

THIRD PARTY INTERVENTION

*On behalf of I Have Rights and the Border
Violence Monitoring Network*

Application nos:

10063/22 A.B. v. Greece

11762/22 D.G. v. Greece



17th July 2023



**Border Violence
Monitoring Network**

EUROPEAN COURT OF HUMAN RIGHTS
Council of Europe
67075 Strasbourg
Cedex France
BY FAX and POST

17th July 2023

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Pursuant to the Registrar's notification dated 26 June 2023 that the President of the Section has granted leave, under Rule 44(3) of the Rules of the European Court of Human Rights.

Summary

This submission is made by I Have Rights (“IHR”), a non-profit refugee law clinic operating in Samos, Greece and the Border Violence Monitoring Network (“BVMN”), a network of non-governmental organisations situated along the Balkan and Greek migration route, whose purpose is to monitor, document and litigate human rights violations at European borders (together, “the Intervenors”).

The Intervenors make the following submissions to assist the Court in offering impartial, specific and evidence-based insight regarding the treatment of refugees, asylum seekers and other people on the move in Greece, with the aim of further elucidating the wider context in which the facts of these applications arose, and the implications of any decision the Court may take.

These submissions are in two parts: in Part I, the Intervenors outline the *modus operandi* of the Greek State in conducting pushbacks of people on the move, in particular in the Evros border region. In doing so, the Intervenors draw on their comprehensive database of on the ground evidence and testimony documenting incidents of pushbacks and expulsions between Greece and Türkiye, gathered since 2019. The Intervenors outline the key elements of these pushback operations, drawing parallels between them and the Court’s established case law regarding inhuman and degrading treatment, torture and the prohibition against refoulement.

In Part II, the Intervenors analyse the Court’s case law regarding admissibility, in particular in relation to the exhaustion of domestic remedies under Article 35 of the Convention, demonstrating the lack of effective and accessible legal remedies for individuals who have been subjected to pushbacks in violation of their fundamental rights.

Part I: The Modus Operandi of the Greek State in conducting pushbacks of people on the move in the Evros Region

A. Pushbacks in violation of the prohibition of torture or inhuman or degrading treatment or punishment

BVMN and its member organisations collected 79 accounts documenting instances of pushbacks in the Evros region throughout 2021. Given that each incident of pushback typically impacts multiple individuals, BVMN estimates that approximately 3,639 people were subjected to pushbacks based on these testimonies. All reported a form of violence perpetrated in the course of the unlawful pushback. From 2019 until the present day, BVMN’s member organisations have documented 215 accounts of pushbacks from Greece, affecting an estimated 8,576 individuals. In 94% of testimonies, respondents stated that the perpetrators exerted a form of violence against them or other people in the group. These findings present compelling evidence of a systematic pattern of violence and inhuman and degrading treatment towards people seeking protection at and within Greece’s borders. This is in violation of the absolute right to be free from torture or inhuman or degrading treatment and punishment encompassed in Article 3 of the European Convention on Human Rights (“the Convention” or “ECHR”).

Respondents consistently recount distressing experiences during pushbacks such as being forced to undress, having their personal belongings confiscated, and/or being detained in extremely cramped conditions without access to essential provisions such as medication, basic hygiene, food, or water.¹ A BVMN respondent stated, “*I thought we were going to die because we were hungry and so thirsty*”.² Another respondent reported that some members of his group were told to drink toilet water which subsequently made them sick.³ Instances of verbal intimidation and degrading language have also been reported. For example, a respondent from Tunisia reported that he repeatedly faced derogatory slurs from a uniformed man with a Greek flag on their arm, being referred to as an “*Arab dog*”.⁴ In

¹ BVMN, ‘I asked for the simple thing to give me back my medicine and they didn’t - you think they will give me asylum?’, (2 December 2021), available at: <https://borderviolence.eu/testimonies/february-12-2021-0000-tychero-balbancik/>.

² BVMN, ‘Detained for 18 hours and pushed back via the Evros river: “I thought we were going to die because we were hungry and so thirsty”’, (10 May 2022), available at: <https://www.borderviolence.eu/violence-reports/may-10-2022-2200-palea-sagini-gr-to-karakasim-tr/>.

³ Mobile Info Team, ‘Illegal Pushbacks in Evros: Evidence of Human Rights Abuses at the Greece/Turkey Border’, (November 2019), available at: [Illegal+Evros+pushbacks+Report+Mobile+Info+Team_final.pdf \(squarespace.com\)](https://www.squarespace.com/illegal-evros-pushbacks-report-mobile-info-team-final-pdf).

⁴ BVMN, ‘They kept saying to us “Arab dog”. You can’t imagine how much hatred was there. It felt like it was a retaliation’, (10 April 2021), available at: <https://borderviolence.eu/testimonies/april-10-2021-0000-soufli-to-nasuhbey-via-evros-meric-river/>.

another pushback testimony, the respondent recounted that the perpetrator wearing “black clothes and balaclava” put a bottle of water in front of him and warned him not to touch the bottle or he would be punished.⁵

The above-mentioned testimonies are a glimpse into the extensive catalogue, documented by BVMN and its member organisations, of inhuman and degrading treatment endured by people on the move. It is crucial to acknowledge that these accounts represent only a fraction of the larger body of evidence attesting to the practice of pushbacks. Through the comprehensive database maintained by BVMN, along with reports from international and non-governmental organisations, it becomes undeniably clear that Greece has implicated a systematic and widespread practice of subjecting people on the move to degrading and inhuman treatment, in violation of Article 3 of the Convention.⁶

Moreover, in a significant share of the cases documented by BVMN, treatment towards people on the move during pushbacks from Greece is extremely violent. Victims reported being repeatedly and severely beaten while in custody and whilst being forcibly returned to Türkiye. For example, a 19-year old respondent reported in February 2021, that people he identified as Greek officers cuffed his hands with zip ties whilst another officer held him down to let two others beat him with a metal baton for an estimated duration of 15 minutes.⁷ When the respondent was subsequently brought to the Evros River, he was separated from the group, reportedly forced to undress completely, and again had his hands cuffed with zip ties. He also described being gagged with a sock after which he was severely beaten with wooden sticks until they broke and the perpetrators switched to metal poles.⁸ Another respondent reported that uniformed men put their knees on children’s necks after beating them with sticks before pushing the group back over the Evros to Türkiye.⁹

Consistent with the established case law of the Court, such practices can be classified as torture. As per the prohibition set forth in Article 3, torture is defined as inhuman treatment causing very serious and cruel suffering. Furthermore, the treatment also needs to be deliberate, for instance with the intention to extract information or instil fear or intimidation in order to qualify as torture.¹⁰ The cases of *Selmouni v. France* and *El-Masri v. the Former Yugoslav Republic of Macedonia* are particularly relevant in the context of evaluating the treatment faced by individuals during pushbacks. In *Selmouni*, the Court held that the French authorities had tortured the applicant considering *inter alia* the fact that the applicant had received a large number of blows over a sustained period of time.¹¹ In *El-Masri*, the Court held that the applicant had been subjected to torture after he had been beaten, stripped naked, shackled and hooded, deprived of his senses, and had been forcibly transferred to a plane.¹² The Court considered that the physical force used against the applicant had been excessive and unjustified. Moreover, as the measures in *El-Masri* were used with premeditation, the aim being to cause severe pain or suffering to obtain information, inflict punishment or intimidate the applicant, the treatment amounted to torture.¹³

As demonstrated by the testimonies of people on the move, the Greek authorities engage in systematic and premeditated violent treatment, including beatings, forced stripping, use of zip ties, and deprivation of senses, before unlawfully forcibly returning people to Türkiye.¹⁴ By drawing a parallel between the aforementioned testimonies and the Court’s established case law it is plausible to argue that the treatment endured by people on the move during pushbacks in the Evros region falls within the definition of torture adhered to by the Court.

⁵ BVMN, ‘The officer put a bottle of water in front of the respondent and told him: ‘if you touch this bottle, I will leave you a souvenir you will never forget’, (18 February 2021), available at:

<https://borderviolence.eu/testimonies/february-18-2021-0200-pythion-cakmakkoy/>.

⁶ See for instance, Council of Europe, ‘Report to the Greek Government on the ad hoc visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment From November 2021 to 1 December 2021’, (2 September 2022), available at: <https://rm.coe.int/1680a7ce96> and Amnesty International, ‘Greece: violence, lies and pushbacks’, (2021), available at: <https://www.amnesty.org/en/documents/eur25/4307/2021/en/>. For BVMN testimonies see, <https://borderviolence.eu/testimonies/>.

⁷ BVMN, ‘They put zip ties on my hands and one officer pressed my head with his foot and 2 others beat me with a metal beton’, (11 February 2021), available at: <https://borderviolence.eu/testimonies/february-11-2021-0000-didymoteicho-serem/>.

⁸ Ibid.

⁹ BVMN, ‘It was like what happened when George Floyd was killed, the officer’s put their knees on the children’s necks’, (27 May 2021), available at: <https://borderviolence.eu/testimonies/may-27-2021-0000-poros-feres-near-to-perifereiki-zoni-parkou/>.

¹⁰ Council of Europe, ‘Prohibition of Torture’, available at: <https://www.coe.int/en/web/echr-toolkit/interdiction-de-la-torture>.

¹¹ *Selmouni v. France*, para 100-105.

¹² *El-Masri v. the Former Yugoslav Republic of Macedonia*, para 205.

¹³ Ibid, para 211.

¹⁴ Marion MacGregor, ‘Social Media Video: Migrants in Greece blindfolded and handcuffed’, (Info Migrants), (27 June 2023), available at: <https://www.infomigrants.net/en/post/49955/social-media-video-migrants-in-greece-blindfolded-and-handcuffed>.

The latter is especially compelling bearing in mind that when *Selmouni v. France* was decided upon in 1999, the Court considered that the threshold of torture was evolving and that acts that would previously be considered inhuman and degrading treatment could be classified as torture in the future to maintain an increasingly high standard, as required for the protection of human rights and fundamental liberties.¹⁵ This reflects the current need to critically evaluate and adapt the understanding of torture to align with contemporary instances of very serious and cruel suffering. This includes pushbacks, which regardless of whether they involve severe violence or not, can be evaluated within the framework of torture based on their inherent elements.

Any pushback operation inherently involves several elements that could be deemed as constituting torture; *inter alia* removal from the protection of the law, the use of unjustified physical force, and the redirection to dangerous terrain and the removal of essential protective items including warm clothes and mobile devices to request assistance. These elements deliberately impose very serious and cruel suffering on people with the aim of deterrence and therefore satisfy the definition of torture as set forth by the Court.

B. The principle of non-refoulement

The expulsion of a person by a Contracting State may give rise to an issue under Article 3 of the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture, inhuman or degrading treatment or punishment in the receiving country.¹⁶ In these circumstances, Article 3 implies an obligation not to deport the person in question to that country.¹⁷

As of July 2020, the Ministry of Justice in Türkiye has reported that 58,409 people were on trial and 132,954 under criminal investigation for connections to the Gülen movement.¹⁸ According to the findings of a The Human Rights Association Documentation Unit, at least 980 persons were subjected to torture and other forms of ill-treatment in places of official detention during the first 11 months of 2022.¹⁹

Evidence compiled by both domestic and international human rights organizations suggests that individuals associated with the PKK or Gülen movements in Türkiye are more likely to be subjected to mistreatment, abuse, or possible torture.²⁰ Around 1,700 people accused of Gülen membership are detained in Istanbul Marmara, making it the prison with the most number of prisoners associated with accused Gülenists.²¹ In April 2022, reports emerged that guards at Istanbul Marmara prison had beaten inmates and urged the prisoners to kill themselves.²²

Unlawful summary returns of persons to Türkiye, without access to lodge an asylum claim, could expose them to persecution and ill-treatment, in violation of Article 3 and the principle of non-refoulement. In 2022 there was a 145% increase in the number of asylum applications filed by Turkish nationals in EU countries (total of 49,720).²³ Those who express the wish to claim asylum must have access to asylum procedures. As expressed by the UN Special Rapporteur on the Human Rights of Migrants, “*the right to individual assessment is the cornerstone of human rights and refugee protection [...] returning people without due process will inevitably result in cases of refoulement to situations where they may face the risk of death, torture, ill-treatment, persecution or other irreparable harm*”.²⁴

¹⁵ *Selmouni v. France*, para 101.

¹⁶ *M.A. and Others v. Lithuania* (Application no. 59793/17).

¹⁷ *F.G. v. Sweden* (Application no. 43611/11).

¹⁸ Human Rights Watch, ‘World Report 2021: Turkey’, available at: <https://www.hrw.org/world-report/2021/country-chapters/turkey>.

¹⁹ US Department of State, ‘2022 Country Reports on Human Rights Practices: Turkey’, available at: <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/turkey>.

²⁰ *Ibid*, page 5.

²¹ Stockholm Center for Freedom, ‘Number of Gülen followers in Istanbul prison surpasses all others jailed on terrorism charges’, (25 October 2022), available at: <https://stockholmcdf.org/number-of-gulenists-in-istanbul-prison-surpasses-all-others-jailed-on-terrorism-charges/>

²² Amnesty International, ‘Turkey 2022’, available at: <https://www.amnesty.org/en/location/europe-and-central-asia/turkey/report-turkey/>.

²³ Eurostat, ‘Annual Asylum Statistics’, (15 March 2023), available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics&oldid=558844#Citizenship_of_first-time_applicants_E2.80.93_mainly_Syrian.2C_Afghan.2C_Venezuelan_and_Turkish.

²⁴ United Nations, ‘Greece: Rights Violations against Asylum Seekers at Turkey-Greece Border Must Stop’, (23 March 2020), available at: <https://www.ohchr.org/en/press-releases/2020/03/greece-rights-violations-against-asylum-seekers-turkey-greece-border-must>.

Where an individual has an ‘arguable complaint’ that their removal would expose them to treatment, contrary to Article 2 or 3 of the Convention, they must have an effective remedy, in practice as well as in law, in accordance with Article 13 of the Convention.²⁵ Once a person has expressed the intention to apply for asylum, the burden of proof shifts to the Greek authorities to ‘ascertain and evaluate all the relevant facts’.²⁶ The Court held in *D v. Bulgaria* that authorities have the obligation to adequately examine the risks of the asylum seeker being subjected to Article 3 violations, in a procedure in accordance with Article 13 requirements. The procedure must be independent, rigorous and must suspend the removal decision.

C. Border practices in violation of the right to life

The lives of those seeking international protection in Greece are put at risk, as a direct result of the systematic practice of pushbacks carried out by the Greek authorities at the Evros land border. Pushbacks do not comply with Greece’s positive obligation to take appropriate steps to safeguard the lives of those within their jurisdiction, under Article 2 of the Convention.

There is sufficient evidence to suggest that pushbacks pose a real risk to life. According to Pavlos Pavlidis, a forensic pathologist at the General Hospital of Alexandroupoli, Evros has the “*largest number of buried and unidentified people-on-the-move in Greece*”.²⁷ In a February 2022 interview, Pavlidis reported that 23 bodies had emerged from Evros in the first 2 months of 2022 alone. These statements correspond with the internal BVMN database of dead and missing cases at the Evros. From November 2020 until July 2022, BVMN member organisations compiled 42 missing cases in the Evros border area, 26 of which (62%) went missing in the Evros river.²⁸

Recorded testimonies by BVMN indicated a recurrent practice of people on the move being taken only a couple of metres across the river, before being forced to jump in and swim the remaining distance to the Turkish side.²⁹ Women and young children are reportedly subjected to the same treatment.³⁰ Testimonies reflected the high risk of drowning for those forced to jump, with drowning being recognised as the cause of death for 70% of recorded deaths of people on the move at the Evros border.³¹ Between January 2018 and October 2020, the International Organisation for Migration recorded that at least 86 people had drowned in the Evros river, 16 of those being children.³² Risk to life is further exacerbated by the actions of Greek authorities. For example, reports detail officers tying people’s hands behind their backs, before throwing them into the river.³³ The inflatable boats used for the crossing are also typically described as overcrowded by victims, further increasing the risk to life. For example, in August 2020, an overcrowded dingy capsized in the river, reportedly leading to two men drowning.³⁴

While the Greek authorities bear the burden of evidence indicating their involvement in pushbacks at the Evros, they are concurrently obligated to safeguard the lives of individuals within their jurisdiction. If Greek authorities are

²⁵ ECtHR, ‘Guide on the case-law of the European Convention on Human Rights: Immigration’, (31 August 2022), available at: https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf.

²⁶ *F.G. v. Sweden* (Application no. 43611/11), para 122.

²⁷ International Committee of the Red Cross (ICRC), ‘Tragedy at Evros: A perilous river crossing to Greece.’, (30 August 2017), available at: <https://www.icrc.org/en/document/tragedy-evros-perilous-river-crossing-greece#:~:text=Wet%2C%20cold%2C%20tired%20and%20lost,was%20walking%20along%20nearby%20tracks>.

²⁸ BVMN, ‘Islets, Interim Measures and Illegal Pushbacks’, (1 July 2022), available at: https://borderviolence.eu/app/uploads/Islets_4.pdf.

²⁹ BVMN, ‘More than 50 officers using 13 vehicles and 2 boats’, (3 March 2021), available at:

<https://borderviolence.eu/testimonies/march-3-2021-0000-ispala/> and BVMN, ‘I heard two shots’, (18 January 2023), available at: <https://borderviolence.eu/testimonies/january-18-2023-near-evros/>.

³⁰ BVMN, ‘Detained for 18 hours and pushed back via the Evros River’, (10 May 2022), available at:

<https://borderviolence.eu/testimonies/may-10-2022-2200-palea-sagini-gr-to-karakasim-tr/> and BVMN, ‘I was afraid that the boat would flip and I would drown’, (12 November 2021), available at: <https://borderviolence.eu/testimonies/november-12-2021-0000-lavara-karayusufu/>.

³¹ Marianna Karakoulaki Alexandroupoli (DW), ‘The deadly Evros River Borderland’, (9 January 2018), available at:

<https://www.dw.com/en/the-deadly-evros-river-borderland/g-45301014>.

³² European Union Agency for Fundamental Rights, ‘Migration: Fundamental Rights Issues at Land Borders’, (2020), available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-land-borders-report_en.pdf.

³³ Josoor, ‘They left him on an island, he couldn’t swim’, (31 March 2021), available at:

<https://www.josoor.net/post/they-left-them-on-an-island-he-couldnt-swim-he-called-his-mother-one-last-time-greece-has-become-hell-for-refugees>.

³⁴ BVMN, ‘Deaths during Pushbacks at the Evros Border’, (9 September 2020), available at:

<https://borderviolence.eu/testimonies/september-9-2020-1100-greek-turkish-border-near-edime/>.

aware that a person's life is at risk, they must take adequate and immediate measures to protect that person's life.³⁵ Reports of a general situation of life-threatening circumstances towards a specific group of individuals, a previous sequence of similar situations of the arbitrary deprivation of life,³⁶ complaints to relevant authorities of a specific risk towards a person or groups of persons,³⁷ a geographical situation that has repeatedly posed a risk to life,³⁸ and the availability of practical information pointing out this threat,³⁹ should prompt the State to heightened vigilance towards potential infringements of the right to life.⁴⁰

D. The practice of detaining people on the move in violation of the right to liberty and security

Under EU and domestic law, persons must be afforded asylum seeker status and derived rights as soon as they express the intention to seek international protection, even if they are not registered as such. Asylum seekers should benefit from material reception conditions of a certain standard,⁴¹ and they should enjoy freedom from detention.⁴²

BVMN member organisations have recorded multiple testimonies which recall the use of informal and incommunicado detention sites, such as abandoned buildings and farm outbuildings, during pushbacks.⁴³ There are few features to distinguish between treatment or conditions in official and unofficial detention sites, with testimonies reporting that pushback victims were forced to drink from dirty communal toilets, overcrowding in detention cells or rooms and excessive violence being used at both types of sites.⁴⁴ The continued use of informal detention sites serves as a mechanism for authorities to attempt to escape legal or administrative oversight whilst conducting pushbacks.⁴⁵ In March 2020, *The New York Times* published an extensive report documenting the Greek government's use of a secret extrajudicial location where people were incommunicado detained before being expelled to Türkiye without due process.⁴⁶

According to international declarations and legal decisions, it is widely recognised that prolonged incommunicado detention, as a form of enforced disappearance, is considered ill-treatment.⁴⁷ Though as shown in *El Masri v. The Former Yugoslav Republic of Macedonia*, even shorter periods can be considered a violation.⁴⁸ During incommunicado detention, individuals are removed from the protection of the law both by the denial of due process safeguards in their detention and deportation, and by being *de facto* barred from accessing asylum procedures,⁴⁹ and undermines the protections afforded by Article 5. Detaining individuals in this manner during pushbacks deprives them of their right to challenge the lawfulness of their detention through depriving them access to lawyers, reasons for their detention and their lack of registration at detention sites. Evidence of such practices in incommunicado detention during pushbacks is addressed below in turn.

Testimonies collected by BVMN detail how people held in incommunicado detention do not have access to legal assistance. For example, three Kurdish-Turkish nationals reported to have been held in incommunicado detention during their pushback from Greece.⁵⁰ They reported that their Greek lawyer had called all the police stations in the

³⁵ *Osman v. United Kingdom* (Application No. 23452/94), para 116.

³⁶ *Mahmut Kaya v. Turkey* (Application no. 22535/93) para 67.

³⁷ *Kılıç v. Turkey* (Application no. 22492/93) para 64.

³⁸ *Budayeva and others v. Russia* (Application No. 15339/02), para 24.

³⁹ *Öneriyildiz v. Turkey* (Application No. 48939/99), para 98.

⁴⁰ *Nesibe Haran v. Turkey* (Application No. 28299/95), para 74.

⁴¹ Article 55 Law 4636/2019 ("International Protection Act"), Gov. Gazette A' 169/1.11.2019, available in Greek at: <https://www.kodiko.gr/nomothesia/document/572171/nomos-4636-2019>; Article 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.

⁴² Article 46, International Protection Act; Article 8, Reception Conditions Directive.

⁴³ The Left, 'Black Book of Pushbacks', (2022), available at: <https://left.eu/issues/publications/black-book-of-pushbacks-2022/>.

⁴⁴ *Ibid.*

⁴⁵ BVMN, 'Briefing: Torture and Pushbacks - Greece 2020' (2020), available at:

<https://borderviolence.eu/app/uploads/Greece-Torture-Report-2020.pdf>.

⁴⁶ The New York Times, 'We Are Like Animals': Inside Greece's Secret Site for Migrants', (10 March 2020), available at:

<https://www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html>.

⁴⁷ *Munira MUJKANović* against Bosnia and Herzegovina and 5 other applications (Application No. 47063/08), para 16.

⁴⁸ ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia* (Application No. 39630/09), Judgment, 13 December 2012.

⁴⁹ Valentina Azarova, Amanda Danson Brown and Itamar Mann, 'The Enforced Disappearance of Migrants', Boston University International Law Journal, (August 2022), available at: https://www.bu.edu/ilj/files/2022/08/Vol_-40_1-Azarova-et-al_-online-unprinted.pdf.

⁵⁰ BVMN, 'Witnessing torture in the Soufli Police Station', (26 September 2020), available at: <https://www.borderviolence.eu/violence-reports/september-26-2020-0000-411929-9n-262943-1e-2/>.

Evros border region to ask for them, including the one they were held in, but the officers at the police station reportedly told the lawyer that they were not there.⁵¹ Similarly, in 2021 Amnesty International found in their research into pushbacks from Greece that all participants held in incommunicado detention reported having no access to consult with lawyers or the opportunity to make phone calls.⁵²

Evidence suggests that individuals held in incommunicado detention are not informed of the reason for their apprehension and detention,⁵³ constituting a clear violation of Article 5(2). In the above-mentioned 2021 research, Amnesty International reported that all of their participants held incommunicado in Greece were not informed of the reason for their arrest, and any information provided regarding reasons for people's apprehension and detention was false.⁵⁴

Numerous organisations have also reported that individuals held in incommunicado detention are not officially registered at detention sites.⁵⁵ This is supported by the testimonies collected by BVMN, as exemplified by the case of another Kurdish-Turkish national who explained that his Greek lawyer contacted border police stations in an attempt to locate him.⁵⁶ However, since the Greek police had allegedly refused to formally register the individual and were holding him incommunicado, the lawyer was unable to locate him.⁵⁷

Part II. Lack of available and effective domestic remedies in refoulement cases

Having addressed the *modus operandi* of the Greek authorities in conducting pushbacks, the Intervenors turn to consider the stark lack of available and effective domestic remedies for non-citizen applicants who seek redress for violations of Article 3 and/or Article 2 of the Convention for risk to life and ill-treatment by Greek authorities in breach of the fundamental protection of non-refoulement, including during pushbacks.

A. Legal framework: the requirement to exhaust domestic remedies in Article 35

The requirement to exhaust domestic remedies set out in Article 35 of the Convention reflects customary international law and the core principle of subsidiarity of the Court. As noted above, the requirement is based on the assumption, as reflected in Article 13 of the Convention, that the domestic legal order provides an effective remedy for the violation of Convention rights. Determining whether an applicant meets the admissibility criteria in Article 35 is a fact-specific exercise.⁵⁸ It is, however, beyond doubt that this requirement is not “cast in stone”,⁵⁹ and that remedies relevant to admissibility must be both available and effective. In other words, an applicant must only seek to exhaust those domestic remedies that are accessible and are capable of providing redress in respect of their complaints, offering reasonable prospects of success.⁶⁰

While the principle of non-refoulement is a core protection under international human rights, refugee, and customary international law, no legal remedy exists in the Greek domestic system concerning its violation. In the subsequent section, the Intervenors examine each of the supposed domestic remedies, showing they are either inaccessible (and thus the redress supposedly offered by them is illusory), or ineffective to answer the harms alleged by individuals in the position of the Applicants.

⁵¹ Ibid.

⁵² Amnesty International, ‘Greece: violence, lies, and pushbacks’, (2021), available at: <https://www.justice.gov/eoir/page/file/1411031/download>.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Human Rights Watch, ‘Greece: Violence Against Asylum Seekers at Border’, (2022), available at:

<https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border>; Refugee Support Aegan, ‘RSA Submission to the United Nations Committee on Enforced Disappearances’, (2022), available at:

https://www.ohchr.org/sites/default/files/documents/hrbodies/ced/cfis/consultations-concept-note/csos/2022-07-26/RSA_Submission_CED-1-public.pdf

⁵⁶ BVMN, ‘Asylum is in Athens [and not here].’, (17 October 2020), available at:

<https://www.borderviolence.eu/violence-reports/october-17-2021-0000-405633-8n-262108-2e/>.

⁵⁷ Ibid.

⁵⁸ See further *Lopes de Sousa Fernandes v. Portugal* [GC], para 134; see, also, *Kozacıoğlu v. Turkey* [GC], para 40.

⁵⁹ See the Court's Practical Guide on admissibility criteria, para 89.

⁶⁰ See *Sejdovic v. Italy* [GC], para 46; and *Paksas v. Lithuania* [GC], para 75.

i. Supposed remedies under Administrative Law

An individual can only challenge an administrative act under Greek law if they have obtained a written decision of the administrative organ of the State to appeal. As set out in Part I, it is inherent in the nature of the Greek State's *modus operandi* regarding pushbacks that no such written decision exists for individuals who are pushed back. It follows then, that where no decision to remove or deport or expel an individual is formally made, that non-existent decision cannot be challenged in Greek administrative courts.

Furthermore, only deportation, return and readmission decisions can be quashed before the competent administrative court pursuant to Article 15 of Law 3068/2002. Other relevant acts of administrative wrongdoing must be challenged through a civil action seeking compensation under Article 105 of the Introductory Law of the Greek Civil Code ("the Introductory Law"). Article 105 of the Introductory Law reflects the Greek State's liability to provide compensation for any damage caused to those subject to administrative wrongdoing such as the failure to follow proper procedure in registering the arrival of individuals on Greek territory, or the failure to observe procedure in deciding to remove such individuals from the territory.

However, it is well established as a matter of the Court's case law that intentional ill-treatment in breach of Article 3 of the Convention is not remediable solely by compensation. As set out in *Gäfgen v. Germany*, "if the authorities could confine their reaction to incidents of willful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice".⁶¹ A claim for compensation under Article 105, therefore, is not an effective remedy for individuals that are already removed from Greek territory when they seek redress from the Court for violations of their Article 2 and 3 Convention rights.

ii. Supposed remedies under Criminal Law

As to the criminal law, the Intervenors consider that it is highly doubtful that individuals who have been pushed back to a third country would be able to access effective remedies under the criminal law for at least three reasons.

First, any exposure to ill-treatment in a third country, although consequent to being pushed back, cannot form the basis of a criminal complaint in Greece, due to the territorial jurisdiction set out in Article 5 of the Greek Penal Code.⁶² Torture or exposure to inhuman or degrading treatment performed in a third state, such as Türkiye, do not constitute crimes that can be prosecuted under Greek penal legislation by virtue of an extraterritorial jurisdiction provision, since they are not covered by Article 8 of the Greek Penal Code nor are the Intervenors aware of any other international agreements or Conventions that would allow their prosecution.

Second, even in instances where a criminal complaint could in theory be brought against Greek authorities specifically for their conduct during a pushback (for example, due to unreasonable use of force, torture, bodily harm),⁶³ there are significant legal and practical obstacles to bringing such cases, including a lack of available evidence as well as difficulty in identifying the responsible force or individual due to the covert and clandestine nature of pushbacks.⁶⁴ While the Intervenors acknowledge and accept that geographic borders are not per se an obstacle to exhausting domestic remedies in another Convention state,⁶⁵ this does not negate the very real challenges faced by those who have been subjected to pushbacks, perhaps in particular those who are consequently imprisoned in other states, in accessing any remedies. The Intervenors are not aware of any successful prosecution of any Greek state actor with respect to acts committed against individuals during pushbacks such as murder, manslaughter,

⁶¹ See *Gäfgen v. Germany* [GC], para 119, citing *Krastanov v. Bulgaria*, para 60; *Çamdereli v. Turkey*, para 29; and *Vladimir Romanov v. Russia*, para 78.

⁶² Article 5(1) of the Greek Penal Code reads in relevant part: "Greek penal laws apply on all acts committed within the Greek territory, even when committed by aliens."

⁶³ The sections of the Greek Penal Code that may be relevant to such potential prosecutions include Articles 137A (Torture), 299 (Murder), 302 (Unintentional Murder or Manslaughter), 306 (Exposure to Risk), 307 (Failure to intervene to save life), 308 et seq (Bodily Harm), 322 (Abduction), and 325 (Illegal Retention).

⁶⁴ Human Rights Watch, "Their Faces Were Covered": Greece's Use of Migrants as Police Auxiliaries in Pushbacks', (7 April 2022), available at: <https://reliefweb.int/report/greece/their-faces-were-covered-greece-s-use-migrants-police-auxiliaries-pushbacks-eneltr>.

⁶⁵ *Demopoulos and Others v. Turkey* (dec.) [GC], paras 98 and 101.

torture, exposure, failure to offer assistance, bodily injury or grievous bodily harm, let alone any successful prosecution based on a breach of the principle of non-refoulement.

Finally, Article 4 et seq. of the Convention for the Protection of all Persons from Enforced Disappearance (“the CPPED”) provides that the act of enforced disappearance should be punished under domestic penal law (despite the CPPED forming part of domestic law strictly by virtue of its signing and ratification, as a result of Article 28 of the Greek Constitution).⁶⁶ Although the CPPED was ratified by Greece with Law 4268/2014, to the knowledge of the Intervenors, no concrete strategies or plans for implementation have surfaced since its introduction to the domestic legal order.

iii. Research in relation to supposed remedies conducted in the NOMOS database

The Intervenors have conducted targeted research in the established database of domestic legal procedures in Greece (the “NOMOS” database) to identify whether there have indeed been cases brought under the Articles and Laws discussed above, with respect to the violation of the principle against refoulement, and related violations of Articles 2 and 3 of the Convention. As of the 14th of July, the results of the research is summarised as follows:⁶⁷

- (a) A search query using the word “refoulement” (“επαναπροώθηση”) applied to the 18,092 entries for penal cases contained in the NOMOS database returned only 31 entries. 14 of these were cases of removal after rejection of asylum claims or other relevant reasons, while a further 10 concerned acts where the accused was a third country national due to be deported due to criminal charges. Of the remaining 7 results, 5 concerned acts irrelevant to refoulement (embezzlement, bribery, bodily harm, escape of a detainee), and 1 concerned administrative jurisdiction and was thus also irrelevant. Only 1 result indicated the prosecution and conviction of Coast Guards at first instance for torture (365/2013 Navy Court – “Ναυτοδικείο Πειραιά”) - this conviction was later overturned on appeal. In any event, this case did not itself concern a removal procedure, but rather involved alleged acts of inhuman and degrading treatment of detainees by Greek State agents when the individuals entered Greek waters.
- (b) Further research in the NOMOS database under the thematic inventory concerning judgments issued on cases of alleged violations of Article 105 of the Introductory Law,⁶⁸ which, as discussed above, permits individuals to seek compensation for harm suffered as a result of unlawful administrative acts or omissions, filtered by the search queries “refoulement” and “asylum” yielded the following results:
 - i. The query “asylum” (“άσυλο”) returned 11 judgments dated between 2006 and 2023. 1 judgment was irrelevant (owing to the erroneous use of the word “asylum” to describe a mental institution); whereas 5 of the remaining 10 cases concerned the confiscation of property from a third country national in the context of debts and domestic proceedings. The remaining 5 concerned lawsuits which resulted from the deaths or serious endangerment of health of the claimant or of their relatives’ due to the material living conditions at reception and identification centres in Greece.
 - ii. The query “refoulement” (“επαναπροώθηση”) returned only 9 results, none of which were relevant to refoulement or pushbacks, save for 2 judgments that concerned the distinct instance of deportation following criminal conviction in Greece.

⁶⁶ The Committee on Enforced Disappearances (“CED”) in responding to Greece’s report submitted under Article 29 of the CPPED recommended that Greece redouble its efforts to “prevent and investigate the disappearance of migrants, including in the context of pushbacks and vessels arriving by sea or the Evros River, and ensure that those responsible are prosecuted” (Concluding observations on the report submitted by Greece under Article 29 (1) of the Convention, 12 May 2022).

⁶⁷ Note on the search terms: the search terms used in the NOMOS database were in Greek; namely, the Greek words for asylum “άσυλο”, refoulement “επαναπροώθηση” and refugees “πρόσφυγες” were used in order to cover all most likely word combinations used in case summaries. It is noted that the word for refoulement can mean the same as the word for “extradition”, thus operating as a confounding factor. The results that arose due to this error have been clarified as such. It is noted that no results came up when usage of the term “pushback” was attempted.

⁶⁸ Notably having been presented by the Greek government as a viable remedy within the meaning of Article 13 ECHR in a multitude of cases concerning systemic pathologies, mainly regarding material conditions in police departments, prisons or administrative holding cells of individuals pending extradition, as well as material conditions in reception and identification centres.

- (c) Searching for references to the provisions of the CPPED returned only one result, which did not concern an act of enforced disappearance. Similarly, a search for Article 322 (Abduction), when cross-referenced with either “refoulement” or “asylum” returned no results.

As the Court is well aware, the development and availability of a remedy said to exist, including its scope and application, must be confirmed or complemented by practice or case law.⁶⁹ The Intervenors point to a stark lack of such evidence. As demonstrated by the research above, the possibility of criminal prosecution or receiving compensation via a civil action remains illusory.

B. The failure to conduct adequate investigation leading to a “*de facto* general policy” regarding illegal pushbacks

Aside from the legal avenues listed above, the Intervenors further note that no adequate administrative remedy is available via the Greek Ombudsman or the National Transparency Agency, although both bodies are often cited by the Greek State as the responsible bodies to investigate allegations of pushbacks. The Intervenors contend that neither of these agencies can be said to offer an effective remedy, and furthermore, that the Greek State’s failure to investigate properly the overwhelming evidence of illegal pushbacks indicates an “*administrative practice*” rendering the requirement to engage with investigatory remedies null under Article 35 of the Convention.

i. Greek Ombudsman

The Greek Ombudsman exists under Greek law as an independent authority charged with combatting maladministration and mediating between State agencies and the public, to provide assistance in the effective exercise of individual rights.⁷⁰ Under Law 4443/2016, a mechanism for the investigation of arbitrary incidents, including in relation to forced removal of third country nationals, was integrated into the office of the Greek Ombudsman.⁷¹ However, this mechanism self-avowedly does not replace the judicial and disciplinary monitoring of cases within its competences, including cases of pushbacks.⁷² In its interim report on “Alleged pushbacks to Turkey of foreign nationals who had arrived in Greece seeking international protection”, commenced on its own initiative, the Ombudsman concluded that his powers to effectively investigate the factual basis of the complaints were “limited”,⁷³ and furthermore that “[t]he large number of the complaints [...] regarding illegal pushbacks of hundreds or even thousands of foreign nationals, from Greece to Turkey [...] has created concerns regarding the level of the protection of human rights in Greece”, such that the Ombudsman recommends formal investigation by the police of such incidents.⁷⁴ The status of any police response to these recommendations remains unclear. In any case, as expressly stated in its founding legislation and as has been admitted by the Ombudsman itself, the Ombudsman holds no authority or power to impose sanctions.

ii. National Transparency Agency (“NTA”)

The NTA was established by Law 4622/2019, with the proposed aim to be an independent body subject to parliamentary control, charged with, *inter alia*, investigating fraud within “*all general government bodies and services, including legal entities governed by public law [...]*”.⁷⁵ As such, its competences touch on the investigation of complaints relating to relevant Greek authorities’ unlawful acts or omissions. However, the NTA has been widely criticised inside Greece and internationally for its failure to act independently, for lacking expertise to investigate

⁶⁹ *Mikolajová v. Slovakia*, para 34.

⁷⁰ See further the description of the mission and aims of the Greek Ombudsman available at the website of the Independent Police Complaints Authorities’ Network, available at: <https://ipcan.org/members/the-greek-ombudsman>.

⁷¹ See further Law 4443-2016, available in English at: [Law 4443/2016 on equal treatment between persons irrespective of racial or ethnic origin | European Website on Integration \(europa.eu\)](http://www.theioi.org/downloads/64ok3/National%20Mechanism%20For%20The%20Investigation%20Of%20Arbitrary%20Incidents%20-%20Report%202017-18.pdf).

⁷² See further the Explanatory Memorandum to Law 4443/2016 and; and The Greek Ombudsman, ‘National Mechanism for the Investigation of Arbitrary Incidents - Report 2017-2018’, available at: <https://www.theioi.org/downloads/64ok3/National%20Mechanism%20For%20The%20Investigation%20Of%20Arbitrary%20Incidents%20-%20Report%202017-18.pdf>.

⁷³ The Greek Ombudsman, ‘Alleged pushbacks to Turkey of foreign nationals who had arrived in Greece seeking international protection’, (2020), available at: <https://old.synigoros.gr/?i=human-rights.en.recentinterventions.791674>.

⁷⁴ *Ibid.*

⁷⁵ See Article 83 para 1 of Law 4622/2019.

pushbacks and for excluding relevant bodies such as UNHCR, NGOs and people on the move who brought complaints from its investigations.⁷⁶ Moreover, the NTA has no powers to grant relief to individuals in any event.

iii. *A de facto* general policy

As set out in detail in Part I, international human rights organisations have confirmed that pushbacks are carried out on a widespread and systematic basis by the Greek state. As noted above, neither the Greek Ombudsman, nor the NTA, has been able to conduct an effective investigation into the practice of pushbacks. Moreover, the Court found in *Safi v. Greece*, that within the Greek judicial system, in a case where penal procedures were initiated, that they resulted in a deficient and inadequate investigation.⁷⁷

The Intervenors further note that the requirement to exhaust domestic remedies is inapplicable where an “*administrative practice*” consisting of a repetition of acts incompatible with the Convention, as well as an official tolerance by the relevant authorities is shown to exist, such as to render proceedings, if possible, futile or ineffective.⁷⁸ Such a situation persists in Greece today. Widespread prima facie evidence that pushbacks are repeatedly occurring over Greece’s border exists - that such incidents persist, and that Greece has conducted no adequate investigation into pushbacks suggests an official tolerance of such acts. On the contrary, Greek officials have persistently denied the existence of any practice or policy of pushbacks.⁷⁹ In such circumstances, the Intervenors contend that a strict admissibility requirement to exhaust domestic remedies should not be rigidly applied to exclude applicants from seeking recourse on the international level.

⁷⁶ Greek Council for Refugees, ‘European Council on Refugees and Exiles - Greece Country Report: Access to the territory and push backs’, (8 June 2023), available at:

https://asylumineurope.org/reports/country/greece/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/#_ftn14.

⁷⁷ See *Safi and others v. Greece* (app. n° 5418/15) in which the Court, apart from other findings regarding shortcomings in the proceedings observed that: “*le procureur s’est limité à constater que « le refoulement comme procédure de renvoi ou de remorquage (...) vers les eaux territoriales turques n’existe pas en tant que pratique (...) ».* Il a ajouté qu’il serait « inutile et superflu » de prendre en compte les paramètres spécifiques des allégations des requérants en raison du fait que leur version des faits était basée sur l’hypothèse que leur bateau était remorqué vers les côtes turques, ce qui, selon l’évaluation et l’appréciation des preuves faites par le procureur, ne pouvait pas être le cas en l’espèce”

⁷⁸ *Aksoy v. Turkey*, para 52; *Georgia v. Russia* (I) [GC], paras 125-159; *Ukraine v. Russia (re Crimea)* (dec.) [GC], paras 260-263, 363-368; *Georgia v. Russia* (II) [GC], paras 98-99 and 220-221.

⁷⁹ European Council on Refugees and Exiles (ECRE), “Greece: Government States 150,000 People have been “Averted” but Denies Pushbacks, ‘Safe Third Country’ Inadmissibility Decisions Continue as Hate Crimes are On the Rise in Türkiye”, (9 September 2022), available at: <https://ecre.org/greece-government-states-150000-people-have-been-averted-but-denies-pushbacks-safe-third-country-inadmissibility-decisions-continue-as-hate-crimes-are-on-the-ris/>; and Human Rights Watch, “Greece Is Still Denying Migrant Pushbacks”, (21 August 2020) available at: <https://www.hrw.org/news/2020/08/21/greece-still-denying-migrant-pushbacks>.