EUROPEAN COURT OF HUMAN RIGHTS

Application No. 62410/17

BETWEEN:

M.H.

Applicant

v.

SERBIA Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS

The AIRE Centre (Advice on Individual Rights in Europe), DCR (Dutch Council for Refugees), ECRE (European Council on Refugees and Exiles)

04 March 2019

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

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

III. Application of the safe third country concept is contingent on the applicant being admitted to the territory, having effective access to a fair asylum procedure in the safe third country as well as access to the rights under Articles 2–34 of the Refugee Convention, where the applicant is entitled to those rights. The applicant must also have an effective opportunity to rebut the presumption of safety in his or her individual circumstances, access to an effective remedy with automatic suspensive effect and access to free legal assistance and representation. Should the removing State wish to rely on diplomatic assurances from the country to which removal is proposed before sending the applicant there, these should be precise, individualised and subject to the guarantees stipulated in this Court's case law.

A. ECHR right of *non-refoulement* under Art. 3 and the Safe Third Country Concept (STC)

1. The legal background to this litigation is the application of the Safe Third Country concept as applied by the Republic of Serbia to the Former Yugoslav Republic of Macedonia (FYROM), now the Republic of North Macedonia (NM).[1] This section focuses on the obligations of the Contracting Parties to the Convention, including the *non-refoulement* principle, in the context of returns to NM (and likely onwards to Greece)[2] of refugees and migrants, with special reference to returns carried out in application of a STC rule.

2. The principle of *non-refoulement* under the ECHR and international law entails an obligation not to return (*refouler*) people to places where there are substantial grounds for believing that they will face a real risk of serious violations to their human rights - including of the right to life, freedom from torture or ill-treatment, flagrant denial of justice or the right to liberty[3] - in the event of their removal, from the State's jurisdiction. It applies both to transfers to a State where the person will be at direct risk (*direct refoulement*), and to transfers to States where there is a risk of further transfer to a third country where the person will be

[1] For the purposes of this draft the interveners will refer to the at the time of the case in question F.Y.R.O.M, now Republic of North Macedonia, as North Macedonia (NM) throughout the entire draft.

[2] "*In the absence of an adequate system for orderly management of irregular movements, in particular effective readmission arrangements with neighbouring countries, illegal returns continued. Since January 2017, international organisations recorded 3 726 persons returned irregularly to Greece."* Macedonian Young Lawyers' Association (MYLA), 'UPR Submission on asylum and migration' (2018), para 13, available at: http://myla.org.mk/wp-content/uploads/2018/08/MYLA-UPR-submission-on-asylum-and-migration.pdf.

[3] Othman (Abu Qatada) v. the United Kingdom, App. No. 8139/09, (17 January 2012), paras. 233, 258-261; N.A. v. the United Kingdom, App. No. 25904/07, (17 July 2008); Soering v. the United Kingdom, App. No. 14038/88, (7 July 1989), Series A. no. 161.

at risk (*indirect refoulement*).[4] This principle is absolute, and no derogations are permitted either in law or in practice.[5]

3. This Court's jurisprudence has repeatedly affirmed that although the right to refugee status is not covered by the Convention or its Protocols,[6] the wider principle of *non-refoulement* is essential in order to protect 'the fundamental values of democratic societies'[7] and is well established in the case law of this Court.[8] The Contracting Parties' obligations under Article 3 ECHR are engaged where substantial grounds have been shown for believing that an individual would be exposed to a real risk of treatment contrary to Article 3 upon removal from the Contracting Parties' jurisdiction.[9]

4. Under this Court's jurisprudence applying the principle of *non-refoulement,* such assessment first requires the both domestic authorities and this Court to examine the conditions in that country in the light of the standards of Article 3 of the Convention.[10] Such assessment must be "*a rigorous one"*.[11] It is in principle for the applicant to adduce evidence "*capable of proving*" the classic *Soering* test.[12] But, ultimately, the decision-maker must "*assess the issue in the light of all the material placed before it and, if necessary, material obtained of its own motion*".[13] Where evidence "*capable of proving*" such risk is adduced by the applicant, "*it is for the Government to dispel any doubts about it*".[14] Where the situation in the receiving state is such that the removing state can be deemed to have constructive knowledge of it, it is under a duty of enquiry to verify, before removal, that the person concerned will not face a real risk of prohibited treatment in the country of destination.[15]The assessment must focus on the foreseeable consequences of the removal 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****"*(emphasis added).[16] This Court has reaffirmed that the fact that an applicant might fail to describe the risks faced does not exempt the sending country from complying with its positive obligations under Article 3 of the ECHR.[17] It is the responsibility of the removing State to ensure respect for the principle of *non-refoulement*.[18]

5. In *non-refoulement* cases, this Court, in assessing the compatibility with Article 3 of a removal that has already taken place, considers the information and the facts that were known or that ought to have been known to exist at the time of removal.[19] In cases where the prospective removal has yet to take place, the Court will assess the situation on the basis of information known to it at the time when the Court considers the case.[20] In *F.G. v. Sweden*, the Grand Chamber of this Court held that the competent domestic

[4] 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.
[5] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; UNCAT, Adel Tebourski v. France, CAT/C/38/D/300/2006, 11 May 2007, paras. 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, para. 12.
[6] Salah Sheekh v. the Netherlands, op. cit., para. 135.
[7] Chahal v. the United Kingdom, App. No. 22414/93, [GC] (15 November 1996), para. 96; Vilvarajah and Others v. the United Kingdom, App. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, (30 October 1991), para. 108.
[8] Soering v. the United Kingdom, op. cit, paras. 35-36, 88-91.
[9] Hilal v. the United Kingdom, App. No. 45276/99, (6 March 2001), para. 59; Ahmed v. Austria, App. No. 29564/94, (17 December 1996), paras. 38-41.
[10] Mamatkulov and Askarov v. Turkey [GC], App. Nos. 46827/99 and 46951/99, (04 February 2005), para. 67; F.G. v. Sweden [GC], App. no. 43611/11, (23 March 2016), para. 112.
[11] Sufi and Elmi v. the United Kingdom, App. Nos. 8319/07 and 11449/07, (28 June 2011), para. 214; Chahal v. the United Kingdom, op. cit., para. 96; Saadi v. Italy, App. No. 37201/06, (28 February 2008), para. 128.
[12] Sufi and Elmi v. the United Kingdom, op. cit., para. 214.
[13] N v. Finland, App. No. 38885/02, (26 July 2005), para. 160; Hilal v. the United Kingdom, op cit., para. 60; Vilvarajah and Others v. the United Kingdom, op. cit., para. 107.
[14] N. v. Sweden, App. No. 23505/09, (20 July 2010), para. 53; R.C. v. Sweden, App. No. 41827/07, (9 June 2010), para. 50.
[15] Mamatkulov and Askarov v. Turkey [GC], op. cit., para. 69.
[16] Sufi and Elmi v. the United Kingdom, op. cit., para. 216; Vilvarajah v. the United Kingdom, op. cit., para. 108.
[17] Hirsi Jamaa and Others v. Italy, App. No. 27765/09, (23 February 2012), para. 157.
[18] Sharifi and Others v. Italy and Greece, App. No. 16643/09, (21 October 2014), para. 232, reminiscent of the principles of M.S.S. v. Belgium and Greece [GC], App. No. 30696/09, (21 January 2011) and Hirsi Jamaa and Others, op. cit., paras. 338-343 and 146-148 respectively.
[19] Ilias and Ahmed v. Hungary, App. No. 47287/15, (14 March 2017), para. 105, cross-referencing: Muminov v. Russia, App. No. 42502/06, (11 December 2008), paras. 91-92. See also: F.G. v. Sweden, op. cit., para. 115, cross-referencing Chahal v. the United Kingdom, op. cit., para. 86.
[20] Chahal v. the United Kingdom, op. cit., para. 86; Ahmed v. Austria, App. No. 25964/94, (17 December 1996), para 43.

authorities should investigate, 'on their own motion', not only circumstances presenting 'a well-known general risk' in relation to which "*information […] is freely ascertainable from wide number of sources*",[21] but also "*facts relating to a **specific** individual that could expose him to a risk of ill treatment in breach of [Art. 2 and 3 ECHR]*" could expose him to a risk of ill treatment.[22]

6. Any examination adhering to the above standards of the individual circumstances must take into account the ***specific*** circumstances of those individuals subject to the removal, which can have a decisive role in the way the return is experienced and on the harm caused in practice. In practical terms, this means that the same treatment can have different effects on people in different situations or with enhanced vulnerability. In its jurisprudence on Article 3 ECHR this Court has always recognised that the "*sex, age and state of health*" of the applicant must be taken into account.[23] In *Tarakhel v. Switzerland* this Court found that for a feared removal to fall within the scope of Article 3 "*the ill- treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim*" and further quoting *M.S.S. v. Belgium and Greece* "*particularly underprivileged and vulnerable population groups, asylum seekers require special protection under that provision*".[24] The particular situation of asylum-seekers demonstrably suffering from acute mental health problems[25] including post-traumatic stress disorder (PTSD) should be given enhanced consideration when a return to a third country is being assessed. Many CoE states recognise this.[26] For instance, the Maltese legislation expressly provides that "*the accelerated procedure shall not be applied in case where it is considered that an applicant requires special procedural guarantees as a consequence of having suffered torture, rape or other serious form of psychological, physical or sexual violence*".[27]

7. Consequently, the States must have in place effective systems for identifying people within their jurisdiction who need protection under the prohibition of *refoulement*,[28] as well as to ensure access to fair and efficient national asylum procedures in compliance with the requirements of an effective remedy.[29]This obligation applies *a fortiori* when those individuals fearing a treatment contrary to Article 3 ECHR are specifically vulnerable.[30]

8. Access to a fair and efficient national asylum system, and the requirement of rigorous scrutiny of claims alleging potential breaches of Convention rights, would be undermined in case of a schematic reliance by domestic authorities on a national law considering a particular STC. On 13 March 2018, the Grand Chamber considered returns pursuant to the STC rule in the case of *Ilias and Ahmed v. Hungary*.[31] In its Chamber judgement, this Court first found that the approach of the Hungarian authorities created an 'unfair and excessive burden of proof',[32] and secondly, it held that the authorities had failed to comply with their obligation to consult available material from reliable sources that clearly stated that neither Serbia, nor the

[21] F.G. v. Sweden [GC], App. No. 43611/11, (23 March 2016), paras. 126 and 157; Hirsi Jamaa and Others v. Italy, op. cit., paras. 131-133; M.S.S. v. Belgium and Greece, op. cit., para. 366.
[22] F.G. v. Sweden, op. cit., paras. 127 and 157.
[23] See *inter alia* Ireland v. the United Kingdom, App. No. 5310/71, (18 January 1978), para. 162; Tyrer v. the United Kingdom, App. No. 5856/7, (25 April 1978), paras. 29 and 30.
[24] See *inter alia* Tarakhel v. Switzerland, App. No. 29217/12, (04 November 2014), paras. 118-119; M.S.S. v. Belgium and Greece, op. cit., para. 251.
[25] Rocio Naranjo Sandalio, 'Life After Trauma: The Mental-Health Needs of Asylum Seekers in Europe', Migration Policy Institute (30 January 2018), available at: https://www.migrationpolicy.org/article/life-after-trauma-mental-health-needs-asylum-seekers-europe.
[26] AIDA, 'The Concept of vulnerability in European asylum procedures' (2017), available at: http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_vulnerability_in_asylum_procedures.pdf.
[27]Regulation 7 Procedural Regulations, AIDA Country Report (2016), p. 32.
[28]Hirsi Jamaa and Others v. Italy, op. cit., para. 202.
[29]Sharifi and Others v. Italy and Greece, App. No. 16643/09, (21 October 2014), para. 174.
[30] Tarakhel v. Switzerland, op. cit.
[31]Ilias and Ahmed v. Hungary, op. cit.: this judgment is not final. Request for referral to the GC has been accepted. Judgment is awaited.
[32]In particular, the Court considered that such approach would create a presumption that needed to be rebutted by the applicants, *ibid,* para. 118. This issue will not be discussed in detail in this comment.

former Yugoslav Republic of Macedonia, nor Greece[33] had adequate asylum systems at the material time.[34] The Chamber judgment also found that the simple inclusion of a country in a STC list does not alter the principle that the protection against *refoulement* must be practical and effective, as opposed to theoretical and illusory. The returnee must have access to an individualized, fair and efficient asylum procedure.[35] The increasingly problematic application of the STC concept by States has continued to be brought to the attention of this Court in a number of communicated cases.[36]

9. A Contracting Party's obligations to prevent Article 3 violations require a thorough investigation of the general situation for those returned in light of their particular circumstances. The Serbian STC list, as contained in the Serbian Asylum Act (Official Gazette no. 109/2007) did not include an explicit and up-to-date assessment of whether NM is a STC for international protection applicants,[37] but included only generic and unverified assumptions.[38] Furthermore, the legal definition of a STC did not require an assessment of the asylum-seeker's chances of accessing the asylum procedure in the STC or require the Serbian state to obtain guarantees to that effect in situations where this is doubtful.[39] In reality, even following some legislative improvements, *de facto* NM's asylum system is still characterized by multiple deficiencies. These include lack of effective access to asylum, including rejections at the border; systematic arbitrary returns, in particular to Greece, and poor quality of asylum decisions.[40] These will be elaborated upon in Section 2 of this intervention.

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

B. Procedural rights under Article 3 and Article 13

11. This Court has consistently held that the obligation of the State Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures to ensure that no individuals within their

[33] M.S.S. v. Belgium and Greece, op. cit., paras. 62 - 86, 231, 299-302 and 321.
[34] Ilias and Ahmed v. Hungary, op. cit., paras. 121 – 123.
[35] *Ibid,* paras. 117-124.
[36] See the communicated cases of J.B. v. Greece, App. No. 54796/16 (return to Turkey as a STC); A.K. v. Serbia, App. No. 57177/16 (return to FYROM as a STC); M.H. and others v. Croatia, App. No. 15670/18 (return to Serbia as a STC) and Al Husin v. Bosnia and Herzegovina, App. No. 10112/16 (return to a third country deemed safe).
[37] Handbook on the International and European Standards in the Field of Asylum and Migration and their Applicability and relevance to the Republic of Serbia, p. 184, available at: http://www.tcma.rs/files/manual-eng.pdf, quoting the Serbian law on STC "Decision Establishing the List of Safe Countries of Origin and STC" published in the Official Gazette of the Republic of Serbia No. 67/2009.
[38] *Ibid.*
[39] Handbook on the International and European Standards in the Field of Asylum and Migration and their Applicability and relevance to the Republic of Serbia, pg. 184, available at: http://www.tcma.rs/files/manual-eng.pdf, accessed on 20/02/2019. In June 2018 Law on Asylum and Temporary Protection (LATP), Official Gazette no. 24/2018 came into force. Article 42 of LATP still prescribes that an asylum application may be dismissed without examining it on the merits if the concept of a safe third country can be applied. Although the new law significantly improves the framework of the STC, there are still ambiguities that may obstruct its adequate application. Namely, according to the Article 45 of the LATP, the safe third country is the country where the applicant is safe from persecution as defined in Article 24, as well as from the risk of suffering serious harm referred to in Article 25 (2) thereof. Additionally, the safe third country is only that country in which the applicant enjoys the guarantees from *refoulement*, which includes access to an efficient asylum procedure (Art. 45 (1)). Previous practice of the STC lists has been abolished by the LATP. For more information, see (Upcoming), AIDA Report, Serbia, 2018.
[40] Macedonian Young Lawyers Association, State of Asylum in the Republic of Macedonia 2017, available at: http://myla.org.mk/wp-content/uploads/2019/03/State-of-Asylum-2017-.pdf.

jurisdiction are subjected to ill-treatment.[41] Article 13 enshrines a positive obligation on the State to ensure access to effective remedies and reparation for any violations.

12. This Court has found a close and rigorous scrutiny of arguable[42] claims in *non-refoulement* cases to be an integral part of protecting an individual's rights under Articles 3 and 13 ECHR.[43] This requires the Contracting Parties, *inter alia*, to assess all evidence at the core of a *non-refoulement* claim,[44] including, where necessary, to obtain such evidence *proprio motu*; not to impose an unrealistic burden of proof on applicants or require applicants to bear the entire burden of proof;[45] to take into account all relevant country of origin information materials originating from reliable and objective sources;[46] and to apply the principle of the benefit of the doubt in light of specific vulnerabilities of asylum-seekers.[47]

13. To comply with Article 3 safeguards, individuals must be told, in simple, non-technical language that they can understand, the reasons for their expulsion, and the process available for reviewing or challenging the decision.[48] For the information to be accessible, it must be presented in a form that takes account of the individual's level of education.[49] Accessible legal advice and aid may be required for the individual to fully understand his or her circumstances.[50]

14. Individuals at risk of prohibited treatment under the Convention have a right to an effective remedy, which is capable of reviewing and overturning the decision to expel,[51] including when it is based on the STC concept. Any remedy must be accessible in practice as well as in law, not theoretical and illusory, and cannot be unjustifiably hindered by the acts or omissions of the authorities.[52] This Court's jurisprudence highlights a number of obstacles that may render the remedy against prohibited treatment under Article 3 ineffective, *inter alia*, removing the individual before he or she had the practical possibility of accessing the remedy;[53] the lack of a remedy's automatic suspensive effect;[54] excessively short time limits in law for submitting the claim or an appeal;[55] insufficient information on how to gain effective access to the relevant procedures and remedies;[56] obstacles in physical access to and/or communication with the responsible authority;[57] lack of (free) legal assistance and access to a lawyer;[58] and lack of interpretation.[59]

15. Treating all individuals compatibly with the Convention includes the obligation to identify and pay special attention to the needs of people in a vulnerable situation. This includes asylum-seekers, unaccompanied

[41] Hirsi Jamaa and Others v. Italy, op cit., paras. 70, 114.
[42] This Court has noted that in order to be arguable the right in question must not necessarily be violated and does not require certainty, but rather the claim must not be so weak that it would not be admissible under the ECtHR. Diallo v. Czech Republic, App. No. 20493/07, (28 November 2011), paras. 59 -71.
[43] Jabari v. Turkey, App. No. 40035/98, (11 July 2000), paras. 39, 50.
[44] *Ibid*, paras. 39-40; Singh and Others v. Belgium, App. No. 33210/11, (2 October 2012), para. 104.
[45] M.S.S. v. Belgium and Greece, op. cit., paras. 344-359; Hirsi Jamaa and Others v. Italy, op. cit., paras. 122-158.
[46] Salah Sheekh v. the Netherlands, op cit., para. 136.
[47] M.A. v. Switzerland, App. No. 52589/13, (18 November 2014), para. 55.
[48] Hirsi Jamaa and Others v. Italy, op. cit., para. 204; Čonka v. Belgium, op cit., (5 February 2002), para. 44.
[49] *"The information should be provided in a timely manner and should be as complete as possible. (…) Language and communication should be adapted to the gender, age, physical and mental state and/or education level of the person in front of you"* EASO, Frontex, 'Access to the Asylum Procedure: What you need to know' (2016), pp. 17 – 18, available at: https://www.easo.europa.eu/sites/default/files/public/FAQs_0.pdf
[50] *"– the remedy shall be accessible, which implies in particular that, where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given it free of charge, in accordance with the relevant national rules regarding legal aid;*" Guideline 5. Remedy against the removal order in CoE Committee of Ministers "Twenty Guidelines on forced return" adopted on 4 May 2005 as referenced by the ECtHR in De Souza Ribeiro v. France, App. No. 22689/07, para. 47.
[51] Shamayev and Others v. Georgia and Russia, App. No. 36378/02, (12 April 2005), para. 460; M.S.S. v. Belgium and Greece, op. cit.; Čonka v. Belgium, op. cit., paras. 77-85.
[52] Čonka v. Belgium, op. cit, para. 46, 75.
[53] Shamayev and Others v. Georgia and Russia, op cit., para. 460; Labsi v. Slovakia, App. No. 33809/08, (15 May 2012), para. 139.
[54] Baysakov and Others v. Ukraine, App. No. 54131/08, (18 February 2010), para. 74; M.A. v. Cyprus, App. No. 41872/10, (23 July 2013), para. 133.
[55] I.M. v. France, App. No. 9152/09, (14 December 2010), para. 144; M.S.S. v. Belgium and Greece, op. cit., para. 306.
[56] Hirsi Jamaa and Others v. Italy, op. cit., para. 204.
[57] Gebremedhin v. France, App. No. 25389/05, (26 April 2007), para. 54; I.M. v. France, op cit., para. 130; M.S.S. v. Belgium and Greece, op cit., paras. 301 - 313.
[58] M.S.S. v. Belgium and Greece, op cit., para. 319; *mutatis mutandis* N.D. and N.T. v. Spain App. Nos. 8675/15 and 8697/15, (3 October 2017), para. 118.
[59] Hirsi Jamaa and Others v. Italy, op cit., para. 202.

children and families with children, the elderly, the sick and injured and persons with disabilities,[60] including acute mental health issues, irrespective of whether national authorisation to enter the territory has been granted.[61] States have an obligation to enable those who wish to identify themselves as seeking asylum to do so[62] and to permit them access to determination procedures with all the procedural safeguards required by national law,[63] including access to information, legal aid and access to effective remedies.

16. Hence, the interveners note that, in the light of the Court's case-law and the intended purpose of Article 13, asylum-seekers are deemed to be in "an inherently vulnerable situation",[64] which merits special attention by public authorities to ensure their full and effective access to domestic remedies. This must apply *a fortiori* to asylum-seekers who are specifically vulnerable due to additional factors (e.g. asylum-seekers who are also minors, disabled, mentally ill, psychologically distressed, or otherwise disadvantaged) and guarantees tailored to their specific needs (e.g. child-friendly justice, psychological assistance, tailored information provision) must be complied with.

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

18. Furthermore, the interveners submit that, in order to treat all individuals compatibly with the Convention, special consideration should be given to the vulnerable condition of asylum-seekers in general and to the specific circumstances of each individual, in order to ensure that all asylum-seekers enjoy a full and effective access to domestic remedies.

C. Diplomatic assurances in the context of Article 3 ECHR and the situation in North Macedonia

a) Diplomatic assurances in the context of Art. 3 ECHR and the 'safe third country' concept

19. This Court has not yet expressly addressed the issue of diplomatic assurances linked to the STC presumption or within the context of international protection of particularly vulnerable persons in situations when this is found appropriate. This Court identified the standards on diplomatic assurances in *Othman (Abu Qatada) v. UK* in 11-points. The criteria were required in extradition cases, where the criminal justice/law enforcement systems are usually within the control of the state. However, guaranteeing the applicants' Article 3 rights in the asylum context, with various procedural possibilities that may not fall under formal state monitoring mechanisms, calls for an even more stringent application of the 11-point criteria (although obtaining diplomatic assurances may not be feasible on every single asylum case). According to this Court's established case law on diplomatic assurances[65] in general, a State

[60]Muskhadzhiyeva and Others v. Belgium, App. No. 41442/07, (19 January 2010); Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, App. No 13178/03, (12 October 2006).
[61]*Mutatis mutandis* Saadi v. the United Kingdom [GC], App. No 13229/03 (29 January 2008), para. 66; Mohamad v. Greece, App. No. 70586/11, (11 December 2014), para. 44.
[62]Hirsi Jamaa and Others v. Italy, op cit.
[63]Kebe and Others v. Ukraine, App. No. 12552/12, (12 January 2017), para. 104.
[64]M.S.S. v. Belgium and Greece, op. cit., para 233.
[65] Even where such high levels of safeguards do apply, the former UN Special Rapporteur on Torture affirmed that, 'diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement.' (Manfred Nowak, UN Special Rapporteur on Torture, Annual Report to the General Assembly, UN Doc. A/60/316, 30 August 2005 (Nowak Report 2005), §32). The ICJ supports this position and opposes all use of diplomatic assurances against torture or other ill-treatment (See, ICJ, *Assessing Damage, Urging Action, Report of the Eminent Jurist Panel on Terrorism, Counter-terrorism and Human Rights*, (ICJ, 2009), pp.104-106 & 118-119; ICJ, Legal Commentary to the ICJ Berlin Declaration (ICJ, 2008), pp.100-104.). See also: Amnesty International, Human Rights Watch and International Commission of Jurists, Reject Rather than Regulate: Call on Council of Europe Member States not to Establish Minimum Standards for the Use of Diplomatic Assurances in Transfers to Risk of Torture and Other Ill-Treatment (December 2005).

wishing to rely on diplomatic assurances must ascertain, on the basis of objectively verifiable evidence, that the assurances are reliable in practice.[66] The risk of ill- treatment must be ruled out.[67] Sometimes the general situation in a country is as such that it will mean that no weight at all can be given to diplomatic assurances.

20. The Court will recall that the case of *K.R.S v. United Kingdom* (concerning returns to Greece) was declared inadmissible. In *K.R.S.* the Court had sought informal clarification from the UK who in turn sought information from the Greek authorities. The Court's decision refers to a concatenation of letters, including letters enclosed within letters, from the Greek and UK authorities. The letters from the Greek authorities did not specifically address relevant matters (namely the risk of onward *refoulement*), "*even though they were requested to do so*".[68] The UK submitted a further letter from Greece, asserting that asylum applicants' rights generally would be respected. As has been well documented since the *K.R.S* decision these assurances by the Greek authorities were at best unduly optimistic and at worst disingenuous.

21. In *M.S.S. v Belgium and Greece*, which subsequently considered the situation in Greece, the Belgian Government argued that it had similarly sought assurances from the Greek authorities, sufficient to support a presumption that Greece fulfilled its international obligations in asylum matters. The Court, however, departed from the approach taken in *KRS* and concluded that the Greek assurances were inadequate and unreliable.[69] The assurances were effectively rebutted by detailed information from credible sources, including reports by reputable human rights organisations. The Court found this rebuttal important due to the applicant being "*particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously*" and referred specifically to the fact that there was "*no guarantee concerning the applicant in person*".[70] This position was further developed in the case of *Tarakhel v. Switzerland,* whereby the increased vulnerability of a family, gave rise to the need for "specific" assurances by the receiving State regarding the reception of the applicants in facilities and conditions tailored to their needs.[71]

22. Moreover, it is now considered established case law of this Court that the value of assurances that an individual would not be subjected to anticipated treatment contrary to the Convention will be compromised, when there appears to be no objective means of monitoring their fulfilment.[72]

23. The interveners submit that in the situations where reliance on diplomatic assurances is appropriate and may secure a person's rights guaranteed by the Convention, these assurances must not only be tested against detailed and reliable information but also examined in light of the context in which such assurances are given.[73] Importantly, for such assurances to be reliable they should be

[66]Othman (Abu Qatada) v. the United Kingdom, op. cit., para. 189.
[67]Saadi v. Italy op cit., para 148; Ismoilov and Others v. Russia, App. No. 2947/06, (24 April 2008), para 127; Ryabikin v. Italy, App. No. 8320/04 (19 June 2008), para. 119.
[68]K.R.S. v. the United Kingdom, App no. 32733/08, page 17.
[69]M.S.S. v. Belgium and Greece, op cit., paras 348-353.
[70]M.S.S. v. Belgium and Greece, op cit., paras 232 and 354.
[71]Tarakhel v. Switzerland, op cit., paras 120-121.
[72]Shamayev and Others v. Georgia and Russia, op cit., para 350; Mamatkulov and Askarov v. Turkey, App Nos. 46827/99 and 46951/99 [GC] (4 February 2005) para 73, See: Wouters, Cornelis Wolfram. *International legal standards for the protection from refoulement.* Diss. Intersentia Publishers, Antwerpen, 2009, § 3.3.2.6b, p.287.
[73] This is in line with the UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, August 2006, §§48-49: *'In assessing the weight which may be given to diplomatic assurances in the examination of an asylum claim, the decision-making authority should be guided by the criteria which have been developed under international and regional human rights law for the evaluation of diplomatic assurances.'*

individualised, precise and cover the particular needs of the person whose Convention rights may be violated. The interveners consider that in countries where conditions rapidly change, where numbers of people in need of protection are higher than the capacity of the asylum system may handle, inadequate reception conditions and deficiencies in an asylum system, general assurances cannot be relied upon at all. Any assurances given by a State with a domestic system which has reported shortcomings and previous violations of Convention rights will inevitably struggle to satisfy the requirements of specificity or practicality.

b) Reliable Information on North Macedonia

24. The situation in NM has been raising continuous concerns regarding the adequacy of its asylum and reception systems. In 2015 the UN High Commissioner for Refugees (UNHCR), concluded that the country had not been able to ensure that asylum-seekers have access to a fair and efficient asylum procedure. Those who managed to get access to the asylum procedure were confronted with a lack of (adequate) interpretation and systematic identification of persons with specific needs, including children. Decisions were often inadequately reasoned and rarely based on the merits.[74] The European Commission criticized the quality of the asylum procedure and noted that "the asylum recognition rate remains low, and the Administrative Court continues to process asylum appeals largely on procedural rather than substantive grounds, leading to long delays and repeat appeals".[75] These findings[76] led UNHCR to conclude that NM does not meet international standards for the protection of refugees and does not qualify as a STC and that States should refrain from sending asylum seekers there until further improvements have been made, in accordance with international standards.[77]

25. Despite some positive developments, the abovementioned concerns are still present. Lack of information, legal assistance and interpretation as well as inability to register asylum applications at the border on many occasions have resulted in arbitrary returns;[78] arbitrary designation of a case to the "accelerated procedure" that always results in its rejection;[79] poor quality of asylum decisions under both regular and accelerated procedures with very limited if at all assessment of individual circumstances;[80] and arbitrary detention[81] illustrate the unpredictability of the system. Numerous and credible reports highlight routine returns from Serbia to Greece.[82] According to statistics provided by the Macedonian Young Lawyers Association (MYLA) at least 894 people were returned to Greece in 2017 without any form of legal procedure.[83] More than 15 per cent of them were Syrians.

[74] UNHCR, UNHCR observations: The former Yugoslav Republic of Macedonia as a country of asylum, August 2015.
[75] EC staff working document for the Former Yugoslav Republic of Macedonia, report, 2015, 10 November 2015.
[76] Also relevant in 2017: MYLA, On the Efficiency of the Legal Protection of Human Rights in FYROM, p. 30 –36.
[77] UNHCR, UNHCR observations: The former Yugoslav Republic of Macedonia as a country of asylum, August 2015; MYLA, Annual report on immigration detention in Macedonia 2016, January 2017 and mid-year report on immigration detention in Macedonia, January- June 2017; Helsinki Committee for Human Rights of the Republic of Macedonia, Refugees rights: National and International Standards Opposite the Situation on the Field, 16 January 2017.
[78] Report from the Macedonian Ombudsman - National Preventive Mechanism unannounced visit in the Transit Center Vinjoug on 16th of May 2016, available at: http://ombudsman.mk/upload/NPM-dokumenti/2016/Redovna%20nenajavena%20Vinojug-16.05.2016.pdf accessed on 05.10.2016; MYLA, State of Asylum in the Republic of Macedonia, 2017, section 3.1, 4.2; AIDA Country Report, Serbia, 2018, p. 45 illustrates one of such cases when an asylum seeker asserted that he was detained in North Macedonia, denied the possibility to apply for asylum and then informally expelled to Greece.
[79] MYLA, State of Asylum in the Republic of Macedonia, 2017, section 3.2 and 6.2.
[80] MYLA, State of Asylum in the Republic of Macedonia, section 6.
[81] MYLA, Human Rights Violations against Refugees and Migrants along the Western Balkan Route, 2017, p. 15; UN CHR, The former Yugoslav Republic of Macedonia: Zeid calls for alternatives to detention and expulsion of migrants, available at: https://ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20567&LangID=E;; Global Detention Project, Former Yugoslav Republic of Macedonia Immigration Detention Profile, 2017 .
[82] MYLA, State of Asylum in the Republic of Macedonia, 2017, sections 3.1, 4.2.
[83] Macedonian Young Lawyers' Association (MYLA), 'UPR Submission on asylum and migration' (2018), available at: http://myla.org.mk/wp-content/uploads/2018/08/MYLA-UPR-submission-on-asylum-and-migration.pdf; These numbers are reported to be even higher: since January 2017, international organisations recorded 3726 persons returned irregularly to Greece, European Commission – Communication on EU Enlargement Policy: The former Yugoslav Republic of Macedonia 2018 Report, p. 40; Macedonian Young Lawyers' Association (MYLA): UPR Submission on asylum and migration (2018), para 13.

D. An analysis of the international standards applicable to the STC and the principle of *non-refoulement.*

26. Article 53 ECHR requires states not to fall below the standards of the 1951 Convention in carrying out their substantive and procedural obligations under Article 3 ECHR. States parties to the 1951 Refugee Convention and its 1967 Protocol are normally required to accept those who claim to be refugees in order to examine their claim.[84] However, States may, in certain circumstances, send asylum-seekers to countries that can be considered safe, provided that removal there is in line with their obligations under the Refugee Convention, including full access to the rights under the Refugee Convention (Articles 2 – 34), including the principle of *non-refoulement* under Article 33 of the Refugee Convention.[85] UNHCR, scholars and domestic judges, have expressed the view that a State may only send an asylum-seeker to a country where he or she will be granted protection 'comparable' or 'equivalent' with what he or she is entitled to under the Refugee Convention in the sending State, including, at least, all the rights that the Refugee Convention guarantees.[86] The sending State must also satisfy itself that the receiving State interprets refugee status in a manner that respects the true and autonomous meaning of the refugee definition set by Art. 1 of the Refugee Convention.[87]

27. The UNHCR has observed that to excuse a country from the duty to examine an asylum application on the merits on the basis of a 'safe country' rule, creates a 'grave confusion' between admissibility decisions 'made on purely formal grounds' and decisions on the substance of the claim, which, in turn, pertain to a claim's well-foundedness and should be treated autonomously. To collapse these two steps into one would amount to denying the applicant the opportunity to present the grounds 'on which his or her claim to international protection is premised.[88] The UNHCR also warned against using "the mere transit" through the country for the application of the STC criteria. The Agency stated that transit thus defined 'does not, in and by itself, provide sufficient grounds'[89] for a State 'to refuse considering [the request] in substance'.[90] Transit is 'often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection'. When a transfer is based on an agreement with a third country by which the latter commits to providing asylum determination and international protection,[91] other commentators have noted that this too does not equate to an '[a]ssurance that the […] country will actually provide a fair refugee status determination (or […] effective protection […]'.[92]

28. In accordance with guidelines endorsed by the UN Office of the High Commissioner for Human Rights,[93] certain migrants are entitled to specific protection based on factors such as the situations they left behind,

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[84] UNHCR, *Background Note on the Safe Country Concept and Refugee Status Background Note on the Safe Country Concept and Refugee Status* EC/SCP/68, 26 July 1991, para 16.

[85] UNHCR, *EXCOM Conclusions No. 15 (XXX) of 1979 on refugees without an asylum country and No. 58 (XL) of 1989 on the irregular movement of asylum-seekers, in Compilation of Conclusions Adopted by the Executive Committee on the International Protection of Refugees: 1975-2004*, available at: http://www.unhcr.org/uk/publications/legal/41b041534/compilation-conclusions-adopted-executive-committee-international-protection.html

[86] Michelle Foster, *Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State*, 28 Michigan Journal of International Law 233 (2007), available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1175&context=mjil, p. 264-5.

[87] University of Michigan Law School, *The Michigan Guidelines on Protection Elsewhere*, Michigan Journal of International Law 209 (2007), available at: http://www.refworld.org/docid/4ae9acd0d.html, para 4 and UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23 March 2016, available at: http://www.refworld.org/docid/56f3ee3f4.html p. 2.

[88] UNHCR, *Background paper No. 2: The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees*, May 2001, available at: http://bit.ly/2hLhym9

[89] UNHCR, Background paper No. 2 [*supra* no 48]; UNHCR Executive Committee Conclusions [*supra* no 42].

[90] See: *supra no 48;* Violeta Moreno-Lax, *The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties,* in Guy S. Goodwin-Gill and Philippe Weckel (eds) *Migration & Refugee Protection in the 21st Century: Legal Aspects* (Brill, 2015), p.681.

[91] Violeta Moreno-Lax, *The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties, above,* p.632.

[92] Legomsky, Stephen H. *Secondary refugee movements and the return of asylum seekers to third countries: the meaning of effective protection*, International Journal of Refugee Law 15.4 (2003): p567-677; p.633.

[93] *Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations,* UN Office of the High Commissioner & Global Migration Group.

the conditions they face on arrival and their health status. With regard to these 'vulnerable' migrants, the authorities must "*implement legal obligations to ensure that no person is returned to a place where there are substantial grounds to believe that they would be at risk of being subject to torture or other cruel, inhuman, or degrading treatment or punishment*".[94]

29. Furthermore, in their preparation for the Global Compact for Safe, Orderly and Regular Migration, UN member states agreed to cooperate and unify their response to the "*needs of migrants in situations of vulnerability*". This included a commitment to "*uphold the prohibition on returning migrants when there is a real and foreseeable risk of death, torture and other cruel, inhuman and degrading treatment or punishment*".[95] In respect to these vulnerable migrants, the Global Compact reiterated its commitment to the rule of law, due process and access to justice, and recognised that these principles are fundamental to all aspects of migration governance.

30. Last but not least, the interveners wish to bring to the attention of the Court the fact that EU law should also be taken into consideration. Serbia is not a member of the European Union (EU) and therefore it is not bound by its asylum and migration acquis. However, given its status as an EU Candidate State since 2012, Serbia is under obligation to align its legislation and the practices of its competent authorities with the EU *acquis communautaire*. Therefore, the Court should also take into account EU migration and asylum law standards in consideration when assessing the quality of asylum proceedings in Serbia. The interveners would like to draw the attention of the Court to the safeguards under the EU Charter of Fundamental Rights (especially Articles 1, 4, 18, 19 and 47), the Recast Asylum Procedures Directive (especially Article 38) and the Dublin III Regulation (especially Article 3 paragraph 3).

31. **The interveners submit that a return that exposes applicants to the risk of onward *refoulement,* and deprives them of rights guaranteed by international law, including full access to rights under the Refugee Convention (Articles 2 – 34) in particular, clearly violates the above principles, irrespective of whether the third country is listed as a STC or not.[96]**

[94] Ibid. p. 31.
[95] *Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration*, UN General Assembly, 30 July 2018.
[96] Joined Cases C-411/10 *N.S. v. Secretary of State for the Home Department* and C-493/10 *M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, ECLI:EU:C:2011:865.