Application No. 14165/16

Sh.D and others
v
Greece, F.Y.R.O.M., Austria, Hungary, Slovenia, Croatia and Serbia

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WRITTEN SUBMISSIONS ON BEHALF OF STATEWATCH AS THIRD PARTY INTERVENER

A. Introduction

1. These written submissions are presented on behalf of Statewatch, hereinafter "the Intervener", pursuant to the grant of permission of the President of the First Section of the Court notified in a letter dated 6 July 2016 and addressed to Statewatch by the Section Registrar.

2. Statewatch is a registered UK charity comprised of lawyers, academics, journalists, researchers and community activists across the EU. A core charitable purpose is to monitor decisions taken at state and EU level to implement justice, home affairs and migration policies which impact on civil rights and liberties by documenting factual developments on the ground, publishing journalistic articles, and conducting critical research on this range of topics. Statewatch has been reporting extensively on the refugee crisis in the Mediterranean, with a particular emphasis on the situation in Greece. Statewatch staff and Trustees have visited the centres and camps of Pipka, Moira and Kara Tepe in Lesvos over the past five years where the treatment of unaccompanied and separated asylum-seeking and migrant children has been raised repeatedly in the media, by UN agencies and non-governmental organisations.

3. The Intervener invites this Court to find that:

   (1) The particular vulnerabilities of unaccompanied child asylum seekers, by virtue of both their age and their status as lone asylum seekers, require an evaluation of the compliance or otherwise of the Greek state with Article 3 of the European Convention on Human Rights ('ECHR') in its management of reception facilities and processing of asylum claims by reference to the absolute obligations enshrined in the UN Convention on the Rights of the Child ('UNCRC') including principles of non-discrimination, best interests as a primary consideration, and right of the child to adequate care, standards of living and provisions of the child's psychological, physical health, educational and emotional development. The continued serious deficiencies in the guardianship, reception (and de facto use of detention), protection and processing of claims in respect of unaccompanied asylum seeking children in Greece, as reported by UN and EU agencies and non-governmental organisations, persist at a level of severity incompatible with Article 3, ECHR.

   (2) States party to the decision to close the Western Balkans route knew or ought to have known about the continued serious systemic deficiencies in the Greek state in respect of asylum seekers, and particularly in respect of the reception, guardianship and processing of claims of unaccompanied asylum seeking children. Non-admission at the border along the Balkan and neighbouring states of unaccompanied asylum seeking children seeking access to the territory violates *non-refoulement* obligations under international refugee and human rights law and is incompatible with Article 3, ECHR.

B. Factual Context

4. In a report following his visit to Greece in May 2016, the UN Special Rapporteur on the human rights of migrants observed that Greece is faced with the biggest movement of migrants and refugees in Europe since 1945.[1] In 2015, children made up 28% of more than 850,000 who arrived by sea in Greece.[2] By 2016 (to 7 July 2016), children made up an increasing proportion (39%) of the 163,114 arrivals in Greece by sea.[3] Of those children arriving by sea, 21,706 were unaccompanied.[4]

5. In *MSS v Greece*, No. 3069609, this Court noted *"the particular state of insecurity and vulnerability in which asylum seekers are known to live in Greece"*,[5] finding the reception conditions, the use of detention and the shortcomings in the asylum procedure incompatible with Article 3, ECHR. It did so having regard on the one hand to the applicant's status as an asylum seeker which meant that he was *"a member of a particularly underprivileged and vulnerable population group in need of special protection"* and on the other hand, the Greek authorities' failure to discharge their obligations to provide such protection under the EU Reception Directive (Council Directive 2003/9/EC).[6] On the basis of those findings, this Court also found Belgium's actions in seeking to return the applicant asylum-seeker to Greece for examination of his asylum application incompatible with Article 3, ECHR because they violated its *non-refoulement* obligations.

6. Following *MSS,* EU member states suspended returns of asylum seekers under the 'Dublin Regulation' to Greece. Since then, the situation in Greece has been monitored by the Committee of Ministers of the Council of Europe and by the EU Commission. This Court has, in successive judgments, continued to find violations of Article 3 ECHR in cases concerning the reception and detention conditions at Greek border posts of asylum applicants.[7] On 15 June 2016 the EU Commission concluded that notwithstanding *'the continuous steps taken by Greece to improve its asylum system'*, the shortfalls in the system identified in *MSS* had not been sufficiently remedied to enable resumption of returns to Greece under the Dublin regulation.[8] The findings include:
   - Continued inadequate reception capacity to cope with the high numbers of refugees arriving in Greece which *"fall far short of"* the requirements in the Reception Conditions Directive (recast), 2013/33/EU;[9]
   - Staffing levels for the Asylum Service "*falling far short of*" what is required to manage the current and likely future caseload in an adequate manner;[10]
   - Lack of an appeals authority, thus absence of effective remedies for those refused asylum;[11]
   - Unavailability, in practice, of free legal aid, provided for in Greek law;[12]

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[1] UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece, 16.5.2016

[2] UNHCR's Greece data snapshot (26 December 2015). See also Migration of children to Europe, 30.11.2015, IOM and UNICEF Data Brief

[3] UNHCR's Refugees/ Migrants Emergency Response data for Greece (as at 31 August 2016)/

[4] Greece: Mapping of Unaccompanied Children (UAC): UNHCR Intervention as of 23 August 2016. See also Compilation of Data, Situation and Media Reports on Children in Migration (updated on 11 July 2016) at page 46.

[5] See *MSS v Greece* at paragraphs 259 and 263.

[6] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers in the member States. See *MSS v Greece* at paragraphs 250, 263, 264.

[7] Mohamad v Greece, No. 705861/11, §§58-62; Peers v Greece, No. 28524/95, §§67-68, ECHR 2001 III; Riad and Idiab c Belgium, 29787/03 and 29810/03 our, §97, 24 January 2008; Tabesh v Greece, No. 8256/07, §§34-37; Rahimi v Greece, No. 8687/08, §§ 59 -62; RU v Greece, No. 2237/08, §§54-56; AF v Greece, No. 53701/11, §§68-70; and de los Santos and Cruz v Greece, No. 2134/12 and 2162/12, §43

[8] Commission Recommendation of 15.6.2016, C (2016) 3805, recital (7)

[9] Reception Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). Commission Recommendation of 15.6.2016, C (2016) 3805, recitals (10) and (11)

[10] Commission Recommendation of 15.6.2016, C (2016) 3805, recital (14)

[11] Commission Recommendation of 15.6.2016, C (2016) 3805, recital (7)

[12] Commission Recommendation of 15.6.2016, C (2016) 3805, recital (18)

7. In respect of unaccompanied minors, the EU Commission concluded that there remained a lack of appropriate procedural guarantees and reception conditions, including provision for an efficient guardianship system[13] and places in facilities for this cohort with the consequence of children remaining in de facto detention pending appropriate reception arrangements[14], and lack of access to education.[15] This is consistent with the findings made by the UN Special Rapporteur as to the continuing serious deficiencies in practice for guardianship, the use of de facto detention under 'protective custody' for unaccompanied minors and the lack of intervention by guardians in issues related to the minors' reception conditions and effective access to the asylum system.[16]

8. Current statistics collected by the UN agencies continue to paint a bleak picture of systemic deficiencies. According to UNICEF, in the first 11 weeks of 2016, only 1,156 unaccompanied and separated children had been registered in Greece and that *'unprecedented numbers'* of refugee and migrant children were now *'stranded in Greece'*.[17] The UNHCR reported that as at 7 July 2016, there were only 641 beds available for unaccompanied children. With inadequate reception facilities, children continue to stay either in camps with no contact with any state, UNHCR or NGO personnel[18] or placed temporarily in 'protective' custody in police stations, amounting to de facto detention.[19] Adolescent males (aged 14 – 17) often do not want to be identified as children so as to avoid being put in 'protective custody',[20] which consequently exposes them to a range of risks from lack of access to basic humanitarian support for essential living to exploitation and trafficking by organised criminal gangs. There have been frequent and continued reports of unaccompanied children not receiving regular meals and being harassed and beaten by men in the camps and reception centres.[21] Europol reported that during 2015, some 10,000 unaccompanied children disappeared from reception facilities in countries of first arrival, including significant numbers going missing from Greece.[22]

9. Up until 8 March 2016, when the border between Greece and F.Y.R.O.M. (hereinafter Macedonia) was definitively closed, the vast majority of the refugees and migrants arriving in Greece, including unaccompanied and separated children, continued on their journeys towards other EU countries passing through the Balkans. It is reportedly a result of the desire to reunite with family members or the prospect of receiving support from communities established in another member state, as well as the lack of adequate reception services, impediments to access effective asylum and poor integration prospects in Greece.[23] On 18 November 2016, Macedonia, along with Serbia, Croatia and Slovenia, changed its border management practices and introduced the first in a series of border control measures refusing to admit anyone unless they had papers to prove they originate from Afghanistan, Iraq or Syria.[24] Further steps to stop the flow of migration through the Balkans followed an extended cooperation agreement between the police chiefs of Austria, Slovenia,

[13] Commission Recommendation of 15.6.2016, C (2016) 3805, recital (19)
[14] Commission Recommendation of 15.6.2016, C (2016) 3805, recital (21)
[15] Commission Recommendation of 15.6.2016, C (2016) 3805, recital (21).
[16] UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece, 16.5.2016
[17] *EU asylum applications from lone children quadruple,* 11.4.2016, euobserver.com/investigations/132986
[18] Pro Asyl Report: Greece - Vulnerable lives on hold*,* 28.5.2016, p. 5
[19] Report of the fact-finding mission by Ambassador Tomáš Boček. Special Representative of the Secretary General on migration and refugees to Greece and "the former Yugoslav Republic of Macedonia"
[20] Migration of children to Europe, 30.11.2015, IOM and UNICEF Data Brief. See also Pro Asyl Report: Greece - Vulnerable lives on hold*,* p 17
[21] Pro Asyl Report: Greece - Vulnerable lives on hold*,* p. 9
[22] Fundamental Rights Report, 2016, Asylum and migration into the EU in 2015, p. 21
[23] Amnesty International: Trapped in Greece: An Avoidable Refugee Crisis, 18.4.2016,.
[24] EU/Balkans/Greece: Border Curbs Threaten Rights, 1.3.2016, Human Rights Watch; Trapped in Greece: An Avoidable Refugee Crisis, 18.4.2016, Amnesty International

Croatia, Serbia and Macedonia signed on 18 February 2016[25], which had the practical effect of closing the border between Greece and Macedonia to Afghans whilst Syrians and Iraqis were permitted to enter only if carrying required country of origin documents.[26]

10. On 7 March 2016, the EU heads of State made a joint statement that definitively marked the closure of the Western Balkans route from Greece to non-EU citizens without requisite documentation.[27] The next day no one was allowed to cross the Greek-Macedonian border, leaving refugees stranded in mainland Greece in circumstances where there was already insufficient reception capacity, including basic humanitarian services, to cope with the high numbers of refugees in Greece. The European Commission gave the figure of 57,000 irregular migrants stranded as a result of closure of the Western Balkans route.[28] Attempts by refugees and migrants to cross the border irregularly were met by push back by Macedonian police with Medicins Sans Frontieres (MSF), volunteers on the ground and media recording testimonies of use of teargas and stun grenades to prevent migrants from crossing the border.[29]

11. On 18 March 2016, EU heads of State reached an agreement with Turkey[30] imposing further border restrictions on refugees arriving in Greece from Turkey. Under the EU-Turkey agreement, new "irregular" migrants crossing from Turkey into Greek islands will be returned to Turkey. The 'hotspots' set up on the Greek islands have become detention centres. As a result, UNHCR and MSF withdrew from some of the 'hotspots', not wishing to participate in a system they considered unfair and inhumane.[31]

C. Legal Submissions

(i) Scope of Article 3 as pertaining to unaccompanied and separated child refugees

12. This Court has ruled that Article 3 cannot be interpreted as obliging contracting states to provide everyone within their jurisdiction with a home.[32] Nor does it oblige states to give refugees financial assistance to enable them to maintain a certain standard of living.[33] However, whilst acknowledging these principled rulings by this Court on the scope of Article 3, the Intervener recalls this Court's judgments holding that Article 3 ECHR in conjunction with Article 1 is to provide effective protection, especially children and other vulnerable persons and include reasonable steps to prevent ill-treatment which the authorities had or ought to have known.[34]

13. In *MSS v Greece, supra*, this Court observed that what was at issue in that case in respect of the deficiencies in the Greek asylum system could not be considered in terms identified in *Müslim v. Turkey*.[35] There, the evidence before the Court was that adult asylum applicants were sleeping

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[25] Joint Statement of Heads of Police Services from the Meeting held in Zagreb, Croatia on 18th February 2016

[26] Europe's Refugee Emergency Response Update #24, 19-25 February 2016, UNHCR

[27] Statement of the EU Heads of State or Government (7.3.2016). See also Regional Refugee and Migrant Response Plan for Europe: Eastern Mediterranean and Western Balkans Route, January to December 2016 (Revision May 2016):

[28] European Commission Recommendation of 15.6.2016, C(2016) 3805 final, recital (5)

[29] FYROM police fire tear gas at migrants, 29.2.2016, ekathimerini; See also Report on the Unlawful Pushbacks from FYROM / Macedonia to Greece on 14 March 2016 by Moving Europe; EU/Balkans/Greece: Border Curbs Threaten Rights, 1.3.2016, Human Rights Watch; Europe migrant crisis: Hundreds injured as police tear gas asylum seekers at Macedonian border, 10.4.2016, abc news; *Trapped in Greece: an avoidable refugee crisis* April 2016, Amnesty International, p. 10f

[30] EU-Turkey statement, 18.3.2016, EN Press release 144

[31] *UNHCR, MSF withdraw from Greece's refugee 'hotspots''* 22.3.2016, Al Jazeera

[32] Chapman v the United Kingdom [GC], No. 27238/95, §99, ECHR 2001-I.

[33] *Müslim v. Turkey*, No. 53566/99, § 85, 26 April 2005, and *M.S.S. v Greece,* supra, § 249.

[34] *Rahimi v Greece* at §§60-62, adopting this Court's findings in Mubilanzila Mayeka and Kaniki Mitunga v Belgium, No. 13178/03, § 53, ECHR 2006 XI. Osman v UK, 28 October 1998, § 116, Reports 1998-VIII

[35] Citation at footnote 33 above.

rough, and had no or limited access to sanitary facilities or to the most basic humanitarian provision to meet essential living needs. This Court held that the obligation to provide accommodation and decent material conditions to impoverished asylum seekers had entered into positive law and the Greek authorities were bound to comply with their own legislation transposing European Union law, namely the Reception Directive. What the applicant held against the Greek authorities in the *MSS* case was that, because of their deliberate actions or omissions, it had been impossible in practice for him to avail himself of those rights and provide for his essential needs. In concluding that the systemic deficiencies in the reception conditions and the asylum procedures in Greece were incompatible with Article 3, this Court attached considerable importance to the applicant's status as an asylum seeker, acknowledging that asylum seekers are *"a member of a particularly underprivileged and vulnerable population group in need of special protection."*[36] This Court made this observation noting the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive.

14. The Intervener observes that there has consistently been broad consensus at the international and European level that where children are also seeking asylum, their extreme vulnerability is compounded. It has long been recognised that unaccompanied children *"have often had little or no choice in the decisions that have led to their predicament and vulnerability. Irrespective of their immigration status, they have special need that must be met."*[37] The UNHCR observed that *"children – whether refugees, internally displaced or stateless – are at greater risk than adults of abuse, neglect, violence, exploitation, trafficking or forced recruitment into armed groups."*[38] Moreover *"[f]orced displacement exacerbates children's exposure to neglect, exploitation, and sexual and other forms of violence and abuse. Children are at particular risk and require special attention due to their dependence on adults to survive, their vulnerability and to physical and psychological trauma and their needs that must be met to ensure normal growth and development."*[39]

15. The UN Committee on the Rights of the Child has acknowledged the particular vulnerability of unaccompanied and separated children, owing to their having *"undergone separation from family members and hav[ing] also, to varying degrees, experienced loss, trauma, disruption and violence. Many such children, in particular those who are refugees, have further experienced pervasive violence and the stress associated with a country afflicted by war."*[40] That this cohort of children is entitled to 'special protection and assistance provided by States' is made explicit by virtue of Article 20 of the UN Convention on the Rights of the Child (UNCRC).

16. In view of the absolute nature of obligations deriving from the UNCRC, in the implementation of article 4 of the UNCRC, the particular vulnerability of unaccompanied and separated children must be taken into account and will necessarily result in making the assignment of available resources to such children a priority.[41] The approach to Article 4 UNCRC is also to be governed by a prohibition against any discrimination on the basis of the status of a child being unaccompanied or separated

[36] *MSS v Greece* at §251.
[37] UNHCR Guidelines on Polices and Procedures in dealing with Unaccompanied Children Seeking Asylum, 1997.
[38] UNHCR: A Framework for the Protection of Children, 2012.
[39] UNHCR: Age, Gender and Diversity Policy, 2011.
[40] UN Committee on the Rights of the Child, General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, §§16 and 47.
[41] UN Committee on the Rights of the Child, *General Comment No 6* at §16.

or as being a refugee, asylum-seeker or migrant[42] and by the requirement to consider the best interests of the child as a primary consideration.[43]

17. The UN Committee on the Rights of the Child identified a detailed list of measures necessary for states to satisfactorily discharge of their obligations under the UNCRC toward unaccompanied and separated asylum-seeking children in *General Comment No 6* including: to establish administrative structured need to enable the discharge of both positive and negative obligations under the UNCRC;[44] to set up a functioning asylum system and to *"build capacities necessary"* to provide for the particular needs of unaccompanied asylum seeking children;[45] to "take all necessary measures to identify children as being unaccompanied or separated at the earliest possible stage including at the border";[46] to appoint a guardian for the child as soon as identified as unaccompanied or separated, and to provide a child involved in asylum procedures with a legal representative, free of charge;[47] to provide sufficient protection from violence and exploitation to the *"maximum extent possible"* which would jeopardize a child's right to life survival and development;[48] to ensure arrangement of adequate care, accommodation and support for the child's physical and psychological health and access to educational and vocational opportunities based on individualised assessments of the child's best interests;[49] and to elicit the child's views and wishes in decisions made affecting the child, and to provide the child with all relevant information concerning their entitlements, services and the asylum process to allow for the child to have a well-informed expression of his wishes and views.[50]

18. The same principled approach set out in the UNCRC, and advocated under the General Comment No 6, has been incorporated into EU law. The principle of best interests of the child being a primary consideration is enshrined at Article 24. EU asylum *acquis* implemented in light of the jurisprudence of the Court of Justice of the European Union requires that the best interest of the child underpin all decisions taken with regard to children and that member states must act to ensure the child's protection and care are a primary consideration in decision-making.[51] This is evident from the way the Reception Directive (as recast) articles 8, 9, 11, 24 and 26 and the Procedures Directive (as recast),[52] articles 10, 15, 25 are framed, with recognition of the specific procedural and substantive reception safeguards children require in accordance with their special needs.

19. As to the detention of unaccompanied and separated children, General Comment No 6 states that detention *"cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof."*[53] Detention must be the exception to the rule, rather than the norm, and be used as a *"measure of last resort and for the shortest appropriate period of time."* The Intervener notes that the written submissions made on behalf of the Aire Centre, the European Council on Refugees and Exiles and the International Commission of

[42] Article 2 of the UNCRC; General Comment No 6 at §18.
[43] Article 3 of the UNCRC. General Comment No 6 at §§19-22. See also UN Committee on the Rights of the Child, General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration.
[44] General Comment No 6 at §13.
[45] General Comment No 6 at §64; Article 22 of the UNCRC.
[46] General Comment No 6 at §13.
[47] General Comment No 6 at §§21, 33-38, 69.
[48] General Comment No 6 at §23.
[49] Articles 20, 22-24, 25, 27-29, 39; General Comment No 6 at §§39-41, 44-49.
[50] Article 12, UNCRC; General Comment No 6 §25-.
[51] CJEU, C-648/11, *MA, BT and DA v Secretary of State for the Home Department*, 6 June 2013.
[52] Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).
[53] Article 37, UNCRC; General Comment No 6 at §§61-63.

Jurists to this Court in these proceedings focus on the detention of unaccompanied asylum seeking children and respectfully indicates its agreement with those submissions. The Intervener does not propose to rehearse the same principles well-traversed in those submissions save to invite this Court to observe the explicit distinction drawn between adequate accommodation and detention centres in the Reception Directive (as recasted), the latter not constituting suitable reception facilities.[54]

20. The *lex specialis* character of the UNCRC in aiding the interpretation of the scope of ECHR rights has been acknowledged in this Court's successive judgments. In *Sahin v Germany,* No. 30943/96, this Court said that *"the human rights of children and the standards to which all governments must aspire in realizing these rights for all children are set out in the Convention on the rights of the child."*[55] In successive judgments, most recently in *Tarakhel v Switzerland*, supra and *Rahimi v Greece*, supra, this Court recognised the special position of child asylum seekers who present with specific vulnerabilities and needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The child's dual vulnerabilities as a child as well as an asylum seeker is and should be the decisive factor and takes precedence over considerations relating to the status of illegal immigrant.[56]

21. In *Rahimi v Greece*, the Greek authorities were found to have failed to take appropriate measures to protect and care for the applicant unaccompanied asylum-seeking child which Article 3 ECHR positively obliged the state to do. There the applicant had been wrongly detained as an adult in breach of Articles 3 and 5. This Court considered the circumstances the applicant was found in after release were also degrading and reached the level of severity for a finding of breach of Article 3. In arriving at that finding, this Court observed the finding made in *MSS* as to the vulnerabilities of asylum seekers generally and took particular note of the applicant's extremely vulnerable situation characterised by his young age, his being unaccompanied and lacking any legal status in a strange country and the associated anxieties and anguish of having to be solely reliant on himself.[57]

22. Whilst the Intervener notes that this Court will approach the assessment of a breach of Article 3 by reference to the facts pertaining in individual applications, the court has also held that given the absolute nature of the protection afforded by Article 3, there is a heightened onus on state authorities to evidence, by reference to internal data and data from reliable and objective sources such as UN agencies and reputable non-governmental organisations, that the measures in place for the protection of children and vulnerable persons against torture and inhuman or degrading treatment are effective. In *Rahimi*, and in *Mohamad v Greece*,[58] this Court found that the findings of systemic deficiencies made in *MSS v Greece* and in subsequent judgments of this Court prevailed, with the Greek authorities putting forward no fact or argument capable of contradicting those findings that could lead this Court to reach a different conclusion as to compatibility of the reception facilities and asylum procedures in Greece from that which this Court reached in the other cases.

23. In view of the widely reported continuing serious deficiencies and significant delays in practice for reception (and use of prolonged de facto detention), guardianship and access to asylum processes by UN and EU agencies and non-governmental organisations, the Intervener submits

[54] Articles 8, 9 and 11 of the Reception Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

[55] Sahin at §39. See also *Tarakhel v Switzerland, supra* at 99, referring to Popov v France at §91.

[56] See *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, § 55, ECHR 2006-XI, and *Popov v. France*, nos. 39472/07 and 39474/07, §91, 19 January 2012); Tarakhel v Switzerland, No. 29217/12, §§96-99.

[57] *Rahimi v Greece* at §§87-89.

[58] *Mohamad v Greece* at §§58-62.

that there remains no evidential basis that could lead this Court to reach a different conclusion to that which has prevailed to date, namely that the omissions to date of the Greek authorities in implementing a system of monitoring, supervising, assisting and safeguarding the best interests of unaccompanied asylum-seeking children persist at a level of severity of degrading treatment such as to amount to a breach of the state's obligation under Article 3, ECHR.

(ii) Closure of the Western Balkans Route and non-refoulement obligations engaging Article 3, ECHR

24. It is well established that *"a state has the right to control the entry of non-nationals into its territory"*, but that the exercise of that right is subject to its treaty obligations, including those arising under the ECHR.[59] Thus, *"expulsion, extradition or any other measure to remove an alien may give rise to an issue under article 3, and hence engage the responsibility of the expelling state under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to article 3 in the receiving country. In such circumstances, article 3 implies an obligation not to expel the individual to that country"*.[60]

25. Although reference is made there only to expulsion, extradition or any other measure to remove an alien as potentially giving rise to an issue under article 3, the Intervener submits that the refusal by the state to admit an alien is equally capable of breaching Article 3. Discussion of the principle of non-refoulement expressed in article 33(1) of the 1951 Convention relating to the Status of Refugees (hereinafter 'the Refugee Convention') and its 1967 Protocol relating to the Status of Refugees (hereinafter 'the 1967 Protocol') is relevant in this context.

26. Within the framework of the Refugee Convention, *non-refoulement* constitutes an essential and non-derogable component of international refugee protection. A resolution of the Committee of Ministers of the Council of Europe recommended that governments should *"ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution"* for a Refugee Convention reason (with added emphasis).[61] In a later recommendation the same body said that members states were recommended to *"ensure that the principle according to which no person should be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he has a well-founded fear of persecution"* for a Refugee Convention reason (with emphasis added).[62]

27. The fundamental and non-derogable character of the principle of *non-refoulement* has also been re-affirmed by the Executive Committee of the UNHCR in numerous Conclusions since 1977. In successive conclusions, the Executive Committee has made clear that the non-refoulement obligation prohibits non-admission to as well as expulsion from the territory. For example, No. 22(XXXII) – 1981 said: *"In all cases the fundamental principle of non-refoulement – including non-rejection at the frontier – must be scrupulously observed*." Conclusion No 81 (XLVIII) – 1997 referred to a *"comprehensive approach to refugee protection"* comprising, *inter alia*, *"no rejection*

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[59] *Abulaziz v UK* (1985) 7 EHRR 471, para. 67

[60] *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 at §114; *Saadi v. Italy* [GC], no. 37201/06, at §152, ECHR 2008; *MSS supra* at §365; *Soering v. the United Kingdom*, 7 July 1989, at §§90-91, Series A no. 161; *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, at §103, Series A no. 125; *H.L.R. v. France*, 29 April 1997, § 34, *Reports* 1997-III; *Jabari v. Turkey*, no. 40035/98, at §38, ECHR 2000-VIII; and *Salah Sheekh v. the Netherlands*, no. 1948/04, at §135, ECHR 2007-I.

[61] Resolution (67) 14, Adopted by the Minsters' Deputies on 29th June 1967, Asylum to Persons in Danger of Persecution

[62] Council of Europe Committee of Ministers, Recommendation No R (84) 1 of the Committee of Ministers to Member States on the protection of persons satisfying the criteria in the Geneva Convention who are not formally recognised as refugees

at frontiers without the application of these procedures." Conclusion No 82 (XLVIII) – 1997 referred to *"the need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs."* Conclusion No 85 (XLIX) – 1998 *"strongly deplores the continuing incidence and often tragic humanitarian consequences of refoulement in all its forms … and reiterates in this regard the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining their status and protection needs."* Conclusion No 99 (LV) – 2004 referred to *"non-refoulement, including non-rejection at frontiers without access to fair and effective procedures for determining status and protection needs."* Finally, Conclusion No. 108 (LIX) – 2008 referred to *"current and persistent protection problems of persons of concern, including the rejection of refugees and asylum seekers at frontiers without examination of claims for asylum or safeguards to prevent refoulement."*

28. Goodwin Gill and McAdam said *"the term non-refoulement derives from the French refouler which means to drive back or to repel as of an enemy who fails to breach one's defences"*.[63] Further, *"by and large, states in their practice and in their recorded views have recognized that non-refoulement applies to the moment at which asylum seekers present themselves for entry, either within a state or at its border"*.[64] According to Hathaway, *"where there is a real risk that rejection will expose the refugee in any manner whatsoever to the risk of being persecuted for a Convention ground, article 33 amounts to a de facto duty to admit the refugee, since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk"*.[65] Later, he referred to *"the implied duty to admit refugees under article 33… the right of entry that flows from the duty of non-refoulement is entirely a function of the existence of the risk of being persecuted"*.[66]

29. An explicit *non-refoulement* provision is also contained in Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which prohibits the removal of a person to a country where there are substantial grounds for believing that he would be in danger of being subjected to torture'. Nowak and McArthur said of that provision *"the word 'return' also includes the practice of sending aliens back at the border before having entered the territory of the sending state"*.[67]

30. In respect of children, General Comment No 6 of the UN Committee on the Rights of the Child states that in affording proper treatment of unaccompanied or separated children, states must *"fully respect"* non-refoulement obligations deriving from international human rights, humanitarian and refugee law and, in particular, must respect obligations codified in Article 33 of the Refugee Convention and in Article 3 of CAT. This is echoed in the guidelines produced by the UNHCR in respect of unaccompanied children seeking asylum, which state that *"because of his / her vulnerability, an unaccompanied child seeking asylum should not be refused access to the territory"*.[68] Under EU asylum acquis, the jurisprudence of the CJEU acknowledges the unique position enjoyed by unaccompanied asylum seeking children not to be bound by the strict hierarchy of the Dublin Regulations such that determination of the relevant state's responsibility to examine the child's asylum application must be by reference to a clear, transparent and assessment of the individual child's best interests. A failure to adopt such an approach violates Article 24 of the Charter of Fundamental Rights.[69]

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[63] The Refugee in International Law p. 201

[64] The Refugee in International Law, p. 208

[65] The Rights of Refugees under International Law, p. 301

[66] The Rights of Refugees under International Law, p. 302

[67] The UN Convention Against Torture: a commentary, Nowak and McArthur

[68] UNHCR guidelines on polices and procedures in dealing with unaccompanied children seeking asylum (1997)

[69] *MA and BT v Secretary of State for the Home Department,* supra.

31. Although Article 1, ECHR obliges parties to *"secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention"* and jurisdiction is generally speaking, territorial, this Court has consistently held that the decisive criterion in determining 'jurisdiction' is not whether a person is within the territory of the state concerned, but whether or not, in respect of the conduct alleged, he or she is under the effective control of, or is affected by those acting on behalf of, the state in question. Thus, in a decision in which it examined the circumstances in which the obligations under the ECHR may apply extraterritorially, this Court has held that while from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial, it may extend to acts of its authorities which produce effects outside its own territory'[70] for example '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'.[71] A state whose ships, acting on the high seas so as to prevent asylum seekers reaching its territory and returning them to the country in which there was a risk of treatment in breach of article 3 thereby acted in breach of article 3.[72] Also relevant in the present context is the judgment of this Court in *Issa and Ors v Turkey*, No. 3821/96, 16 November 2004,[73] which confirmed that *"a State may also be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter state …. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate on its own territory."*

32. In the current context, this Court found in *MSS v Greece* that Belgium to have violated its non-refoulement obligations in seeking to return an asylum applicant to Greece where the Belgian state *"knew or ought to have known"* that the applicant had no guarantee that his asylum application would be seriously examined by the Greek authorities, and "by knowingly exposing him" to conditions of detention and living conditions that amounted to degrading treatment.[74] The *MSS* judgment was followed by the judgment of the CJEU in *N.S.* (C-411/10) and *M.E. and Ors* (C-493/10) which concluded that the return of asylum seekers by one member-state to another where there were substantial grounds for believing that there were systemic flaws in the asylum procedure and reception conditions for asylum applicants resulting in inhuman or degrading treatment, the transfer would be a breach of *non-refoulement* obligations.

33. The Intervener therefore submits that while every country has the prerogative to control its borders, action by the Balkan states and neighbouring states to push back at the border or reject refugees and asylum-seekers based on their nationality and without any possibility of claiming asylum or otherwise having their individual circumstances taken into account violates the non-refoulement obligations. The direct consequence of the decision to close the West Balkans route is to knowingly expose individuals – and in particular unaccompanied children, acknowledged to be a most vulnerable category of persons - to *"the risk of proscribed ill-treatment"* [75] in breach of Article 3, ECHR.

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[70] *Al-Skeini v UK* (2011) 53 EHRR 18, §133
[71] *Al-Skeini v UK* at §134
[72] *Hirsi Jamaa v Italy* (2012) 55 EHRR 21
[73] *Issa v Turkey* at §71 with references *inter alia* to decisions of the Human Rights Committee and the Inter-American Commission of Human Rights.
[74] *MSS v Greece* at §§358, 360 and 367.
[75] *Hirsi Jamaa v Italy* at §115.