A. Summary of facts and procedures

1. This complaint is submitted on behalf of the following Syrian nationals: […].

2. On 9 October 2016, a group of 114 refugees arrived at the Greek island Milos.[1] As there is currently no reception facility on Milos, 91 persons (78 Iraqi nationals and 13 Syrian nationals) were transferred to the Greek Island Leros on 14 October 2016. The Iraqi and Syrian families, including the applicants, were received at the reception facility PIPKA (Leros)[2], the other Iraqi and Syrian nationals were placed in the Leros hotspot. These families formally[3] expressed their wish to apply for international protection at the Reception and Identification Service Leros.[4]

3. On Wednesday 19 October 2016, the Greece police transported two Syrian families, including the applicants, from PIPKA and other Syrians (i.e. one woman and three men) from the Leros hotspot to the police station of Leros around 7 PM. The police informed the applicants that they would be transferred to Athens the next day.[5] Instead, the families were transported to Kos around 5.30 AM on Thursday 20 October 2016.

4. The applicants, the Syrian woman and the three Syrian men were subsequently readmitted by plane to Adana, Turkey without due consideration of their asylum claims.[6] The Hellenic Republic Ministry of Citizen Protection has confirmed the presence of Frontex members and a representative of the Greek Ombudsman.[7]

[1] Hellenic Coast Guard, *Διάσωση προσφύγων και σύλληψη των αλλοδαπών διακινητών τους στη Μήλο* [The rescue of refugees and the arrest of their smugglers], 9 October 2016, available at http://www.hcg.gr/node/13657; UNHCR, *UNHCR concern over the return of 10 Syrian asylum-seekers from Greece*, 21 October 2015, available at http://bit.ly/2hsXnYq; Amnesty International, *Greece: Evidence points to illegal forced return of Syrian refugees to Turkey*, 28 October 2016, available at http://bit.ly/2f5djfC; The Guardian, *Syrian refugees: we were tricked into returning to Turkey*, 1 November 2016, available at http://bit.ly/2eqI6oL.
[2] See at http://www.lesvossolidarity.org/.
[3] There are documents from the RIS stating their wish to seek asylum in Greece [**ANNEX 2**].
[4] See at http://firstreception.gov.gr.
[5] A lawyer, who tried to assist the families at the police station, was informed by a policeman that the families would not stay all night at the police station but be transferred to Kos.
[6] Reportedly, the Reception and Identification Service Leros informed the police present at the Kos Airport about the asylum requests of Syrian nationals.
[7] Hellenic Republic Ministry of Citizen Protection, *Response of the Ministry of Citizen Protection to the request form the UN High Commissioner for Refugees*, 21 October 2016, available at http://bit.ly/2hLvHhO.

5. The ten Syrian nationals, including the applicants, were transferred from the Adana Airport to the Düziçi Temporary Reception Centre, in Osmaniye province, south eastern Turkey. At the Düziçi Temporary Reception Centre, the Syrian nationals, including the applicants, were unable to get in contact with NGOs or lawyers. They were not give proper information and also prohibited from leaving the Reception Centre.[8]

6. Having spent almost two weeks in detention in the Düziçi Temporary Reception Centre, the applicants were given temporary protection registration documents and released on 2 November 2016.[9] The applicants left the Düziçi Temporary Reception Centre and travelled to the village Saruj, near the Syrian border. As the Turkish government failed to renew the applicants' temporary residence status, the applicants decided to continue their travels to Iraq via a mountain road. At the Turkish border, the applicants were arrested and detained in a Turkish camp for three days. After their release, the applicants travelled to Irbil, Iraq with the help of an Iraqi individual.

7. On 4 January 2017, counsel for the applicants submitted a complaint regarding their return operation from Kos, Greece to Adana, Turkey on 20 October 2016 at the Frontex Fundamental Right Officer.[10] On 15 February 2017, the complaint was deemed admissible and, subsequently forwarded to the Frontex Executive Director and the Greek Ombudsman.[11] The Greek Ombudsman will review the complaint; decide on the findings; take appropriate follow-up measures; and inform the Fundamental Rights Offices of these findings and follow-up within the period of up to 6 months. On 20 March 2017, Frontex granted access to the Operation Plan and Evaluation report of the Frontex operation on 20 October 2016.[12] So far no reaction from the Greek Ombudsman in pursuance of the Frontex communication, has been received.

8. The applicants have also complained about their illegal readmission before the Greek authorities via the Greek Ombudsman. On 7 November 2016, the Greek Ombudsman

[8] Please see the following report regarding the conditions at the Düziçi Temporary Reception Centre: Council of Europe, *Report of the fact-finding mission to Turkey by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, 30 May – 4 June 2016*, 10 August 2016, available at http://bit.ly/2bnNllx.
[9] [**Annex 3**] and [**Annex 4**].
[10] [**Annex 5**].
[11] [**Annex 6**].
[12] [**Annex 7**].

requested the Greek police ('the Readmission department and first Reception Centre)' for information as well as a copy of the relevant case file.[13] By 9 January 2017, the Ministry of Public Order and Citizen Protection informed the Greek Ombudsman that both the Minister of Public Order and Citizen Protection and the Minister of Immigration Policy had requested the General Inspector of Public Administration to urgently examine the complaints submitted by UNHCR.[14] To this letter, the Ministry of Ministry of Public Order and Citizen Protection attached their press release dated 9 November 2016 which confirmed the request at the General Inspector of Public Administration. On 20 February 2017, the Greek Ombudsman repeated his request for further information as well as a copy on the relevant case law.[15] Two days later, on 22 February 2017, the Greek Ombudsman requested the General Inspector of Public Administration to be informed on the progress of the case and the outcome of the inquiry.[16] By letter dated 13 April 2017, the Greek Ombudsman, once again, requested the General Inspector of Public Administration to submit the requested information by 23 April 2017.[17] Thus far, the Greek authorities have failed to respond to any of the Greek Ombudsman's requests.

B. Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments by Greece

Violation of Article 3 of the Convention

9. The applicants contend that their expulsion to Turkey, implemented under inadequate procedural safeguards, amounted to arbitrary deportation and exposed them not only to ill-treatment to Turkey but also to a real risk of indirect *refoulement* to Syria in breach of Article 3 of the Convention.

10. The Government has particularly failed to fulfil their substantive and procedural obligations in the asylum proceedings concerning the assessment of a real risk of Article 3 violation. The Government has a positive obligation to ensure that the return to Turkey complies with the principle of *non-refoulement* per Article 3 of the Convention, which

[13] [**Annex 8**].
[14] [**Annex 9**].
[15] [**Annex 10**].
[16] [**Annex 11**].
[17] [**Annex 12**].

necessitates a close and rigorous assessment of such risk on an individual basis. [18] The fact that the Greek authorities have automatically regarded Turkey as a "safe third country" without a thorough and individualised assessment has resulted in a breach of the substantive and procedural limbs of Article 3 of the Convention.

11. Article 3 of the Convention implies an obligation not to deport asylum seekers "where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country."[19] The "rigorous" assessment of existence of a real risk "must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances."[20] In this regard, there should exist "effective guarantees (…) that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to which the country from which he or she has fled".[21]

12. In the present case, the applicants were removed from Greece on the basis of the EU-Turkey statement listing Turkey as a "safe third country" and establishing a presumption in this respect. It follows from the Court's established case-law that "it is incumbent on the domestic authorities to carry out an assessment of [the real risk of inhuman and degrading treatment in a chain-*refoulement* situation from Turkey to Syria] of their own motion when information about such a risk is ascertainable from a wide number of sources."[22] Furthermore, the persons concerned shall be given an effective opportunity to rebut this presumption of safety.

13. In the present case, the situation in Turkey is well-known and easily to verify on the basis of multiple reliable and objective sources. The applicants therefore consider that, when they were removed to Turkey, the Greek authorities knew or should have known that, as irregular Syrian migrants, they would be exposed in Turkey to treatment in breach of the

[18] ECRE, *ECRE Memorandum to the European Council Meeting 17 – 18 March 2016: Time to Save the Right to Asylum*, 11 March 2016, available at http://bit.ly/2p6TKIB, p. 2.
[19] *Saadi v. Italy*, 28 February 2008, no. 37201/06, §§124-125.
[20] *F.G. v. Sweden*, 23 March 2016, no. 43611/11, §§113-114.
[21] *M.S.S. v. Belgium and Greece*, 21 January 2011, no. 30696/09, § 286.
[22] *Ilias and Ahmed v. Hungary, 14 March 2017* no. 47287/15, §115; *M.S.S. v. Belgium and Greece*, 21 January 2011, no. 30696/09, §366.

Convention (in particular the prohibition of *non-refoulement*) and that they would not be given any kind of protection in that country.[23]

14. It should first be noted that Turkey has ratified both the Geneva Convention and its 1967 Protocol with a geographical limitation for non-European asylum seekers. Turkey therefore does not accept – as a matter of law- obligations arising from the Geneva Convention with regard to non-European refugees. On this basis alone, Turkey should not be considered a "safe third country" as it does not provide protection in accordance with the Geneva Convention.[24]

15. In this context, the Greek authorities should have "include[d] the evaluation of the practice in [Turkey]" as the thorough assessment "cannot be limited to a mere review of the legal provisions in national law or adherence to international human rights treaties."[25] Even if one accept that Turkey provides protection equivalent to the Geneva Convention (despite the geographical limitation), the Greek authorities should have assessed to what extent the applicants would have access to the asylum procedure if returned to Turkey. In *M.S.S. v. Belgium and Greece*, the ECtHR established that:

> "it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3."[26]

16. The applicants' possibility to have access to the asylum procedure in Turkey is highly related to the quality of the asylum procedure, including the length of the asylum

[23] *Hirsi Jamaa and Other v. Ita*ly, 23 February 2012, no. 27765/09, §131.
[24] Please see the Opinion of Cathryn Costello, Andrew W Mellon Associate Professor of International Human Rights and Refugee Law, attached to this complaint form [**ANNEX 13**].
[25] Dutch Council for Refugees and ECRE, 'The DRC/ECRE desk research on application of a safe third country and a first country of asylum concepts to Turkey' May 2016, p. 4 [**ANNEX 14**]; See also *Saadi v. Italy*, 28 February 2008, no. 37201/06, § 147: "the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention."[25]
[26] *M.S.S. v. Belgium and Greece*, 21 January 2011, no. 30696/09, §359 [emphasis added].

procedure[27], the right to a personal interview[28] and interpreters, the quality of the decisions, the right to an effective remedy[29], and the availability of legal assistance.[30]

17. In the present case, the Syrian nationals have been transferred from the Adana Airport to the Düziçi Temporary Reception Centre, in Osmaniye province, south eastern Turkey. At the Düziçi Temporary Reception Centre, the applicants were unable to get in contact with visitors or lawyers. They were also prohibited from leaving the Düziçi Temporary Reception Centre. The conditions at the Düziçi Temporary Reception Centre have recently been aptly criticized by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees:

> Staff of the camp carried handcuffs and truncheons. Entry to the camp was manned by security officers and there was a heavy metal gate. The camp itself was surrounded by a fence topped with barbed wire. I was particularly troubled by the situation in Düziçi. I have no doubt that the residents of the camp are in *de facto* detention, without any of the safeguards afforded to them by law. The detention of Syrians returned from Greece is especially concerning since it would appear that it has no legal basis: the Turkish authorities have given assurances to the European Commission that all Syrians returned under the EU-Turkey agreement will be granted temporary protection in Turkey. There is therefore no prospect of removal such as to justify Article 57 detention; and since they are under the temporary protection regime, Article 68 is not applicable. [31]

18. This is all the more cogent as there was a real risk that the applicants would have been exposed to a risk of chain-*refoulement* from Turkey to Syria. In the present case, the Greek authorities did not seek to rule out that the applicants, driven back through Turkey, might further be, either expelled or forced to move, to Syria, notably given the procedural shortcoming and the very low recognition rate of Syrian asylum seekers in Turkey. It is general policy that the return of Syrian asylum seekers to Syria would expose them to a

[27] *M.S.S. v. Belgium and Greece*, 21 January 2011, no. 30696/09, §320.
[28] *Charahili v. Turkey*, 13 April 2010, no. 46605/07, §57: *Abdolkhani and Karimnia v. Turkey*, 22 September 2009, no. 30471/08, §82.
[29] *Saadi v. Italy*, 28 February 2008, no. 37201/06, §142; *Salah Sheekh v. the Netherlands*, 11 January 2007, no. 1948/04, §136; *I.M. v. France*, 2 Februry 2012, no. 9152/09, §§132, 133, 134, 135.
[30] *Abdolkhani and Karimnia v. Turkey*, 22 September 2009, no. 30471/08, §114.
[31] Please see the following report regarding the conditions at the Düziçi Temporary Reception Centre: Council of Europe, *Report of the fact-finding mission to Turkey by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, 30 May – 4 June 2016*, 10 August 2016, available at http://bit.ly/2bnNllx.

real risk of being subjected to inhuman or degrading treatment in breach of Article 3 of the Convention.[32]

19. It moreover follows from several reports from international human rights organisations[33] that Turkey does not adhere in practice to the principle of *non-refoulement*, "a prohibition on returning a person to a place where he or she faces a risk of persecution, torture or inhuman or degrading treatment" in accordance with the Geneva Convention.[34] As highlighted by Amnesty International, "asylum-seekers and refugees were at risk of *refoulement* from Turkey and have been forcibly returned to countries such as Syria, Iraq and Afghanistan."[35] Thus, despite the incorporation of the *non-refoulement* principle under Article 6 of its Law on Foreigners and International Protection[36] and Article 4 of its Temporary Protection Regulation[37], Turkey does not comply with the prohibition of *refoulement* in practice. Hence, "in light of the fact that each asylum application must be examined individually based on the specific circumstances of the case", the Greek authorities should have examined the risk of *non-refoulement* on "a case-by-case basis in order to establish if that particular applicant enjoys sufficient protection in Turkey"[38]

20. A rigorous assessment of the evidence of the practice in Turkey is especially important as UNHCR has recently been unable to gain unrestricted access to the pre-removal centres in Turkey as indicated in a letter from the UNHCR Representation in Greece.[39] UNHCR has furthermore been unable to get access to information on both the legal status and the

[32] See e.g. United Kingdom: Home Office, *Country Information and Guidance - Syria: the Syrian Civil War*, 19 August 2016, Version 3.0, available at: http://www.refworld.org/docid/57e2b0954.html; UN High Commissioner for Refugees (UNHCR), *International Protection Considerations with regard to people fleeing the Syrian Arab Republic*, Update IV, November 2015, available at: http://www.refworld.org/docid/5641ef894.html; See also *S.K. v. Russia*, 24 January 2017, no. 52722/15.

[33] Dutch Council for Refugees and ECRE, 'The DRC/ECRE desk research on application of a safe third country and a first country of asylum concepts to Turkey' May 2016, p. 4-6; Jesuit Refugee Service, *The EU-Turkey Deal – Analysis and Considerations*, 29 April 2016, p. 4-6.

[34] Steve Peers and Emanuela Roman, 'The EU, Turkey and the Refugee Crisis: What Could possibly go wrong?' (*EU Law Analysis*, 5 February 2016) http://eulawanalysis.blogspot.nl/2016/02/the-eu-turkey-and-refugee-crisis-what.html.

[35] Amnesty International, *A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal*, 14 February 2017, EUR 25/5664/2017, available at: http://www.refworld.org/docid/58a30b0b4.html, p. 13/14.

[36] Law no. 6458 on 2013 of Foreigners and International Protection, 4 April 2013.

[37] Temporary Protection Regulation, 22 October 2014.

[38] Steve Peers and Emanuela Roman, 'The EU, Turkey and the Refugee Crisis: What Could possibly go wrong?' (*EU Law Analysis*, 5 February 2016) http://eulawanalysis.blogspot.nl/2016/02/the-eu-turkey-and-refugee-crisis-what.html..

[39] Letter from the UNHCR Representation in Greece , related to Syrians readmitted to Turkey, 23 December 2016, http://www.statewatch.org/news/2017/jan/unhcr-letter-access-syrians-returned-turkey-to-greece-23-12-16.pdf.

location of individuals who have been readmitted from Greece under the EU-Turkey statement.

> "There are, however, three specific challenges: First, UNHCR does not benefit at this stage from unhindered and predictable access to pre-removal centres in Turkey (…). Second, UNHCR needs to seek authorization to visit the centre at least five working days in advance which, in practice, does not allow for timely monitoring of some individual cases. Third, UNHCR does not systematically receive information on the legal status and location of individuals who have been readmitted from Greece and is not always able to track their location and monitor their situation once they have left the reception centre."[40]

21. In this letter, UNHCR Representation therefore urges the Greek authorities to conduct a thorough assessment of the individual circumstances of the asylum applicants in Greece before returning the asylum seekers to Turkey. This letter suggests that Turkey is for the UNHCR not a "safe third country" at it requires a thorough and individualised assessment of any asylum application before returning any asylum seekers back to Turkey. It is the general accepted interpretation that the UNHCR letters can be perceived as warning letter to the Greek authorities as the UNHCR was not in a position to declare Turkey a "safe third country".

> "a thorough assessment of the individual circumstances of each asylum applicant, including those belonging to minority grounds, is required in Greece before an asylum seeker is returned to Turkey, in accordance with relevant international, European and national standards."[41]

22. In this regard, the Greek authorities cannot evade their responsibility under Article 3 of the Convention by relying on the EU-Turkey statement, all the less as this is no more than a press release.[42] Even if it were to be assumed that this agreement statement made express provision for the return to Turkey of asylum seekers arriving in Greece, "the Contracting States' responsibility continues even after their having entered into treaty

[40] Ibid.
[41] Ibid.
[42] Cases T-192/16, T-193/16, T-257/16, *NF, NG and NM v. European Council* (CJEU, 28 February 2017).

commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States."[43]

23. In light of the above, there should have existed effective guarantees in Greece that protected the applicants against arbitrary *refoulement*, be it direct or indirect, to their country of origin Syria from which they had fled. The applicants contend that the "procedure" applied by the Greek authorities was not appropriate to provide the necessary protection against a deportation to a real risk of inhuman and degrading treatment.

24. The applicants explicitly expressed their wish to apply for international protection at the Reception and Identification Service Leros. Nevertheless, they were effectively denied access to the procedure by transporting the applicants to the police station of Leros around 7 PM on Wednesday 19 October 2016. Subsequently, the families were transported to Kos around 5.30 AM on Thursday 20 October 2016. Even if the applicants had failed to express their intention to request international protection, this does not exempt the Greek authorities from fulfilling their obligations under Article 3 of the Convention.[44]

25. The applicants were also not provided with information enabling them to gain effective access to the asylum procedure and to substantiate their complaints. Having been given no information concerning their true destination, the applicants had been convinced, throughout their transfer from Leros to Kos, that they were being taken to Athens. The police at the Leros police station even explicitly deceived the applicants about their return to Turkey. Compare, the following statement in *Ilias and Ahmed v. Hungary:*

[43] *Hirsi Jamaa and Others v. Ita*ly, 23 February 2012, no. 27765/09, §129.
[44] Compare *Hirsi Jamaa and Others v. Ita*ly, 23 February 2012, no. 27765/09, §133: "133. The Court observes firstly that that fact was disputed by the applicants, who stated that they had informed the Italian military personnel of their intention to request international protection. Furthermore, the applicants' version is corroborated by the numerous witness statements gathered by the UNHCR and Human Rights Watch. In any event, the Court considers that it was for the national authorities, faced with a situation in which human rights were being systematically violated, as described above, to find out about the treatment to which the applicants would be exposed after their return (…). Having regard to the circumstances of the case, the fact that the parties concerned had failed to expressly request asylum did not exempt Italy from fulfilling its obligations under Article 3."

> 116. The Court has previously found that the lack of access to information is a major obstacle in accessing asylum procedures. It reiterates the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints (…).[45]

26. With respect to the applicants' asylum seeking children, Member States are also bound by the UN Convention on the Rights of the Child ("UNCRC") and the Court must, therefore, ensure that the Article 3 of the Convention is interpreted and applied in a manner, which does not diminish the rights and reduces protection guaranteed under the applicable children's rights *ex* Article 53 of the Convention. In this connection, the Court has on several occasions stated that there is a broad consensus – including in international law[46] – that in all decisions concerning children, their best interest must be paramount as required by Article 3 of the UNCRC.[47] The asylum seeking children should therefore only have been returned to Turkey if this would have been in their best interest.

27. In their third-party submission, the AIRE Centre, the European Council on Refugees and Exiles and Amnesty International consider that '[s]ubstantively children have the right to have their best interest assessed and taken into account as a primary consideration, and procedurally Art. 3 [UNCRC] required that any decision-making process affecting children must include an evaluation of the possible impact of the decision on the child and any decision must expressly refer to this.'[48] Hence, a separate consideration of the rights of the child should have been conducted in the present case.[49]

28. The Court has repeatedly stated that "it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations

[45] *Ilias and Ahmed v. Hungary, 14 March 2017* no. 47287/15, §116.
[46] See *inter alia* Article 10(3) ICESCR, Article 24(1) ICCPR, Article 24 Charter of Fundamental Rights of the European Union.
[47] See e.g. *Popov v. France*, 19 April 2012, nos. 39472/07 and 39474/07; *Neulinger and Shuruk v. Switzerland*, 6 July 2010, no. 41615/07; *Muskhadzhiyeva and Others v. Belgium*, 19 January 2010, no. 41442/07; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, no. 13178/03; See also *El-Ghatet v. Switzerland*, 8 November 2016, no. 56971/10, §46.
[48] The AIRE Centre, European Council on Refugees and Exiles and Amnesty International, *Written submissions in Tarakhel v. Switzerland, Application No. 29217/12*, p. 6, available at http://www.asylumlawdatabase.eu/en/content/ecthr-tarakhel-v-switzerland-application-no-2921712; see also UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: http://www.refworld.org/docid/51a84b5e4.html.
[49] The following provision of the CRC are relevant in the current instance: 2, 6, 19, 22, 24, 26, 27, 31, 37 & 39.

relating to the status of illegal immigrant".[50] Asylum seeking children require "special protection" in view of their "specific needs and their extreme vulnerability"[51] as a result of their age, lack of independence and asylum seeker status.[52] Whether asylum seeking children are unaccompanied or accompanied by their parents, is irrelevant in this respect.

29. In the present case, the Greek authorities failed to assess whether the return of the asylum seeking children to Turkey would have been in their best interest. In addition, the Greek authorities failed to assess whether the physical reception conditions in the Düziçi Temporary Reception Centre in Turkey were adapted to their age and would not "create ... for them a situation of stress and anxiety, with particularly traumatic consequences".[53] Hence, the Greek authorities have knowingly exposed the applicants' children to conditions of detention and living conditions that amounted to treatment prohibited by Article 3 of the Convention.[54]

30. Having regard to the above considerations, the applicants contend that they did not have the benefit of effective guarantees which would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment in breach of Article 3 of the Convention. There has accordingly been a violation of that provision in this regard both in its substantive and procedural limbs.

Violation of Article 13 taken together with Article 3 of the Convention

31. The applicants further contend that they were not offered an effective remedy under Greek law by which to lodge their arguable complaints under Article 3 of the Convention, in breach of Article 13 of the Convention. In this regard, the applicants submit – as established above – that they have "an arguable complaint" under Article 3 of the Convention. Hence, the Greek authorities should have guaranteed the availability of an effective remedy for the purpose of Article 13 of the Convention.

32. It follows from the Court's established case-law that "that an applicant's complaint alleging that his or her removal to a third State would expose him or her to treatment

[50] *Tarakhel v. Switzerland*, 4 November 2014, no. 29217/12, §99.
[51] Ibid, §119.
[52] Ibid, §99.
[53] Ibid, §119.
[54] See e.g. *M.S.S. v. Belgium and Greece*, 21 January 2011, no. 30696/09, §§ 362-368.

prohibited under Article 3 of the Convention "must imperatively be subject to close scrutiny by a 'national authority'".[55] Hence, an effective remedy within the meaning of Article 13 taken together with Article 3 requires "firstly "independent and rigorous scrutiny" of any complaint made by a person in such a situation, where "there exist substantial grounds for fearing a real risk of treatment contrary to Article 3" and secondly, "the possibility of suspending the implementation of the measure impugned."[56]

33. In the present case, the applicants had no access to an asylum procedure to properly identify them and to assess their personal circumstances before they were returned to Turkey. In addition, there were no legal advisors among the people involved in their return. In addition, the applicants were given no information on their deportation to Kos by the police, who led them believe that they were being taken to Athens, Greece. The police have moreover not informed the applicants as to the procedure to be followed to avoid being returned to Turkey. These circumstances are collaborated by witness statements from UNHCR and Amnesty International.[57] Compare *Hirsi Jamaa and Other v. Italy*:

> 204. The Court has previously found that the lack of access to information is a major obstacle in accessing asylum procedures (…). It reiterates here the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.[58]

34. In light of these circumstances, the applicants were effectively deprived of any remedy which would enable them to lodge their complaints under Article 3 of the Convention with a competent authority and to obtain a thorough and rigorous assessment of their requests before their removal measure was enforced. Hence, there has been a violation of Article 13 taken together with Article 3 of the Convention.

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[55] *Hirsi Jamaa and Other v. Ita*ly, 23 February 2012, no. 27765/09, §198.
[56] Ibid.
[57] UNHCR, *UNHCR concern over the return of 10 Syrian asylum-seekers from Greece*, 21 October 2015, available at http://bit.ly/2hsXnYq; Amnesty International, *Greece: Evidence points to illegal forced return of Syrian refugees to Turkey*, 28 October 2016, available at http://bit.ly/2f5djfC; The Guardian, *Syrian refugees: we were tricked into returning to Turkey*, 1 November 2016, available at http://bit.ly/2eqI6oL.
[58] *Hirsi Jamaa and Other v. Ita*ly, 23 February 2012, no. 27765/09, §204.

C. Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments by Turkey

Violation of Article 5 §§1, 2 and 4 of the Convention

35. The applicants contend that their committal at the Düziçi Temporary Reception Centre in Turkey amounted to deprivation of liberty which was devoid of any legal basis, in breach of Article 5 § 1 of the Convention.

36. It must first be determined that the placing of the applicants in the Düziçi Temporary Reception Centre constituted a deprivation of liberty with the meaning of Article 5 of the Convention. In this regard, it does not depend on the classification in Turkish national law ("Temporary Reception Centre") whether the restriction on the applicants' liberty of movement constitutes a "deprivation of movement". "The notion of deprivation of liberty within the meaning of Article 5 § 1 contains both an objective element of a person's confinement in a particular restricted space for a not negligible length of time, and an additional subjective element in that the person has not validly consented to the confinement in question (…). The objective elements include the type, duration, effects, and manner of implementation of the measure in question, the possibility to leave the restricted area, the degree of supervision and control over the person's movements and the extent of isolation (…)."[59]

37. The applicants in the present case were confined for one week in the Düziçi Temporary Reception Centre, which – especially for the children involved – bears a strong resemblance to a detention centre, being under the Turkish State's effective control. The Düziçi Temporary Reception Centre could not be accessed from the outside, even by their lawyer. There has therefore been a *de facto* deprivation of liberty under Article 5 of the Convention, "regardless of the name given".[60] Furthermore, the applicants had neither validly consented to the confinement nor existed there an effective opportunity to leave the Düziçi Temporary Reception Centre. The applicants were only given their temporary

[59] *Ilias and Ahmed v. Hungary,* 14 March 2017, no. 47287/15, §115; *M.S.S. v. Belgium and Greece,* 21 January 2011, no. 30696/09, §53.
[60] UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: http://www.refworld.org/docid/503489533b8.html, para. 7.

protection registration documents and, subsequently, released after one week, whilst prior to that no examination or proportionality test had been conducted.

38. Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, for instance, considered the Düziçi Temporary Reception Centre as a *de facto* detention centre:

> I was particularly troubled by the situation in Düziçi. I have no doubt that the residents of the camp are in *de facto* detention, without any of the safeguards afforded to them by law. The detention of Syrians returned from Greece is especially concerning since it would appear that it has no legal basis: the Turkish authorities have given assurances to the European Commission that all Syrians returned under the EU-Turkey agreement will be granted temporary protection in Turkey. There is therefore no prospect of removal such as to justify Article 57 detention; and since they are under the temporary protection regime, Article 68 is not applicable. (…) Although the authorities informed me that those residing in Düziçi were free to leave at any time, none of the residents whom I interviewed believed that this was the case. They all stated that when they had asked to be released they had been told to "wait a little while longer". [61]

39. In agreement with Ambassador Tomáš Boček, the impugned measure lacked any basis in domestic law. There are two types of detention under the Law on Foreigners and International Protection in Turkey. Article 57 of the Law on Foreigners and International Protection provides a legal basis for the administrative detention of foreigners for the purpose of removal. Article 68 of the Law on Foreigners and International Protection provides a legal basis for the administrative detention of international protection applicants during the processing of their applications.

40. As the Turkish authorities have given assurances to the European Commission that all Syrians returned under the EU-Turkey statement will be granted temporary protection, there was no prospect of removal as to justify detention under Article 57 on the Law on Foreigners and International Protection. Moreover, as the Syrian applicants are under the

[61] Council of Europe, *Report of the fact-finding mission to Turkey by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, 30 May – 4 June 2016*, 10 August 2016, available at http://bit.ly/2bnNllx.

temporary protection regime, Article 68 of the Law on Foreigners and International Protection is also not applicable.

41. The detention of the applicants has therefore not been "prescribed by law" per Article 5 § 1 of the Convention. The Court has previously concluded that the deprivation of liberty should be based on a clear and accessible legal basis and on a formal decision taken by the authorities.[62] In the present case, the applicants were merely transferred to the Düziçi Temporary Reception Centre with a view to await the allocation of the temporary protection registration documents. As a result, the deprivation of the liberty of the applicants was not based on a clear and accessible legal basis. Neither had a formal decision been taken by the Turkish authorities as regards their transfer to the Düziçi Temporary Reception Centre. It follows that the applicants' detention cannot be considered "lawful" for the purpose of Article 5 § 1 of the Convention.

42. As the applicant's detention had no clear and accessible legal basis in Turkish law, the Turkish authorities have also not been able "to inform the applicants of the legal reasons for their deprivation of liberty and thus provided them with sufficient information to enable them to challenge the grounds for the measure before a court."[63] Under those circumstances, the Turkish authorities failed to adduce any document capable of satisfying the requirements of Article 5 § 2 of the Convention.

43. Notably, the applicants also did not have at their disposal any "proceedings by which the lawfulness of [their] detention [could have been] decided speedily by a court". The applicants' detention at the Düziçi Temporary Reception Centre consisted in a *de facto* measure, not supported by any decision specifically addressing the issue of deprivation of liberty. As the detention at the Düziçi Temporary Reception Centre had not been ordered in any formal proceedings or taken shape in a decision, it is "quite inconceivable for the applicants to have pursued any judicial review".[64] It therefore follows that there has been a violation of Article 5 § 4 of the Convention. Even if there would have been an effective

[62] *Ilias and Ahmed v. Hungary, 14 March 2017* no. 47287/15, §68; *Khlaifia and Others v. Italy*, no. 15/12/2016, 15 December 2016, §106-107.
[63] *Khlaifia and Others v. Italy*, no. 15/12/2016, 15 December 2016, §117.
[64] *Ilias and Ahmed v. Hungary*, 14 March 2017, no. 47287/15, §75.

remedy, the applicants would not have been able to exercise them because they were unable in practice to contact their lawyer.[65]

44. The applicants would moreover like to draw the Court's attention to the failure of the Turkish authorities to acknowledge the children's best interest as a primary consideration in ordering the detention.[66] In light of Article 53 of the Convention, the Turkish authorities should have respected their obligations under the UNCRC (Articles 3 and 37) when interpreting their obligations under Article 5 of the Convention.[67] In light of these provisions, "detention should only be imposed as a measure of last resort after other less coercive measures have been examined."[68] In this context, UNHCR[69] has recently argued that children should never be detained for immigration related purposes:

> In this context, UNHCR's position is that *children should not be detained* for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and *detention is never in their best interests*. *Appropriate care arrangements and community-based programmes* need to be in place to ensure adequate reception of children and their families.[70]

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[65] Compare *Rahimi v. Greece*, 5 April 2011, no. 8687/08, 120-121: "120. Enfin, la Cour doit aussi se pencher sur les circonstances particulières de l'espèce pour évaluer l'efficacité des recours précités. Elle renvoie en ce sens à ses considérations lors de l'examen du grief tiré de l'article 3 de la Convention. La Cour observe notamment que le requérant ne pouvait en pratique contacter aucun avocat. (…). 121. Au vu de ce qui précède, la Cour conclut qu'il y a eu violation de l'article 5 § 4 de la Convention."

[66] For a comprehensive analysis of the international law and standards on detention of migrant children see: The AIRE Centre, European Council on Refugees and Exiles and Amnesty International, *Written submissions in H.A. and Others v. Greece, Application No. 19951/16*, available at http://bit.ly/2oIwTpr and The AIRE Centre, European Council on Refugees and Exiles and Amnesty International, *Written submissions in Sh. D. and others v. Greece and others*, Application No. 14165/16, available at http://bit.ly/2bvVecL [**Annex 15**].

[67] *Rahimi v. Greece*, 5 April 2011, no. 8687/08, §108.

[68] The AIRE Centre, European Council on Refugees and Exiles and Amnesty International, *Written submissions in H.A. and Others v. Greece, Application No. 19951/16*, available at http://bit.ly/2oIwTpr, p. 4: See also *Rahimi v. Greece*, 5 April 2011, no. 8687/08, § 109: "De plus, elles n'ont pas recherché si le placement du requérant dans le centre de rétention de Pagani était une mesure de dernier ressort et si elles pouvaient lui substituer une autre mesure moins radicale afin de garantir son expulsion. Ces éléments suscitent des doutes aux yeux de la Cour, quant à la bonne foi des autorités lors de la mise en œuvre de la mesure de détention."

[69] See also The AIRE Centre, European Council on Refugees and Exiles and Amnesty International, *Written submissions in H.A. and Others v. Greece, Application No. 19951/16*, available at http://bit.ly/2oIwTpr, p. 1: "Article 53 of the ECHR stipulates that the Convention rights must be construed in accordance with other international human rights obligations of States Parties, including the CRC. This is particularly important in relation to any deprivation of liberty where the primary consideration must be given to an individual child's circumstances, in light of his or her best interests. A comprehensive assessment of the best interests of the child will presumptively exclude any resort to detention for children, when the detaining measures are being contemplated not in the context of furthering the child's best interests but in the context of immigration control."

[70] UN High Commissioner for Refugees (UNHCR*), UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: http://www.refworld.org/docid/5885c2434.html, p. 2.

Violation of Article 3 of the Convention

45. The applicants contend that their committal at the Düziçi Temporary Reception Centre in Turkey subjected them to inhuman and degrading treatment in breach of Article 3 of the Convention. In this respect, the applicants argue that the situation at the Düziçi Temporary Reception Centre fell within the scope of Article of Article 3 of the Convention as the ill-treatment attained a minimum level of severity.

46. In order to fall within the scope of Article 3 of the Convention, "the ill-treatment must attain a minimum level of severity", which is dependent on "all circumstances of the case, such as 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."[71] The Court has repeatedly emphasized that asylum seekers require "special protection" under Article 3 of the Convention as a "particularly vulnerable group".[72] In this regard, asylum seeking children in particular require special protection due to their "specific needs and extreme vulnerability".[73]

47. In this context, the Court has repeatedly established that the detention of (un)accompanied children in the migration context has resulted in a violation of Article 3 of the Convention.[74] In these cases, the Court found a violation of Article 3 of the Convention due to the combination of three factors: the age of the children involved, the length of their detention and whether the detention conditions had been adapted to their age. The conditions at the Düziçi Temporary Reception Centre should therefore have been adapted to their age, "to ensure that those conditions do not "create ... for them a situation of stress and anxiety, with particularly traumatic consequences"".[75]

48. In light of Article 53 of the Convention, the Turkish authorities were moreover obliged to ensured that Article 3 of the Convention was interpreted and applied in accordance with Article 3 and 37 of the UNCRC. The Court has on several occasions emphasized that Article 37 (c) of the UNCRC provides that "[e]very child deprived of liberty shall be

[71] *Tarakhel v. Switzerland*, 4 November 2014, no. 29217/12, §118.
[72] Ibid.
[73] Ibid, § 119.
[74] See e.g. *Popov v. France*, 19 January 2012, nos. 39472/07 and 39474/07; *Rahimi v. Greece*, 5 April 2011, no. 8687/08; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2010, no. 13178/03; *Muskhadzhiyeva and Others v. Belgium*, 19 January 2010, no. 41442/07.
[75] Ibid.

treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age".[76] If – as a last resort and for the shortest period of time – asylum seeking children are placed in detention, the conditions should be appropriate to their age.

> In the exceptional case of detention, conditions of detention must be governed by the best interests of the child and pay full respect to article 37(a) and (c) of the Convention and other international obligations. Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so. Indeed, the underlying approach to such a program should be "care" and not "detention". (…) They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. During their period in detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release. They also have the right to recreation and play as provided for in article 31 of the Convention.[77]

49. Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees considered the Düziçi Temporary Reception Centre especially inappropriate for the children involved:

> Düziçi is a container camp with a capacity of 5,000. On the day of my visit (1 June 2016), it was less than half full. (…) the general conditions were not good. On the day I visited it, it was very hot; the containers, which were on a hillside, were exposed to the sun, with the result that it was very warm inside. Many of the young children I saw were barefoot and dirty. Aside from my concerns about the legality of detention of the camp's residents, it was clear to me that improvements were required to the material living conditions there. (…) Staff of the camp carried handcuffs and truncheons. Entry to the camp was manned by security officers and there was a heavy metal gate. The camp itself was surrounded by a fence topped with barbed wire. On the other hand, the situation for children in Düziçi camp is dire. There was an empty container, with a blackboard, designated as an education space, but I was informed by

[76] See e.g. *Popov v. France*, 19 January 2012, nos. 39472/07 and 39474/07, §90.

[77] UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: http://www.refworld.org/docid/42dd174b4.html, p. 19. See also UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: http://www.refworld.org/docid/503489533b8.html, p. 36.

the authorities that because of the transient nature of the population it was not feasible to arrange for teaching. In any case the size of the container was clearly wholly inadequate for the high number of children in the camp. Although high turnover may mean that children do not spend long there, it is unacceptable for them to suffer any break in their education. The same is true of children in removal centres, although, of course, this report calls for children not to be detained at all.[78]

50. As clearly indicated in the report from Ambassador Tomáš Boček, the situation for children in the Düziçi Temporary Reception Centre is especially dire for young children without adequate educational facilities.[79] In the present case, the children were held for over a week in this adult environment, with the staff of the camp carrying handcuffs and truncheons, and the entry to the camp manned by security officers in front of a heavy metal gate surrounded by a fence topped with barbed wire.

51. In light of the young age of the applicants – *i.e.* six, five, two and one years old at the time of their detention at the Düziçi Temporary Reception Centre -, those living conditions were ill-adapted to their age and inevitably created for them and their parents a situation of stress and anxiety, with particularly traumatic consequences. In addition, the four children found themselves in a situation of vulnerability accentuated by the confinement. Moreover the anxiety of their parents as a result of lack of information and the arbitrary manner of conduct by the Turkish authorities, had an adverse effect on the well being of the children.

52. Accordingly, in view of the children's young age, the length of their detention and the conditions of their confinement in a detention centre the treatment exceeded the threshold of seriousness for Article 3 of the Convention. In this respect, the Turkish authorities failed to take into account the inevitably harmful consequences for the children. As a result, the treatment exceeded the threshold of seriousness for Article 3 of the Convention. There has therefore been a violation of that Article is respect of the children and their parents.

[78] Council of Europe, *Report of the fact-finding mission to Turkey by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, 30 May – 4 June 2016*, 10 August 2016, available at http://bit.ly/2bnNllx.

[79] Compare Refugee Studies Centre, *Forced Migration Review No. 54 - Resettlement*, February 2017, Issue 54, available at: http://www.refworld.org/docid/58cbcb314.html, p. 86: "While these returnees were released from detention and transferred to other cities in Turkey after a few weeks, the detention conditions in Düzici camp were so bad that one Syrian woman with four children asked to be returned to Syria instead."

Violation of Article 13 taken together with Articles 3 and 5 of the Convention

53. The applicants contend that they were not offered an effective remedy under Turkish law to challenge their deprivation of liberty at the Düziçi Temporary Reception Centre in breach of Article 13 read in conjunction with Article 5 of the Convention. In addition, the applicants neither had access to any effective remedy to challenge the conditions at the Düziçi Temporary Reception Centre in breach of Article 13 read in conjunction with Article 3 of the Convention.

54. The applicants submit that they have "an arguable complaint" under Articles 3 and 5 of the Convention. Hence, the Turkish authorities should have guaranteed the availability of an effective remedy for the purpose of Article 13 of the Convention. In the present case, the applicants did not have any access to judicial review of their detention as they were not given the opportunity to obtain legal assistance. Compare the following reports:

> "As stated above access to judicial review of a detention order should be set against the difficulties in obtaining legal assistance. The General Legal Aid system in Turkey requires the applicant to approach the bar association to make a formal request for legal aid, highly impossible for detainees as legal representation of a client in Turkey depends on the representative obtaining notarised power of attorney. This is contingent on the International Protection Applicant Registration Document which is not provided for detainees. A detainee's right to legal assistance is therefore nullified rendering access to an effective judicial remedy of the detention order void."[80]
>
> "For Syrian nationals detained at Düzici, access to lawyers and temporary asylum protection has been difficult. Despite amendments having been made to Turkey's Temporary Protection Regulation for Syrians, Amnesty International reported that some Syrians returned from Greece were denied access to a lawyer in Turkey and were not adequately provided with information about temporary protection in Turkey."[81]

55. In light of these circumstances, the applicants were effectively deprived of any remedy which would enable them to lodge their complaints under Articles 3 and 5 of the Convention with a competent authority. Hence, there has been a violation of Article 13 taken together with Articles 3 and 5 of the Convention.

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[80] European Council on Refugees and Exiles, *The DCR/ECRE desk research on application of a safe third country and a first third country of asylum concepts to Turkey*, 20 May 2016, p. 14-15.
[81] Refugee Studies Centre, *Forced Migration Review No. 54 - Resettlement*, February 2017, Issue 54, available at: http://www.refworld.org/docid/58cbcb314.html, p. 86.