765/09, [GC] (23 February 2012), para. 202.
[60] International Covenant on Civil and Political Rights,16 December 1966, United Nations, Treaty Series,vol. 999, p. 71 **(Annex 19).**
[61] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, **(Annex 1)**
[62] Agiza v. Sweden CAT no. 233/2003, 20 May 2005, para. 13.7 **(Annex 20)**; Alzery v. Sweden, CCPR/C/88/D/1416/2005, UN Human Rights Committee (HRC), 10 November 2006, para. 11.8 **(Annex 21**).
[63] Council of Europe: Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 5. **(Annex 22).**
[64] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147 **(Annex 23).**

encompassing a remedy for its breach, even though it may not contain a right to such a remedy at face value. The nature of *refoulement* is such that an allegation of a breach of that Article relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in Article 3 requires an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that Article 3 issues arise.[65]

22. **The interveners submit that disregarding country reports and other evidence submitted by applicants and imposing an unfair and excessive burden of proof on individuals concerned; lack of interpretation in a language applicants understand; lack of access to clear information provided with due regard to vulnerabilities and educational level; lack of access to a lawyer; and lack of access to effective remedy with a jurisdiction of *ex nunc* examination of the case, all render access to rights under Articles 3 and 13 of the Convention ineffective, theoretical and illusory.**

IV. The concept of Safe Third Country, refugee law and other standards and mechanisms.

23. This Court's jurisprudence recognizes that Convention rights are not applied in a vacuum,[66] but are to be interpreted in the light of and in harmony with other international law standards and obligations,[67] including under treaty and customary international law.[68] The Convention relating to the Status of Refugees and the 1967 Protocol (RC)[69] is particularly relevant to the Court's determination of the present case.
24. Whereas the RC does not provide for an unfettered right of refugees to choose their host state, no obligation to apply in the first country reached after fleeing their country of origin can be derived from international refugee law. According to UNHCR, the primary responsibility to provide protection rests with the State where asylum is sought. UNHCR EXCOM Conclusion No 15 (XXX) calls on States to take asylum seekers' intentions as to the country in which they wish to request asylum "as far as possible into account", while "regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State".[70]
25. While each State Party to the RC has a responsibility to examine refugee claims made to it,[71] States may send asylum seekers to countries which can be considered safe, provided that their return is in line with their obligations under RC and in particular the principle of *non-refoulement* under Article 33.[72]
26. UNHCR, domestic judiciaries, and scholars have expressed the view that a State may only send an asylum seeker to a country where he or she will be granted protection "comparable" or "equivalent" to that to which he or she is entitled to in the sending state, including **all obligations imposed by the RC under Articles 2 - 34**.[73] The sending State must also satisfy itself that the receiving State interprets refugee status in a manner that respects the true and autonomous meaning of the refugee definition set by Article 1 of the Convention.[74]
27. UNHCR has reiterated that the application of the safe third country concept requires an individual assessment of whether the previous state will readmit the person; grant the person access to a fair and efficient procedure for determination of his or her protection needs; permit the person to remain; and accord the person standards of treatment commensurate with the RC and international human rights standards, including protection from

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[65] Agiza v. Sweden, op. cit., paras. 13.6 – 13.7 **(Annex 20).**
[66] Öcalan v. Turkey [GC], App. No. 46221/99, (12 May 2005), para. 163.
[67] Demir and Baykara v. Turkey [GC], App. No. 34503/97, (12 November 2008), para. 67; Al-Adsani v. UK [GC], App. No. 35763/97, (21 November 2001), para. 55.
[68] Al-Adsani, op cit; Waite and Kennedy v Germany, [GC] no. 26083/94, (18 February 1999); Taskin v Turkey, App. No. 46117/99, 10 November 2004.
[69] The 1951 Convention relating to the Status of Refugees, 189 United Nations Treaty Series 137, entered into force 22 April 1954 (hereafter the Refugee Convention); as amended by the Protocol Relating to the Status of Refugees, 606 United Nations Treaty Series 267, entered into force 4 October 1967 (the Protocol or 1967 Protocol). **(Annex 24).**
[70] UNHCR, Refugees Without an Asylum Country No. 15 (XXX), 1979, Executive Committee 30th session, United Nations General Assembly Document No. 12A (A/34/12/Add.1), paras. (a), (iii), (iv). **(Annex 25).**
[71] Background Note on the Safe Country Concept and Refugee Status Background Note on the Safe Country Concept and Refugee Status EC/SCP/68, UNHCR, 26 July 199, para. 16**, (Annex 26).**
[72] EXCOM Conclusions No. 15 (XXX) of 1979 on refugees without an asylum country and No. 58 (XL) of 1989 on the irregular movement of asylum-seekers, in Compilation of Conclusions Adopted by the Executive Committee on the International Protection of Refugees: 1975-2004, **(Annex 27).**
[73] Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State, Michelle Foster University of Melbourne Law School, 2007, pp. 233, 264 – 265**, (Annex 28).**
[74] University of Michigan Law School, The Michigan Guidelines on Protection Elsewhere, 3 January 2007, p. 4, **(Annex 29)**; Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, UNHCR, 23 March 2016. p. 2, **(Annex 30).**

refoulement.[75] Where she or he is entitled to protection, a right of legal stay and a timely durable solution are also required.[76]

28. Moreover, UNHCR has highlighted that where the STC concept is applied an individual asylum seeker should be given an opportunity within the procedure to rebut the presumption that she or he will be protected and afforded the relevant standards of treatment, in a previous State based on his or her circumstances.[77]
29. Similarly, in the John Doe et al case, the Inter-American Commission on Human Rights (IACHR) found that Canada was in violation of Articles XXVII (on the right to asylum) and XVIII (on the right to a fair trial) of the American Declaration on Human Rights, as a result of Canada's application of its "direct-back policy" to three individuals who, having arrived into Canada from the US, were removed back to the US. The IACHR concluded that "every Member State has the obligation to ensure that every refugee claimant has the right to seek asylum in foreign territory, whether it be in its own territory or a third country to which the Member State removes the refugee claimant. To the extent that the third country's refugee laws contain legal bars to seeking asylum for a particular claimant, the Member State may not remove that claimant to the third country. […] [T]he Member State must conduct an individualized assessment of a refugee claimant's case *[…]. If there is any doubt as to the refugee claimant's ability to seek asylum in the third country, then the Member State may not remove the refugee claimant to that third country".* [78]
30. **The interveners submit that a return that exposes applicants to the risk of *refoulement*, and deprives them of rights guaranteed by international law, including full access to rights under the Refugee Convention (Articles 2 – 34) and procedural guarantees violates Contracting States' international obligations regardless of whether the third country is listed as a 'safe third country'.**

V. The concept of STC under EU law.

31. 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.[79]
32. The EU Charter of Fundamental Rights (CFR)[80] 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 Article 47 (right to an effective remedy and to a fair trial). As the CFR forms part of EU primary legislation, instruments of secondary EU law and the provisions of the recast Asylum Procedures Directive (rAPD),[81] governing the STC concept under the *EU asylum acquis* must be interpreted in line with it.
33. For EU Member States, the STC concept is primarily regulated under Article 38 rAPD. While this provision is optional under EU law, those EU Member States, who chose to apply it[82] must comply with the number of guarantees set out, *inter alia*, in Articles 38, 6 and 10 rAPD. In particular, they must assess the safety of the STC taking into consideration the applicant's specific circumstances.[83] Such individual examination requires a rigorous assessment of evidence in line with Article 10(3)(b) rAPD, as well as an assessment of the existence of a "sufficient" connection between the applicant and the safe third country concerned on the basis

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[75] 1951 Convention relating to the Status of Refugees, Article 33, op. cit. (Annex 23); UNHCR Executive Committee Conclusion No. 6(XXVIII) (1977) **(Annex 31)**; UNHCR Note on the Principle of Non-Refoulement, November 1997, **(Annex 32**). Protection from refoulement also includes protection from torture and other cruel, inhuman or degrading treatment or punishment; risks to life, or to deprivation of liberty without due process as developed under international human rights law.

[76] UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, paras. 12 to 16, **(Annex 33).**

[77] Ibid, para. 13

[78] John Doe et al v. Canada, Report N. 78/11 – Case 12.586, Inter-American Commission on Human Rights (21 July 2011) para 128. **(Annex 34).**

[79] 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.

[80] Council of the EU, Charter of Fundamental Rights of the European Union (2007/C 303/01),14 December 2007, C 303/1, **(Annex 35)**

[81] Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2003] OJ L 326/13 **(Annex 36)**.

[82] A considerable number of Member States have chosen not to transpose into national law or make use of one or more of the 4 safe country concepts. See with regard to the safe third country and first country of asylum concepts, AIDA, Admissibility, responsibility and safety in European asylum procedures, September 2016, and with regard to the safe country of origin concept. ECRE, "Safe countries of origin": A Safe Concept?" September 2015 **(Annex 37).**

[83] Dutch Council of State, 13 April 2017, ECLI:NL:RVS:2017:3378, para, 2.2 **(Annex 38).**

of which it would be reasonable for that person to go to that country and apply for international protection there. The latter is implied in the obligation under Article 38(2)(a) and (c) rAPD to have rules requiring such connection and the possibility for the applicant to challenge the existence of such a sufficient connection.[84] The existence of a "sufficient" connection cannot be derived from mere transit through a third country or entitlement to entry without actual presence.[85]

34. To this end, the situation in the STC shall be such as to ensure that: '(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/EU; (c) the principle of *non-refoulement* in accordance with the Geneva Convention [RC] is respected; (d) the prohibition of removal, in violation of the rights [under - among others – Article 3 ECHR and 4 CFR] is respected; and (e) the possibility exists to request refugee status and if found to be a refugee receive protection in accordance with the [RC]'. The rules governing the designation of a country as a STC must be laid down in national law in line with the criteria under Article 38(3) rAPD. Member States are under an obligation to apply the criteria and procedural safeguards relating to the safe third country concept in the rAPD in all types of asylum procedures, including those operated at the border or in transit zones.[86]

35. **The interveners submit that an EU Charter compliant interpretation of the STC concept under EU law requires that guarantees must be provided in each individual case that the applicant will be treated in accordance with the following principles in the safe third country concerned: (1) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (2) there is no risk of serious harm as defined in Directive 2011/95/EU, (3) the principle of *non-refoulement* in accordance with the Refugee Convention and international human rights law is respected; (4) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention, meaning ratification and observance in practice of the 1951 Convention and the 1967 Protocol, and (5) there is access to effective remedy within the meaning of Article 47 CFR.**

VI. The nature of deprivation of liberty.

36. It is well established in the jurisprudence of this Court that a deprivation of liberty under Article 5 ECHR is defined, not simply by reference to the classification defined by national law, but in light of the reality of the restrictions imposed on the person concerned.[87] This includes the type of restrictions imposed; their duration; their effects on the individual and the manner of implementation of the measure.[88] It is the cumulative effect of the restrictions imposed, taking into account the particular circumstances of the affected person, which is to be assessed in determining whether he or she has been deprived of liberty.[89]

37. In the migration context, therefore, persons placed in facilities classified as a "reception", "holding" or "accommodation" centres, even if not defined as detained under national law, may be considered to be deprived of their liberty under Article 5 ECHR due to the nature of the restrictions on their freedom of movement.[90] These principles apply equally to measures in international zones at points of entry to a State, which have been found to amount to deprivation of liberty under Article 5 in a number of cases.[91] The UN

[84] Recital 44 rAPD.
[85] UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23 March 2016, p. 6. (**Annex 30**); Dutch Council of State, 13 April 2017, ECLI:NL:RVS:2017:3381, para. 6.1. **(Annex 40).**
[86] Article 3(1) and Article 43 rAPD.
[87] Amuur v. France, ECtHR, App. No. 17/1995/523/609, (20 May 1996), para. 42; Abdolkhani and Karimnia v. Turkey, App. No. 30471/08, (22 September 2009), paras. 125-127; Ashingdane v. United Kingdom, App. No. 8225/78, (28 March 1985), paras. 42,127.
[88] Amuur v. France, op. cit., para 42.
[89] Guzzardi v. Italy, App. No.7367/76, 6 November 1980), para. 93. Similar principles are applied by the UN Human Rights Committee under Article 9 ICCPR. See Celepli v. Sweden, CCPR, Communication No. 456/1991, Views of 26 July 1994, **(Annex 41).**
[90] Abdolkhani and Karimnia v. Turkey, op.cit., para. 12, Amuur v France, op. cit., para. 43; Riad and Idiab v. Riad and Idiab v. Belgium, App. Nos. 29787/03 and 29810/03, (24 January 2008), para. 68.
[91] Amuur v. France, op cit, para. 43; Riad and Idiab v Belgium, op. cit., para.68; Shamsa v Poland, App. No.45355/99, (27 November 2003), para. 47; Nolan and K v Russia, App. No.2513/04, (12 February 2009), paras.93-96. The CPT Standards, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CoE Doc. CPT/Inf/E (2002) 1 - Rev. 2010, Strasbourg, December 2010 ("CPT Standards"), pages 53-54**. (Annex 42).**

Human Rights Committee has similarly considered that restrictions imposed in international zones, such as in airports, may amount to deprivation of liberty under Article 9 ICCPR.[92]

38. The *UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* recognises that regardless of the name given to a place of detention, the important question is whether an asylum seeker is being deprived of liberty *de facto*.[93] Detention can take place at land and sea borders, in the "international zones" at airports, and extraterritorially.
39. The availability of support, information, advice, and other procedural safeguards necessary to overcome restrictions on freedom of movement, is relevant to an assessment of whether there is deprivation of liberty. In *Amuur v France*, it was a factor in the Court's finding that the applicants had been deprived of their liberty in the international zone of an airport that they were not provided with legal or social assistance by the authorities and that they had no access to judicial review of the restrictions imposed on them. The Court stressed that measures restricting freedom of movement must not deprive asylum seekers of the protection afforded by the RC.[94]
40. This Court has consistently ruled that a person held in an international zone may be deprived of their liberty despite the fact that they are free to leave for their country of origin or a third country.[95] In *Amuur v. France,* the Court noted that the possibility of removal to a third country "becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in."[96] **Indeed, in the submission of the interveners, the right to liberty would be illusory if it could only be exercised by travel to another state entailing a risk of serious violations of Convention rights, either in that state or as a result of onward *refoulement*.**

VII. Detention in accordance with the law and protection against arbitrariness.

41. The requirement of Article 5.1 that detention should be in accordance with law has its foundation in principles of the rule of law, legality and protection against arbitrariness.[97] To be in accordance with law, detention must have a clear legal basis in national law, and must follow a procedure prescribed by law.[98] It must also conform to any applicable norms of international law.[99]
42. In European Union Member States, EU law, specifically the instruments of the Common European Asylum System (CEAS) as interpreted in light of the EU Charter of Fundamental Rights (CFR) regulate the detention of asylum seekers and is directly binding in the national law of those States, under Article 291 TFEU. EU law in this field should therefore be interpreted as constituting "national law" with which an EU Member State must comply in order for detention to be lawful.[100] Detention which is contrary to the standards or procedures prescribed by EU law is likely to be arbitrary.[101]
43. The recast Reception Conditions Directive (rRCD) permits the detention of asylum seekers only on the six grounds listed, the assessment of which must adhere to the requirements of **necessity and proportionality**.[102]The recast RCD states that detention must be a measure of last resort and only applied after an assessment of the effectiveness of less coercive alternative measures.[103] Asylum seekers must not be held in detention for the sole reason that they are seeking asylum.[104] Detention must be ordered in writing stating the reasons in fact and in law on which it is based.[105] The recast RCD also provides for the right to judicial review of detention[106] and the right to free legal aid and representation in regard to such review.[107] The judicial review of asylum seekers detention must comply with the guarantees provided for in Article 47 CFR (right to an effective remedy and to a fair trial).[108]

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[92] Human Rights Committee General Comment on the right to Liberty, HRC GC No 35 on Article 9 (Liberty and Security of the Person) CCPR/C/GC/35,16 December 2014, para.5. (**Annex 43).**
[93] UNHCR Guidelines on guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention, 2012, Terminology, para. 7, **(Annex 44).**
[94] Ibid, paras. 43 and 45.
[95] Amuur v France, op. cit., para. 48; See also Riad and Idiab, op. cit., para 68.
[96] Ibid, para. 48.
[97] Medvedyev v France [GC], App. No.3394/03, (29 March 2010), para.80; Louled Massound v Malta, op. cit., para.61.
[98] Louled Massound v Malta, op. cit., para.61
[99] Medvedyev v France [GC], App. No.3394/03, (29 March 2010), paras.79 – 80.
[100] Suso Musa v Malta, App. No.42337/12, (23 July 2013), para.97.
[101] Suso Musa v Malta, op. cit., para.97.
[102] Case C-528/15 Al Chodor, 15 March 2017, paras 39-40**, (Annex 45)**
[103] Recast Reception Conditions Directive, Article 8(2), **(Annex 46**), Case C-18/16 K., 14 September 2017, para. 44 **(Annex 47)**
[104] Recast Reception Conditions Directive, Recital 15 and Article 8.
[105] Recast Reception Conditions Directive, Article 9(2).
[106] Recast Reception Conditions Directive, Article 9(4).
[107] Recast Reception Conditions Directive, Article 9.
[108] Article 47 of the CFR codified the EU law acquis on effective judicial protection, bringing the right to an effective remedy (Article 13 ECHR) and that to a fair trial (Article 6(1) ECHR), under the same provision. The explanations to the CFR **(Annex 48)** in relation to its

44. **The Court of Justice of the European Union** (CJEU) in *Al Chodor*[109] supports the need for a clear and specific legislative basis for asylum detention. In that case the CJEU, interpreting provisions for detention under the Dublin III Regulation **held that a clear law of general provision establishing the objective criteria on which asylum seekers could be detained was required as a legal basis for detention, and that "settled case-law confirming a consistent administrative practice […] cannot suffice". The Court of Justice stressed that detention must be "subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness".**
45. Article 5.1 ECHR further requires that the law governing detention must be of sufficient quality to avoid arbitrariness, and must be accessible, reasonably precise and foreseeable in its application.[110] The requirement of accessibility has special implications for laws affecting non-nationals, including asylum seekers, given the particular difficulties they may encounter in accessing information or understanding the law. These characteristics are of fundamental importance with regard to asylum seekers in international, transit or border zones in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies.[111]
46. For detention related to immigration control to be free from arbitrariness, as required by Article 5.1.f, it must be carried out in good faith; be closely connected to a permitted ground; the place and conditions of detention must be appropriate and the length of detention must not exceed what is reasonably required for the purpose pursued.[112] Procedural safeguards, including an effective remedy to contest the lawfulness of detention, are also essential to the prevention of arbitrariness. In *Louled Massoud v Malta*, for example, in the absence of an effective remedy, or of other procedural safeguards, the detention of the applicant was found to be arbitrary under Article 5.1.[113]
47. The interveners stress that an effective judicial review of detention in accordance with Article 5.4, clearly prescribed by law and accessible in practice, is an essential safeguard against arbitrary detention, including in the context of immigration control. Access to legal aid and advice is important in ensuring the accessibility and effectiveness of judicial review, as has been noted by the Court in *Suso Musa v Malta*[114] and the absence of provision for legal assistance in law or in practice should be taken into consideration in assessing both the arbitrariness of detention under Article 5.1.f and the adequacy of judicial review under Article 5.4.[115]
48. Furthermore, in light of applicable EU law, international law and standards, prevention of arbitrary detention requires consideration of less intrusive alternatives to detention, before detention is imposed. The Court has required, for example, that such alternatives be sought in order to avoid arbitrary detention of child migrants in violation of Article 5.1.f (*Popov v France*[116]) and has acknowledged the particular vulnerabilities of all asylum seekers in detention.[117] Consideration of less intrusive alternatives to detention for the purposes of immigration control is also required in order to protect against arbitrary detention under Article 9.1 ICCPR (*C v. Australia,*[118]) as well as under UNHCR Guidelines on Detention (Guideline 4.1).[119] The Council of Europe's *Twenty Guidelines on Forced Return* establish a general principle that alternatives to detention of migrants should be considered first (Guideline 6).[120]
49. **In light of the obligations of EU Member States under EU law, including the recast Reception Conditions Directive, and Article 53 ECHR, the interveners submit that detention of asylum seekers falling within the scope of that Directive will be unlawful and arbitrary where it fails to make clear and accessible legislative provision for the permissible grounds of detention, or for procedural protections for detainees, including judicial review and access to legal advice. Detention will be arbitrary where it is not a measure of last resort, but is imposed without consideration of less onerous alternative measures.**

Article 47(2) make it expressly clear that the standards and requirements of Article 6(1) ECHR apply in the interpretation of its provisions. Article 47 applies in full to matters of EU law, including migration and asylum.

[109] C-528/15 Al Chodor, 15 March 2017, paras 39-40.

[110] Del Rio Prada v Spain [GC], App. No.42750/09, (21 October 2013), para.125, Amuur v France, op cit, para. 50.

[111] Amuur v France, op cit, para.50.

[112] Saadi v UK, op. cit, para. 74; Yoh-Ekale Mwanje v Belgium, op cit paras. 117-119.

[113] Louled Massoud v Malta, Application no.24340/08, (27 July 2010).

[114] Ibid, para. 61.

[115] Account should also be taken of the UNHCR Detention Guidelines which provide for a range of procedural safeguards, including access to legal advice and judicial review; Guideline 7**, (Annex 44).**

[116] Popov v France, App. No.39472/07, (19 January 2012), paras.119-121

[117] M.S.S. v Belgium and Greece, op. cit., para. 232.

[118] C. v. Australia, UN Human Rights Committee, Communication No. 900/1999, Views of 13 November 2002, para. 8.2. **(Annex 49).**

[119] UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, Guideline 4.1, (**Annex 44**).

[120] The Council of Europe's Twenty Guidelines on Forced Return, Guideline 6, **(Annex 22).**