

I. Assessment in removal decisions under Article 3 of the Convention, the non-refoulement and human dignity under international and EU law.

1. The *non-refoulement* principle is essential in order to protect ‘*the fundamental values of democratic societies*’¹, and is ‘*a value of civilisation closely bound up with respect for human dignity, part of the very essence of the Convention*’.² Under the ECHR and other international human rights law instruments applicable to Contracting Parties, this principle entails an obligation not to transfer (*refouler*) people where there are substantial grounds for believing that they would face a real risk of serious human rights violations - including of Article 3³ - in the event of their removal, in any manner whatsoever, from the State’s jurisdiction. Contracting Parties will violate Article 3 by removing an individual ‘*where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country*’ under the classic *Soering* test.⁴
2. The *non-refoulement* principle is absolute, permitting no derogations either in law or in practice.⁵ Article 3 *non-refoulement* obligations extend to both protection against deliberate harm by State agents and non-State actors⁶ and protecting against removal to face living conditions amounting to serious ill-treatment. As the Court put it in *Sufi and Elmi*: ‘*the responsibility of the state under Article 3 might be engaged in respect of treatment where an applicant, who was wholly dependent on state support, found himself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity*’.⁷
3. This Court ruled that treatment prohibited by Article 3 ECHR must attain a minimum level of severity, the assessment of which is ‘relative, depending on all the circumstances of the case’, including its physical or mental effects, and the age, sex, vulnerability and state of health of the victim.⁸
4. In order for the *non-refoulement* prohibition to be practical and effective and not theoretical and illusory,⁹ this Court has found a close and rigorous scrutiny of arguable¹⁰ claims in expulsion cases to be an integral part of protecting an individual’s rights under Article 3.¹¹ This requires Contracting Parties, *inter alia*, to assess all evidence at the core of a *non-refoulement* claim,¹² including, where necessary, by: a) obtaining such evidence *proprio motu*;¹³ b) not imposing an unrealistic burden of proof on applicants or requiring them to bear the entire burden of proof;¹⁴ c) taking into account all relevant country of origin information originating from reliable and objective sources;¹⁵ and d) applying the principle of the benefit of the doubt in light of specific vulnerabilities

¹ *Chahal v. the United Kingdom* [GC], no. 22414/93, 15 November 1996, § 96; *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991, § 108.

² *Khlaifia and Others v. Italy* [GC], no. 16483/12, 15 December 2016, § 158

³ *Othman (Abu Qatada) v. the United Kingdom*, no. 8139/09, 17 January 2012, § 233, 258 -261; *N.A. v. the United Kingdom*, no. 25904/07, 17 July 2008; *Soering v. the United Kingdom*, App. No. 14038/88, 7 July 1989.

⁴ *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, § 90-91, Series A no. 161; *Vilvarajah and Others v. the United Kingdom*, nos. 13163/87 13164/87 13165/87 13447/87 13448/87, 30 October 1991, § 103, Series A no. 125; *H.L.R. v. France*, no. 24573/94, 29 April 1997, § 34, Reports 1997-III; *Jabari v Turkey*, no. 40035/98, 11 July 2000, § 38; *Salah Sheekh v. the Netherlands*, no. 1948/04, 11 January 2007, § 135; and *Saadi v Italy*, no. 37201/06, 28 February 2008, § 152; *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011, § 365.

⁵ *Saadi v Italy*, op. cit., § 127; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; *Adel Trebourski v. France*, UNCAT, CAT/C/38/D/300/2006, 11 May 2007, § 8.2 – 8.3. UN Human Rights Committee, General comment no. 31 [80]. The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, § 12. This is unlike in refugee law, where the principle is not absolute.

⁶ *J.K and others v Sweden* [GC], no.59166/12, 23 August 2016.

⁷ *Sufi and Elmi v. United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011, § 279.

⁸ *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011, § 219; *Sufi and Elmi v. United Kingdom*, op.cit., § 213.

⁹ *Arctico v. Italy*, App. No 6694/74, 13 May 1980, § 33.

¹⁰ *Diallo v. Czech Republic*, no 20493/07, 28 November 2011, § 59 -71.

¹¹ *Jabari v. Turkey*, no. 40035/98, 11 July 2000, § 39, 50.

¹² *Ibid*, § 39-40; *Singh and Others v. Belgium*, no. 33210/11, 2 October 2012, § 104

¹³ In *F.G v Sweden* [GC] this Court reiterated that the obligations incumbent on the States under Articles 2 and 3 ECHR entail that the authorities carry out an assessment of that risk of their own motion, in particular, where the national authorities have been made aware of the fact that the asylum-seeker may plausibly be a member of a group systematically exposed to practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in their membership of the group concerned (§ 127).

¹⁴ *M.S.S. v. Belgium and Greece*, GC, op.cit., § 344-359; *Hirsi Jamaa and Others v. Italy*, no. 27765/09, 23 February 2012, § 122-158.

¹⁵ *Salah Sheekh v. the Netherlands*, no. 1948/04, 11 January 2007, § 136.

of the persons concerned.¹⁶ Moreover, such assessment must focus on the foreseeable consequences of the latter's removal to the country of destination, which must be considered in light of both the general situation and their personal circumstances.¹⁷

5. **The interveners submit that, where there is a *prima facie* case that an individual's removal would engage Article 3, either as a consequence of the termination of essential support in the expelling country or of the intolerable situation to which the person concerned would be exposed in the country of destination, removal is absolutely prohibited.¹⁸ This absolute prohibition requires that the *primary focus* of the State's assessment procedures must be on those circumstances and whether Article 3 is engaged, and not on reasons that might justify expulsion or exclusion. This is because if the Article 3 threshold is met the reasons advanced for exclusion from refugee status¹⁹ cannot justify expulsion.**
6. The interveners note that the fundamental concept of human dignity is essential when assessing the risk of Article 3 prohibited treatment. The Court has long declared that '*the very essence of the Convention is respect for human dignity and human freedom*'.²⁰ When examining Article 3 violations and assessing a risk of them, this Court often invokes human dignity as a notion that requires individual assessment. This is illustrated by the interpretation of 'degrading treatment': '*Even if there is no evidence of actual bodily injury or intense physical or mental suffering, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity (...) it may be characterised as degrading and thus fall within Article 3*'.²¹
7. In the case of refugees, who are seriously ill or where there is an indication of a serious condition, which is unrelated or related to having a variation of sex characteristics and includes a physical or mental health condition that carries a risk of mortality and commonly affects a person for several years, in order to comply with their Convention obligations, Contracting Parties should investigate the potential implications of such condition. In doing so the test established by this Court in *Paposhvili v Belgium*,²² involving comparing the state of health prior to removal and how it is likely to evolve after removal, should be applied in combination with the *Soering* test. Therefore, the assessment should be made analysing, *inter alia*, (a) '*on a case-by-case basis whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3*' and (b) '*the extent to which the individual in question will actually have access to this care and these facilities in the receiving State*'. Costs associated with medication and treatment, the existence of social and family networks, and the distance travelled to in order to access the required care should be included in the assessment.²³
8. **The interveners submit that, in order to guarantee the diligent, case-by-case, Convention-compatible risk assessment of human rights violations following removal, the *Soering* and *Paposhvili* tests should be applied in combination in expulsion cases relating to refugees or persons otherwise in need of international protection with a serious or suspected serious condition.** This Court has reiterated that the '*authorities*' obligation under Article 3 to protect the integrity of the persons concerned' could be '*fulfilled primarily through appropriate procedures allowing such examination to be carried out*'.²⁴
9. This Court has held that the ECHR does not exist in a vacuum and States remain bound by their obligations under international law when implementing the Convention; Article 53 ECHR makes this expressly clear.²⁵

¹⁶ *Mutatis mutandis M.A. v. Switzerland*, no. 52589/13, 18 November 2014, § 55.

¹⁷ *Sufi and Elmi v UK*, op. cit., § 216; *Vilvarajah v UK*, op. cit., § 108.

¹⁸ *Saadi v. Italy*, op.cit., § 127, 138 and 139.

¹⁹ CJEU, Joined cases C-391/16, C-77/17 and C-78/17, ECLI:EU:C:2019:403. The adoption of a decision to exclude an individual from the refugee status under Directive 2011/95 cannot alter the fact of their being refugees where they satisfy the material conditions necessary to be regarded as being refugees for the purposes of Article 2(d) of that directive, and Article 1(A) of the Geneva Convention; *K.I v France*, no. 5560/19, 15 April 2021, § 122 – 123.

²⁰ *Christine Goodwin v. the United Kingdom*, no. 28957/95, 11 July 2002, § 90; *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, 17 July 2014, § 118 and *Pretty v. the United Kingdom*, no. 2346/02, 29 April 2002, § 65.

²¹ *Khlaifia and Others v. Italy*, no. 16483/12, 15 December 2016, § 169; *Valašinas v. Lithuania*, no. 44558/98, 24 July 2001, § 117.

²² *Paposhvili v Belgium*, § 188 – 193.

²³ *Ibid.*, § 190.

²⁴ *Mutatis mutandis*, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 182, ECHR 2012; *Tarakhel*, op.cit., § 104; and *F.G. v. Sweden*, op.cit., § 117.

²⁵ *Pini and Ors v. Romania*, no. 78028/01, 22 June 2004, § 138.

Where Contracting Parties to the ECHR are also bound by EU law, the Court must ensure that the Convention rights are interpreted and applied in a manner which does not diminish the rights guaranteed under EU law.²⁶

10. Under EU primary law applicable to the Contracting Parties that are EU Member States, the Charter of Fundamental Rights of the EU (hereafter ‘The Charter’)²⁷ guarantees rights fundamental to the issues under consideration, such as the protection of human dignity (Article 1), the prohibition of torture and inhuman and degrading treatment (Article 4), protection in the event of removal, expulsion or extradition (Article 19). The Court of Justice of the EU (CJEU) has found that the rights guaranteed by Article 4 of the Charter are absolute, and furthermore ‘*closely linked*’ to the prohibition of inhuman and degrading treatment guaranteed by Article 3 ECHR, to which Article 4 of the Charter corresponds.²⁸ The CJEU has confirmed that Member States may not remove individuals where there are substantial grounds for believing that they will face a genuine risk in the country of destination of being subjected to treatment prohibited by Article 4 and Article 19(2) of the Charter.²⁹ It has consistently based its reasoning on the concept of human dignity, reiterating that its role is to ensure that the fundamental right to human dignity and integrity is observed.³⁰
11. The UN Human Rights Committee (CCPR) has also reiterated that State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.³¹ It has considered that a failure to adequately assess an individual’s personal situation in their country of origin would amount to a failure to consider the real, personal and foreseeable risk of ill-treatment upon return.³² Similarly, the UN Committee against Torture (UNCAT) has found that the authorities’ failure to undertake an individualised assessment of the personal and real risk the complainant would face if removed, taking due account of the person’s particular vulnerability, including health status, constituted a violation of Article 3 of the Convention against Torture.³³ The Committee on the Rights of Persons with Disabilities, considering the removal of an individual suffering severe mental illness and depression, referred to *Paposhvili* and required an assessment of ‘sufficient and appropriate’ treatment in a receiving State and consideration of the extent to which the individual would actually have access to care and facilities in the receiving State.³⁴
12. **The interveners submit that the Court ought to be satisfied that the Contracting Party’s authorities conducted an assessment³⁵ of all the relevant facts and circumstances in removal cases that was sufficiently rigorous and adequate to prevent an expulsion prohibited by the Convention. Disregarding or failing to acknowledge certain elements in the course of assessment of the risk of treatment contrary to Article 3, in particular, whether the consequences of the transfer would constitute a serious affront to human dignity, would entail a violation of the Contracting Party’s procedural obligations under that provision.**

II. Vulnerability and assessment in removal cases under international law including ECHR and EU law

²⁶ As regards EU Member States, the ECHR must not be applied in such a way as to diminish human rights protection, “which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.” The Court will recall that in *MSS* the Grand Chamber took into account Greece’s obligations under the Reception Conditions Directive, as part of its national law, to ensure adequate material reception conditions, finding that the situation of extreme poverty brought about by the inaction of the State was treatment contrary to Article 3 ECHR.

²⁷ Charter of Fundamental Rights of the European Union, 2012/C 326/02, OJ C 326, 26.10.2012.

²⁸ Joined Cases C-404/15 and C-659/15, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198, 5 April 2016, § 86.

²⁹ Joined Cases C-391/16, C-77/17 and C-78/17, *M and Others*; ECLI:EU:C:2019:403, 14 May 2019, § 94.

³⁰ C-377/98, *Netherlands v. Parliament and Council*, ECLI:EU:C:2001:523, 9 October 2001, § 70; C-36/02, *Omega*, ECLI:EU:C:2004:614, 14 October 2004, § 34.

³¹ UN Human Rights Committee, CCPR, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, § 9, UN Human Rights Committee, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, § 12.

³² CCPR, *A.G. & others v Angola* (CCPR/C/129/D/3106/2018-3122/2018), 21 Jul 2020, § 7.4, 7.6.

³³ *CAT Adam Harun v. Switzerland*, (CAT/C/65/D/758/2016), § 9.7-9.11.

³⁴ *CRPD N.L v Sweden* CRPD/C/21/DR/42/2017, § 7.5

³⁵ *N.A. v the United Kingdom*, no. 25904/07, 17 July 2008, § 119; *F.G. v. Sweden* [GC], no. 43611/11, 23 March 2016, § 117 and, *M.S. v. Slovakia and Ukraine*, no.17189/11, 11 June 2020, § 114.

13. The Contracting Parties' obligation to treat all individuals compatibly with the Convention requires them to identify and give special consideration to the needs of people in vulnerable situations. Accordingly, it is essential that the domestic authorities' assessment to determine the risk of ill-treatment in respect of Article 3 pays particular regard to the existence of specific vulnerabilities. The Court has identified several particularly vulnerable groups that have suffered prejudice, social exclusion and discriminatory treatment on account of their sex,³⁶ sexual orientation,³⁷ race or ethnicity,³⁸ mental faculties,³⁹ disability⁴⁰ or health status.⁴¹
14. Similarly, the CJEU has made clear that the threshold⁴² for an Article 4 Charter violation could be met by particularly vulnerable applicants under circumstances that may not constitute a violation *vis-à-vis* all applicants.⁴³ It has also stressed the need for Member States to provide protection for vulnerable groups, such as Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI+) persons in line with human dignity by pointing to the consequences of a Member State's indifference to reliance on the State for protection.⁴⁴
15. The CCPR has held that '*individual circumstances ... include factors that increase the vulnerability of such persons and that could transform a situation that is tolerable for most into an intolerable one for others.*'⁴⁵ The '*vulnerability-increasing factors*' include, *inter alia*, medical conditions.⁴⁶ It considers the 'cumulative effect' of specific vulnerable circumstances and requires national authorities to do the same in order to comply with their obligations under the ICCPR.⁴⁷ Similarly, the UNCAT has found violations in cases where the authorities neglected considering particular vulnerability factors such as: mental health,⁴⁸ low level of education/lack of family networks,⁴⁹ and (gender-based) violence in the country of return.⁵⁰
16. **The interveners submit that, in order to treat all individuals compatibly with the Convention, vulnerability must be given special attention, particularly with respect to an assessment of the risk of ill-treatment under Article 3. Any assessment must include consideration of the specific circumstances of the individual as well as group-specific vulnerabilities. In the removal context, besides the consideration of individual vulnerabilities, the Contracting Party must also recognise and address the vulnerable condition of particular groups facing social exclusion, discrimination, and persecution in the countries of transfer, including based on their sex characteristics. The assessment should consider the cumulative effect of the specific vulnerabilities of an individual, including, *inter alia*, physical disabilities, mental health, social exclusion, low educational attainment or intellectual disability.**

III. Article 3 risk assessment in the removal context as relating to intersex persons.

17. The term "intersex" is an umbrella term for the physical spectrum of variations of sex characteristics that naturally occur in humans. Intersex individuals are born with sex characteristics - sexual anatomy, reproductive

³⁶ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, no. 9214/80; 9473/81; 9474/81 (28 May 1985) § 78, and *Burghartz v. Switzerland*, no. 16213/90 (22 February 1994) § 27.

³⁷ *Schalk and Kopf v. Austria*, no. 30141/04 (22 November 2010) § 97. *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96 (27 December 1999) § 90.

³⁸ *D.H. and Others v. the Czech Republic* [GC], no. 57325/00 (13 November 2007) §182. *Timishev v. Russia*, nos. 55762/00 and 55974/00 (13 March 2006) § 56.

³⁹ *Alajos Kiss v. Hungary*, no. 38832/06 (20 August 2010) § 42, and, *mutatis mutandis*, *Shtukaturov v. Russia*, no. 44009/05 (27 June 2008) § 95.

⁴⁰ *Glor v. Switzerland*, no. 13444/04 (6 November 2009) § 80.

⁴¹ *Kiyutin v. Russia*, No. 2700/10, (15 September 2011) § 64.

⁴² CJEU, Judgment of 19 March 2019, *Ibrahim*, C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, § 89-91.

⁴³ CJEU, Judgment of 19 March 2019, *Ibrahim*, C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219, § 93.

⁴⁴ C-79/13, *Saciri and Others*, 27 February 2014, § 35; C-163/17, *Jawo*, 19 March 2019, § 92; C-179/11, *Cimade and Gisti*, 27 September 2012, § 56; Joined Cases C-148/13, C-149/13, C-150/13, A, B, C, v. Netherlands, 2 December 2014; C-353/16, *MP v. Secretary of State for the Home Department*, 24 April 2018, § 36; and C-473/16, *F v. Hungary*, 25 January 2018, § 36.

⁴⁵ [emphasis added] UN Human Rights Committee, *Bayush Alemseged Araya v. Denmark*, § 9.7.

⁴⁶ CCPR, *R.A.A. and Z.N. v. Denmark*, Communication No. 2608/2015, 29 December 2016, 7.8.

⁴⁷ CCPR, *A.A.S. v. Denmark*, Communication No. 2464/2014, 16 September 2016, 7.7; HRC, *X. v. Denmark*, Communication no. 2389/2014, 21 October 2015, 7.7.

⁴⁸ CAT, *Adam Harun v. Switzerland*, Communication No. 758/2016, 8 February 2019, 9.9 and 9.10;

CAT, *Khademi v. Switzerland*, 20 January 2015, 7.6.

⁴⁹ CAT, *N.A.A. v. Switzerland*, Communication No. 639/2014, 16 June 2017, 7.5.

⁵⁰ CAT, *F.B. the Netherlands*, Communication No. 613/2014, 15 December 2015, 8.8.

organs, hormonal structure and/or levels and/or chromosomal patterns - that do not fit the typical definition of male or female.⁵¹ The fact that someone has an intersex body can become apparent at different times in their life: at birth, during childhood, in puberty, or even during adulthood.⁵² Depending on the specific life circumstances and the degree of taboo in their environment, a person might learn that they have an intersex body at a very early age or later in life. According to the UN statistics, up to 1.7% of the population is born with intersex traits.⁵³ While most intersex people are healthy, a very small percentage may have medical conditions that might be life-threatening, if not treated promptly.⁵⁴ An intersex person may identify with any gender identity and have any sexual orientation.⁵⁵

18. Intersex people are subjected to human rights violations because of their physical (primary or secondary sex) characteristics. They are often stigmatized and subjected to multiple human rights violations that include forced and coercive medical interventions;⁵⁶ restrictions on the exercise of legal capacity and in access to remedies and justice; discrimination in access to education, healthcare, employment and services; multiple types of ill-treatment. The root causes of human rights violations against intersex people include harmful gender stereotypes, stigma, taboos and pathologisation (i.e., treating intersex persons as necessarily ill or disordered).⁵⁷
19. Sociological research found that respondents whose intersex characteristics were visible to strangers were more likely to experience discrimination; these experiences included violence, insults and discrimination that associated such characteristics with being LGBT+ or having a disability.⁵⁸ Further research on intersex persons found that a majority of respondents had a physical appearance that did not fit expectations associated with the sex recorded on their birth certificates.⁵⁹ These experiences' cumulative impact can be detrimental for these people's mental health.⁶⁰
20. The interveners reiterate that because the bodies of intersex people are perceived as not conforming with sex and gender norms, they face stigma and discrimination, in particular, in access to healthcare. Intersex persons right to health is negatively impacted by stigma and bias within healthcare systems, poor quality healthcare, institutional violence, lack of access to medical records, lack of training of medical professionals, lack of research on the long-term health outcomes and needs of intersex people, and a lack of standards of care that are respectful of the rights of intersex people. Intersex adults report discrimination in access to care based on their intersex traits, including lack of access to necessary screening and procedures, prejudice, and an absence of health professionals trained on the specific health needs they may have.⁶¹
21. Few States investigate human rights violations against intersex people. These violations continue to happen in a generalised climate of impunity despite States' obligation to investigate human rights violations and provide redress and remedies under international law.⁶²
22. **The interveners submit that stigma, social exclusion, severe discrimination and ill-treatment as well as a climate of impunity against such violations and reluctance to provide remedies for them are wide-spread in countries with discriminatory practices against intersex people and other vulnerable groups and a record of human rights violations against them. This can have a seriously detrimental effect on mental health of intersex people.**

⁵¹ Dan Christian Ghattas (2019): Protecting Intersex people in Europe. A toolkit for law and policy makers. Ed. by ILGA Europe and OII Europe. Brussels/Berlin, p.9.: <https://bit.ly/3tyJKtn>

⁵² EU Fundamental Rights Agency (FRA), The fundamental rights situation of intersex people, p. 2. <https://bit.ly/3CkORRK>

⁵³ United Nations Office of the High Commissioner for Human Rights (2015): Fact Sheet. Intersex. <https://bit.ly/37nM6AX>

⁵⁴ FRA, The fundamental rights situation of intersex people, p. 2. <https://bit.ly/3CkORRK>

⁵⁵ UNHCR, Guidance, Working with LGBTIQ+ people in forced displacement, 2021, p. 10: <https://bit.ly/3fBJWC2>

⁵⁶ See, OII Europe, ILGA-Europe, C.I.A., Joint comments in *M. v France*, no. 42821/18, section 1, for more information.

⁵⁷ OHCHR, Background Note on Human Rights Violations against Intersex People, p.3.: <https://bit.ly/3fE69PZ>

⁵⁸ Jones T, Hart B, Carpenter M, Ansara G, Leonard W and Lucke J, *Intersex: Stories and Statistics from Australia* (Open Book Publishers, Cambridge, UK, 2016) pp 63–64 <https://bit.ly/3lgTsmz>

⁵⁹ Office of the Attorney General and Department of Justice, n 29 at 14. Moreover, the available data show that intersex people may experience high rates of poverty, associated with high rates of early school leaving, stigmatization and discrimination. OHCHR, Background note, op. cit., p. 23

⁶⁰ Dan Christian Ghattas (2019), op.cit., p. 23

⁶¹ OHCHR, Background note, op. cit

⁶² Ibid, p. 37

23. As far as the interveners are aware, this Court has not yet had a chance to address the expulsion of intersex applicants to their countries of origin, where educated and beneficial treatment of conditions related to sex characteristics or gender confirmation⁶³ is not available, and where this group of people faces social exclusion, discrimination and persecution or where state policies and practices contribute to and/or tolerate debasement and affront to dignity of intersex persons. However, this Court has found that inability and unwillingness of the State authorities to provide the necessary protection against ill-treatment on grounds of sexual orientation emanating from non-State actors may give rise to a violation to Article 3.⁶⁴ **The interveners submit that, *mutatis mutandis*, these findings should be applicable to a real risk of Article 3 violations in connection with an individual's sex characteristics.**
24. **The interveners further submit that in the context of expulsion of vulnerable intersex persons, in order to prevent treatment contrary to Article 3, Contracting Parties must undertake a diligent, case-by-case assessment of *inter alia* whether (i) the person concerned will have access to gender confirmation treatment they opted for if such treatment would be interrupted by removal, in particular whether such treatment is *generally* available in the country of removal and whether a *specific* returnee will have access to it; (ii) given the available information concerning the state of health and specific vulnerabilities of the person concerned, the extent to which the absence of such treatment will have a detrimental effect on their physical and mental health; (iii) in case of recorded discrimination, persecution and social exclusion of intersex persons in general in the country of destination, the person concerned will be able to access medical care for their medical conditions; (iv) the removal of the person concerned will subject them to undignified living conditions that will be exacerbated by their vulnerabilities and social exclusion and contribute to their inability to access the medical help they require; (v) State protection is available against treatment prohibited by the Convention emanating from non-State actors, and if the country of destination will be willing and able to provide such protection.**
25. In making such an assessment Contracting Parties must *inter alia* consider the concerned individual's state of mental and physical health prior to removal and its likely evolution after removal,⁶⁵ in particular if the removal is to a country, where gender confirmation treatment is unavailable. This assessment should include not only an evaluation of the enhanced risk of cancer or other serious conditions that will have a detrimental effect on a person's health, but also evaluate the effect on mental health, including the likelihood of suicide or other forms of self-harm, if necessary treatment and mental health follow-up are unavailable. Moreover, consideration of whether the individual in question will have access to care and facilities in the receiving State will be required. In this respect, costs associated with medication and treatment, the existence of social and family networks, and the distance travelled in order to access the required care are relevant to the assessment.

IV. Imputed sexual orientation and criminalisation in the country of destination

26. Intersex persons who have not had the opportunity to complete their desired gender confirmation treatment may have sex characteristics or the appearance of a specific gender. If intersex persons in these circumstances have a relationship with persons perceived to be of the same gender as themselves, they will be perceived as having same-sex relations and may be subjected to laws criminalising same-sex conduct in a country of removal.⁶⁶
27. Laws criminalising same-sex conduct are discriminatory and incompatible with human rights law and standards.⁶⁷ This Court has consistently found that laws criminalising consensual same-sex activity amount to an unjustifiable interference with an individual's right to private life, including in circumstances where the law

⁶³ Also referred as gender reassignment

⁶⁴ *B and C v Switzerland*, nos. 889/19 and 43987/16), 17 November 2020, § 62 - 63

⁶⁵ *Paposhvili v Belgium*, no. 41738/10, 13 December 2016.

⁶⁶ To illustrate, there is official confirmation by the CCPR that Morocco is enforcing its laws criminalizing homosexuality. *'The Committee is concerned at the criminalization of homosexuality, the fact that it is punishable by a term of imprisonment of up to 3 years and the arrests that have been made on that basis. It is also concerned by reports of the advocacy of hatred, discrimination and violence against people because of their sexual orientation or gender identity' (arts. 2, 9 and 26). (CCPR/C/MAR/CO/6, § 11)"*

⁶⁷ UNHCR SOGI Guidelines, § 27.

had not been applied in practice.⁶⁸ In addition, in *Smith and Grady v. the United Kingdom*, this Court observed that it “would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3”.⁶⁹ In *Identoba and Others v. Georgia*, this Court reiterated that “discriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3 where it attains a level of severity such as to constitute an affront to human dignity.”⁷⁰

28. UN human rights Treaty Bodies and independent experts have repeatedly urged States to repeal laws criminalising homosexuality.⁷¹ They have called attention to the ways in which the criminalisation of consensual same-sex sexual conduct legitimises prejudice and exposes people to hate crimes and police abuse, and have recognised that it can lead to torture and other ill-treatment.⁷² **Laws and regulations directly or indirectly criminalising consensual same-sex sexual orientation or conduct provide State actors with the means to perpetrate human rights violations, and enable non-State actors to persecute individuals on account of their real or imputed sexual orientation with impunity.**⁷³ As a result of criminal sanctions, people may be threatened with arrest and detention based on their real or imputed sexual orientation and may be subjected to baseless and degrading physical examinations, purportedly to ‘prove’ their same-sex sexual orientation.⁷⁴
29. This Court has also found that pernicious legal, administrative, policy and/or judicial measures that were *in themselves* discriminatory – whether or not enforced – or that were implemented in a discriminatory manner, violated the ECHR and caused their victims to experience fear and distress.⁷⁵ This approach recognises the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments, whether arising from misfeasance of State actors outside due process or – frequently – from the abuses of non-State actors, whose own discrimination and discriminatory violence are legitimized by the existence of discriminatory penal sanctions, and against whom the State does not offer protection. In *Dudgeon*, the Commission in fact noted the possibility of such laws making it more likely that police and private actors would commit acts of extortion and other crimes as well as engage in discriminatory treatment,⁷⁶ instead of, or at times in addition to, prosecution. Most recently, in *B.C. v Switzerland* this Court found that lack of availability of State protection against ill-treatment emanating from non-State actors may result in Article 3 violation.⁷⁷

⁶⁸ *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Norris v. Ireland*, 26 October 1988, Series A no. 142; *Modinos v. Cyprus*, 22 April 1993, Series A no. 259.

⁶⁹ *Smith and Grady*, nos. 33985/96 33986/96, (27 September 1999), § 121.

⁷⁰ *Identoba and Others v. Georgia*, (no. 73235/12), (12 May 2015), § 65.

⁷¹ E.g., Human Rights Committee, *Toonen v Australia* (Communication 488/1992, 4 April 1994), UN Doc. CCPR/C/50/D/488/1992.

⁷² E.g., *Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law*, Office of the High Commissioner for Human Rights, HR/PUB/12/06, 2012, p. 33; and the Report of the UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: A/56/156, 3 July 2001, § 20 and, generally, §§ 18-25.

⁷³ As the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted: “sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals,” A/HRC/14/20, § 20. The UN Special Rapporteur on extrajudicial executions noted that criminalization increases social stigmatization and made people “more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity”, A/57/138, § 37.

⁷⁴ A/HRC/16/47/Add.1, opinion No. 25/2009 (Egypt), §§ 24, 28-29; Concluding Observations of the Committee against Torture on Egypt (CAT/C/CR/29/4), §§ 5(e) and 6(k). See also A/56/156, § 24; A/HRC/4/33/Add.1, p. 316, § 317; A/HRC/10/44/Add.4, pp. 86-87, § 61; and A/HRC/16/52/Add.1, p. 276, § 131.

⁷⁵ *Dudgeon v. the United Kingdom*, op.cit., § 40 to 46; *Norris v. Ireland*, op.cit., § 38, 46, 47; *Modinos v. Cyprus*, op.cit., §§ 23, 24, 26; *A.D.T. v. the UK*, no. 35765/97, judgment, 31 July 2000, §§ 26 and 39; *Bayev and Others v. Russia*, nos. 67667/, 20 June 2017, § 68.

⁷⁶ See the European Commission’s report in *Dudgeon*, cited in the Court’s judgment in the same case, “the existence of the law will give rise to a degree of fear or restraint on the part of male homosexuals [...] the existence of the law prohibiting consensual and private homosexual acts [...] provides opportunities for blackmail [...] and may put a strain upon young men [...] who fear prosecution for their homosexual activities”. They reached this conclusion despite their finding that the number of prosecutions in such cases [...] was so small “that the law has in effect ceased to operate”. It appears inevitable to the Commission that the existence of the laws in question will have similar effects. [...]”, Commission’s report, § 94.

⁷⁷ *B and C v Switzerland*, op. cit. §. 62 – 63.

30. Thus, the mere existence of laws criminalising consensual same-sex conduct, including in countries where they have not been recently “enforced”,⁷⁸ can give rise to acts of persecution, without necessarily leading to recorded court cases and convictions and also entails a real risk that the said laws may be enforced in the future.⁷⁹ Furthermore, the UN SOGI Expert notes ‘*Legislation, public policy and jurisprudence that criminalize same-sex relationships and particular gender identities are per se contrary to international human rights law, fuel stigma, legitimize prejudice and expose people to family and institutional violence and further human rights abuses, such as hate crimes, death threats and torture.*’⁸⁰
31. In the same manner, even in States where laws criminalising same-sex sexual conduct exist but are not actively “enforced”, **intersex persons perceived to have same-sex relationships in practice have no State protection against ill-treatment by non-State actors often by reason of a fear of prosecution if they approach the police. Similarly, intersex persons may be prevented from accessing essential services, including medical treatment, by reason of such fears. State protection in such countries, including through appropriate criminal sanctions against ill-treatment of intersex persons at the hands of non-State actors, is often unavailable or the state is unwilling to provide such protection.**
32. The UN SOGI Expert has further identified underreporting as a problem due to fear and stigma.⁸¹ This suggests that the absence of data on the implementation of criminal law may in itself be evidence of oppression and threats suffered by LGBTI+ persons. It further highlights the difficulties in making a rigorous assessment of whether the laws criminalising same-sex relationship are implemented, in particular where there is no LGBTI+ organization in the country, nor is there a framework for regular and impartial monitoring of the issue.
33. The most recent Report of the Working Group on the Universal Periodic Review of Morocco urges *inter alia* a revision of the criminal code to decriminalise consensual same-sex relations to ensure compliance with international standards.⁸² Notably in the report, France urges Morocco to put an end to forms of discrimination (including legal ones) faced by lesbian, gay, bisexual, transgender and intersex persons.⁸³
34. **In light of the above, the interveners submit that the existence of laws criminalising consensual same-sex sexual conduct discloses dispositive evidence of a real risk of Article 3 prohibited treatment for intersex persons based on real or perceived sexual orientation,⁸⁴ thus triggering the prohibition on exposing the individual concerned to such treatment under that provision of the Convention.**

V. Article 8 assessment in removal decisions

35. Even if the Article 3 ‘threshold of severity’ is not met, an expulsion may nevertheless violate Article 8.⁸⁵ **An interference with rights protected under Article 8 may be so severe that it will require exceptionally weighty justification under Article 8(2).** In such circumstances, states should examine this Convention issue *ex proprio motu* as this Court has emphasised that Article 8 does not merely compel a Contracting State to

⁷⁸ *Modinos v. Cyprus and Dudgeon v. the United Kingdom*. As long as statutes are not repealed, there continues to be a real risk of their enforcement and therefore a real risk that individuals would face criminal investigations, charges, trials, convictions and penalties such as imprisonment, because of their real or perceived sexual orientation or gender identity; UNHCR SOGI Guidelines, §§ 27, 29.

⁷⁹ In *Dudgeon v. the United Kingdom*, this Court observed that, notwithstanding the then apparent paucity or even absence of a record of prosecutions in these types of cases, it could not be said that the legislation in question was a dead letter, because there was no stated policy on the part of the authorities not to enforce the law (§41). In *Modinos v. Cyprus*, this Court reiterated this point by noting that, notwithstanding the fact that the Attorney-General had followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct considering that the law in question was a dead letter, the said policy provided “no guarantee that action will not be taken by a future Attorney-General to enforce the law, particularly when regard is had to statements by Government ministers which appear to suggest that the relevant provisions of the Criminal Code are still in force”, *Modinos*, judgment of the Court, § 23.

⁸⁰ UNHRC 2018 Report on protection against violence and discrimination based on SOGI, UN Doc. A/HRC/38/43, § 20. See also Interim report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary Executions, UN Doc. A/57/138, § 37.

⁸¹ UN HRC 2018 Report on protection against violence and discrimination based on SOGI, UN Doc. A/HRC/38/43, § 64.

⁸² UN HRC, Report of the Working Group on the Universal Periodic Review: Morocco, 13 July 2017, A/HRC/36/10, § 114.32, 144.79

⁸³ UN HRC, Report of the Working Group on the Universal Periodic Review: Morocco, 13 July 2017, A/HRC/36/10, §144.73

⁸⁴ *Ülke v. Turkey*, no. 39437/98, 24 January 2006.

⁸⁵ *Bensaid v the United Kingdom*, no. 44599/98, 6 February 2001, § 46.

abstain from interferences with an individual's right to private and family life, but may also impose positive obligations on a State, such as the adoption of measures designed to secure respect for this right.⁸⁶

36. Once a serious interference is being considered, the criteria that must guide national courts in assessing the proportionality of that interference under Article 8⁸⁷ include consideration of: the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he or she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation; and the strength of social, cultural and family ties with the host country and the country of destination.⁸⁸ **The interveners invite the Court to recall that all relevant factors must be taken into account in cases concerning the removal of migrants following a criminal conviction⁸⁹ in light of the particular circumstances of the case.⁹⁰**
37. In cases of a removal of settled migrants, this Court's Grand Chamber has found that the State "must strike a fair balance between the competing interests of the individual and of society as a whole and that the extent of the State's obligations will vary according to the particular circumstances of the persons involved".⁹¹ It has further held that assessing the relevant elements in a case concerning an applicant's removal "constitutes a procedural obligation with which they must comply in order to ensure the effectiveness of the right to respect for family life".⁹² **While Contracting Parties may conclude that the removal of a foreign national is compatible with Article 3 ECHR, because it would not meet Article 3 threshold of severity, they are nevertheless, required to examine whether, pursuant to Article 8, the individual's specific situation at the time of removal would require refraining from removal and granting them leave to remain.⁹³**
38. **The Court must be satisfied that Contracting Parties conducted 'a sufficient and convincing examination of the relevant facts and considerations and a detailed balancing of the interests involved'.⁹⁴ In this regard, the Court should assess whether the conclusions of Parties were arbitrary or manifestly unreasonable.⁹⁵**

Article 8 considerations in light of the impossibility to continue gender confirmation treatment

39. The interveners note that the definition of private life is not exhaustive and may encompass *inter alia* 'the physical and psychological integrity of a person'.⁹⁶ In the case of *Bensaid*, this Court observed that where measures taken by domestic authorities would have sufficiently adverse effects on an individual's physical and moral integrity, and where those measures do not reach the Article 3 severity threshold, the Court may find the said measures to be in breach of Article 8 nonetheless.⁹⁷ A person's mental health is a crucial element of private life and moral integrity that requires consideration in respect of Article 8.⁹⁸
40. Article 8 further guarantees protection of one's personal autonomy, including the right to establish details of one's identity.⁹⁹ A situation in which a person has undergone gender confirmation treatment would fall within the meaning of private life under Article 8.¹⁰⁰ Moreover, this Court has held that an impediment to the legal recognition of a person's gender identity would negatively affect the psychosocial and mental health of a person in their everyday life.¹⁰¹ **The interveners submit that Contracting Parties should consider the availability of quick, transparent, and accessible procedures for the recognition of an individual's gender identity, as well as the intimate importance associated with it,¹⁰² and whether the inability to express one's gender**

⁸⁶ *Bédat v. Switzerland* [GC], no. 56925/08, 29 March 2016, § 73.

⁸⁷ *K.A v Switzerland*, no. 62130/15, 7 July 2020), § 40; *Üner v. The Netherlands*, no. 46410/99, 18 October 2006, § 57.

⁸⁸ *K.A v Switzerland*, no. 62130/15, 7 July 2020, § 40; *Üner v. The Netherlands*, no. 46410/99, 18 October 2006, § 57

⁸⁹ *Üner v. The Netherlands*, no. 46410/99, 18 October 2006, § 74.

⁹⁰ *K.A v Switzerland*, no. 62130/15, 7 July 2020, § 41.

⁹¹ *Paposhvili v Belgium* [GC], op.cit., § 221.

⁹² *Paposhvili v Belgium* [GC], op.cit., § 224.

⁹³ *Paposhvili v Belgium* [GC], op.cit., § 225. *Bensaid v the United Kingdom*, op.cit., § 46.

⁹⁴ *K.A v Switzerland*, No. 62130/15, op.cit., § 52.

⁹⁵ *K.A v Switzerland*, No. 62130/15, op.cit., § 52.

⁹⁶ *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020, § 109; *Goodwin v the United Kingdom*, op.cit., § 90.

⁹⁷ *Bensaid v the United Kingdom*, op.cit., § 47.

⁹⁸ *Ibid.* § 47-48.

⁹⁹ *Ibid.* § 47

¹⁰⁰ *Hämäläinen v Finland* [GC], No. 37359/09, 16 July 2014, § 59; *L. v Lithuania*, No. 27527/03, 11 September 2007, §§ 56-58; 60-66.

¹⁰¹ *X v. The Former Yugoslav Republic of Macedonia*, No. 29683/16, 17 January 2019, § 22 and § 44.

¹⁰² *Sousa Goucha v. Portugal*, No. 70434/12, 22 March 2016, § 27.

identity would negatively affect one's physical and moral integrity including that person's long term mental health.¹⁰³

41. In situations where no medical facilities are reasonably accessible or available to an individual for the purpose of full gender confirmation treatment, it has been noted that a person may find themselves '*in a situation of distressing uncertainty vis-à-vis [their] private life and the recognition of [their] true identity*'.¹⁰⁴ **The interveners submit that the possibility to continue gender confirmation treatment, and the impact of denying such treatment, should be examined by the Contracting Party as a part of assessment of the compatibility of the measures in prospect with Article 8 ECHR. Where the reasons for an interference are not deemed to be both relevant and sufficient, the interference cannot be considered necessary in a democratic society.**¹⁰⁵
42. This Court has similarly noted that access to gender confirmation treatment relates to one of '*the most intimate areas of private life*'¹⁰⁶ and its particular importance should be emphasised when considering the balance of competing interests under Article 8.¹⁰⁷ **The interveners invite the Court to consider whether measures taken by a Contracting Party to restrict an individual's enjoyment of rights under Article 8 were consistent with the same. When doing so, it is noted that this Court has observed that a Contracting Party's margin of appreciation will be narrower where an important facet of a person's identity, i.e. their gender identity, is in question.**¹⁰⁸
43. This Court has explicitly recognised the importance and relevance of family ties or support networks in removal cases.¹⁰⁹ Relevant considerations include: the length of time the applicant had resided in the host country; the ability to speak the language of the country of origin; and the existence of '*close ties with his country of origin*' or an applicant's '*main social, cultural and family ties*'.¹¹⁰ It is further noted that Article 8 also protects a person's right to establish and develop relationships and that '*the totality of social ties*' between migrants and the community in which they live falls within the meaning of Article 8.¹¹¹
44. **The interveners submit that consideration of these factors assumes a more significant role in circumstances where a person's removal may interfere with their ability to express their gender identity.**
45. The Court has further recognised that there should be additional consideration of the strength of an applicant's social and family ties in a host country if that person arrived in that host country at a young age.¹¹² As such, it has been found that '*the special situation of foreigners*' who have spent most of their childhood in the host country, including having been educated there, must be taken into account accordingly.¹¹³ In such cases, there must be '*very strong reasons*' to justify the expulsion of an applicant who has spent most or all of their childhood in the host country.¹¹⁴ This Court has further recognised that the country where a person has spent most of their lives and formed close social and family ties contributes to the development of their identity and is of fundamental importance under Article 8.¹¹⁵ **The interveners submit that where there is a lack of proven links with the applicant's country of origin, in conjunction with other considerations, the removal of the applicant would not be justified and would be disproportionate to the aim pursued.**¹¹⁶

¹⁰³ *X v. The Former Yugoslav Republic of Macedonia*, No. 29683/16, 17 January 2019, § 70.

¹⁰⁴ *L. v Lithuania*, No. 27527/03, op.cit., § 59. *X v. The Former Yugoslav Republic of Macedonia*, No. 29683/16, 17 January 2019, § 70.

¹⁰⁵ *Y.Y v Turkey*, No. 14793/08, 10 March 2015, § 121.

¹⁰⁶ *Van Kück v Germany*, No. 35968/97, 12 September 2013, § 82.

¹⁰⁷ *Van Kück v Germany*, op.cit., § 72. In the concurring opinion of Judge Ress it was further noted that prolonging the time where gender reassignment surgery is not made available is "not in keeping with 'respect' for private life" as guaranteed under Article 8 ECHR.

¹⁰⁸ *Y.Y v Turkey*, No. 14793/08, 10 March 2015, § 101; *Hämäläinen v Finland* [GC], No. 37359/09, 16 July 2014, § 67; *Söderman v Sweden* [GC], No. 5786/08, 12 November 2013, § 78-79.

¹⁰⁹ *Unuane v. The United Kingdom*, No. 80343/17, 24 November 2020, § 89; *Emre v. Switzerland*, No. 5056/10, October 2011, § 72.

¹¹⁰ *Maslov v Austria*, No. 1638/03, 23 June 2008, § 97.

¹¹¹ *Ibid.*, § 63.

¹¹² *Ibid.*, § 74.

¹¹³ *Ibid.*, § 73 and 74.

¹¹⁴ *Ibid.*, § 75.

¹¹⁵ *Mokrani v France*, No. 52206/99, 15 July 2003, § 31; *Y.Y v Turkey*, No. 14793/08, 10 March 2015, § 66. See also CCPR/C/122/D/2264/2013, *Deepan Budlakoti v. Canada*, 29 August 2018.

¹¹⁶ *Maslov v Austria*, No. 1638/03 (23 June 2008), § 100.