EUROPEAN COURT OF HUMAN RIGHTS

M.N. and Others v. Belgium

Application no. 3599/18

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

INTERVENERS

pursuant to the Deputy Grand Chamber Registrar's notification dated 13 February 2019 that the President of the Grand Chamber had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

6 March 2019

I. Jurisdiction under Article 1 ECHR and other international instruments

1. It is well established in this Court's case law that individuals fall within a State's jurisdiction, for purposes of the protection of the Convention, when they are on a State's territory, lawfully or otherwise.[1] The Court has additionally recognised that, in a number of situations, jurisdiction under Article 1 of the Convention may extend to **actions by a State** or **the effects produced as a result**, when they occur outside the national territory, including outside the territory of Member States of the Council of Europe.[2]

2. First, the Court has held that jurisdiction is established where a State, acting through its agents, organs, officials, army or local administration exercises **effective control over** territory or **control over individuals** outside its territory.[3] As such, the acts or omissions of agents or organs of the State operating outside a State's territory and affecting individuals have been considered to bring the affected individuals under their authority or control, thus triggering the jurisdiction of the State.[4]

3. Second, the extra-territorial exercise of jurisdiction has been recognised in cases involving the **activities** of a State's **diplomatic or consular agents** abroad, whether or not there has been any effective control over territory or control over individuals, as long as they are exercising State **authority**.[5] To illustrate, the Court has held that "the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law" [6] can amount to jurisdiction where authority is exerted by the State. State authority, as per the Commission's decision in *X. and Y. v. Switzerland*, can also arise where a State is responsible for a procedure and the effects of an act which were produced in a third country.[7] The Commission held that the act undertaken by the Swiss authorities to prohibit the entry of foreign nationals in Liechtenstein had an effect in both Switzerland and Liechtenstein and, as a consequence, brought all affected persons under Swiss jurisdiction within the meaning of Article 1 of the Convention.[8]

4. The decision of consular staff to issue or deny to issue a visa is an example of the State exercising authority. According to Article 5 (d) of the Vienna Convention on Consular Relations, consular functions consist of, *inter alia*, **issuing visas** or other appropriate documents to individuals wishing to travel to the sending State.[9] Such actions are a form of border governance[10] which follow a procedure and have effects on the persons applying for a visa. The fact that, in certain Contracting States, the decision on the merits is made by immigration officers does not alter the fact that diplomatic or consular agents are exercising State authority, hence jurisdiction, when issuing or denying visa applications, which produces effects engaging the enjoyment of Convention rights on the persons concerned.[11] To rule otherwise would mean that there exists an "area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the

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

[2] ibid *Al Skeini and Others*, paras. 133 and 142; *Pad v. Turkey*, App. no. 60167/00 (ECtHR, 28 June 2007), para. 53.

[3] ibid *Al Skeini and Others*, paras. 134 and 138; *Bankovic and Others v. Belgium and Others*, App. no. 52207/99 (ECtHR, 12 December 2001), para. 73; *Ilascu and Others v. Moldova and Russia*, App. no. 48787/99 (ECtHR, 8 July 2004), para. 314; *Treska v. Albania and Italy*, App. no. 26937/04 (ECtHR, 29 June 2006), para. 101.

[4] *Turkey v. Cyprus*, App. no. 25781/94 (ECtHR, 10 May 2001). In *Jaloud v. the Netherlands,* App. no. 47708/08 (ECtHR, 20 November 2014), for instance, the existence of extra-territorial jurisdiction has been recognised when State agents have subjected individuals to checkpoint controls outside the territory of the Contracting State.

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

[6] ibid *Al-Skeini and Others,* para. 134; The ECtHR explicitly refers to: *Bankovic and Others v. Belgium and Others*, App. no. 52207/99 (ECtHR, 12 December 2001), para. 73; *X. and Y. v. Switzerland*, App. nos. 7289/75; 7349/76 (Commission, 14 July 1977): "The Commission first recalls its earlier case law where it has already been established that the Contracting Parties' responsibility under the Convention is also engaged insofar as they exercise jurisdiction outside their territory and thereby bring persons or property within their actual authority or control"; *X. v. Federal Republic Germany*, App. no. 1611/62 (Commission, 25 September 1965), p. 158; *X. v. United Kingdom,* App. no. 7547/76 (Commission, 15 December 1977), p. 73; *M. v. Denmark*, App. no. 17392/90 (Commission, 14 October 1992), p. 193.

[7] *X. and Y. v. Switzerland*, App. nos. 7289/75; 7349/76 (Commission, 14 July 1977), p. 73.

[8] ibid.

[9] Vienna Convention on Consular Relations 1963 (adopted on 24 April 1963, entered into force on March 1967) 596 UNTS 261 (VCCR 1963), art. 5(d).

[10] *M.A. and Others v. Lithuania*, App. no. 59793/17 (ECtHR, 11 December 2018) Concurring Opinion Judge Pinto de Albuquerque, para. 8.

[11] *X. and Y. v. Switzerland*, App. nos. 7289/75; 7349/76 (Commission, 14 July 1977), p. 73.

States have undertaken to secure to everyone within their jurisdiction"[12], in contradiction with the Court's established case law.[13]

5. A Contracting State's control over immigration has to be exercised consistently with Convention obligations.[14] Whilst there is no right for a non-national to enter or remain in a State, immigration applications made by individuals outside a Contracting State's territory have been found to trigger the jurisdiction of the relevant Contracting State.[15] In *East African Asians (British protected persons) v. the United Kingdom*, the Commission implicitly accepted that the jurisdiction of a State could be exercised through the denial of entry to individuals outside the State's territory arguing that the effects or repercussions of denying entry to individuals to a State may cause interference with the rights protected under the Convention.[16]

6. The Commission concluded, as early as 1965, that jurisdiction of a State is obtained within the meaning of Article 1 of the Convention with regard to acts of diplomatic or consular agents. In these cases, it is not determinative whether or not the applicant is a national of the Contracting State, but rather whether the diplomatic or consular agents exercise authority over the person(s) concerned, i.e. in so far as they affect such persons by their acts. In *X. v. Federal Republic Germany*, the Commission held that diplomatic and consular representatives of their country of origin perform certain duties which may make the country liable in respect of the Convention.[17] Subsequently, in *X. v. the United Kingdom,* which concerned a request of a mother residing in the United Kingdom to the British consular authorities in the Kingdom of Jordan to act in order to safeguard the well-being of her daughter, the Commission held that: "even though the alleged failure of the consular authorities to do all in their power to help the applicant occurred outside the territory of the United Kingdom, it was still 'within the jurisdiction', within the meaning of Article 1 of the Convention."[18] In *M. v. Denmark,* the Commission summarised its repeated jurisprudence and made clear that, while embassies are not part of the sending State: "authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged."[19] No additional requirements were set.

7. These situations should be distinguished from the inadmissibility decision *Abdul Wahab Khan v. the United Kingdom,* in which the applicant had voluntarily returned to his country of origin after his leave to remain in the United Kingdom was cancelled.[20] The Court found his complaint concerning Articles 2, 3, 5, and 6 of the Convention inadmissible because the applicant did not "complain about the acts of British diplomatic and consular agents in Pakistan", and therefore the "exceptions to territorial jurisdiction" did not apply.[21]

8. More than one State can have jurisdiction for Convention purposes in respect of situations taking place on the territory of the same State. It is clear that, whenever the State through its agents exercises authority or control over an individual, and thus jurisdiction, the State is under an obligation under Article 1 of the Convention to secure to that individual those rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. It is in this sense that Convention rights can be exceptionally "divided and tailored".[22]

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

9. In view of Article 53 of the Convention, the jurisprudence of other international human rights bodies concerning extra-territorial jurisdiction on the basis of authority or control of either persons or territory, including in relation to consular assistance, is of relevance.

10. The International Court of Justice (ICJ) has repeatedly affirmed, that the body of international human rights treaties elaborated under UN auspices will have extraterritorial application for jurisdictional purposes.[23] In *Armed Activities*

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[12] *Hirsi Jamaa and Others v. Italy* [GC], App. no. 27765/09 (ECtHR, 23 February 2012), para. 178.
[13] *Sargsyan v. Azerbaijan* [GC], App. no. 40167/06 (ECtHR 16 June 2015), para. 148.
[14] *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, App. nos. 9214/80, 9473/81, 9474/81 (ECtHR, 24 April 1985), paras. 59-60. Also see *Haydarie v. the Netherlands,* App. no. 8876/04 (ECtHR, 20 October 2005).
[15] *East African Asians (British protected persons) v. the United Kingdom*, App. no. 440370 (Commission, 14 December 1973), paras. 185-186.
[16] ibid, paras. 185-187.
[17] *X. v. Federal Republic Germany*, App. no. 1611/62 (Commission, 25 September 1965).
[18] *X. v. United Kingdom,* App. no. 7547/76 (Commission, 15 December 1977).
[19] *M. v. Denmark*, App. no. 17392/90 (Commission, 14 October 1992).
[20] *Abdul Wahab Khan v. the United Kingdom,* App. no. 11987/11 (ECtHR, 28 January 2014).
[21] ibid, para. 25.
[22] *Al-Skeini and Others v. the United Kingdom*, App. no. 55721/07 (ECtHR, 7 July 2011), para. 137.
[23] In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras. 108-111, the ICJ found the reading of the HRC to be in accordance with the object and purpose of the treaty as well as the

on the Territory of the Congo, the ICJ held that: "international human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".[24] In the *Provisional Measure in the case of Georgia v. Russian Federation,* the ICJ held: "there is no restriction of a general nature in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) relating to its territorial application (…) the Court consequently finds that these provisions of CERD generally appear to apply **like other provisions of instruments of that nature**, to the actions of a State party when it acts beyond its territory."[25]

11. The ICJ has also specifically endorsed the interpretation by the UN Human Rights Committee (HRC) that the International Covenant on Civil and Political Rights (ICCPR) applies extra-territorially.[26] In General Comment No. 31, the HRC affirmed that: "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. (…) [T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory **or subject to the jurisdiction of the State party**."[27]

12. The HRC has held that a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations on the territory of another State. The risk of an extra-territorial violation must be a **necessary and foreseeable** consequence and must be judged on the **knowledge** the State party had at the time.[28] In this regard, the HRC has also recognised extra-territorial jurisdiction with regard to diplomatic and consular personnel. In *Samuel Lichtensztejn v. Uruguay,* it stated that "the issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is 'subject to the jurisdiction' of Uruguay for that purpose".[29] Other UN bodies have also recognised extra-territorial jurisdiction.[30]

13. In the advisory opinion "The Environment and Human Rights", the Inter-American Court of Human Rights (IACtHR) stated that the jurisdiction of States, in relation to the protection of human rights under the American Convention on Human Rights includes situations beyond its territorial limits.[31] It concluded that: "The concept of jurisdiction under Article 1(1) of the American Convention encompasses any situation in which a State exercises effective authority or control over an individual or individuals, either within or outside its territory".[32] In reaching this conclusion, the IACtHR relied on numerous decisions of the Inter-American Commission[33] as well as case law of this Court.[34] In a recent advisory opinion 'The institution of asylum and its recognition as a human right in the Inter-American system of protection', the IACtHR stressed that receiving States are under the obligations arising from Article 1(1) of the American Convention, as long as they are exercising control, authority or responsibility

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preparatory works; See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, para. 216; Hemme Battjes, 'Territoriality and Asylum Law: The Use of Territorial Jurisdiction to Circumvent Legal Obligations and Human Rights Law Responses, Netherlands Yearbook of International Law 2016' [2017] NYIL 263.

[24] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, para. 216.

[25] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Provisional Measure) [2008] ICJ Rep 353, para. 109 [emphasis added].

[26] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para. 107-113; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, para. 216.

[27] UN Human Rights Committee (HRC), *General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 10 [emphasis added].

[28] *Mohammad Munaf v. Romania*, Com. no. 1539/2006 (HRC, 30 July 2009); *A.R.J. v. Australia*, Com. no. 692/1996 (HRC, 28 July 1997); *Roger Judge v. Canada,* Com. no. 829 /1998 (HRC, 13 August 2003).

[29] *Samuel Lichtensztejn v. Uruguay,* Com. no. 77/1980 (HRC, 31 March 1983), para. 6.1. See also *Delia Saldias de Lopez v. Uruguay*, 52/1979 (HRC, 19 July 1981), para. 12.3.

[30] *J.H.A. v. Spain*, no. 323/2007 (CAT, 21 November 2008), para. 8.2: "In particular, it considers that such jurisdiction must also include situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention. This interpretation of the concept of jurisdiction is applicable in respect not only of article 2, but of all provisions of the Convention"; Joint General Comment No. 4 of UNCMW and No. 23 (2017) of the CRC: "Jurisdiction cannot be limited/excluded in zones or areas subjected to migration control operations, including international waters or other transit zones and can arise in presence of children attempting to enter its territory"; Maastricht ETO principles on Extraterritorial Obligations of States in the Area of Economic,Social&Cultural Rights.

[31] *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights),* Advisory Opinion OC-23/18, IACtHR Series A No 23 (15 November 2017).

[32] ibid, para. 74: "De conformidad con las normas de interpretación de tratados, así como aquellas específicas de la Convención Americana (supra párrs. 40 a 42), el sentido corriente del término jurisdicción, interpretado de buena fe y teniendo en cuenta el contexto, fin y propósito de la Convención Americana señala que no está limitado al concepto de territorio nacional, sino que abarca un concepto más amplio que incluye ciertas formas de ejercicio de la jurisdicción fuera del territorio del Estado en cuestión."

[33] ibid, para. 75.

[34] ibid, para. 79; *Victor Saldaño v. Argentina*, no. 38/00 (Inter-American Commission on Human Rights, 11 March 1999).

over any person, regardless of whether he or she is on the territorial, fluvial, maritime or aerial territory of such State.[35]

14. The obligations established under that Convention are thus applicable to the conduct of diplomatic personnel deployed in the territories of third States, whenever the nexus of personal jurisdiction can be established with the particular person.[36] In this regard, the IACtHR recalled similar jurisprudence by the HRC and the Commission.[37]

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

15. Contracting States are responsible for securing the Convention rights to all those who fall within their jurisdiction under Article 1 of the Convention. This requires States to take all reasonable steps to secure respect for the Convention rights and freedoms.[38] This encompasses both obligations to refrain from acting as well as obligations to act (positive obligations). Moreover the Court has stressed that even in the absence of effective control over a (part of its) territory, that State "still has a positive obligation under Article 1 of the Convention to take the **diplomatic, economic, judicial or other measures** that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention."[39] Thus jurisdiction, and indeed, a "State's responsibility may (…) be engaged on account of acts which have **sufficiently proximate repercussion** of rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction."[40] In this regard the Court has held that States, operating through their agents or organs, can be held liable under the Convention where they do not take the necessary measures to prevent treatment incompatible with the Convention from occurring or have allowed, caused (directly or indirectly), contributed to, or actively facilitated the treatment through their action or inaction.[41]

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

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

17. It is important to note that this Court has consistently held that "the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective".[42] Such an interpretation of the Convention can be seen in the landmark *Soering* case where the Court stressed the absolute nature of Article 3 and its applicability in the context of extradition, when the person would suffer treatment contrary to that Article in the receiving State. The Court held: "It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture".[43] While not explicitly articulated in the general wording of Article 3, the Court inferred from the prohibition contained therein a prohibition to extradite in such circumstances.

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[35] *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18, IACtHR Series A No 25 (30 May 2018), para. 177.
[36] ibid, para. 176.
[37] ibid, paras. 174-175.
[38] *Z. and Others v. the United Kingdom* [GC], App. no. 29392/95 (ECtHR, 10 May 2001), para. 73.
[39] *Treska v. Albania and Italy,* App. no. 26937/04 (ECtHR, 29 June 2006); *Manoilescu and Dobrescu v. Romania and Russia,* App. no. 60861/00 (ECtHR, 3 March 2005), para. 101; *Ilascu and Others v. Moldova and Russia*, App. no. 48787/99 (ECtHR, 8 July 2004), para. 331.
[40] *Ilascu and Others v. Moldova and Russia*, App. no. 48787/99 (ECtHR, 8 July 2004), para. 317-318.
[41] ibid; *El-Masri v. "the former Yugoslav Republic of Macedonia"*, App. no. 39630/09 (ECtHR, 13 December 2012), para. 211.
[42] *Soering v. United Kingdo*m, App. no. 14038/88 (ECtHR, 7 July 1989), para. 87.
[43] ibid, para. 88.

II.I. Positive obligations and the principle of *non-refoulement*

18. The principle of *non-refoulement* is part of general international law, rooted in both treaties and customary international law, with applications both in international human rights[44] and refugee law.[45] Under Article 3 of the Convention, the prohibition of *non-refoulement*, imposes both positive and negative obligations on the State.

19. In respect of negative obligations, Contracting States are primarily obliged to refrain from returning an individual to another State or taking any other measure forcing an individual to return or be transferred to a country where he or she is at a real risk of being subjected to ill-treatment.[46] The principle of *non-refoulement* under Article 3, as under international human rights and refugee law, applies both to transfers to a State where the individual will be directly at risk (direct *refoulement*), and to transfers to States where there is a risk of further transfer to a third State where the individual will be at risk (indirect or chain *refoulement*).[47]

20. In addition, Contracting Parties also have certain *positive obligations* in regard to *non-refoulement* under the Convention. Although the Court has consistently held that "Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens"[48], Contracting Parties' compliance with the principle of *non-refoulement* requires them to have in place effective systems for identifying people within their jurisdiction who are entitled to benefit from that principle.

21. As the Court has consistently held, under Article 1 read in conjunction with Article 3, States must "take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment", including by private persons.[49] State responsibility under Article 3 is therefore engaged when state authorities **fail to take preventive measures** to protect the individual from inhuman and degrading treatment. This includes all steps that the State can reasonably be expected to take to protect individuals, in the case of a particular threat to an individual or a group, from harm to their physical integrity of which it knew or ought to have known.[50] In *Mahmut Kaya,* the Court held: "State responsibility may therefore be engaged where the framework of law fails to provide adequate protection (…) or where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known."[51]According to the Court in *E. v. United Kingdom*, "a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State".[52]

22. In *Hirsi Jamaa,* the Court concluded that the Italian government knew or ought to have known of the treatment suffered by migrants in Libya. In this regard, the Court noted how "that situation was well-known and easy to verify on the basis of multiple sources". It therefore considered that when the applicants were removed, the Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country."[53] Accordingly, asylum claims that are based on a well-known general risk in a country and information about such a risk is freely ascertainable from a wide number of sources, the State's obligations under Article 3 are understood by the Court as requiring States to assess that risk of their own motion.[54]

23. In the light of the well-established responsibility for extraterritorial effects of acts or omissions, the State also has a duty to take reasonable measures in its power to prevent foreseeable risks of torture or inhuman or degrading treatment by officials in other States or by non-State actors. As the Grand Chamber reaffirmed in *El Masri,* State responsibility may therefore be engaged under Article 3 when a State fails to take such measures and as a result of that, the individual is directly or indirectly exposed to a risk of treatment contrary to Article 3 of the Convention

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[44]See e.g. Article 3 ECHR; Article 7 ICCPR and Article 3 CAT.

[45]Article 33 of the 1951 Refugee Convention; Guy S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*' [2011] 23 International Journal of Refugee Law 443, 444; Ministerial Meeting of States Parties to the 1951 Convention and/ or its Protocol relating to the status of refugees, Declaration of States Parties to the 1951 Convention and/ or its Protocol relating to the status of refugees, HCR/MMSP/2001/09, (16 January 2002).

[46]Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009), pp. 29 and 316.

[47]*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.

[48]*Hirsi Jamaa and Others v. Italy* [GC], App. no. 27765/09 (ECtHR, 23 February 2012), para. 113.

[49]*Opuz v. Turkey*, App. no. 33401/02 (ECtHR, 9 June 2009), para. 159.

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

[51]*Mahmut Kaya v. Turkey*, App. no. 22535/93 (ECtHR, 28 March 2000), para. 115.

[52]*E. and Others v. United Kingdom*, App. no. 33218/96 (ECtHR, 26 November 2012), para. 99.

[53]*Hirsi Jamaa and Others v. Italy* [GC], App. no. 27765/09 (ECtHR, 23 February 2012), para. 131; *M.S.S. v. Belgium and Greece* [GC], App. no. 30696/09 (21 January 2011), para. 314.

[54]ibid, *Hirsi* Jamaa, paras. 131-133 and *M.S.S.*, para. 366; *F.G. v. Sweden*, App. no. 43611/11 (ECtHR, 23 March 2016), para. 126.

about which the State knew or ought to have known.[55] This includes State authorities handing over an individual who is within its jurisdiction, to the authorities of another State, knowing that the individual faces a real risk of ill-treatment following transfer.

24. In this regard, the Court has recognised asylum seekers as a "particularly underprivileged and vulnerable" group in society and has held that they require "special protection" under Article 3.[56] As such, the Court has held that Contracting States are obliged to abstain from any action which would prevent people from accessing procedures for determining their protection needs.[57] Under Article 3, States are prohibited from rejecting a person in need of protection who finds himself at the State's border.

25. The HRC has also set out similar obligations, under the ICCPR,[58] as it has stressed that there may be circumstances in which a failure to ensure Covenant rights as required by Article 2 of the Covenant would give rise to violations by State Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures.[59] The HRC has stated that "the State party must not only refrain from violating an individual's rights itself, but it must also protect an individual from a violation of his or her rights by third parties, be they private individuals, corporations, or other non-State actors. This may well require positive action by the State party, for example by establishing an appropriate legislative and policy framework and devoting sufficient resources to their effective implementation."[60]

26. The IACtHR has found that under the principle of *non-refoulement*, the State has specific obligations towards individuals that have asked for protection at a diplomatic representation including the individualised assessment of the risk and the adequate means of protection.[61] In this regard, the IACtHR recalled that it is not sufficient that States abstain from causing a violation of the said principle, but it is imperative that they adopt positive measures and added that States must undertake all the necessary means to protect individuals in the event of a real risk to their life, integrity, liberty, or security if they were sent back.[62]

27. Furthermore, it is relevant that under the international law of state responsibility, as reflected in the International Law Commission (ILC) articles on State Responsibility[63], the responsibility of States is engaged for wrongful conduct where it co-operates in situations of gross or systematic violations of norms of peremptory international law, and fails to take positive, co-operative action by lawful means to bring such situations to an end.[64] It is submitted that positive obligations under Article 3 of the Convention should be interpreted in light of these principles, and may therefore in certain circumstances imply an obligation to allow individuals within the extra-

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[55]*El Masri, v. "the former Yugoslav Republic of Macedonia"* [GC]*,* App. no. 39630/09 (ECtHR, 13 December 2012), para. 198; *Isaak v. Turkey*, App. no. 44587/98 (24 June 2008), para. 119; *Ilascu and Others v. Moldova and Russia*, App. no. 48787/99 (ECtHR, 8 July 2004), para. 331; and *a contrario Azemi v. Serbia*, App. no. 11209/09 (ECtHR, 5 November 2013), para. 47; See also Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009), p. 315: "if the individual finds himself within the diplomatic mission of a State party, that State may have the obligation to allow his presence or, in order to secure effective protection from refoulement, may even have the obligation to enable him to travel to the territory of the State party".

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

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

[58]Applicable under Article 53 of the Convention.

[59]General Comment No. 31, paras. 7-8: "Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations (…) There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."

[60]UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 15 (Rev.1), Civil and Political Rights: The Human Rights Committee*, May 2005, No. 15 (Rev.1), p. 5.

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

[62]*The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18, IACtHR Series A No 25 (30 May 2018), para. 194-197.

[63] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001,Supplement No. 10 (A/56/10), chp.IV.E.1

[64]ibid, arts. 40 and 41.

territorial jurisdiction of the state to access a procedure and to obtain a visa, where applicable, in order to protect them from another State's gross or systemic failure to meet peremptory norms of international human rights law.

28. Article 14 of the Universal Declaration of Human Rights (UDHR) recognises the right "to seek and enjoy in other countries asylum from persecution". Article 33 of the 1951 Refugee Convention obliges States to desist from expelling or returning a refugee in any matter whatsoever to the frontiers of territories where his life or freedom would be threatened. The principle of *non-refoulement* contained in Article 33 has extraterritorial effect. Under this provision individuals will come within the jurisdiction of the State when individuals are under the effective control of a State or are affected by those acting on behalf of the State wherever this occurs.[65] Both Article 14 of the UDHR and Article 33 of the 1951 Refugee Convention can entail a *de facto* duty to admit a refugee when this is the only means of avoiding an impermissible consequence of exposure to persecution.[66] It is exactly that act of exposing an individual to the risk of ill-treatment that engages the responsibility of the State under Article 3 of the Convention, within its jurisdiction, whether exercised on the territory or extra-territorially.[67] Conduct of non-admittance of an individual in need of international protection without an effective opportunity given to apply for protection may thus constitute constructive *refoulement* under international law. A good faith understanding of the duty of *non-refoulement* requires states to provide reasonable access and opportunity for a protection claim to be made.

29. In this regard, it is noteworthy that at least sixteen European states have or have had schemes in place for the issuance of visas for asylum related purposes.[68] Such schemes generally do not entail access to a full-fledged asylum-procedure outside the territory, but they do allow for a *prima facie* assessment of the international protection claim consequently permitting the applicant to travel to the territory of that State with the purpose of facilitating access to the asylum procedure in the territory of that State. Spain is one of the States that has such a scheme in law. The Court asked a number of questions about this scheme during the hearing in *N.D and N.T.* The representative of the Spanish government suggested such a visa as a way to have in place a form of orderly migration.[69]

30. The European Parliament, recognising the absence of a legal framework at the European Union level in respect of humanitarian visas and the human cost that has and continues to result from such a gap, has recently adopted a resolution requesting the Commission to submit a proposal for a Regulation establishing Humanitarian Visas for persons in need of protection and who seek admission to the territory of Member States.[70] The adopted resolution demonstrates the feasibility for Member States to issue humanitarian visas as well as the economic, social and legal necessity of their adoption. A similar view has been held by Judges of this Court in *Hirsi Jamaa* in which Judge Pinto de Albuquerque found the issuance of humanitarian visas to those applying at embassies and facing a real risk of Article 3 treatment to be a positive obligation for Contracting States under the Convention.[71]

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

II.I. Procedural guarantees

32. Under this Court's case law in application of the principle of *non-refoulement,* the assessment of whether there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment contrary to Article 3 in the destination country first requires the decision-maker to examine the conditions in that country in light of the standards elaborated by the Court under Article 3 of the Convention.[72] Specifically, this should be done through an "independent and rigorous scrutiny" of any claim that there exists substantial grounds for fearing a real

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[65] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003), p. 111.

[66] James C. Hathaway, *The Rights of refugees under International Law* (Cambridge University Press 2005), p. 301.

[67] *Cruz Varas and Others v. Sweden,* App. no. 15576/89 (ECtHR, 20 March 1991), para. 76.

[68] *Ulla Iben Jensen*, Study for the Libe Committee, Humanitarian visas: option or obligation, p.41.

[69] Article 38 of Organic Law 12 of 2009, amended 2014. The regulatory decree governing the more detailed conditions and procedures for such applications had not yet been implemented.

[70] European Parliament resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)).

[71] *Hirsi Jamaa and Others v. Italy* [GC], App. no. 27765/09 (ECtHR, 23 February 2012), Concurring Opinion Judge Pinto de Albuquerque who cites additional sources in support of this interpretation.

[72] *Mamatkulov and Askarov v. Turkey* [GC], App. no. 46827/99 and 46951/99 (ECtHR, 4 February 2005), para. 67; *F.G. v. Sweden* [GC], App. no. 43611/11 (ECtHR, 23 March 2016), para. 112.

risk of treatment contrary to Article 3.[73] It is in principle for the applicant to adduce evidence "capable of proving" that such substantial grounds exist.[74] It is, however, the duty of the decision-maker to "assess the issue in the light of all the material placed before it and, if necessary, material obtained of its own motion".[75] Where evidence "capable of proving" such risk is adduced, "it is for the Government to dispel any doubts about it".[76]

33. The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the contested act or omission. Where the situation in the receiving state is such that the responsible State can be deemed to have constructive knowledge of it, it is under a duty to act taking that information into account.[77] The assessment must focus on the foreseeable consequences of the return of the applicant to the country of destination and "[t]his in turn must be considered in the light of the general situation there as well as the applicant's personal circumstances".[78] It is the responsibility of the State whose action or omission results in the individual being exposed to a treatment contrary to Article 3, to ensure respect for the principle of *non-refoulement*.[79]

II.II. Absolute nature of Article 3 ECHR obligations

34. The Court has repeatedly emphasised the absolute nature of Article 3 of the Convention underlying that the seriousness of the prohibition provided therein "**does not allow for any exceptions or justifying factors or balancing of interests**".[80] In *Saadi v. Italy*, the Court specifically held that, with regard to the absolute nature of Article 3, it is incompatible with the Convention to draw a distinction between treatment inflicted "directly by a signatory State and treatment that might be inflicted by the authorities of another State". It expressly rejected the argument "that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole".[81] In *Hirsi Jamaa,* the Court also reiterated that a situation of large influx of migrants as well as an economic crisis could not absolve Contracting States from discharging their obligations under Article 3. In *M.S.S.*, the Court ruled that "States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions".[82]

35. Considerations of the possible number of people that might avail of a means of protection cannot, thus, be used as a justification for limiting the protection of the Convention. Other human rights mechanisms have used similar reasoning. The HRC held that torture, cruel and inhuman or degrading treatment "can never be justified on the basis of a balance to be found between society's interest and the individual's rights under article 7 of the Covenant".[83]

36. Furthermore, the concerns about "asylum shopping" mentioned by certain States in this regard is sufficiently covered by the Dublin III Regulation, which establishes the criteria and mechanisms for determining the EU Member State responsible for examining an application for international protection lodged in one of the EU Member States by a third-country national or a stateless person.[84]

37. The interveners submit that to comply with their obligations under the Convention, Contracting States are prohibited from refusing to issue visas to travel to their territory when requested by those who have an

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[73] *Jabari v. Turkey*, App. no. 40035/98 (ECtHR, 11 July 2000), para. 39; S*ufi and Elmi v. the United Kingdom*, App. nos. 8319/07 - 11449/07 (ECtHR, 28 June 2011), para. 214; *Chahal v. the United Kingdom*, App. no. 22414/93 (ECtHR, 27 June 1995), para. 96; *Saadi v. Italy*, App. no. 37201/06 (ECtHR, 28 February 2008), para. 128; *M.S.S. v. Belgium and Greece*, App. no. 30696/09 (ECtHR, 21 January 2011), para. 293; *Abdolkhani and Karimnia v. Turkey*, App. no. 30471/08 (ECtHR, 22 September 2009), para. 108.

[74] *Sufi and Elmi v. the United Kingdom,* App. nos. 8319/07 and 11449/07 (ECtHR, 28 June 2011), para. 214.

[75] *N. v. Finland,* App. no. 38885/02 (ECtHR, 26 July 2005), para. 160; *Hilal v. the United Kingdom,* App. no. 45276/99 (ECtHR, 6 March 2001), para. 60; *Vilvarajah and Others v. the United Kingdom*, App. nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 26 September 1991), para. 107.

[76] *N. v. Sweden,* App. no. 23505/09 (ECtHR, 20 July 2010), para. 53; *R.C. v. Sweden*, App. no. 41827/07 (ECtHR, 9 June 2010), §50.

[77] *Mamatkulov and Askarov v. Turkey* [GC], App. nos. 46827/99 and 46951/99 (ECtHR, 4 February 2005), para. 69.

[78] *Sufi and Elmi v. the United Kingdom*, App. nos. 8319/07 - 11449/07 (ECtHR, 28 June 2011), para. 216; *Vilvarajah and Others v. the United Kingdom*, App. nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 26 September 1991), para. 108.

[79] *Sharifi and Others v. Italy and Greece,* App. no. 16643/09 (ECtHR, 21 October 2014), para. 232: reminiscent of the principles of *M.S.S. v. Belgium and Greece* [GC], App. no. 30696/09 (ECtHR, 21 January 2011), paras. 338-343 and *Hirsi Jamaa and Others v. Italy* [GC], App. no. 27765/09 (ECtHR, 23 February 2012), paras. 146-148.

[80] *Gäfgen v. Germany*, App. no. 22978/05 (ECtHR, 1 June 2010), para. 107 [emphasis added].

[81] *Saadi v. Italy* [GC], App. no. 37201/06 (ECtHR, 28 February 2008), para. 138.

[82] *M.S.S. v. Belgium and Greece* [GC], App. no. 30696/09 (ECtHR, 21 January 2011), para. 216.

[83] UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations, Canada,* 20 April 2006, CCPR/C/CAN/CO/5, para. 15.

[84] Council Regulation (EC) 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31 (Dublin III Regulation).

arguable claim that he or she is at real risk of an Article 3 violation in a third State. This is particularly the case if no other legal route to safety exists and where if denied such visas, refusal would leave the applicants at a real risk of exposure (whether directly or indirectly) to violations of Article 3 in the third State and the Contracting State from which the visa is requested has (or ought to have) knowledge of the risks in question. The visas issued should allow the applicants to access the asylum determination procedure on the territory of the requested Contracting State.

III. Specific guarantees with regard to children

38. Under the Court's case law children and asylum seekers are recognised, each in their own right, as forming a vulnerable group. This Court has recognised that children are among the "most vulnerable persons in society".[85] Where children are also seeking asylum that vulnerability is thus necessarily heightened. The Court defines asylum-seeking children as being in a condition of extreme vulnerability.[86] Respect for this enhanced vulnerability must be a primary consideration, taking precedence over the irregular migration status of children and/or of their parents.[87]

39. The Court considers that what constitutes prohibited treatment under Article 3 depends in some situations on the sex, age and health of the victim. In cases involving children, the effects of certain acts or omissions can reach the threshold required for a breach of Article 3 of the Convention to arise even where in the same circumstances this threshold is not reached in the case of adults.[88] Moreover, States are required to provide for heightened and targeted procedural obligations in relation to migrant and asylum-seeking children.

40. The UN Convention on the Rights of the Child (UNCRC) and other international treaties[89] oblige States to provide specific safeguards and guarantees for the protection and care of children and acknowledge the extreme vulnerability of children in migration. The Court has consistently held that the Convention does not exist in a vacuum and States remain bound by their obligations under international law, including the UNCRC, when implementing the Convention.[90] Articles 22 and 37 of the UNCRC contain the principle of *non-refoulement*. The principle that the best interests of the child (BIC-principle) shall be a primary consideration in all actions concerning children is a fundamental interpretive legal principle, a substantive right and a rule of procedure under international law on the rights of the child.[91] This principle is established in Article 3(1) UNCRC and applies to public or private social welfare institutions, including migration authorities, who must assess and be guided by the principle in all their acts.[92]

41. The CRC and CMW have also stressed that "[a]ccess to justice is a fundamental right in itself and a prerequisite for the protection and promotion of all other human rights, and as such it is of paramount importance that every child in the context of international migration is empowered to claim his/her rights. (…) All children, including children accompanied by parents or other legal guardians, should be treated as individual rights holders, their child-specific needs considered equally and individually, and their views appropriately heard and given due weight."[93]

42. In *D.D. v. Spain*, the CRC held that the failure to carry out an initial evaluation on the existence of a risk of persecution and/or irreparable harm in the country to which the complainant was going to be returned and to fail to take into account the child's vulnerability and best interests violated articles 3, 20 and 37 of the Convention.[94] In *Y.B. and N.S. v. Belgium,* concerning the denial of a humanitarian visa to a Moroccan child taken under a *kafala*

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[85] *Rahimi v. Greece*, App. no. 8687/080 (ECtHR, 5 July 2011), para. 87.

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

[87] ibid *Mubilanzila Mayeka*; *M.S.S. v. Belgium and Greece* [GC], App. no. 30696/09 (ECtHR, 21 January 2011), para. 232; *H.A. and Others v. Greece*, App. no. 19951/16 (ECtHR, 28 February 2019), para. 171.

[88] ibid *Mubilanzila Mayeka,*para. 50; *Muskhadzhieyeva and Others v. Belgium*, App. no. 41442/07 (ECtHR, 19 January 2010), para. 58.

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

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

[91] *Rahimi v. Greece*, App. no. 8687/080 (ECtHR, 5 July 2011), para. 108; See also Case *C-129/18 SM v. Entry Clearance Officer, UK Visa Section* [2019] ECLI:EU:C:2019:140, Opinion Advocate General Campos Sánchez-Bordona, para. 100.

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

[93] Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23 (16 November 2017), paras. 14 and 15.

[94] *D.D. v. Spain*, no. 4/2016 (CRC, 1 February 2018), para. 14.3-14.5.

arrangement by a Belgium-Moroccan couple, the CRC held that the Belgium authorities had failed to consider the best interests of the child and had not allowed the child the right to be heard, in breach of Articles 3 and 12 UNCRC.[95] According to the CRC, the general arguments provided by the Belgian authorities in this complaint reflected a failure to consider the child's specific situation as required by the BIC-principle under Article 3 CRC.[96] In respect of the right of the child to be heard, the CRC held that even if the child is very young or in a vulnerable situation (e.g. disability, minority group, migrant status) that does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests.[97]

43. In *Rahimi v. Greece,* when considering the situation of an unaccompanied asylum seeking child in detention, the Court recalled the BIC-principle confirming that in all actions relating to children such assessment must be undertaken separately and prior to a decision that will affect that child's life.[98] Independently from the outcome, decisions must clearly reflect the fact that this approach has been followed and an assessment has been carried out.[99] In the migration context, the BIC-principle requires the application of a special regime, distinct from that applicable to adults, whereby an assessment of all elements of a child's interests in a specific situation is undertaken.[100]

44. The presence of children in migration bears relevance to State's position on the exercise of jurisdiction. The CRC applies to "those children who come under the State's jurisdiction while attempting to enter the country's territory". In *D.D. v. Spain*, an unaccompanied asylum-seeking minor, who was arrested by Spanish security forces at the border of Melilla, was found to be within Spain's jurisdiction as he was under its effective control or authority.[101]

45. The interveners submit that Article 3 of the Convention read in the light of Article 3, 20, 22 and 37 of the UNCRC taken together with Article 53 of the Convention requires that the best interests of the child underpin all decisions taken by Contracting States with regard to children, and that Contracting States ensure the child's protection and give separate consideration to the child's interest. These standards apply to decisions on visa applications made by children and their parents at the embassy of a Contracting State.

III. The CJEU case of X and X and EU law

46. The interveners submit that with regard to EU Member States responsibilities, the relevant Convention obligations must be interpreted by this Court in a manner consistent with the EU law obligations binding on those States.[102]

47. The Court of Justice of the European Union (CJEU) held that issuing visas to a Syrian Christian family seeking to access a Schengen State legally for the purpose of claiming asylum was outside the scope of the Schengen system, thereby entrenching the absence not only in the Common European Asylum System (CEAS) itself but elsewhere in EU law of any legal route for asylum seekers to reach Europe.[103] It laid responsibility for any such access with the national authorities. The Schengen Visa Code being *inapplicable,* EU Member States are thus unconstrained by EU law when issuing or denying visas. The absence of an appropriate visa in EU law does not absolve States from the obligations set out above in the preceding sections. States are bound by their obligations under international (human rights) law.

48. The AG *Mengozzi* Opinion, that was not upheld by the CJEU, as the CJEU did not undertake a human rights law assessment of the case, is relevant to the application of this framework, since it is based on an assessment of the EU Charter of Fundamental Rights as interpreted in light of the Convention.[104] The AG *Mengozzi* made clear that States are required to issue a visa when in light of the specific circumstances of the case there are substantial grounds to believe that a refusal to issue the visa would have a direct consequence of exposing the individuals concerned to treatment prohibited by Article 4 of the EU Charter. An analysis of EU law in light of international law therefore supports the conclusion that States are prohibited from refusing to issue visas to travel to their territory when requested by those who have an arguable claim that he or she is at real risk of an Article 3 violation in a third State.

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[95] *Y.B. and N.S. v. Belgium*, no. 12/2017 (CRC, 27 September 2018), para. 8.9.
[96] ibid, paras. 8.3-8.5. The CRC refers to: UN CRC, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14, para. 32.
[97] ibid, paras. 8.7-8.8. The CRC refers to: UNCRC, *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para. 21; UN CRC, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14, paras. 53-54.
[98] *Rahimi v. Greece*, App. no. 8687/080 (ECtHR, 5 July 2010), para. 108.
[99] UNCRC, *General comment No. 14*, paras. 6(c) and 14(b).
[100] ibid, paras. 54, 75 -76.
[101] *D.D. v. Spain*, no. 4/2016 (CRC, 1 February 2018), para. 13.4.
[102] Applicable under Article 53 of the Convention.
[103] Case C-638/16 PPU *X and X v. Belgium* [2017] ECLI:EU:C:2017:173.
[104] Case C-638/16 PPU *X and X v. Belgium* [2017] ECLI:EU:C:2017:93, Opinion of AG Mengozzi, paras. 139-140.