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Application No. 15670/18

M.H. and Others v. Croatia

Third party intervention on behalf of the Hungarian Helsinki Committee

pursuant to the Registrar's notification dated 17 September 2018 that the President of the Section has granted leave, under Rule 44(3) of the Rules of the European Court of Human Rights.

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A. Detention of children

I. The best interest of the child as primary consideration

1. Based on Article 53 of the Convention, the Court has previously held that the Convention '*must be applied in accordance with the rules of international law, in particular those concerning the international protection of human rights.'*[1]
2. The best interest of the child is one of the fundamental values of the UN Convention on the Rights of the Child (CRC).[2] To this end, in line with Article 3(1) of the CRC *'[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'*
3. The best interest principle is enshrined also in Article 24(2) of the Charter of Fundamental Rights of the European Union (the EU Charter) and as such it is also part of primary EU law.[3] Given that it is based on the CRC, the content and scope of the best interest principle shall also be interpreted as deriving from the CRC. It shall thus be regarded as a complex, threefold concept: a substantive right, a fundamental, interpretative legal principle and a rule of procedure.[4] In the case of *MA, BT, DA,*[5] the Court of Justice of the European Union (CJEU) refers to the best interests of a child as a fundamental right and not as a general principle of law and therefore the limitation applied to the principles (they shall be judicially cognisable only in the interpretation of acts in the ruling on their legality)[6] does not apply.
4. Based on the above, this Court noted that *'there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount…'*[7]According to the UN Committee on the Rights of the Child it must be given a heightened priority, and assessed on a case-by-case basis, '*especially when an action has an undeniable impact on the child concerned (…) carefully balancing the interest of all parties.'*[8]
5. **It may therefore be concluded that the best interest of the child shall be a frame that limits the scope of State actions regarding children – especially when those will have a direct impact on them – to an area where the primary consideration of these interests is a binding substantive and procedural right as well as an interpretive legal principle. State actions falling outside of this frame cannot be considered lawful and within a State's margin of appreciation and therefore are in breach of the Convention**.

II. The application of the best interest principle to the rights guaranteed by the Convention

Article 3

6. This Court established that the extreme vulnerability of children is a decisive factor, one that takes precedence over their status as illegal immigrants.[9] States therefore have a duty as part of their positive obligations under Article 3 of the Convention to protect them and take appropriate measures to this end.[10]

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[1] *Pini and Others v. Romania*, no. 78028/01, 22 June 2004, §138.
[2] Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have his or her best interest taken as primary consideration (Article 3(1)) (CRC GC No. 14) I. A.
[3] Article 6(1) of the Treaty on the European Union.
[4] Explanations Relating to the Charter of Fundametal Rights (2007/C 303/02) Explanation on Article 24 – The rights of the child.
[5] C-648/11 MA, BT, DA, EU:C:2013:367, §§57, 58.
[6] Article 52(5) of the EU Charter.
[7] *Neulinger and Shuruk v. Switzerland*, no. 41615/07, §135.
[8] CRC GC No. 14 (2013) IV. A. 4.
[9] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, §55; *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13, §103; *Popov v. France*, nos. 39472/07 and 39474/07, §91.
[10] *Popov v. France*, nos. 39472/07 and 39474/07, §91.

7. In this context, it must be stressed that '*Article 3 makes no provisions for exceptions*.'[11] States therefore are obliged to attribute extreme care and due consideration to the best interest of children in a migratory context, owing to their inherent vulnerability.
8. Regarding the assessment of the threshold beyond which treatment is in breach of Article 3 for children, special importance must be attached to the fact that *'[c]hildren have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status.*'[12] This means that asylum seeking children, whether accompanied or not, are likely to be the most vulnerable among asylum seekers, *'a particularly underprivileged and vulnerable population group in need of special protection.'*[13]
9. A careful assessment of the best interest of the child as set out in Section I. is therefore a necessary prerequisite for a State to avoid breaching its positive obligations under Article 3. The absolute lack of a best interest assessment and the evident neglect of this legally binding obligation may easily give rise to treatment in beach of Article 3. In this, special importance must be attributed to the rights and needs of the child[14] as set forth in the CRC both in a material and procedural sense.[15] In this context it must be stressed that the instalment of playgrounds, child-friendly rooms and colourful pictures on the walls cannot satisfy these legal requirements.
10. **Detention, especially when paired with substandard conditions, may easily render the enjoyment of these rights illusory. No child can make use of her or his rights guaranteed by the CRC as elements of their best interest in an environment that is a constant source of anxiety, psychological disturbance and one that brings about the degradation of the parental image in the eyes of the children, an especially traumatic experience. Being confined in a guarded institution, where the level of surveillance is high and the elements of everyday life are strictly controlled can be perceived by children as a never-ending state of despair, which may in itself reach the severity necessary to constitute a breach of Article 3.[16]**

Article 5(1)

11. With regard to children, as set forth in Section I., their best interest shall be taken into account as primary consideration when deciding about the limitation of their liberty. While there is no ban on the detention of children *per se* in international or EU law, the latter provides for this possibility only as a measure of last resort, in the absence of other viable alternatives,[17] while laying down that nobody shall be held in detention for the sole reason of being an asylum seeker.[18]
12. Recently there have been signs of a '*rising consensus'*[19] on the necessity of a ban on the detention of asylum seeking children. According to the CRC Committee, *'the possibility of detaining children as a measure of last resort (…) is not applicable in immigration proceedings as it would conflict with the principle of the best interest of the child and the right to development.'*[20]
13. The right to liberty of asylum seekers may only be restricted when it is necessary, and restriction has to be proportionate to the aim pursued.[21] In a migratory context, Article 5(1)(f) can be relied upon,

[11] *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, §48; *Soering v. the United Kingdom*, no. 14038/88, §88.
[12] *Tarakhel v. Switzerland*, no. 29217/12, §99.
[13] *M.S.S. v. Belgium and Greece*, no. 30696/09, §251.
[14] CRC GC No. 14 I.A.
[15] Articles 8, 19, 22, 37, 31, 28 CRC.
[16] See *mutatis mutandis Popov v. France*, nos. 39472/07 and 39474/07, §101.
[17] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) Recitals (18), (20), Articles 8(2) – (4), 11.
[18] Recast RCD Recital (15), Article 8(1); Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) Article 26(1) [2013] OJ L 180/60.
[19] Written submissions on behalf of the AIRE Centre, the Dutch Refugee Council, the European Council on Refugees and Exiles and the International Commission of Jurists in the case of *Trawalli and Others v. Italy*, no. 47287/17, §§15, 17, 18; UNHCR's position regarding the detention of refugee and migrant children in the migration context, http://www.unhcr.org/protection/detention/58a458eb4/unhcrs-position-regarding-detention-refugee-migrant-children-migration.html.
[20] Joint general comment No.4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, §10.
[21] *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13, §§111, 144, 146.

which may constitute a legitimate aim – the protection of public order and national security, which are undeniably in the interest of society.[22] States however have a duty to carefully balance competing interests and they shall not disregard the best interest of the child, which must be a primary consideration. This primary nature entails that when '*different interests are being considered in order to reach a decision on the issue at stake',* the child's interests need to be given priority. Where a '*legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.'*[23]

14. This Court attaches special importance not only to the existence of domestic law *per se*, but to the '*quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention',*[24] which must be read in accordance with a State's other obligations under international law. In this regard the particular harm of detention to vulnerable groups must also be considered.[25] This Court considered the detention of migrant minors to be in breach of Article 5(1) when *'the children's particular situation was not examined and the authorities did not verify that (…) detention was a measure of last resort for which no alternative was available.'*[26]
15. **It may therefore be concluded that domestic law allowing for the detention of asylum seeking children is in breach of Article 5(1), owing to the fact that detention as an institution, especially when other alternatives are available is never in the best interest of the child and therefore is unnecessary and immensely disproportionate to the aim pursued.**

Article 8

16. The inherent detrimental effects of detention may interfere with the rights of children as set forth in both limbs of Article 8. The Court pointed out that when judging the lawfulness of restriction under Article 8(2), '*the decisive issue is whether a fair balance between the competing interests at stake – those of the child (…) and of public order – has been struck, within the margin of appreciation afforded to States in such matters (…), bearing in mind, however, that the child's best interests must be the primary consideration…'.*[27] In this context, the Hungarian Helsinki Committee (the HHC) wishes to direct the Court's attention to the above-presented analysis on the primary nature of the best interest of the child and the margin of appreciation afforded to a State in light of this principle.
17. Regarding the family limb, the Court held that keeping the family together in detention does not in itself mean that the right to family life was not violated. States are obliged to actively seek solutions other than detention in order to effectively preserve the right to family life.[28] The degradation of the parental image, as set forth above, may result in the dysfunctionality of the family, a devastating loss for children, further increasing their extreme vulnerability.
18. Regarding the private life limb, it may be said that the lack of personal autonomy and ability to establish and develop relationships with other human beings in detention strips children from the chance of harmonious development in a safe and sound environment, which is against their best interest.[29]
19. **It may therefore be concluded that the detention of asylum seeking children results in a disproportionate interference of their right to private and family life in breach of Article 8.**

B. Undocumented collective expulsions along the Western Balkan route

20. Hungary was the first country along the Western Balkan route to legalize the *de facto* collective expulsion of migrants in July 2016, allowing the Hungarian police to automatically push back migrants apprehended within 8 km of either the Serbian-Hungarian or the Croatian-Hungarian border to the

[22] See *mutatis mutandis Mubilanzila Mayeka and Kaniki Mitunga* v. Belgium, no. 13178/03, §§ 96, 102.
[23] CRC GC 14. I.A.
[24] *Khlaifia and Others v. Italy,* no. 16483/12, §91.
[25] *Rahimi v. Greece*, no. 8687/08, §86.
[26] *Popov v. France*, nos. 39472/07 and 39474/07, §119.
[27] *Mutatis mutandis Neulinger and Shuruk v. Switzerland,* no. 41615/07, §134.
[28] *Popov v. France*, nos. 39472/07 and 39474/07, §147.
[29] *Ternovszky v. Hungary*, no. 67545/09, §22; *Neulinger and Shuruk v. Switzerland*, no. 41615/07, §§135-136.

external side of the border fence.[30] Further amendments entered into force on 28 March 2017, authorizing the Police to push back unlawfully staying migrants from anywhere in the country across the border fence, without any legal procedure or opportunity to challenge this measure.[31] The significance of these steps should not be underestimated as the below examples show how Hungary's approach has set a new trend along the Western Balkan route resulting in severe human rights violations.

21. Apart from the well-documented widespread violence,[32] common to these measures are the absolute lack of identification and documentation. In some instances, the police take mugshot photos of those apprehended, but neither their name, nor their fingerprints are recorded. In line with the relevant legislation, any photo or video recording made during such measures are to be permanently destroyed after 3 working days.[33] Those apprehended do not have the right to apply for asylum, have no access to interpretation or to legal assistance. As no procedure is conducted, no decision is issued thus no remedy is available.
22. The Hungarian police publishes data on its website[34] on these push-backs and so-called blocked entries: in 2016 (after 5 July): 19,057; in 2017: 20,100; in 2018 (until 30 June): 2,812. UNHCR also reports on collective expulsions in its biweekly Serbia Update[35] but the figures pertaining to Hungary are always lower than the official statistics of the Hungarian police, suggesting that the actual figures are considerably higher than what UNHCR and its implementing partners are able to detect.
23. The Belgrade Centre for Human Rights in its report for 2017 on Serbia[36] states '*collective expulsions and inhumane treatment of refugees and other migrants became a daily reality*'. Migrants are regularly pushed back to Serbia from Hungary, Croatia and Romania and Serbia pushes migrants back to FYROM, as shown by UNHCR.[37]
24. Push-backs from Croatia are documented by Are You Syrious regularly:[38] some 2500 people were pushed back to Bosnia and Herzegovina since the beginning of 2018, while 1385 were expelled, often collectively, to Serbia in spring 2018 alone.[39] The persisting violations of human rights at the borders have triggered debates in the Croatian Parliament,[40] as well as investigations by the Ombudsperson.[41]
25. Info Park Belgrade[42] in their July 2018 report quote the informal group No Name Kitchen's experience on push-backs and the denial of the right to claim asylum in both Croatia and Slovenia: '*Volunteers record that almost all encounters between Croatian police and migrant groups result in either the use of electrocuting batons, physical violence or having ones' phones smashed or money stolen*.' Migrants arrested in Croatia and Slovenia, following the incidents of violence are then forcibly returned to either Bosnia and Herzegovina or Serbia.

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[30] 71/A(1) of Act LXXX of 2007 on Asylum, and 5(1a) of Act LXXXIX of 2007 on State Borders, see more: https://www.helsinki.hu/en/hungary-latest-amendments-legalise-extrajudicial-push-back-of-asylum-seekers-in-violation-of-eu-and-international-law/.

[31] http://www.helsinki.hu/wp-content/uploads/HHC-info-update-push-backs-5-July-2016.pdf.

[32] E.g., Human Rights Watch, *Hungary: Migrants Abused at the Border*, 13 July 2016, https://www.hrw.org/news/2016/07/13/hungary-migrants-abused-border; Médecins Sans Frontières, *Serbia: Games of Violence*, 4 October 2017; Council of Europe, *Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees to Serbia and two transit zones in Hungary 12-16 June 2017*, SG/Inf(2017)33; CPT, Report to the Hungarian Government on the visit to Hungary carried out by the CPT from 20 to 26 October 2017, CPT/Inf(2018) 42.

[33] 42(7c) of Act XXXIV of 1994 on the Police.

[34] http://www.police.hu/hu/a-rendorsegrol/statisztikak/hatarrendeszet.

[35] https://reliefweb.int/report/serbia/unhcr-serbia-update-6-19-august-2018.

[36] http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2018/04/Right-to-Asylum-in-the-Republic-of-Serbia-2017.pdf.

[37] https://data2.unhcr.org/es/documents/download/61805.

[38] https://www.facebook.com/areyousyrious/.

[39] UNHCR, *Desperate Journeys: Refugees and migrants arriving in Europe and at Europe's borders*, January-August 2018; UNHCR, *Inter-Agency Operational Update: Serbia*, April-June 2018.

[40] Croatian Parliament, 'Izvješće Odbora za unutarnju politiku i nacionalnu sigurnost s rasprave o uskraćivanju međunarodne zaštite u Republici Hrvatskoj', 1 March 2018; 100 Posto, 'UNHCR: 'Ove godine primili smo prijave 700 migranata da ih je policija pretukla', 100 Posto doznaje: Sabor pokreće istragu', 5 September 2018.

[41] Croatian Ombudsman, 'Ispitivanje pritužbi na policijsko postupanje prema migrantima', 28 August 2018.

[42] https://hu-hu.facebook.com/infoparkserbia/.

26. Based on the statistics and reports above, it can be stated that both Croatia and Serbia followed the Hungarian example and turned to the practise of using violent expulsions.
27. Slovenia has also followed the examples above, since according to the reports, migrants are facing the obstacles in accessing asylum procedures, in potential violation of the principle of *non-refoulement*, by being immediately returned to Croatia.[43]
28. To date, no video recording similar to that filed by the Applicants in *N.D. and N.T. v. Spain*,[44] made by journalist waiting next to the border fence, where published. This is largely due to the simple fact that while the Melilla border fence is about 10 km long, the Croatian-Serbian border, where the alleged collective expulsion in this case took place, is 314 km long, making it almost impossible to record such instances.
29. **To conclude, these reports, testimonies and certain legislation show that the widespread push-backs observed along the Western Balkan route also pose a serious threat of chain-*refoulement*, aggravating the rights violations and the physical safety of the affected persons. Moreover, due to the clandestine and unofficial nature of collective expulsions, and the hundreds of kilometres long borders where these instances potentially take place, the documentation of these measures while they are taking place is extremely difficult, therefore many such violations remain undocumented.**

C. The prohibition of collective expulsion and the challenges of evidence gathering

I. The prohibition of collective expulsion in international and EU law

30. As the prohibition of collective expulsion of aliens set out in Article 4 Protocol 4 to the ECHR is recognised in multiple other international and regional conventions,[45] it has become a principle of international law.
31. According to Article 53 of the Convention, where applicable law is binding EU law, no provision of the Convention and Protocols thereto can be interpreted by EU member states in a way that diminishes the rights and reduces the protection guaranteed under EU law.[46] Croatia is bound by the EU Charter and the EU asylum *acquis*.[47] The responsibility of EU States under the EU asylum *acquis* is engaged in relation to any individuals who may wish to seek international protection. Most relevant to the present case is the recast Asylum Procedures Directive, which applies to asylum applications '*made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States*'[48] and establishes that '*[i]n the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention or as persons eligible for subsidiary protection, every applicant should have access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his or her case and sufficient procedural guarantees to pursue his or her case throughout all stages*

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[43] https://english.sta.si/2536307/amnesty-insists-slovenia-unlawfully-rejecting-migrants, http://pic.si/wp-content/uploads/2018/07/1.-REPORT-ON-FINDINGS-AND-OBSERVATIONS-ON-THE-IMPLEMENTATION-OF-RETURN-PROCEDURES-IN-ACCORDANCE-WITH-THE-PRINCIPLE-OF-NON-1.pdf.

[44] *N.D. and N.T. v. Spain*, no. 8674/15.

[45] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 22(1); International Covenant on Civil and Political Rights, Article 13; African Convention on Human and Peoples' Rights, Article 12(5); American Convention on Human Rights, Article 22(9); Arab Charter on Human Rights, Article 26(2); the EU Charter, Article 19(1); Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, Article 25(4).

[46] *M.S.S. v. Belgium and Greece*, no. 30696/09, especially §§ 57-86, 250.

[47] '*Under EU law, Article 78 of the Treaty on the Functioning of the EU stipulates that the EU must provide a policy for asylum, subsidiary protection and temporary protection, 'ensuring compliance with the principle of non-refoulement. This policy must be in accordance with [the 1951 Geneva Convention and its Protocol] and other relevant treaties', such as the ECHR, CRC, CAT, ICCPR, ICESCR. The EU asylum acquis measures have been adopted under this policy, including the Dublin Regulation (Regulation (EU) No. 604/2013), the Qualification Directive (2011/95/EU), the Asylum Procedures Directive (2013/32/EU), and the Reception Conditions Directive (2013/33/EU).'* Fundamental Rights Agency, *Handbook on European law relating to asylum, borders and immigration* (European Union Agency for Fundamental Rights 2014), pp. 64-65.

[48] Article 3(1) of the recast Asylum Procedures Directive.

of the procedure.'[49] Moreover, the Directive envisages the right to an effective remedy against any decision regarding an asylum application, including at the border and the transit zone.[50] This is only possible after an individualised identification and a meaningful opportunity to raise objections, which in itself requires having had prior access to information about the procedures and legal assistance.[51]

32. The EU Charter clearly recognises the right to asylum.[52] Relatedly, the prohibition of *refoulement,*[53] the prohibition of torture and inhuman or degrading treatment or punishment,[54] and the prohibition of collective expulsion[55] spelled out in the EU Charter further strengthen the framework where a) migrants cannot be returned to a situation where they would be at risk of torture, inhuman or degrading treatment, or *refoulement*, and b) that returns, transfers, and refusals of entry at the border are decided on an individual basis, after an individualised assessment of the particular situation, with the insurance of an available effective remedy against any such decision. This position was adopted by this Court as well in *Hirsi Jamaa and Others v. Italy*.[56] This Court has also held that international and domestic law recognises the right 'to seek asylum' and that the 2005 Asylum Procedures Directive requires the EU Member States to 'ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf'.[57]
33. **It may therefore be concluded that the absolute prohibition of *refoulement* applies not only to acts but to omissions that result in the exclusion from the territory of a Contracting Party of individuals under its jurisdiction, regardless of whether the individuals concerned were removed from the territory of the Contracting Party or were denied access to it without a due assessment of their individual circumstances. Moreover, such collective denial of access to the territory of a Contracting Party, regardless of its actual nature, without due assessment of each individual's personal circumstances, is in breach of the absolute prohibition of collective expulsion.**

II. The relevant jurisprudence of this Court and the issue of evidence in alleged violations of Article 4 Protocol 4

34. In the handful of cases where the Court delivered a judgment on the merits, two types of collective expulsion cases can be distinguished: where the applicants were undisputedly already on the respondent state's territory[58] and where the applicants were turned away prior to entering the respondent state's territory.[59]
35. The latter circumstance shifted the focus to the question of jurisdiction and, separately to whether Article 4 Protocol 4 is applicable in cases where the alleged victims have not set foot on the territory of a Contracting State. As this Court will recall, it was clearly established in *Hirsi Jamaa v. Italy* that despite being on the high seas, the applicants were under the 'exclusive *de facto* and *de jure* control of the Italian authorities', even if not on Italy's territory.[60] Regarding the application of Article 4 Protocol 4 to cases where the applicants have not set foot on the territory of a Contracting State but where driven away nonetheless from that state's territory by the state authorities, the Court argued that: '*[h]aving regard to the foregoing, the Court considers that the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority,*

[49] Recital 25 of the recast Asylum Procedures Directive.
[50] Recitals 25, 30 and Article 46 of the recast Asylum Procedures Directive.
[51] For a more detailed analysis of EU law regarding the prohibition of collective expulsion and the principle of *non-refoulement,* see the third party intervention submitted in the case of *ND. and NT. v. Spain,* no. 8675/15 by the AIRE Centre, Amnesty International, ECRE, and ICJ, pp. 7-10.
[52] Article 18 of the EU Charter.
[53] Article 19(2) of the EU Charter.
[54] Article 4 of the EU Charter.
[55] Article 19(1) of the EU Charter.
[56] *Hirsi Jamaa and Others v. Italy*, no. 27765/09, §§133, 157.
[57] A.E.A. v. Greece, no. 39034/12, §83.
[58] *Čonka v. Belgium,* no. 51564/99; *Georgia v. Russia (I)* [GC], no. 13255/07.
[59] *Hirsi Jamaa and Others v. Italy*, no. 27765/09.
[60] *Ibid*, §§79-82.

the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4."[61] Similarly, in *Sharifi*[62] the Court found Article 4 Protocol 4 applicable *ratione materiae* to cases of refusal to allow entry to the national territory to persons who arrived illegally and did not find it necessary to determine if they entered the territory of a Member State or not. **The relevant question is therefore whether the applicants are under the control of the Member State authority when the expulsion happens.**

36. Common to these cases is that either some type of official procedure had been conducted prior to, sometimes immediately before the expulsion took place, or that the respondent state's authorities handed over the applicants to another state's authorities. In *Čonka*,[63] detention and deportation orders were issued to the applicants to enforce an order to leave the territory, after their asylum applications have been rejected on the second instance as well. In *Hirsi*,[64] the Italian authorities handed over the migrants to the Libyan authorities in Tripoli, whereas in *N.D. and N.T.*,[65] the applicants, despite not being subjected to any procedure nor being served with any official document, were sent back to Morocco where the authorities awaited them.
37. The facts of the present case, and two other communicated cases that took place before the material time of the current case,[66] fundamentally differ from these previously mentioned types whereby absolutely no official procedure, however collective in nature, preceded the removal of the applicants from the respondent state's territory and the applicants were not handed over to the officials of the state where the applicants were removed to.
38. As highlighted under the Section B above, the practice of collective expulsions carried out throughout the Western Balkan route follow the pattern of the present case and the two cases lodged against Hungary (see above). The HHC is of the view that one of the core issues at stake in the present case and in similar pending cases before this Court is how victims of such unofficial practices are able to provide substantial evidence to this Court to prove these violations.
39. In allegations of collective expulsions, applicants are to prove two facts: first, that they were under the jurisdiction of the Contracting Party, and second, that their removal or denial of access was not the result of an individualised assessment of their personal circumstances. It follows from the nature of collective expulsions that authorities might not conduct any procedure and might not produce any documents or records of individuals who would have an arguable complaint of a violation of Article 4 Protocol 4, as was the case of the applicants in *N.D. and N.T.* In this regard it is important to recall that this Court established that in cases where the lack of documents proving that the applicants were indeed under the jurisdiction of the Respondent State can be ascribed to the practice of the Respondent State's authorities, the State cannot hide behind this lack in order to rebut the victim status of the applicants: '*Furthermore, the Court cannot overlook the fact that the applicants' inability to furnish documents identifying them more precisely among the group of migrants expelled on 13 August 2014 is primarily due to the fact that, when they were expelled, the aliens in question did not undergo any identification procedure. In the Court's view, the Government cannot take shelter behind the absence of identification given that they are themselves responsible for it.*'[67]
40. In the aforementioned case, the applicants were able to produce video evidence of them being under Spanish jurisdiction that the Court accepted as credible.[68] However, available reports on collective expulsion practices in the Western Balkan cast doubt on whether producing similar recording is

[61] *Ibid*, §180.
[62] *Sharifi and Others v. Italy and Greece*, no. 16643/09.
[63] *Čonka v. Belgium*, no. 51564/99, §§60-61.
[64] *Hirshi Jamaa and Others v. Italy*, no. 27765/09, §12.
[65] *N.D. and N.T. v. Spain*, no. 8674/15 [Chamber], §§12, 64.
[66] *Khurram v. Hungary*, no. 12625/7; *H.K. v. Hungary*, no. 18531/17.
[67] *N.D. and N.T. v. Spain*, no. 8674/15 [Chamber], §60.
[68] *Ibid*, §§ 14, 59.

possible.[69] As it transpires, authorities along the Western Balkan route carry out measures that raise the possibility of a violation of Article 4 Protocol 4 usually in remote areas, during the night, without prior notification of or handing over those removed to the other state's authorities.

41. It follows from the nature of the practice of collective expulsions, from this Court's position regarding the standard of proof, and also from the impossibility of complaints *in abstracto* in line with Article 34 of the Convention, that in allegations of collective expulsion lodged against Contracting States where it is well documented that the authorities neither conduct any procedure nor produce any documents or records in this regard and do not officially hand over the applicants to another state's authorities, the establishment of a victim status might be as difficult as in cases of forced disappearance, in institutional discrimination allegations, or in certain allegations of violations of Article 18 of the Convention.
42. The Court will recall that it has adopted the standard of proof 'beyond reasonable doubt', and that '*the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake*.'[70]
43. The jurisprudence of this Court concerning forced disappearance cases suggest that despite the lack of documentary evidence, the Court accepted as evidence being 'beyond reasonable doubt' significant amount of credible reports consistently describing the phenomena that an applicant described as support of their victim status.[71] Relatedly, proof that is beyond reasonable doubt may also follow '*from the coexistence of sufficiently strong, clear and concordant interferences or of similar unrebutted presumptions of fact'* in the context where apart from reports, this Court heard witness statements as well.[72]
44. This Court also established that '*[where] the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention*.'[73] The Court may wish to assess the applicability of this logic to Article 4 Protocol 4 cases where the applicants claim to have been under the exclusive control, in many cases effectively in the custody of the authorities during the removal operation and, as in the *Turluyeva* case cited above, credible sources describe the circumstances of such removal operations consistently.
45. Finally, the Court has powers to conduct fact-finding visits on site or hearings in Strasbourg, as it did in numerous cases in the past[74] to assess the validity of the claims and the scope of the alleged violations.
46. **In conclusion, the case at hand and a number of other ongoing cases at this Court might present significant challenges as to assessment of the evidence the applicants are objectively able to furnish the Court with. This challenge is a direct consequence of the Contracting Parties' deliberate practice of carrying out removals without any procedure and without any identification or documentation of the individuals removed from or denied access to their territory. It would be against the principle of rule of law[75] and of the Contracting Parties' obligation to respect the rights set out in the Convention[76] to dismiss the right to seek justice from this Court of persons whose rights protected by the Convention were violated in a manner that deliberately hinders their access to proceedings before this Court.**

[69] See footnote 30 above.
[70] *Nachova and Others v. Bulgaria*, no. 43577/98 [GC], §147.
[71] *Turluyeva v, Russia*, no. 63638/09, §87 and further cases referred to in the same paragraph.
[72] *Ireland v. UK*, no. 5310/71, §161.
[73] *Salman v. Turkey*, no. 21986/93 [GC], §100.
[74] E.g., *Ireland v. UK, no. 5310/71*; *Ilascu and Others v. Moldova and Russia*, no. 48787/99; *Georgia v. Russia (I), no. 13255/07*.
[75] Paragraph 5 of the preamble of ECHR.
[76] Article 1 of ECHR.

D. Detained asylum seekers' right to access NGOs and legal assistance

I. Access to legal assistance

47. The effectiveness of the right of individual petition under Article 34 of the Convention requires Contracting Parties not to hinder in any way the effective exercise of this right. This right is an absolute one and admits of no hindrance. The Court has already established that it is of the utmost importance for the effective operation of the system of individual petition that applicants are able to communicate freely with the Court without being subjected to any form of pressure from the authorities.[77] Refusals by the authorities to allow applicants to meet with their lawyers with a view to bringing proceedings, have led to violations, as it was already established by this Court.[78]
48. According to Article 23 of Recast Asylum Procedures Directive legal advisers must have access to the applicant's file and to clients if held in detention facilities or transit zones. The Parliamentary Assembly of the Council of Europe has acknowledged the necessity of providing legal aid for asylum applicants in Europe, particularly in accelerated asylum procedures and for those at border zones and in detention facilities.[79]
49. This Court has also held that failure to provide any or adequate access to a lawyer, or measures taken by the State to obstruct such access, may violate Article 5(4) of the Convention, where they prevent the detainee from effectively challenging the lawfulness of detention.[80] Preventing access of detained asylum seekers to the attorneys deprives them of the right to effective judicial remedy. In *A.A. v. Greece*, the Court found that the lack of legal aid for a detained asylum seeker made the remedy available purely theoretical and, therefore, amounted to a violation of Article 5(4) of the Convention.[81] In *Suso Musa v. Malta*, the Court found that, although the authorities were not obliged to provide free legal aid in the context of detention proceedings, the lack thereof may raise an issue as to the accessibility of effective remedies.[82]
50. International standards and guidelines also state that detainees should have access to legal advice and facilities for confidential consultation with their lawyer at regular intervals thereafter.[83] Police failure to respect the confidentiality of lawyer-applicant discussions was already found in breach of Article 34 of the Convention.[84] The Court also held that the 'general interest' required that consultations with lawyers should be in conditions 'which favour full and uninhibited discussion'.[85] Interference with the confidentiality of lawyer/client discussions in detention has also been found to violate the right to challenge the lawfulness of detention under Article 5(4).[86]
51. Finally, the initiation of reprisal measures against legal representatives, even though no action is taken at the end can amount to a violation, as the initiation of such measures could have a 'chilling effect' on the exercise of the right to individual petition.[87]
52. **It can therefore be concluded that denying a detained asylum seeker access to a lawyer, interference with the confidentiality of the lawyer-applicant conversation and initiating reprisal measures against the legal representative may amount to the breach of Article 34 of the Convention.**

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[77] *Lopata v. Russia*, no. 72250/01; *Fedotova and Skipitko v. Russia*, no. 40792/10.
[78] *Shtukaturov v Russia*, no. 44009/05; *Gagiu v. Romania*, no. 63258/00; *D.B. v. Turkey*, no. 33526/08.
[79] Council of Europe, Parliamentary Assembly, Resolution 1471(2005), Accelerated Asylum Procedures In Council of Europe Member States, para. 8.10.2, https://goo.gl/x84wQ1.
[80] *Öcalan v. Turkey*, no. 46221/99.
[81] *A.A. v. Greece*, no. 12186/08, §78.
[82] *Suso Musa v Malta*, no. 42337/12.
[83] *Vélez Loor v. Panama*, IACtHR, op. cit., fn. 536, §§132–133, 146. The IACtHR has held that the provision of legal assistance is an obligation inherent to Article 7.6 (right to habeas corpus) and Article 8 (due process), and that in cases involving detention free legal assistance is an 'imperative interest of justice' (§146).
[84] *Oferta Plus SRL v. Moldova*, no. 14385/04.
[85] *Campbell v. UK*, no. 13590/88, §§46-48.
[86] *Istratii v. Moldova*, nos. 8721/05, 8705/05 and 8742/05, §§87–101.
[87] *McShane v. UK*, no.43290/98, §151.

II. Access to assistance from NGOs

53. Article 18(2) of the recast Reception Conditions Directive states: '*Without prejudice to any specific conditions of detention as provided for in Articles 10 and 11, […] Member States shall ensure that: […] (b) applicants have the possibility of communicating with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non-governmental organisations and bodies; (c) family members, legal advisers or counsellors, persons representing UNHCR and relevant non-governmental organisations recognised by the Member State concerned are granted access in order to assist the applicants. Limits on such access may be imposed only on grounds relating to the security of the premises and of the applicants.'*
54. States are recognised to have a certain measure of discretion when evaluating threats to national security and when deciding how to combat these. Nevertheless, this Court now tends to require national bodies to verify that any threat has a reasonable basis in fact.[88] Further on in *J.N.*, the CJEU has emphasized a strict interpretation of the concept of national security and public order required by EU law.[89]
55. The CPT standards[90] established that '*Immigration detainees should be entitled to maintain contact with the outside world during their detention, and in particular to have access to a telephone and to receive visits from relatives and representatives of relevant organisations.'*
56. UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention[91] in Guideline 8 state that '*Asylum-seekers in detention should be able to make regular contact (including through telephone or internet, where possible) and receive visits from relatives, friends, as well as religious, international and/or non-governmental organisations, if they so desire.'*
57. The UN Working Group on Arbitrary Detention in its Revised Deliberation No. 5 on deprivation of liberty of migrants[92] stated that '*The Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and other relevant organizations, including national human rights institutions, national preventive mechanisms and international and national nongovernmental organizations, must be allowed free access to the places of detention where those detained in the course of migration proceedings are held.*'[93]
58. In the report on Australia, the UN Human Rights Committee expressed concern *'at the State Party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organisations to the detainees in order to inform them of this right.'*[94]
59. **The HHC wishes to submit that detained asylum seekers' right to access relevant NGOs is of paramount importance and that Member States have an explicit obligation ("shall") to allow such access. Any limitation to this right based on security concerns should be only imposed in exceptional and justified cases, based on strict interpretation of the concept of national security.**

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[88] *Janowiec and Others v. Russia*, nos. 55508/07 and 29520/09; *Konstantin Markin v. Russia*, no. 30078/06.
[89] C-601/15, 'Public security' covers both the internal security of a Member State and its external security. A threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security.
[90] CPT standards, 8 March 2011, CPT/Inf/E (2002) 1 - Rev. 2010, http://www.refworld.org/docid/4d7882092.html, para. 31.
[91] UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, http://www.refworld.org/docid/503489533b8.html.
[92] UN Working Group on Arbitrary Detention, Revised Deliberation No. 5 on deprivation of liberty of migrants, 7 February 2018, http://www.refworld.org/docid/5a903b514.html, para. 47.
[93] See, for example, E/CN.4/1999/63/Add.3, para. 38; E/CN.4/1999/63/Add.4, para. 52; A/HRC/16/47/Add.2, paras. 126-128; A/HRC/19/57/Add.3, para. 68 (h); A/HRC/27/48/Add.2, para. 127; and A/HRC/30/36/Add.3, para. 80.
[94] Concluding Observations on Australia, CCPR, Report of the Human Rights Committee to the General Assembly, 55th Session, Vol. I, UN Doc. A/55/40 (2000), para. 526. See also, Article 17.2(d), CPED; WGAD, Annual Report 1998, op. cit., fn. 643, para. 69, Guarantees 6 and 7; WGAD, Annual Report 1999, op. cit., fn. 643, Principle 2; European Guidelines on Accelerated Asylum Procedures, CMCE, op. cit., fn. 119, Guideline XI.5 and 6.