
H.T. v. Germany and Greece

Joint Third Party Intervention (ECCHR, Pro Asyl and RSA)

A. Introduction

1. In July 2018 Germany put into place “transit procedures” at the German-Austrian border¹ for third country nationals for whom the EURODAC database indicated a registered asylum claim in another EU country. Following this procedure, these persons were automatically refused entry into Germany and returned back to that other EU country within 48 hours on the basis of bilateral agreements.² The transit procedures are carried out by the *Bundespolizei* (federal police) and do not involve the German authority responsible for asylum claims and Dublin transfers.³ The German government argued that these “transit procedures” did not contravene the current Dublin Regulation⁴ (“Dublin III”) and its implementing national provisions,⁵ but rather established a “pre-Dublin procedure” to establish the EU member responsible for the Dublin procedure. A number of legal scholars and NGOs criticised this approach, pointing out its incompatibility with Dublin III as well as fundamental and human rights.⁶ Nonetheless in August 2018 the “transit procedure” was materialised through agreements with Spain⁷ and Greece.⁸ Thus 7 persons were automatically returned to Greece in

¹ However this policy is in fact applicable beyond the actual border zone. The German government has argued that the policy should be applicable until the first train station of arrival to Germany and on trains traveling to said first station of arrival. This argument has been accepted in court. See VG München (Munich administrative court), judgment of 08.08.2019 (M 18 E 19.32238), §§36-40.

² German Parliament, *Unterabteilung Europa (Europe Department), Ausarbeitung – Transitverfahren und die Fiktion der Nichteinreise* (PE6-3000 – 11/18), 02.08.2018, p.1, available at <https://www.bundestag.de/resource/blob/571498/63352e85f233c385555b830ef826596c/PE-6-111-18-pdf-data.pdf> (accessed on 22.10.2020).

³ *Bundesamt für Migration und Flüchtlinge* or “BAMF” (Federal Administration for Migration and Refugees).

⁴ Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

⁵ In particular §8 of the *Asylgesetz* (Asylum law).

⁶ For an overview of such critiques, see Asyl.net, *Stellungnahmen zu geplanten Zurückweisungen an der Grenze und Transitverfahren* (Opinions on planned returned at the border and transit procedures), 09.07.2018, available at <https://www.asyl.net/view/detail/News/stellungnahmen-zu-geplanten-zurueckweisungen-an-der-grenze-und-transitverfahren/> (accessed on 20.10.2020).

For individual articles, see C. Hruschka, *Gewolltes Recht* (intended right), *verfassungsblog.de*, 02.11.2018, available at <https://verfassungsblog.de/gewolltes-recht/> (accessed on 20.10.2020). On detention without court detention order, see M. Pichl, *Die Fiktion der Souveränität in Transitzentren – Was ist eigentlich mit der Orbánisierung Europas gemeint?* (The fiction of sovereignty in transit procedures – what does the orbanisation of Europe actually mean?), *verfassungsblog.de*, 04.07.2018, available at <https://verfassungsblog.de/die-fiktion-der-souveraenitaet-in-transitzentren-was-ist-eigentlich-mit-der-orbanisierung-europas-gemeint/> (accessed on 20.10.2020).

⁷ Administrative Arrangement between the Ministry of Interior of the Kingdom of Spain and the Federal Ministry of Interior, Building and Community of the Federal Republic of Germany on cooperation between Germany and Spain when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border, 06.08.2018, available at <https://www.documentcloud.org/documents/5427858-Abkommen-Mit-Spanien.html> (accessed on 20.10.2020)

⁸ Administrative Arrangement between the Ministry of Migration Policy of the Hellenic Republic and the Federal Ministry of Interior, Building and Community of the Federal Republic of Germany on cooperation between Germany and Spain when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border, 18.08.2018, available at <https://www.documentcloud.org/documents/5427859-Abkommen-Mit-Griechenland.html>

2018 and 31 persons in 2019.⁹ As a matter of principle, no assurances were provided by Greece under the bilateral agreement as to the treatment of these persons once returned.¹⁰

B. Expelling State's obligations under the European Convention on Human Rights

I. Admissibility and Jurisdiction

2. Jurisdiction is primarily territorial¹¹ and presumed to be exercised throughout the territory. The only possible limitation to territorial jurisdiction is when a State is prevented from exercising its authority in parts of its territory.¹² A State cannot curtail its Convention obligations by declaring an area as non-territorial.¹³ Nor can the special context of migration justify an area outside the law where individuals would not be covered by the Convention through an artificial reduction of its scope.¹⁴ The irregular nature of entry of a non-national does not place them outside of the jurisdiction of a State.¹⁵ A Convention state cannot rid oneself of its human rights obligations through bilateral or multilateral agreements¹⁶ as this would render the notion of effective human rights protection underpinning the entire Convention meaningless.¹⁷

II. Article 3 ECHR

3. Any measure taken by a State to remove a non-national under its jurisdiction to another country constitutes a violation of article 3 European Convention on Human Rights ("ECHR") where there are substantial grounds to believe that the person would face a real risk of treatment contrary to article 3 in the receiving country.¹⁸
4. A State's obligations under article 3 ECHR are absolute and cannot be curtailed due to an increasing flux of migrants and asylum-seekers,¹⁹ an inter-State agreement or cooperation²⁰ or any circumstances or conduct of the victim.²¹
5. **The obligation to assess** the conditions - general and personal²² - in the receiving State in light of article 3 ECHR²³ requires an individual examination by the competent national

⁹ German Parliament, Governmental Answers, 19/19887, 12.02.2020, p.28, §42, available at <https://dip21.bundestag.de/dip21/btd/19/198/1919887.pdf> (accessed on 20.10.2020).

¹⁰ German Parliament, Governmental answer, 19/13857, 09.10.2019, p.13-4, §23, available at <https://dipbt.bundestag.de/doc/btd/19/138/1913857.pdf> (accessed on 28.10.2020).

¹¹ *Güzelyurtlu & others v. Cyprus & Turkey* [GC], 36925/07, 29.01.2019, §178; *Banković & others v. Belgium & others* [GC], 52207/99, 12.12.2012, §59 ff.; *Ilaşcu & others v. Moldova & Russia* [GC], 48787/99, 08.07.2004, § 311; *N.D. and N.T. v. Spain* [GC], 8675/15, 13.02.2020, §103.

¹² *Assanidze v. Georgia* [GC], 71503/01, 08.04.2004, §§137-39; *Ilaşcu* (supra), §§313-13 and 333.

¹³ *N.D. and N.T. (supra)* §§107 ff.; *Loizidou v Turkey* [GC], 15318/89, 18.12.1996, §§18 and 25 ff.

¹⁴ *N.D. and N.T. (supra)*, §110.

¹⁵ *N.D. and N.T. (supra)*, §§97 and 109; *M.K. & others v. Poland*, 40503/17, 23.07.2020, §§129-32.

¹⁶ *N.D. and N.T. (supra)*, §109; *Hirsi Jamaa and Others v. Italy* [GC], 27765/09, 23.02.2012, §129.

¹⁷ *Hirsi Jamaa* [GC] (supra), §178; *Assanidze* [GC] (supra), §142.

¹⁸ *Ilias and Ahmed v. Hungary* [GC], 47287/15, 21.11.2019, §126; *Hirsi Jamaa* [GC] (supra), §114; *H.L.R. v. France* [GC], 24573/94, 20.04.1997, §34; *Vilvarajah and Others v. the United Kingdom*, 13163/87, 30.10.1991, §103; *Cruz Varas and others v. Sweden* [GC], 15576/89, 20.03.1991, §§69-70; *Saadi v Italy* [GC], 37201/06, 28.02.2008, §§124-125; *Soering v. the United Kingdom* [GC], 14038/88, 07.07.1989, §§90 ff.; *F.G. v. Sweden* [GC], 43611/11, 23.03.2016, §111.

¹⁹ *M.S.S. v. Greece and Belgium* [GC], 30696/09, 21.01.2011, §22; *Hirsi Jamaa* [GC] (supra), §122.

²⁰ *Hirsi Jamaa* [GC] (supra), §129.

²¹ *Tabesh v. Greece*, 8256/07, 26.11.2009, §34. See also *Chahal v. U.K.* [GC], 2414/93, 15.11.1996, §79; *Labita v. Italy* [GC], 26772/95, 06.04.2000, § 119.

²² See, *mutatis mutandi*, *F.G.* [GC] (supra), §§114 and 116; *Vilvarajah* (supra), §108.

authorities.²⁴ It also applies when the receiving state is another EU country²⁵ and when the removal occurs in the context of a State cooperation.²⁶ It is for the expelling State to assess risks of treatment in breach of article 3 ECHR on their own motion and prior to removal, whenever information about the existence of a real and concrete risk in the receiving country is freely ascertainable from a number of independent, objective and reliable sources.²⁷ This is irrespective of whether or not the person to be deported has relied on and substantiated relevant individual circumstances as to such risk.²⁸ The assessment must be rigorous²⁹ and must consider all the circumstances of the case.³⁰

6. In the case of asylum seekers, their characteristic as a particularly vulnerable group in need of special protection is pivotal.³¹ Such vulnerability is inherent to being an asylum-seeker as such but can also stem from traumatic experiences previously endured, including during the migratory path.³²
7. Thus before a State attempts to remove an asylum seeker to a third country,³³ it must assess whether the individual will have access to an adequate asylum procedure in the receiving third country or whether she risks direct or indirect *refoulement*,³⁴ and whether living and detention conditions in the receiving third country are compatible with article 3 ECHR.³⁵
8. The risk of treatment contrary to article 3 ECHR can be alleviated when the expelling State obtains **adequate assurances** from the receiving State.³⁶ In those cases the expelling State must examine whether such assurances practically provide sufficient guarantees against treatment contrary to article 3 ECHR.³⁷ This examination entails considering whether the assurances are specific enough, individually framed and with relevant information about the situation in practice.³⁸ The assurances must also be provided by a national authority capable of enforcing them and there should be mechanisms in place for the expelling State to monitor that the assurances are honoured in practice.³⁹
9. When the Court assesses the existence of a risk of treatment contrary to article 3 ECHR, it will consider all the material placed before it, or, if necessary, material obtained *proprio motu*. The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the expelling State at the time of the expulsion.⁴⁰ The

²³ See, *mutatis mutandi*, *F.G.* [GC] (*supra*), §112; *Mamatkulov & Askarov v. Turkey* [GC], 46827/99, 04.02.2005, §67.

²⁴ *Ilias and Ahmed* [GC] (*supra*), §127; *Mamatkulov* [GC] (*supra*), §67.

²⁵ *Ilias and Ahmed* [GC] (*supra*), §§133-4; *M.S.S.* [GC] (*supra*), §342; *Mohammadi v. Austria*, 71932/12, 03.07.2014, § 60; *Tarakhel v. Switzerland* [GC], 29217/12, 04.11.2014, §§103-104; *Sharifi & others v. Italy & Greece*, 16643/09, 21.10.2014, §232.

²⁶ *Mohammadi v. Austria* (*supra*), §60.

²⁷ *M.S.S.* [GC] (*supra*), §366; *Sharifi* (*supra*), §§31-2; *Ilias and Ahmed* [GC] (*supra*), §141.

²⁸ *M.S.S.* [GC] (*supra*), §366; *Ilias and Ahmed* [GC] (*supra*), §141.

²⁹ *Ilias and Ahmed* [GC] (*supra*), §127; *Chahal* [GC] (*supra*), §96.

³⁰ *M.S.S.* [GC] (*supra*), §219; *Tarakhel* [GC] (*supra*), §94; *Ilias and Ahmed* [GC] (*supra*), §127.

³¹ *Mubilanzila Mayeka & Kaniki Mitunga v. Belgium*, 13178/03, 12.10.2006, §§53-55; *M.S.S.* [GC] (*supra*), §251; *Tarakhel* [GC] (*supra*), §97; *S.D. v. Greece*, 53541/07, 11.06.2009, §53; *V.M. and Others v. Belgium*, 60125/11, 07.07.2015, §136; *Rahimi v. Greece*, 8687/08, 05.04.2011, §93.

³² *M.S.S.* [GC] (*supra*), §§232-233; *S.D. v. Greece* (*supra*), §52;

³³ *M.S.S.* [GC] (*supra*), §358; *Ilias and Ahmed* [GC] (*supra*), §§133-4; *Hirsi Jamaa* [GC] (*supra*), §§146 ff.

³⁴ *Ilias and Ahmed* [GC] (*supra*), §131

³⁵ *Ibidem*; *Tarakhel* [GC] (*supra*), §96.

³⁶ *Ilias and Ahmed* [GC] (*supra*), §161.

³⁷ *Chahal* [GC] (*supra*), §105; *Saadi* [GC] (*supra*), §147; *Othman (Abu Qatada) v. U.K.*, 8139/09, 17.01.2012, §187; *Tarakhel* [GC] (*supra*), §121.

³⁸ *M.S.S.* [GC] (*supra*), §354; *Othman* (*supra*), §189; *Tarakhel* [GC] (*supra*), §121.

³⁹ *Othman* (*supra*), §189; *Saadi* [GC] (*supra*), §148.

⁴⁰ *Ilias and Ahmed* [GC] (*supra*), §141; *Sharifi* (*supra*), §§31-2; *Cruz Varas* [GC] (*supra*), §§75-76.

Court will also assess whether the expelling State afforded the applicant a sufficient opportunity to demonstrate that the receiving State was not safe in his particular case.⁴¹

10. **A lack of access to an adequate asylum procedure and subsequent risk of chain refoulement** will be incompatible with article 3 ECHR. The asylum system in the receiving country must be accessible and reliable and provide sufficient legal guarantees against the direct or indirect removal of the asylum seeker to his origin country without a proper evaluation of his asylum claim.⁴² In *Sharifi v. Italy & Greece*, the Court confirmed the existence of such a risk when Italy automatically returned the applicants to Greece on the basis of a bilateral agreement, thus by-passing the procedure under Dublin III. The Court emphasised that the returning country must give access to a procedure during which a risk assessment is carried out, in particular in relation to access to asylum and chain *refoulement*.⁴³
11. **The living conditions of asylum seekers** can also be constitutive of an article 3 ECHR violation in view of the specific vulnerability of asylum seekers as a class of persons⁴⁴ and their dependence to the State for survival.⁴⁵ The inherent vulnerability attached to being an asylum seeker will be considered in addition to other grounds of vulnerability.⁴⁶
12. **Detention conditions** will be in breach of article 3 ECHR when they cause significant mental or physical harm, or arouse a feeling of fear, anguish and inferiority capable of humiliating and debasing the concerned person.⁴⁷ The Court has found relatively short time detention – from 24 hours to several days – can constitute inhuman treatment.⁴⁸
13. Whether detention conditions constitute an inhuman or degrading treatment will depend on all the circumstances of the case, including the duration of the treatment, its physical and mental effects and any particular vulnerabilities of the detainee, for example in light of their state of health, age or gender.⁴⁹ In particular the assessment of detention conditions for asylum-seekers within an asylum procedure must take into account their vulnerabilities,⁵⁰ including those stemming from their past traumatic experiences.⁵¹ In assessing detention conditions against its article 3 ECHR threshold, the Court will consider the specific vulnerabilities of the detainee but also the cumulative effect of the particular detention conditions,⁵² including the space per prisoner in detention cells,⁵³ possibilities to leave the cell and take part in activities,⁵⁴ ventilation as well as access to natural light, air, basic sanitary facilities,⁵⁵ sufficient food⁵⁶ and proper healthcare.⁵⁷

⁴¹ *Ilias and Ahmed* [GC] (*supra*), §148.

⁴² *Idem*, §§134, 137 and 139.

⁴³ *Sharifi* (*supra*), §§232-233.

⁴⁴ *M.S.S.* [GC] (*supra*), §§250-3; *V.M.* (*supra*), §136; *Mubilanzila Mayeka* (*supra*), §§53-55; *Tarakhel* [GC] (*supra*), §§95 ff.; *Rahimi* (*supra*), §93.

⁴⁵ *M.S.S.* [GC] (*supra*), §§250-3; *Budina v. Russia*, 45603/05, 18.06. 2009.

⁴⁶ *Tarakhel* [GC] (*supra*), §119; *V.M.* (*supra*), §138.

⁴⁷ *M.S.S.* [GC] (*supra*), §221; *Kudla v. Poland* [GC], 30210/96, 26.10.2000, §92.

⁴⁸ See for example *S.D. v. Greece* (*supra*), §49; *Mkhitarian v. Armenia*, 22390/05, 02.12.2008, §55.

⁴⁹ *M.S.S.* [GC] (*supra*), §219; *Kudla* [GC] (*supra*), §91.

⁵⁰ *M.S.S.* [GC] (*supra*), §§232 ff.; *S.D. v. Greece* (*supra*), §§52-53.

⁵¹ *Kanagaratnam v. Belgium*, 15297/09, 13.12.2011, §§67 ff.

⁵² *Khlaifia v. Italy* [GC], 16483/12, 15.12.2016, §163; *Muršić v. Croatia* [GC], 7334/13, 20.10.2016, §101.

⁵³ *Muršić* [GC] (*supra*), §§114 ff.; *Khlaifia* [GC] (*supra*), §§164 ff.

⁵⁴ *Kalashnikov* (*supra*), §133; *Muršić* [GC] (*supra*), §§158.

⁵⁵ *Orchowski v. Poland*, 17885/04, 22.10.2009, §122; *Kalashnikov v. Russia*, 47095/99, 15.2.2002, §97.

⁵⁶ *Dudchenko v. Russia*, 37717/05, 07.11.2017, §130.

⁵⁷ *Kudla* [GC] (*supra*), §94; *Algur v. Turkey*, 32574/96, 22.10.2002, §44.

14. As for detention in police custodial facilities, in light of the CPT's recommendations,⁵⁸ the Court's long-standing jurisprudence is that by its very nature, such detention for a period exceeding a month will be in violation of article 3 ECHR.⁵⁹ This is regardless of the existence of evidence as to the actual detention conditions in the relevant police stations.⁶⁰ The Court gives weight to the fact that detention is related to immigration law rather than criminal law.⁶¹ Further the Court highlighted the inadequacy of detention in police custody for those presenting vulnerabilities and special protection needs.⁶² In some cases and in light of the particularities of the case, shorter lengths of detention in police stations have also led to findings of article 3 ECHR violations.⁶³
15. **Publicly available information as to the situation of asylum seekers returned to Greece** includes a long standing jurisprudence. The existence of systemic deficiencies in violation of article 3 ECHR was confirmed in the 2011 judgement in *M.S.S.(supra)*. The continuity of these deficiencies and consequential violations of the ECHR were further confirmed in subsequent judgments from the European Court of Human Rights ("ECtHR").⁶⁴ Indeed the execution of the *M.S.S.* judgment is still incomplete and continues to be examined by the Committee of Ministers.⁶⁵ Moreover the European Court of Justice ("ECJ") has followed the ECtHR jurisprudence and barred asylum seekers' returns to Greece.⁶⁶
16. In Germany the government suspended expulsions of asylum seekers back to Greece between 2011 and 2017.⁶⁷ Since 2017 such expulsions have been rare: in 2018 they could not take place in 97,1 % of the cases, as Greece refused to accept the asylum seekers in light of its housing facilities for asylum seekers.⁶⁸ In 2019 Greece only accepted to take back asylum seekers in 576 out of 9870 cases.⁶⁹ In addition, a number of expulsions back to Greece were suspended by German courts for their incompatibility with article 3 ECHR, because of lasting systematic deficiencies in the Greek asylum system and/or because of inhuman living conditions in Greece.⁷⁰

⁵⁸ European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment - Council of Europe ("CPT"), 2nd General Report, 1992, §42; CPT, 7th General Report, 1997, §27; CPT, 12th General Report, 2002, §47; CPT, Immigration Detention Factsheet, 2017, §§3 ff.

⁵⁹ *Kaja v. Greece*, 32927/03, 27.07.2006, §49; *Vafiadis v. Greece*, 24981/07, 02.07. 2009, §§ 35-36; *Tabesh (supra)*, §43; *Efremidze v. Greece*, 33225/08, 21.06.2011, §41; *H.A. & others v. Greece*, 19951/16, 28.02.2019, §168; *SH.D. & others v. Greece & others*, 14165/16, 13.06.2019, §48.

⁶⁰ *Lica v. Greece*, 74279/10, 17.07.2012, §§47-50; *Ahmade v. Greece*, 50520/09, 25.09.2012, §§100-2; *S.Z. (supra)*, §§40 ff.

⁶¹ *Riad & Idiab v. Belgium*, 29787/03, 24.01.2008 §100; *Tabesh (supra)*, §§37 and 43; *Efremidze (supra)*, §35.

⁶² *SH.D. (supra)*, §50; *H.A. (supra)*, §168.

⁶³ *SH.D. (supra)*, §48; *Tsarpelas v. Greece*, 74884/13, 26.04.2018, §§48-50; *Tabesh (supra)*, §§48-50; *H.A. (supra)*, §166 ff.

⁶⁴ *A.E.A. v. Greece*, 39034/12, 15.06.2018; *F.H. v. Greece*, 78456/11, 31.07.2014; *Amadou v. Greece*, 37991/11, 04.02.2016; *S.G. v. Greece*, 46558/12, 18.05.2017.

⁶⁵ Council of Europe - Department for the Execution of Judgements of the European Court of Human Rights, "Greece", available at <https://www.coe.int/en/web/execution/submissions-greece> (accessed on 21.10.2020).

⁶⁶ *Bundesrepublik Deutschland v. Kaveh Puid* (C-4/11), 14.11.2013; *N.S. v. Secretary of State for the Home Department* (C-411/10 and C-493/10), 21.12.2011.

⁶⁷ *Sueddeutsche Zeitung, Griechenland will Abschiebungen aus Deutschland wieder erlauben* (Greece wants to allow expulsions from Germany again), 05.08.2017, available at <https://www.sueddeutsche.de/politik/asylverfahren-griechenland-will-abschiebungen-aus-deutschland-wieder-erlauben-1.3617689> (accessed on 25.10.20).

⁶⁸ German Parliament, Governmental Answer, 19/8340, 13.03.2019, p.24.

⁶⁹ German Parliament, Governmental Answer, 19/17100, 20.02.20, p.52.

⁷⁰ Verwaltungsgericht ("VG") (administrative court) Saarland, 09.07.2019 (5 L 773/19 - juris); VG Berlin, 28.06.2019 (25 L 268.19.A). Some judgements have concluded that systemic deficiencies exist, in those cases compensated by individual assurances of the Greek authorities: VG Magdeburg, 6.12.2019 (9 B 442/19, BeckRS 2019, 35858); VG Regensburg, 16.8.2018 (13 S 18.50524, BeckRS 2018, 19523). Some judgements have also

17. As for the *refoulement* of Syrians from Turkey, in summer 2016 already, reports of Syrians being irregularly returned to Syria from Turkey were noted by the Council of Europe’s Special Representative on Migration and Refugees.⁷¹ In 2017 Amnesty International highlighted that further to the establishment of a state of emergency in Turkey, safeguards against non-*refoulement* were “*drastically reduced*” and concluded that the risk of *refoulement* from Turkey was “*not theoretical, but very real.*”⁷² In 2018 Human Rights Watch reported that the suspension of the registration of Syrian asylum seekers in many regions in Turkey (including Istanbul) was “*leading to unlawful deportations [and] coerced returns to Syria.*”⁷³
18. As for the risk of detention conditions contrary to article 3 ECHR, the Court has already highlighted that the systematic detention of asylum seekers upon return from another EU country to Greece was problematic.⁷⁴ Furthermore the detention conditions of migrants and asylum seekers in Greece were found to be in violation of article 3 ECHR in many cases over the last decade.⁷⁵ As for reports on the situation in Greece, in submissions made in May 2017 in relation to the execution of *M.S.S.(supra)*, the UNHCR noted, “*a high number of third-country nationals, including asylum seekers, mainly on the islands, continue to be held in detention facilities operated by the police directorates and in police stations, which are totally inappropriate for immigration detention.*” The submissions detail a lack of outdoor facilities, ventilation, natural light and medical services as well as a state of overcrowding. UNHCR concludes, “*these facilities provide an environment which constitutes a risk to the physical and mental health of detainees.*”⁷⁶ In April 2018 the CPT reported, further to a visit in Greece, that, “*conditions of detention in most police and border guard stations visited remain unsuitable for holding persons for period exceeding 24 hours, and yet they were still being used to detain irregular migrants for prolonged periods.*”⁷⁷

III. Article 13 in connection with article 3 ECHR

19. In order to be effective under article 13 ECHR, a remedy must be available in law and in practice.⁷⁸ Its exercise must not be unjustifiably hindered by the authorities’ acts or

addressed the risk of inhuman living conditions for those having obtained international protection in Greece: VG Berlin, 30. November 2017 (23 K 463.17 A –, juris); VG Magdeburg, 13.11.2019 (9 A 281/18 MD). Finally, the German Constitutional Court has highlighted the existence of an obligation to thoroughly and individually assess the facts with regards to potential inhuman living conditions in Greece: judgement of 08.05.2017 (2 BvR 157/17).

⁷¹ Report of the fact-finding mission to Turkey by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, 10.08.2016, SG/Inf(2016)29, p.29, available at <https://www.refworld.org/docid/58de48524.html> (accessed on 26.20.2020).

⁷² Amnesty International, Refugees at Heightened Risk of *Refoulement* Under Turkey’s State of Emergency, 22.09.2017, pp.1 and 4, available at <https://www.amnesty.org/en/documents/eur44/7157/2017/en/>

⁷³ Human Rights Watch, Turkey Stops Registering Syrian Asylum Seekers, 16.07.2018.

⁷⁴ *M.S.S. [GC] (supra)*, §225 ff.

⁷⁵ *A.E. v. Greece*, 46673/10, 27.11.2014; *Peidis v. Greece*, 728/13, 16.07. 2015; *Ali v. Greece*, 13385/14, 07.04. 2016; *Grammosenis v. Greece*, 16287/13, 30.03.2017; *S.Z. v. Greece*, 66702/13, 21.06.2018.

⁷⁶ Explanatory Memorandum pertaining to UNHCR’s submission to the Committee of Ministers of the Council of Europe on developments in the management of asylum and reception in Greece, DH-DD(2017)584, 30.05.2017, p.11, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680717876> (accessed on 21.10.2020).

⁷⁷ Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 19 April 2018 (19 February 2019), pp.4-5, available at <https://rm.coe.int/1680930c9a> (accessed on 29.10.2020).

⁷⁸ *Paksas v. Lithuania [GC]*, 34932/04, 06.01.2011, §75; *Akdivar and others v. Turkey [GC]*, 21893/93, 16.09. 1996, §68; *Sejdovic v. Italy [GC]*, 56581/00, 01.03.2006, §45.

omissions.⁷⁹ Moreover the accessibility of interpreters and legal advisers will be relevant to determining whether a remedy was accessible.⁸⁰ In assessing availability, the Court considers whether information had been accessible to the applicant as to the procedure and process followed in that country.⁸¹ The remedy itself must guarantee a close, rigorous and independent scrutiny of the article 3 ECHR claim⁸² in a reasonably prompt fashion.⁸³

20. Due to the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, in expulsion cases article 13 ECHR in connection with article 3 ECHR requires an automatic suspensive effect pending a decision on the article 3 ECHR risk.⁸⁴
21. Under German law, a refusal of entry decision and its execution can be challenged before the administrative court within two weeks after notification.⁸⁵ The suspensive effect of such a claim is excluded by law.⁸⁶ The claimant can theoretically file an application for interim measures in order to be allowed to enter the country⁸⁷ or request the court to order a suspensive effect against his return.⁸⁸ However, none of these remedies provides for an automatic suspensive effect in accordance with article 13 ECHR. Finally, it would be possible to request interim measures before the Constitutional Court.⁸⁹ However such a request does not have an automatic suspensive effect either. Further such a request would be dismissed as inadmissible due to a failure to exhaust remedies in front of the administrative court. Finally the particularity of the “transit procedure” is that it excludes the initiation of an asylum or Dublin procedure, thus impeding national courts from assessing any article 3 ECHR related risk before the expulsion.

C. Obligations under the Dublin Regulation

22. In its State obligations assessment, the Court considers whether EU law provides fundamental rights protection at least equivalent to that under the ECHR.⁹⁰ Thus the Court has assessed the extent to which EU Member States complied with the ECHR when applying the Dublin Convention (“Dublin I”)⁹¹ and then the Dublin Regulation (“Dublin II”).⁹² In relation to Dublin II the Court pointed out that the existence of the “sovereignty” clause – by which a Member State could examine an asylum application even when such was not its responsibility under Dublin II – allowed States to comply with their ECHR obligations, particularly under

⁷⁹ *Çakıcı v. Turkey* [GC], 23657/94, 08.07.1999, §112; *I.M. v. France*, 9152/09, 02/02/2012, §130; *M.S.S.* [GC] (*supra*), §290; *De Souza Ribeiro v. France* [GC], 22689/07, 13.12.2012, §80.

⁸⁰ *Hirsi Jamaa* [GC] (*supra*), §202; *Sharifi* (*supra*), §168; *M.S.S.* [GC] (*supra*), §§301, 319.

⁸¹ *Hirsi Jamaa* [GC] (*supra*), §§202-4; *M.S.S.* [GC] (*supra*), §§301 ff.; *Kebe v. Ukraine*, 12552/12, 12.01.2017, §104; *Rahimi* (*supra*), §79; *Sharifi* (*supra*), §168; *I.M.* (*supra*), §§145 ff.

⁸² *Chahal* [GC] (*supra*), §151; *M.S.S.* [GC] (*supra*), §293; *Hirsi Jamaa* [GC] (*supra*), §198.

⁸³ *M.S.S.* [GC] (*supra*), §320; *De Souza Ribeiro* [GC] (*supra*), §82.

⁸⁴ *Gebremedhin [Gaberamadhien] v. France*, 25389/05, 26.04.2007, §§58 and 66; *M.S.S.* [GC] (*supra*), §293; *Khlaifia* [GC] (*supra*), §276 and 281.

⁸⁵ Section 74 German Asylum Law (*Asylgesetz*).

⁸⁶ Section 75 German Asylum Law (*Asylgesetz*).

⁸⁷ Section 123 German Administrative Court Procedure Law (*Verwaltungsgerichtsordnung* or “VwGO”). For further details, see NK-AuslR/Marco Bruns, 2 edition 2016, AsylVfG § 18 paras 35-36.

⁸⁸ Section 80 para 5 VwGO.

⁸⁹ Section 32 on the Act of Federal Constitutional Court (include German title).

⁹⁰ *Bosphorus Hava Yolları Turizm v. Ireland* [GC], 45036/98, 30.06.2005, §165.

⁹¹ European Union Convention determining the State responsible for examining applications for asylum lodged in one of the member States of the European Communities of 15 June 1990. See *T.I. v. U.K.*, 43844/98, 07/03/2000.

⁹² Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. See *K.R.S. v. the United Kingdom*, 32733/08, 02.12.2008 *M.S.S.* [GC] (*supra*).

article 3 ECHR.⁹³ Such “sovereignty” clause still forms part of Dublin III.⁹⁴ Thus in cases where Dublin III is duly applied, it is compatible with the ECHR, in particular its article 3.

23. Dublin III guarantees an effective asylum procedure in line and alongside the guarantees provided by the Asylum Procedure Directive⁹⁵ and the Asylum Qualification Directive.⁹⁶ Indeed its recital no. 12 states, “[*The Asylum Procedure Directive*] should apply *in addition and without prejudice to the provisions concerning the procedural safeguards regulated under this Regulation* [emphasis added].” Therefore Member States still must - within any Dublin procedure - facilitate access to their asylum procedure and guarantee different procedural safeguards⁹⁷ to individuals “*who can be understood to seek refugee status*”,⁹⁸ including “*at the border, in the territorial waters or in transit zones*”.⁹⁹

I. Applicability

24. Dublin III applies to all asylum applications lodged by third-country nationals or stateless persons on a Member State’s territory, including expressly at borders and in transit zones.¹⁰⁰ The Member State where the application was lodged will be the one carrying out the Dublin procedure, including the responsibility determination.¹⁰¹ Dublin III applies as soon as an application for international protection is lodged,¹⁰² to determine which Member State is responsible to process it. Dublin III also applies to any subsequent asylum application registered in any other EU Member State by that same individual.¹⁰³ No specific form is required.¹⁰⁴
25. In light of the primacy of EU law, Dublin III cannot be circumvented by establishing a “pre-Dublin” procedure which bypasses Dublin III and all its procedures and safeguards altogether.

⁹³ M.S.S. [GC] (*supra*), §§339-40.

⁹⁴ Article 17(1) Dublin III.

⁹⁵ Directive 2013/32/EU.

⁹⁶ Directive 2011/95/EU.

⁹⁷ Including (under the Asylum Procedure Directive) the rights to i) remain in the Member State pending the asylum procedure (article 9 (1)); ii) a personal interview (articles 10(3) and 14); iii) contact a legal advisor throughout the procedure (article 22).

⁹⁸ Article 1 Dublin III; article 2(b) Dublin III in connection with article 2(h) Qualification Directive.

⁹⁹ Article 3(1) Asylum Procedure Directive.

¹⁰⁰ Article 3(1) Dublin III.

¹⁰¹ Article 20(1) Dublin III. See also A. Lübke, Compatibility of the *refoulement* practice under the German-Greek “Seehofer Agreement” with Union-law requirements for effective legal remedies, 2018, p.4, available at <https://www.proasyl.de/en/material/legal-opinion-on-the-refoulement-practice-under-the-german-greek-seehofer-agreement/> (accessed on 29.10.2020). In certain circumstances, other States may be the ones which will have to carry out the Dublin responsibility determination. Thus an exception is defined in article 20(4) Dublin III and further procedures and safeguards are provided for under Chapter VI Dublin III.

¹⁰² *Ibidem*. As stated at §22 above, the Member State will still be bound by the Asylum Procedure Directive. In particular in relation to the lodging of an asylum application, the Member State will be obliged to facilitate access to its asylum procedure to individuals “*who can be understood to seek refugee status*” as defined by article 2(b) of said Directive, including “*at the border, in the territorial waters or in transit zones*” pursuant to article 3(1) of said Directive. Pursuant to article 8 of the Directive, this entails providing information on asylum procedures, granting access to legal advisors and linguistic assistance and finally registering individual asylum claims.

¹⁰³ In this respect article 20(5) Dublin III refers to the usual transfer procedure in article 23 ff. Dublin III. See also *Bundesrepublik Deutschland v Aziz Hasan* (C-360/16), 25.01.2018; also Lübke (*supra*), p.3.

¹⁰⁴ Article 20(2) Dublin III refers to a form submitted by the applicant or a report prepared by the authorities. See also *Mengesteab* (C-670/16), 26.07.2017, §§75 ff.

Similarly the applicability of Dublin III cannot be excluded based on a refusal of entry¹⁰⁵ or the use of the safe third country concept, as the latter is only applicable to non-EU States.¹⁰⁶

II. Responsible State and material obligations

26. Chapter III of Dublin III¹⁰⁷ provides criteria to determine which Member State is responsible in assessing the substantive asylum procedure. These criteria can be disregarded when a Member State assumes responsibility for the asylum application under the Dublin III “sovereignty” clause.¹⁰⁸ Then the relevant legal safeguards will be those of the Asylum Procedure and Return Directives.
27. In addition, article 3(2) Dublin III specifically provides that in the case of systemic flaws in the asylum system of the Member State that should be responsible, responsibility will shift to the determining Member State if no other responsibility can be designated. The Court of Justice for the European Union (“CJEU”) has confirmed that such will be the case when, in light of evident flaws in the asylum procedure or factually confirmed bad reception conditions in the responsible Member State, there are grounds to believe in a risk of exposure to inhuman or degrading treatment under article 4 of the Charter of Fundamental Rights of the European Union (CFR).¹⁰⁹ If in light of publically available information, the determining Member State ought to be aware that such treatment cannot be excluded, the relevant authorities and courts must refrain from transferring the person and conduct an individual examination.¹¹⁰

III. Procedural obligations

28. Dublin III requires the determining Member State to inform the person concerned about the application of the Regulation, its objectives and content as well as her rights.¹¹¹ Dublin III further stipulates that a personal interview should take place, if necessary with an interpreter, to be summarized in writing.¹¹²
29. If the relevant Member State concludes that another Member State is responsible, the former shall initiate either a “take charge”¹¹³ or a “take back” procedure¹¹⁴ using a specific form.¹¹⁵ The final decision as to responsibility under Dublin III must be notified to the applicant,¹¹⁶ together with information on legal remedies including those with suspensive effect.¹¹⁷ Such a

¹⁰⁵ Indeed Dublin III applies once an asylum application is lodged, including “*at the border or in transit zones*” (article 3). Further, Dublin III foresees applicability in cases of irregular entry (article 13). See also Lübke (*supra*), p.3.

¹⁰⁶ Article 3(3) Dublin III reserves the right to send the person to a safe third country, subject to the Asylum Procedure Directive. Article 33(2)(c) of the latter defines such countries as, “*a country which is not a Member State [and] is considered as a safe third country for the applicant*”. See also *Shiraz Baig Mirza v. Bevándorlási és Állampolgársági Hivatal* (C-695/15), 17.03.2016.

¹⁰⁷ Article 7 ff.

¹⁰⁸ Now article 17(1) Dublin III.

¹⁰⁹ *Puid* (*supra*).

¹¹⁰ *Idem*, §36

¹¹¹ Article 4 Dublin III.

¹¹² Article 5 Dublin III.

¹¹³ Article 21 ff. Dublin III.

¹¹⁴ In case of a new application lodged in the requesting Member State (article 23 ff. Dublin III).

¹¹⁵ See Annex III Dublin III and Regulation 1560/2003/EC which stipulates that Inter-State communication should take place via an electronic communication network (DubliNet) (articles 1, 2 and 15(1)).

¹¹⁶ Article 26(1) Dublin III.

¹¹⁷ Article 26(2) Dublin III.

decision can only be made when the responsible State has agreed to take charge of or take back the person concerned.¹¹⁸

30. Dublin III does not specify which domestic authority is responsible for conducting the Dublin procedure. Under German law it is the BAMF which is responsible for sending “take charge” and “take back” requests.¹¹⁹ These tasks are only incumbent on the border authority if a third-country national is apprehended near a border immediately after unlawful entry from an adjacent Member State and there are indications that the latter or another adjacent Member State is responsible under Dublin III.¹²⁰ Thus, the border authority is not responsible when a non-adjacent state is concerned.

IV. Remedies

31. The applicant has the right to apply for an effective remedy in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.¹²¹ This right is defined generally “*against a transfer decision*” and thus entails an examination of the lawfulness of the whole Dublin procedure, including any issues which may arise under article 4 CFR.¹²²
32. The right to an effective remedy also includes the right to legal assistance¹²³ and the right to request - within a reasonable period of time - the suspension of the Dublin transfer measure.¹²⁴ Under German law an application for suspensive effect has to be filed within one week.¹²⁵

V. Administrative agreements

33. Further to the principle of primacy of EU law,¹²⁶ Dublin III cannot be circumvented through bilateral agreements between Member States. In fact Dublin III foresees and regulates the making of bilateral agreements “*to facilitate its application and increase its effectiveness*”, for example by simplifying procedures and/or shortening time limits.¹²⁷ Nowhere does the Regulation provide for the possibility for Member States to free themselves altogether of their obligations under Dublin III through bilateral agreements, especially not those obligations which provide legal and procedural safeguards to the applicant.¹²⁸

¹¹⁸ *Aziz Hasan (supra)*, §53; *Jafari (C-646/16)* and *A.S. v Republic of Slovenia (C-490/16)*, 26.07.2017, §54.

¹¹⁹ §2(1) in connection with § 1 No. 1 of the Asylum Regulation (*Asylzuständigkeitsbestimmungsverordnung* or “AsylZBV”). The AsylZBV is a statutory ordinance of the Federal Ministry of the Interior issued on the basis of §88 Asylum Act (AsylG), which requires the approval of the Federal Council (the upper house of the German Parliament). Such an ordinance is above an inter-governmental agreement in the German hierarchy of norms. See also VG München, 08/08/2019 (18 E 19.32238), §48.

¹²⁰ §3 AsylZBV.

¹²¹ Article 27(1) Dublin III.

¹²² See for example *Abdullahi (C-394/12)*, 10.12.2013; *Staatssecretaris van Veiligheid en Justitie v. H. (C-582/17)* and *R. (C-583/17)*, 02.04.2019, §§39 ff. For further details see Lübbe (*supra*), p.7.

¹²³ Article 27(5) Dublin III. See also *Ghezelbash v Staatssecretaris van Veiligheid en Justitie (C-63/15)*, 07.06.2016, §50.

¹²⁴ Article 27(3) c and t Dublin III.

¹²⁵ §34a(2) Asylum Law.

¹²⁶ *Costa v. E.N.E.L. (C-6/64)*, 15.07.1964.

¹²⁷ Article 36 Dublin III.

¹²⁸ More specifically those defined under articles 4, 5 and 27 Dublin III. See also Lübbe (*supra*), p.5.