FIRST SECTION

EUROPEAN COURT OF HUMAN RIGHTS

Application No. 13337/19

H.T.

v.

Germany and Greece

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS:

ADVICE ON INDIVIDUAL RIGHTS IN EUROPE (AIRE CENTRE)
EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE)
DUTCH COUNCIL FOR REFUGEES (DCR)

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pursuant to the Registrar's notification dated 9 October 2020 on the Court's permission to intervene under Rule 44 § 3 of the Rules of the European Court of Human Rights

29 October 2020

Summary

I. The interveners submit that to comply with *non-refoulement* obligations under Articles 3 and 13 ECHR, the authorities of a transferring Contracting Party must conduct an effective investigation into the real-time conditions in the receiving country. The automatic reliance on a bilateral arrangement considering a particular receiving country to be safe can never be sufficient and is capable of breaching Convention obligations particularly without an individualised assessment of all the facts and circumstances of the case. An individual assurance of Convention-compliant treatment, able to prevent potential violations of the Convention and applied in light of this Court's case law on the matter, cannot be guaranteed in case of an automatic removal.

II. The prohibition of *refoulement* applies to any act or omission resulting in transfer from the territory of a Contracting Party of individuals under its jurisdiction. The interveners submit that the Contracting Parties cannot evade responsibility – whether through bilateral arrangements or other means - under the Convention. When the Contracting Party is also bound by EU law, guarantees under the Convention shall include state obligations under the Common European Asylum System, including the Dublin III Regulation, by virtue of Article 53 ECHR. The responsibility under EU law is engaged in relation to any individual who in any form expressed a wish to seek international protection.

III. Specific vulnerabilities of asylum seekers should be taken into account at all stages of removal proceedings in order to guarantee enhanced safeguards afforded to them under international and EU law including access to clear information, to interpreters allowing applicants to communicate in a language they understand, to a lawyer, and to effective remedies capable of suspending and halting their removal should their extra vulnerabilities require so.

IV. In light of the obligations of EU Member States under EU law, including the recast Reception Conditions Directive, and Article 53 ECHR, the interveners submit that detention of asylum seekers falling within the scope of that Directive will be unlawful and arbitrary where it is imposed automatically or lacks procedural safeguards for detainees, including judicial review and access to legal advice. Detention will be arbitrary where it is not a measure of last resort but is imposed without consideration of less onerous alternatives.

I. ***Non-refoulement*** **and procedural guarantees under Articles 3 and 13 ECHR concerning removal to another EU Member State**

1. The principle of *non-refoulement* is essential in order to protect 'the fundamental values of democratic societies'[1] and is well established in the case law of this Court.[2] This principle entails an obligation not to transfer people where there are substantial grounds for believing that they would face a real risk of a serious violation of human rights. The *non-refoulement* obligation pertains, among others, to the right to life, the prohibition of torture, flagrant denial of justice or the right to liberty[3] in the event of removal and in any manner within the State's jurisdiction. It applies both to transfers to the State where the person will be at risk (direct *refoulement*), and to transfers to States where there is a risk of onward transfer to a third country where the person will be at risk (indirect *refoulement*).[4]

[1] *Chahal v. the United Kingdom*, App. No. 22414/93, [GC] (15 November 1996), para. 96; *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, (30 October 1991), para. 108.
[2] *Soering v. the United Kingdom*, App. No 14038/88 (7 July 1989), Series A no. 161, pp. 35-36, §§88-91.
[3] *Hirsi Jamaa and Others v. Italy*, App no 27765/09, 23 February 2012, para 114.
[4] *Salah Sheekh v. the Netherlands*, para. 141; M.S.S. v. Belgium and Greece, para. 342.

2. In its Grand Chamber judgment in *Iliás and Ahmed v. Hungary,* the Court made clear that in all cases of removal of an asylum seeker from a Contracting State to an intermediate country without examination of the asylum requests on the merits, it is the duty of the removing State to conduct a thorough examination of whether there is a real risk of the individuals being denied access in the intermediate country to an asylum procedure, protecting them against *refoulement*. This is so regardless of whether the receiving country is an EU Member State or not or whether it is a State Party to the Convention or not. If it is established that the existing guarantees in this regard are insufficient, Article 3 imposes a duty on the Contracting Party to refrain from removal to the country concerned.[5] Removal to a third country must therefore be preceded by a thorough examination of whether the intermediate country's asylum procedure affords sufficient guarantees to prevent an asylum seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces from the standpoint of Article 3.[6]
3. National authorities must carry out a thorough assessment of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice. This includes any intermediate country. It is the duty of those authorities to seek all relevant, up-to-date and generally available information to that effect. General deficiencies well documented in authoritative reports, such as by the UNHCR, Council of Europe and EU bodies, are in principle considered to have been known to the authorities of the expelling country.[7] Articles 3 and 13 require the Contracting Parties, *inter alia,* to assess all evidence at the core of a *non-refoulement* claim,[8] including, where necessary: to obtain such evidence *proprio motu*; not to impose an unrealistic burden of proof on applicants or require them to bear the entire burden of proof,[9] and to apply the principle of the benefit of the doubt in the light of the specific vulnerabilities of asylum seekers.[10] The expelling State cannot simply assume that the asylum seeker will be treated in the receiving, including the intermediate, country in conformity with the Convention standards but must verify how national authorities apply asylum legislation in practice.[11]
4. To comply with Article 3's procedural safeguards, individuals must be told, in simple, non-technical language that they can understand, the reasons for their removal, and the process available for reviewing or challenging the decision.[12] Accessible legal advice and assistance may be required for the individual to fully understand his or her circumstances.[13] Further, individuals at an arguable risk of prohibited treatment under the Convention have the right to an effective remedy, which is not theoretical and illusory, which allows for the review and, if appropriate, for the reversal of the decision to remove.[14] This remedy must exist in practice as well as in law and cannot be unjustifiably hindered by the acts or omissions of the authorities.[15] This Court's jurisprudence found a remedy ineffective, *inter alia*, when removal takes place before the practical possibility of accessing the remedy;[16] due to the lack of automatic suspensive effect;[17] excessively short time limits in law for submitting the claim or an appeal;[18] insufficient

[5] *Ilias and Ahmed*, App. No. 47287/15 [GC], (21 November 2019), para 134.
[6] Ibid, para 137.
[7] *Ilias and Ahmed*, App. No. 47287/15 [GC], (21 November 2019), para 141.
[8] Jabari v. Turkey, App. No. 40035/98, (11 July 2000), paras.39-40; Singh and Others v. Belgium, App. No. 33210/11, (2 October 2012), para. 104.
[9] *M.S.S. v. Belgium and Greece*, op. cit., paras. 344-359; Hirsi Jamaa and Others v. Italy, op. cit., paras. 122-158.
[10] *M.A. v. Switzerland*, App. No. 52589/13, (18 November 2014), para. 55.
[11] *Ilias and Ahmed*, App. No. 47287/15 [GC], (21 November 2019), para1 41.
[12] *Hirsi Jamaa and Others v. Italy*, op. cit., para.204; Čonka v. Belgium, App. No. 51564/99, (5 February 2002), para. 44.
[13] Guideline 5. Remedy against the removal order in CoE Committee of Ministers "Twenty Guidelines on forced return" adopted on 4 May 2005 as referenced by the ECtHR in De Souza Ribeiro v. France, App. No. 22689/07, para. 47.
[14] *Shamayev and Others v. Georgia and Russia*, App. No. 36378/02, (12 April 2005), para.460; *M.S.S. v. Belgium and Greece*, op. cit.; *Čonka v. Belgium*, op. cit., paras. 77-85.
[15] *Čonka v. Belgium* ECtHR, op. cit, para.46, 75.
[16] *Shamayev and Others v. Georgia and Russia*, App. No. 36378/02, (12 April 2005), para.460; *Labsi v. Slovakia*, App. No. 33809/08, (15 May 2012), para. 139.
[17] *Gebremedhin v France*, App No. 25389/05 (26 July 2007) para 66-67; *Baysakov and others v. Ukraine*, App. No. 54131/08, (18 February 2010), para.74; *M.A. v. Cyprus*, ECtHR, Application no. 41872/10, (23 July 2013), para 133.
[18] *I.M. v. France*, App. No. 9152/09, (14 December 2010), para.144; *M.S.S. v. Belgium and Greece*, App. No. 30696/09, [GC] (21 January 2011), para. 306.

information on how to gain effective access to the relevant procedures and remedies;[19] obstacles in physical access to and/or communication with the responsible authority;[20] lack of (free) legal assistance and access to a lawyer;[21] and lack of interpretation.[22]

5. The Human Rights Committee has also recalled that States Parties should give sufficient weight to the real and individual risk a person might face if removed.[23]In particular, the evaluation of whether upon removal the removed individual is likely to be exposed to conditions constituting cruel, inhuman or degrading treatment in violation of Article 7 of the International Covenant on Civil and Political Rights (ICCPR) must be based not only on an assessment of the general conditions in the receiving country, but also on the individual circumstances, including vulnerability-increasing factors which may transform a general situation which is tolerable for most removed individuals to one that is intolerable for some individuals.[24] Further, under the ICCPR and the UN Convention against Torture (UNCAT), States must observe procedural safeguards to ensure that the right to a remedy remains effective in practice. These include the possibility for independent review and scrutiny of any complaint where there are substantial grounds for fearing a real risk of torture, inhuman or degrading treatment or punishment.[25] In cases of *refoulement* to face a risk of torture or ill-treatment, the absolute nature of the rights engaged further strengthens the right to an effective remedy and means that the decision to expel must be subject to close and rigorous scrutiny.[26]
6. The UN Basic Principles and Guidelines on the Right to a Remedy affirm that States should take appropriate legislative, administrative and other measures to prevent violations and to investigate them effectively, promptly, thoroughly and impartially.[27] States also have an obligation to provide available, adequate, effective, prompt and appropriate remedies to victims of violations of international human rights and humanitarian law, including reparation.
7. The UN Committee against Torture has observed that the right to an effective remedy for a breach of the UNCAT underpins the entire Convention, otherwise its protection would be rendered illusory. In the Committee's view, even though it may not contain a right to such a remedy in the text of the Convention, the prohibition on *refoulement* under Article 3 UNCAT should be interpreted as requiring a remedy for its breach. "*The nature of refoulement is such that an allegation of a breach … related to a future expulsion or removal; accordingly, the right to an effective remedy … requires an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that Article 3 issues arise*."[28]
8. **The interveners submit that in order to comply with *non-refoulement* obligations under the ECHR and other international standards referred to above, which are applicable through Article 53 ECHR, the authorities of the transferring Contracting Party, where relevant *proprio motu*, must conduct an effective investigation into the real-time conditions in the receiving country, including the accessibility and reliability of its asylum system and the individual circumstances of the applicant. The automatic reliance on a bilateral arrangement considering a particular receiving country to be safe can never be sufficient, in particular, when deficiencies of the asylum system in this country were known or ought to**

[19] *Hirsi Jamaa and Others v. Italy*, op. cit., para. 204.
[20] *Gebremedhin v. France*, App. No. 25389/05, (26 April 2007), para.54; I.*M. v. France*, App. No. 9152/09, (14 December 2010), para.130; *M.S.S. v. Belgium and Greece*, App. No. 30696/09, [GC] (21 January 2011), paras. 301 - 313.
[21] *M.S.S. v. Belgium and Greece*, App. No. 30696/09, [GC] (21 January 2011), para.319; *mutatis mutandis, N.D. and N.T. v. Spain* App. Nos. 8675/15 and 8697/15, (3 October 2017), para. 118.
[22] *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, [GC] (23 February 2012), para. 202.
[23] See for example, communication No. 1763/2008, *Pillai v. Canada*, Views adopted on 25 March 2011, paras.11.2 and 11.4; Communication No.2409/2014, *Abdilafir Abubakar Ali et al v. Denmark*, Views of 29 March 2016, para. 7.8.
[24] See communication No. 2681/2015, *Y.A.A. and F.H.M. v. Denmark*, Views adopted on 10 March 2017, para. 7.7.
[25] *Agiza v. Sweden*, no. 233/2003 (UNCAT, 20 May 2005), para. 13.7; *Alzery v. Sweden*, CCPR/C/88/D/1416/2005 (HRC, 10 November 2006), para. 11.8.
[26] Council of Europe: Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005, Guideline 5.
[27] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution/adopted by the General Assembly, 21 March 2006, A/RES/60/147, part II (3) A, B and C.
[28] *Agiza v. Sweden*, no. 233/2003 (UNCAT, 20 May 2005), paras. 13.6 – 13.7.

have been known by the authorities, including due to publicly available information from reputable sources. Disregarding country reports; lack of access to interpreters allowing applicants to communicate in a language they understand; lack of access to clear information provided; lack of access to a lawyer; and lack of access to effective remedy with a jurisdiction of *ex nunc* examination of the case render access to rights under Articles 3 and 13 of the Convention ineffective, theoretical and illusory.

Additional procedural guarantees required for vulnerable people

9. This Court has held that vulnerability is not exclusively individual, but it is also the product of specific group-based experiences such as social, economic, political, and historical circumstances.[29] The Court has recognised that asylum seekers are members of a "particularly underprivileged and vulnerable population" [30] and also emphasised that Contracting Parties must "exercise particular care to avoid situations which may reproduce the plight that forced these persons to flee in the first place".[31] In addition to the fact that asylum seekers are already considered to be a vulnerable group *per se*, international and EU law adopt varying definitions of which individuals or groups of individuals should be classified as vulnerable.[32]In particular, the recast Reception Conditions Directive (rRCD) in Article 21 specifically refers to "persons with mental disorders…"as vulnerable. The Court of Justice of the EU (CJEU) further clarified that "in circumstances in which the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment..." [33] In addition, the authorities have the responsibility to verify whether the care in the receiving State would be "sufficient and appropriate in practice for the treatment of the applicant's illness" and "the extent to which the individual in question will actually have access to this care."[34]
10. Hence, the interveners note that, as the Court's case law makes clear, asylum seekers are deemed to be in "an inherently vulnerable situation",[35] which merits special attention by public authorities to ensure their full and effective access to domestic remedies in order to meet the intended purpose of Article 13. This must apply *a fortiori* to asylum seekers who are additionally vulnerable due to other factors, such as being clinically psychologically distressed. States must therefore provide guarantees based on the specific needs of an applicant including psychological assistance, where such circumstances are identified.
11. **The interveners submit that, in order to treat all individuals compatibly with the Convention, special consideration should be given to the vulnerable condition of asylum seekers in general and to the specific circumstances of each individual in order to ensure that all asylum seekers enjoy a full and effective access to the necessary domestic remedies. This must include, *inter alia*, access to clear information provided with due regard to their vulnerabilities and treatment consonant with safeguards provided under EU and international law.**

Diplomatic assurances in the context of Article 3 ECHR

12. This Court laid down the standards, which must be applied to reliance on diplomatic assurances in various cases.[36] In particular, in *Othman (Abu Qatada) v. UK,* it identified 11-points required in extradition cases. However, guaranteeing the applicants' Article 3 rights in the asylum context, with various procedural

[29] *M.S.S. v. Belgium and Greece*, §§ 232, 251.
[30] *M.S.S. v. Belgium and Greece*, § 251.
[31] *O.M. v. Hungary*, no. 9912/15, 5 July 2016, § 53.
[32] *See, e.g.*, Asylum Information Database (AIDA), The concept of vulnerability in European asylum procedures, August 2017, p. 10-11: Art. 22(1) Committee on the Rights of the Child (CRC); UNHCR EXCOM Conclusion No. 105 (LVII) – 2006; and ECtHR, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011, *inter alia*, paras 232,233, 251.
[33] CJEU, Case C-578/16 PPU *C.K. v Slovenia* para 74-75.
[34] *Paposhvili v. Belgium*, no. 41738/10, 17 April 2014, §§ 189, 190.
[35] *M.S.S. v Belgium and Greece* [*supra* no.10], para 233.
[36] *Trabelsi v Belgium, no 140/10 (ECtHR, 7 October 2014); Othman (Abu Qatada) v. UK* no 8139/09 (ECtHR, 17 January 2012); *Ryabikin v. Italy* no 8320/04 (ECtHR, 19 June 2008), *Ismoilov and Others v. Russia* no 2947/06 (ECtHR, 24 April 2008) ; *Saadi v. Italy* No. 37201/06, (ECtHR, 28 February 2008).

possibilities that –unlike in criminal cases - may not fall under formal state monitoring mechanisms, calls for an even more stringent application of the 11-point criteria. According to this Court's established case law on diplomatic assurances in general, a State wishing to rely on diplomatic assurances must ascertain, on the basis of objectively verifiable evidence, that the assurances will be complied with in practice.[37] The risk of ill- treatment must be ruled out.[38] While in some cases the general situation in a country is such that no weight at all can be given to diplomatic assurances, in other cases individual assurances can provide a legal avenue to formally commit the receiving state not to expose the *specific individual* to treatment by act or omission falling within the scope of Article 3 ECHR.[39]

13. In the case of *M.S.S. v Belgium and Greece*, where the Belgian Government had sought assurances from the Greek authorities that, Belgium argued, were sufficient to support a presumption that Greece fulfilled its international obligations in asylum matters, the Court concluded that the Greek assurances were inadequate and unreliable.[40] The assurances were effectively rebutted by detailed information from credible sources, including reports by reputable human rights organisations.[41] The Court found this rebuttal important due to the applicant being "particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously" and referred specifically to the fact that there was "no guarantee concerning the applicant in person."[42] In *Tarakhel v Switzerland*, this Court further held that although the situation in the receiving country was not comparable to the one in M.S.S., the possibility that removed asylum seekers would be left under inadequate reception conditions was not unfounded. It was, therefore, incumbent on the sending state to obtain assurances as to the conditions faced by the applicants upon return. By analogy, the same standards should be applicable in the context of detention conditions.
14. In this context, the UN Committee Against Torture made clear that "d*iplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement as set out in Article 3 of the Convention, where there are substantial grounds for believing that the person would be in danger of being subjected to torture in that State.*"[43] Moreover, according to this Court's established case law, the value of assurances capable of preventing treatment contrary to the Convention will be compromised, when there appears to be no objective means of monitoring their fulfillment in relation to an individual concerned.[44]
15. **The interveners submit that automatic removal without an individual assessment and - where conditions upon removal may breach the Convention - without an individual assurance of Convention-compliant standards upon removal violates Articles 3 and 13 ECHR. In situations where reliance on diplomatic assurances is appropriate to secure a person's Convention rights, those must not only be tested against reliable, individualized and practical information but also examined in the light of the context in which they are given.**[45] **The interveners consider that in countries where conditions rapidly**

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[37] *Othman (Abu Qatada) v. UK* no 8139/09 (ECtHR, 17 January 2012), §189.

[38] *Saadi v. Italy* [*supra* no.2] §148; *Ismoilov and Others v. Russia* no 2947/06 (ECtHR, 24 April 2008), §127; *Ryabikin v. Italy* no 8320/04 (ECtHR, 19 June 2008), §119.

[39] *Tarakhel v Switzerland, no* 29217/12 (ECtHR, 4 November 2014) § 120.

[40] *M.S.S. v Belgium and Greece,* (no 30696/09), paras 348-353.

[41] *M.S.S. v Belgium and Greece,* (no 30696/09), para 160.

[42] *M.S.S. v Belgium and Greece,* (no 30696/09), paras 232 and 354.

[43] [emphasis added] Further, even where such high levels of safeguards do apply, the former UN Special Rapporteur on Torture affirmed that, 'diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement.'(Manfred Nowak, UN Special Rapporteur on Torture, Annual Report to the General Assembly, UN Doc. A/60/316, 30 August 2005 (Nowak Report 2005), §32). The ICJ supports this position and opposes all use of diplomatic assurances against torture or other ill-treatment (See, ICJ, Assessing Damage, Urging Action, Report of the Eminent Jurist Panel on Terrorism, Counter-terrorism and Human Rights, (ICJ, 2009), pp.104-106 & 118-119; ICJ, Legal Commentary to the ICJ Berlin Declaration (ICJ, 2008), pp.100-104.). See also: Amnesty International, Human Rights Watch and International Commission of Jurists, Reject Rather than Regulate: Call on Council of Europe Member States not to Establish Minimum Standards for the Use of Diplomatic Assurances in Transfers to Risk of Torture and Other Ill-Treatment (December 2005).

[44] Shamayev and Others v. Georgia and Russia, no. 36378/02 (ECtHR, 12 October 2005) §350; *Mamatkulov and Askarov v Turkey*, Nos. 46827/99 and 46951/99 (ECtHR GC 4 February 2005) §73, See: Wouters, Cornelis Wolfram. *International legal standards for the protection from refoulement.* Diss. Intersentia Publishers, Antwerpen, 2009, §3.3.2.6b, p.287.

[45] This is in line with the UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, August 2006, §§48-49.

change, where the number of people in need of protection is higher than the capacity of the asylum system, or inadequate reception conditions and deficiencies in an asylum system prevail, general assurances cannot be relied upon at all. Any assurances given by a State with a domestic system which has documented shortcomings and previous violations of Convention rights will presumptively struggle to satisfy the requirements of specificity or practicality.

II. Application of Convention rights in accordance with Article 53 ECHR and obligations under EU law

16. Where the Contracting Party is bound by EU law, Article 53 ECHR means that no provision of the ECHR, including Article 3 and 13, should be applied in a manner that would diminish the rights or reduce the protection guaranteed by the *acquis communautaire*.[46] In line with the legality requirement and with the principle of the rule of law, that runs like a golden thread through the Convention,[47] this Court has considered relevant the standards of the Common European Asylum System (CEAS) when the questions raised fall under the scope of the EU asylum *acquis* and the Contracting Party itself is bound by the CEAS.[48]
17. The EU *acquis* provides for an enforceable individual right to asylum under Article 18 and for the prohibition of *refoulement* and the prohibition of torture and inhuman or degrading treatment or punishment (Article 19 (2) and Article 4) of the Charter of Fundamental Rights of the European Union (CFR). The prohibition of *refoulement* prevents Member States from removing an individual to a situation where he would be at a real risk of torture, inhuman or degrading treatment or punishment and applies to factual scenarios such as rejection at the border, interception and indirect *refoulement*. Member States' obligations apply regardless of whether the person seeking protection at the border has explicitly applied for international protection, implying an obligation to proactively assess the risk of *refoulement* under the mentioned Articles when read in conjunction with Article 52(3) CFR guaranteeing Convention rights.[49]
18. Under Article 3 of the Dublin III Regulation, Member States shall examine *any* application for international protection made on their respective territories according to the hierarchy of criteria laid down in Article 7. Procedurally, regardless of any administrative cooperation between Member States that has been agreed, it continues to be mandatory under Chapter VI to follow the procedure of take-charge and take-back requests. The Regulation does not leave room for exemptions.[50] In particular, the lack of examination of an applicant's individual circumstances is in violation of the Regulation that is unequivocal in stating that "systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment" would make a transfer "impossible."[51] The CJEU has confirmed that a transfer can only be carried out after a full and individual assessment of potential *non-refoulement* obligations.[52] In particular, the CJEU has clarified that the "authorities [must] eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned. In this regard, in particular in the case of a serious psychiatric illness, it is not sufficient to consider only the consequences of physically transporting the person concerned from

[46] *Aristimuño Mendizabal v. France,* no 51431/99 (ECtHR, 17 January 2006); *M.S.S. v. Belgium and Greece* [GC], no 30696/09 (ECtHR, 21 January 2011).
[47] The Convention's preamble recalls the rule of law.
[48] *M.S.S. v. Belgium and Greece* [GC], no 30696/09 (ECtHR, 21 January 2011), §§57-86 and 250; *Sufi and Elmi v. the United Kingdom,* nos 8319/07 and 11449/070 (ECtHR 28 November 2011), §§ 30-32 and 219-226, where the Court had regard to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"), as well as to a preliminary ruling by the European Court of Justice in the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie* asking, *inter alia*, whether Article 15(c) of the Qualification Directive offered supplementary or other protection to Article 3 of the Convention.
[49] *Hirsi Jamaa and Others v. Italy*, no 27765/09 (ECtHR, 23 February 2012), §157.
[50] CJEU, Case C-647/16, Hassan, 31 May 2018.
[51] Article 3(2) REGULATION (EU) No 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 (recast)
[52] CJEU, Case C-578/16, *PPU C.K. and others*, 16 February 2017, para 44.

one Member State to another, but all the significant and permanent consequences that might arise from the transfer must be taken into consideration. In that context, the authorities of the Member States concerned must verify whether the state of health of the person concerned may be protected appropriately and sufficiently by taking the precautions envisaged by the Dublin III Regulation and, in the affirmative, must implement those precautions."[53]

19. Further, the Member State must guarantee the applicant's right to information and to a personal interview according to Articles 4 and 5 of the Regulation. In the cases of *Mukarubega*[54], *Boudjilida*,[55]and *M*[56] the CJEU has also reiterated that "the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely."[57] Moreover, Article 27, read in light of Article 47 CFR, guarantees the applicants' right to an "effective remedy, in the form of an appeal or review, in fact and in law, against a transfer decision, before a court or tribunal" which should also have suspensive effect automatically or upon request. In the *Ghezelbash* ruling, the CJEU further confirmed that "an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the Regulation…".[58] The CJEU has also re-enforced that rapid processing of applications, as envisaged by Recital 5 Dublin III, remains an essential objective.[59]
20. The applicants must also have access to the full-spectrum of other rights guaranteed for them under the CEAS, including the recast RCD, which requires Member States to ensure material reception conditions for applicants, including those awaiting transfer, as long as they are within the jurisdiction of the Member State.[60]
21. **The interveners submit that the prohibition of *refoulement* applies to any act or omission resulting in transfer from the territory of a Contracting Party of an individual under its jurisdiction. The responsibility of EU Member States under the EU asylum *acquis* is engaged, in relation to any individual who in any form expressed a wish to seek international protection and all relevant safeguards under EU law should be complied with by virtue of Article 53 ECHR.**

Circumvention of Convention and EU law obligations

22. This Court's established case law firmly prohibits evasion of state responsibility regardless of whether the non-compliance with Convention standards is made with reference to other legal obligations the State entered into. In the *Bosphorus v Ireland* judgment, the Court stated that "a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations."[61] In the context of bilateral arrangements, this Court specifically held in its *Hirsi Jamaa and Others v Italy* judgment that Contracting Parties "cannot evade [their] own responsibility by relying on obligations arising out of bilateral agreements…, the Contracting States' responsibility continues even after their having entered into treaty commitments ...".[62]In this regard, the Court has explained that "where States cooperated in an area where there might be implications as to

[53]CJEU, Case C-578/16 PPU *C.K. v Slovenia* para 76-77.
[54] CJEU, Case C-166/13 *Sophie Mukarubega v. Préfet de police and Préfet de la Seine-Saint-Denis* [2014] ECLI:EU:C:2014:2336.
[55] CJEU, Case C-249/13 *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques* [2014] ECLI:EU:C:2014:2431.
[56] CJEU, Case C-560/14, *M v Minister for Justice and Equality, Ireland, Attorney General* [2017] ECLI:EU:C:2017:101.
[57] CJEU, Case C-277/11 *M. M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General* [2012] ECLI:EU:C:2012:744, para 87.
[58] CJEU, Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie,* the Netherlands, para 61
[59] CJEU, Case C-201/16 *Majid Shiri, also known as Madzhdi Shiri, joined party: Bundesamt für Fremdenwesen und Asyl,* para 31 (see, by analogy, judgment of 26 July 2017, Mengesteab, C-670/16, EU:C:2017:587, paragraph 54).
[60]Article 17 recast Reception Conditions Directive; CJEU, Case C-179/11 *Cimade and Gisti*, Judgment of 27 September 2012,
[61]United Communist Party of Turkey and Others v. Turkey, judgment of 30 January 1998, Reports 1998-I, pp. 17-18, §29 in *Bosphorus v Ireland* 2005 para 153.
[62]*Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §47, ECHR 2001-VIII, and *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, §128, ECHR 2010 in *Hirsi Jamaa and Others v. Italy* 2012 para 129.

the protection of fundamental rights, it would be incompatible with the purpose and object of the Convention if they were absolved of all responsibility *vis-à-vis* the Convention in the area concerned."[63]

23. In the context of the EU, and according to 4(2) j) of the Treaty on the Functioning of the European Union (TFEU), asylum policy falls under *shared* EU-Member States competence, while Article 78 provides legal basis for the CEAS. The EU legislated issues related to the criteria and mechanisms for determining the Member State responsible for examining an application for international protection in the Dublin III Regulation.[64] The EU exercised its competence to legislate these matters falling under *shared* competence leaving room for Member States to adopt legally binding acts only to the extent that those do not conflict with the Regulation. The principle of the supremacy of EU law governs any potential conflict between EU law and Member State legislation. Provisions not complying with EU law are inapplicable and need to be set aside.[65] In the Dublin III context, the EU chose to lay out the relevant rules in the form of a Regulation – rather than a Directive - which as a rule, has direct effect "capable of creating individual rights that the national courts must protect.[66]
24. Bilateral arrangements between Member States, such as the German-Greek Administrative Arrangement,[67]can *eo ipso* be in conformity with EU law only to the extent that they concern matters where the EU has not acted. Where the EU has acted as it has here by adopting the Dublin III Regulation, to be lawful the acts of the Member States are restricted to implementation measures. The Dublin III Regulation provides for bilateral arrangements between Member States, but these are confined to the area of Administrative Cooperation in Chapter VII. Article 36 specifies that such administrative arrangements may be established "concerning the practical details of the implementation of this Regulation", for instance, through the exchange of liaison officers. Importantly, Article 36(1)b) does not authorize adding to or altering the substantive content of the Dublin III procedure.[68] It allows for arrangements, such as the "simplification of the procedures and shortening of the time limits" to facilitate the implementation of the Regulation. The EU provisions establishing the criteria for determining the responsible Member State (as well as the procedures requiring formal take charge and take back requests and related safeguards) remain in place. Bilateral arrangements which only comply with one of the criteria (for instance, Article 8: Minors) while discarding other criteria, such as family ties or dependency, are in conflict with the Regulation as they create an avenue for circumventing its obligations. Further, under Article 36(3)-(5) of the Regulation, Member States are also obliged to consult the European Commission as to the compatibility of relevant bilateral arrangements with the Regulation before either concluding or amending them and should the Commission identify incompatibilities, the Member State shall eliminate those.[69]
25. **The interveners submit that Contracting Parties cannot evade their responsibility under this Convention (including Articles 3 and 13), by invoking bilateral arrangements or any other means when the Contracting Party is also bound by the EU asylum *acquis.* A State's obligations under the CEAS, specifically the Dublin III Regulation must be met, by virtue of Article 53 ECHR.**

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[63] *M.S.S. v Belgium and Greece*, (no 30696/09), para 342.

[64] REGULATION (EU) No 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 (recast).

[65] CJEU, Case 106/77*Simmenthal* II, para. 17.

[66] CJEU *Case 43-71 Politi.*

[67] Administrative Arrangement between the Ministry of Migration Policy of the Hellenic Republic and the Federal Ministry of the Interior, Building and Community of the Federal Republic of Germany on cooperation when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border; N.B. EDAL 'Germany: Administrative Court of Munich finds German-Greek Administrative Agreement violates European law and orders return of applicant from Greece' (8 August 2019).

[68] CJEU, Case C-65/13 *European Parliament v European Commission* para 23 and para 42 in in H. Bru, A. Anastasopoulou, H. Hyrkkö 'The Circumvention of the Dublin III Regulation through the use of Bilateral Agreements to Return Asylum Seekers to other Member States' Feb 2019, Ghent University, p 16-18.

[69] The CJEU further clarified that the breach of the obligation to notify the Commission "constitutes a substantial procedural defect, such as to render technical regulations adopted inapplicable." CJEU, Case C-443/98 *Unilever Italia Spa and Central Food Spa* para 44 in H. Bru, A. Anastasopoulou, H. Hyrkkö 'The Circumvention of the Dublin III Regulation through the use of Bilateral Agreements to Return Asylum Seekers to other Member States' Feb 2019, Ghent University, p 17.

III. The Contracting States' obligations under Article 5 ECHR

26. For detention to be in accordance with the law within the meaning of Article 5(1) ECHR, it must have a clear legal basis in national law and must follow a procedure prescribed by law[70] - conforming to applicable norms of international law.[71] This Court has held that a person's detention under any of the grounds of Article 5(1)[72] must still be compatible with the overall purpose of Article 5, namely, safeguarding liberty and ensuring that no one is deprived of it arbitrarily.[73] For immigration control-related detention to be free from arbitrariness, as per Article 5(1) f), it must be carried out in good faith; be closely connected to a permitted ground; the place and conditions of detention must be appropriate and the length of detention must not exceed what is reasonably required for the purpose pursued.[74] In light of the applicable EU and international law, prevention of arbitrary detention requires consideration of less intrusive alternatives to detention, including in the context of immigration control under Article 9(1) ICCPR,[75] relevant EU law[76] and the UNHCR Guidelines on Detention.[77]
27. This Court has stated that the Contracting Parties have a positive obligation to take appropriate measures to protect the liberty of persons, especially vulnerable persons.[78] Further, the Court has found that general detention decisions that do not consider the individual's personal circumstances or the possibility to apply less intrusive measures raise an issue under 5(1)f) ECHR.[79] Detention procedures also need to be individualized in order to identify vulnerability and prevent detention where it may not be safe or appropriate.[80] Disregarding the health of a person in immigration detention also violates Article 5(1)f), especially if officials did not consider less intrusive measures.[81] Regarding the second limb of Article 5(1)f), this Court has emphasised that a detention measure will not be justified if deportation proceedings are not in progress[82] and conducted with "due diligence".[83] Further, authorities have an obligation to "consider whether removal is a realistic prospect" and whether the detention pending removal can still be relevant and justified.[84] In the context of detention pending removal, "the necessity of procedural safeguards becomes decisive"[85] to determine whether detention can be considered justified or necessary as well as serving the purpose of preventing arbitrariness.[86]
28. The interveners stress that, in accordance with Article 5(4), an effective judicial review of detention is an essential safeguard against arbitrary detention, including in the context of immigration control. Judicial review must be prescribed by law and accessible in practice. Access to legal aid and advice is important in

[70] *Louled Massound v Malta*, op. cit., para. 61.
[71] *Medvedyev v France* [GC], App. No.3394/03, (29 March 2010), paras.79 – 80.
[72] *Nabil and others v. Hungary* (No. 62116/12), 22 September 2015, para. 18.
[73] *Saadi v. the United Kingdom* [GC] (No. 13229/03), 29 January 2008, para. 66; Khudoyorov v. Russia (No. 6847/02), 8 November 2005, para.137; Rahimi v Greece, *op. cit.*, para. 102.
[74] *Saadi v UK*, op. cit, para. 74; Yoh-EkaleMwanje v Belgium, opcit paras. 117-119.
[75] *C. v. Australia*, UN Human Rights Committee, Communication No. 900/1999, Views of 13 November 2002, para. 8.2.
[76] 2013/33/EU 'Recast Reception Conditions Directive' Article 8 (2),(4); 2018/115/EC 'Return Directive' Article 15 (1); 2013/32/EU 'Asylum Procedures Directive' Article 26; No. 604/2013 'Dublin III Regulation' Article 28 (2); Regulation No. 516/2014 (establishing the Asylum, Migration and Integration Fund) Article 5 […] (g); Article 11 […] (a).
[77] UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, Guideline 4.1; The Council of Europe's Twenty Guidelines on Forced Return, Guideline 6.
[78] *Stanev v Bulgaria* [GC] (No. 36760/06), 12 January 2012, para 120.
[79] *Thimothawes v. Belgium*, App. No. 39061/11, 4 April 2017, para. 73.
[80] Ibid.
[81] *Yoh-Ekale Mwanje v. Belgium*, Application No. 10486/10, 20 December 2011, para. 124.
[82] *Khlaifia and others v. Italy* [GC], App. No. 16483/12, 15 December 2016, para. 90.
[83] *Chahal v. The United Kingdom*, Application No. 22414/93, 15 November 1996, para. 113.
[84] *Amie and Others v. Bulgaria*, Application No. 58149/08, 12 February 2013, para. 77.
[85] *Kim v. Russia*, Application no. 44260/13, 17 July 2014, para. 53.
[86] *Louled Massoud v Malta*, Application no.24340/08, (27 July 2010).

ensuring the accessibility and effectiveness of judicial review.[87] The absence of provision for legal assistance in law or in practice should be taken into consideration when assessing both the arbitrariness of detention under Article 5(1)f) and the adequacy of judicial review under Article 5(4). In *O.S.A. v. Greece*, this Court found a violation of Article 5(4) both due to the absence of interpretation and the lack of access to legal aid.[88]

29. Domestic courts "cannot treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting into doubt the existence of the conditions essential" for the lawfulness of the detention.[89] Since an essential argument was not examined by the reviewing judges, in *S.Z. v. Greece*, this Court found that the applicant "did not have the benefit of an examination of the lawfulness of his detention to a sufficient degree."[90] Similarly, a violation of Article 5(4) was established in *E.A. v. Greece* due to the domestic judge's rejection of the applicant's objections to his detention without any consideration of his asylum application or any examination of the conditions of detention.[91] The recast RCD permits the detention of asylum seekers only on the six enumerated grounds, the assessment of which must adhere to the requirements of necessity and proportionality.[92] It states that detention must be a measure of last resort and only applied after an assessment of the effectiveness of less coercive alternative measures.[93] Asylum seekers must not be held in detention for the sole reason that they are seeking asylum.[94] Throughout, asylum seekers must have access to appropriate material reception conditions. In particular, this Court has found that several months in overcrowded police stations combined with the absence of sleeping facilities and the length of detention,[95] or two months in a "prefabricated cabin" without being allowed outdoors and without access to a telephone, blankets, clean sheets and sufficient hygiene products[96] constitute inhuman or degrading treatment. Detention must be ordered in writing stating the reasons in fact and in law on which it is based.[97] The recast RCD also allows for the right to judicial review of detention[98] and the right to free legal aid and representation with regards to such review.[99] The judicial review of the detention of asylum seekers must comply with the guarantees provided for in Article 47 CFR on the right to an effective remedy and to a fair trial.

30. **In light of the obligations of EU Member States under EU law, including the recast Reception Conditions Directive, and Article 53 ECHR, the interveners submit that detention of asylum seekers falling within the scope of that Directive will be unlawful and arbitrary where it is imposed automatically or lacks procedural safeguards for detainees, including judicial review and access to legal advice. Detention will be arbitrary where it is not a measure of last resort but is imposed without consideration of less onerous alternative measures.**

[87] Ibid, para. 61.
[88] *O.S.A. and others v. Greece*, App. No. 39065/16, 21 March 2019, paras. 53-56.
[89] *Nikolova v. Bulgaria* [GC], no. 31195/96, 25 March 1999, para. 61.
[90] *S.Z. v. Greece*, Application no. 66702/13, 21 June 2018, paras. 70-73.
[91] *E.A. v. Greece*, Application No. 74308/10, 30 July 2015, para. 97.
[92] Case C-528/15 *Al Chodor*, 15 March 2017, paras 39-40.
[93] Recast Reception Conditions Directive, Article 8(2), Case C-18/16 K., 14 September 2017, para. 44.
[94] Recast Reception Conditions Directive, Recital 15 and Article 8.
[95] *Dougoz v. Greece*, 40907/98, 6 March 2001, para. 48.
[96] *S.D. v. Greece*, application no. 53541/07, 11 June 2009, para. 51.
[97] Recast Reception Conditions Directive, Article 9(2).
[98] Recast Reception Conditions Directive, Article 9(4).
[99] Recast Reception Conditions Directive, Article 9.