Submission by the Office of the United Nations High Commissioner for Refugees
in the case of
M.S.S. v. Belgium and Greece

1. Introduction*

1.1. By letter of 3 May 2010, the European Court of Human Rights ("the Court") invited the Office of the United Nations High Commissioner for Refugees ("UNHCR") to submit a written intervention as a third party in the case of *M.S.S. v. Belgium and Greece* (Appl. No. 30696/09). UNHCR welcomes this opportunity, as the present case raises a number of legal issues relating to international protection.

1.2. UNHCR has been entrusted by the UN General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.[1] Paragraph 8 of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees, whereas Article 35 of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention")[2] obliges States Parties to cooperate with UNHCR in the exercise of its functions.

1.3. Part 2 of this submission addresses transfer procedures under the Dublin II Regulation[3] and remedies available against such transfers. Part 3 examines the legal status and material situation of asylum-seekers in Greece, including under Dublin II, while Part 4 sets out the procedure for transfer from Belgium under Dublin II and remedies available against transfer decisions. Part 5 examines the relationship between obligations under Dublin II and those under international law. Finally, part 6 sets out UNHCR's conclusions.

2. Transfer of asylum-seekers under the Dublin II Regulation and remedies against transfer decisions

2.1. The Dublin II Regulation[4] establishes a system to determine responsibility for examining an asylum claim lodged in a Member State of the European Union (EU) or in Iceland, Norway or Switzerland, which participate in the Dublin II system (hereafter "Member States"). The Regulation aims at ensuring each claim is examined by one Member State[5] and is predicated on a presumption that Member States will respect the rights of asylum-seekers who are deemed to be their responsibility, and will examine their claims in a fair and effective procedure.[6] Under Dublin II, responsibility may, *inter alia*, be attributed to a State "where it is established ... that an asylum-seeker has irregularly crossed the

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* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law.

[1] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), at: http://www.unhcr.org/refworld/docid/3b00f0715c.html.

[2] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, at: http://www.unhcr.org/refworld/docid/3be01b964.html.

[3] Council Regulation (EC) No. 343/2003, 18 Feb. 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, at http://www.unhcr.org/refworld/docid/3e5cf1c24.html (hereafter the "Dublin II Regulation" or "Dublin II". Persons transferred from another Member State to Greece under the rules of Dublin II are henceforth referred to as "transferees").

[4] Dublin II Regulation, Recitals 3 and 4, Art. 1.

[5] Dublin II Regulation, Art. 3(1).

[6] Dublin II Regulation, Recitals 4, 5, 12 and 15; Art. 3(1) *et seq.*

border into a Member State by land, sea or air having come from a third country…."[7] Asylum-seekers are frequently transferred from other Member States to Greece on the basis of this provision.

2.2. In many cases, Member States seeking to transfer asylum-seekers under Dublin II obtain the requisite proof of entry into Greece via the "Eurodac" database, established under the Eurodac Regulation,[8] which obliges Member States to record the fingerprints of all asylum-seekers and all persons apprehended "in connection with the irregular crossing ... of the border" who are over 14 years old.[9] Thus, where a person has moved from Greece to another Member State, that Member State is able to ask Greece to acknowledge responsibility under Dublin II based on the fingerprint match. Once Greece has accepted the request made by the Member State, or the time limit for Greece to contest the request has expired, responsibility for examining the asylum claim is transferred to Greece.[10] The Dublin II Regulation provides that such a transfer decision "may be subject to an appeal or review," which shall not suspend implementation of the transfer unless "the courts or competent bodies so decide on a case by case basis if national legislation allows for this".[11] The Regulation also contains a clause stating that "each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation".[12]

2.3. National practice regarding Greek transfers varies quite widely. Some courts have generally endorsed transfers to Greece on grounds including that the country must be presumed to uphold its international obligations, that relevant EU Directives have been transposed into national law, and that it is for the European Commission to address shortcomings in implementation of the Regulation in Greece. Others have ruled against transfers to Greece on grounds including that to do so would constitute, or result in, violations of international and ECHR human rights obligations, both as regards possible onward *refoulement* and as regards treatment in Greece, and/or that transfer would not permit access to a fair and efficient asylum procedure with sufficient safeguards to ensure respect for the right to asylum.[13]

3. The legal status and material situation of asylum-seekers in Greece, including under Dublin II

3.1. The legal status and material situation of asylum-seekers in Greece

3.1.1. UNHCR is concerned that asylum-seekers face serious challenges in enjoying protection in Greece in line with international and European standards.[14] Asylum-seekers in Greece, including those returned to Greece under Dublin II, face multiple hurdles securing access to asylum procedures and international protection. Reception arrangements are grossly inadequate, including for children and other vulnerable persons, leaving large numbers of asylum-seekers to live in destitution. Asylum-seekers lack access to interpretation services, legal advice and representation, are almost certain to have

[7] Dublin II Regulation, Art. 10(1).
[8] Council Regulation (EC) No 2725/2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention, 11 Dec. 2000, at http://www.unhcr.org/refworld/docid/3f4e40434.html ("Eurodac Regulation").
[9] Eurodac Regulation, Arts. 4(1), 8(1).
[10] Dublin II Regulation, Arts. 16(4) and 16(1).
[11] See note 10, Art. 19(2).
[12] See note 10, Art. 3(2). Art. 15 also permits assumption of responsibility for assessing a claim and "on humanitarian grounds".
[13] Annex 1, *UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular relating to transfers to Greece*, 11 June 2010.
[14] For further details see below and Annex 2 to this submission containing UNHCR's *Observations on Greece as a Country of Asylum*, Dec. 2009, at http://www.unhcr.org/refworld/docid/4b4b3fc82.html. Since this case concerns an Afghan national Annex 3 contains p. 21 and p. 24 of *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, July 2009, stating that numerous reports indicate that persons suspected of "spying" on behalf of the Afghan military or the international forces risk execution at the ndands of the armed anti-Government groups. A number of incidents have been reported between 2006 and 2008 in Kandahar, Helmand and Kunar against Afghans accused of working for international military forces.

their claims rejected at first instance,[15] are rarely able to secure an effective remedy against negative decisions, and consequently do not have adequate protection against *refoulement*. Further, asylum-seekers in Greece experience obstacles in trying to secure access to international complaint mechanisms.[16] In addition, in UNHCR's view, the changes in the asylum procedure introduced in July 2009[17] have further diminished the prospects of asylum-seekers, including Dublin II transferees, having their claims determined in a fair and adequate procedure in Greece. While the Greek Government elected in late 2009 is working on proposals to set up a new asylum system, these measures have yet formally to be legislated and implemented.

3.1.2. Dublin transferees face the same difficulties as others arriving in Greece in search of international protection. Asylum-seekers with legal permission to remain in Greece, including transferees, are not exempt from arrest and the risk of possible summary deportation. They are exposed to the same long waiting periods before a decision is made on their asylum claims. In the very likely event that a final negative decision has been taken[18] in the asylum case of a Dublin transferee or deadlines for appeal have expired, then the transferee is detained and receives a deportation order, with no opportunity in practice to re-open the case or challenge the negative first instance decision.

3.2. **Access to asylum procedures in Greece**

3.2.1. Persons transferred to Greece under Dublin II[19] face problems which may hinder or preclude their efforts to register (or re-register) their application for international protection.[20] As a result, access to asylum procedures cannot be guaranteed for transferees. In particular, if a negative decision has been issued prior to or during the individual's absence from Greece and this has been notified to an asylum-seeker registered as of "unknown residence," an applicant returned to Greece is likely to have missed all deadlines for appealing against this decision. With almost all asylum applications rejected at first instance, this practice affects many Dublin transferees. If all deadlines for appeal have lapsed during the person's absence from Greece, the transferee will be served with a deportation order at the airport, without access to the asylum procedure.[21]

3.2.2. Information about the relevant procedures and rights and/or interpretation in languages that asylum-seekers understand is not readily available. Under the process in place from 2008, according to a report by ATIMA,[22] Dublin transferees may be detained upon arrival at the airport up to four days without a detention order and thereby without legal basis. Since mid-2009, when new procedures entered into force,[23] the transferee is released after 24 hours with a police notice informing him/her to

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[15] See Section 3.4.3.

[16] Council of Europe (CoE) Commissioner for Human Rights, CommDH (2010) 9, Third Party Intervention under Article 36, paragraph 2 of the European Convention on Human Rights, in the case of *Ahmed Ali and others v. the Netherlands and Greece*, 10 March 2010, at https://wcd.coe.int/ViewDoc.jsp?id=1595689&Site=CommDH, para. 28.

[17] Presidential Decree No. 81/2009 modifying Presidential Decree 90/2008 on the transposition into Greek legislation of Council Directive 2005/85/EC of 1 Dec. 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Official Gazette A' 99, 30 June 2009).

[18] See para. 3.5.2.

[19] This is so whether or not they have previously applied for asylum there. People who had not done so in Greece may be transferred there under Dublin II on the grounds, among others, that Greece is deemed responsible on the basis of proof through Eurodac or by other means that they entered the EU irregularly via Greece or held a Greek visa or other residence document. See, Dublin II Regulation, Arts. 10 and 9 respectively. If such persons subsequently claim asylum in Greece after transfer, they are treated as new claimants.

[20] See, UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, Global Consultations on International Protection/Third Track, 31 May 2001, EC/GC/01/12, at http://www.unhcr.org/refworld/docid/3b36f2fca.html, para. 23.

[21] UNHCR, *Observations on Greece as a country of asylum*, above footnote 14, pp. 21.

[22] ATIMA (Greek Civil Society Organisation), "Programme for the Provision of Legal and Social Support to Asylum Seekers Transferred to Greece under Dublin II Regulation: First Conclusions and Recommendations" (22 February – 14 April 2010), 12 May 2010. During the project, which ran from 22 February up to 14 April 2010, ATIMA team was in daily contact with the Athens Airport Police.

[23] Presidential Decree No. 81/2009, see note 17.

appear at the Attica Aliens' Immigration Directorate of the Police ("Petrou Ralli") in Athens within three days to declare his/her address and receive a date for his/her asylum interview. This obligation to register a claim (or report in connection with a previous claim) at Petrou Ralli exposes transferees, like other asylum applicants, to significant problems of access to asylum procedures which may prevent them from registering their claims in the short period of time required. These problems are outlined in greater detail in UNHCR's *"Observations on Greece as a Country of Asylum"* and include inadequate capacity to meet demand at Petrou Ralli, where applications of non detainees are registered only one day a week, dropping from 300-350 before October 2009. At present, approximately 30-40 applications are registered on each of these days,[24] although up to 300-400 persons may be queuing to register their claims.

3.2.3. At the same time, applications outside Athens, as well as applications by persons in detention in Athens, have increased.[25] In addition to the registration of initial asylum claims, access to Petrou Ralli is hindered also for other requests by the asylum-seekers, i.e. renewals of "pink cards"[26] or declaration of residence address.[27] An aggravating factor with regard to the lack of access to the asylum procedure is the fact that according to the research conducted between February and April 2010, all the Dublin transferees covered by the research were homeless, despite the existing legal obligation to provide them with accommodation. [28] Being homeless affects their access to the asylum procedure as applicants for international protection are required to provide an address in Greece. Given the difficulties asylum-seekers face in securing accommodation, this proves impossible for many people. Consequently, it is difficult for the authorities to notify homeless asylum-seekers of developments in their case, and for asylum-seekers to meet deadlines for important procedural steps, including the filing of an appeal.[29]

3.2.4. The difficulties for asylum-seekers effectively to access the procedure in Greece are currently being scrutinized by the European Commission, which has opened an infringement procedure, on the issue of access to asylum procedure and respect for fundamental rights.[30]

3.2.5. In UNHCR's view, these procedural and practical obstacles to securing access to asylum procedures are evidence of an asylum system which currently falls well below international and European standards[31], and which might lead to *refoulement*. Even though UNHCR in 2010 has not received further reported instances of the former practice of refusing entry or informally removing unregistered asylum-seekers to Turkey at border points, other means of returning people have been

[24] By contrast, the total number of claims registered in other parts of Greece is greater than in the past.

[25] In four police directorates -- Patras and Evros Region included -- the increase in registration coincides with the introduction of the new decentralized asylum procedures: a sharp increase is noted for the last four months of 2009. However, in all the 49 other police directorates the increase is noted since the beginning of 2009, a phenomenon that may have as one of its reasons the enhancement, in 2009, of the border monitoring activities and presence of various external actors (e.g., UNHCR, the AEGEAS Project, NGOs, etc.) at the regions/borders. As regards individuals who apply for asylum while in detention in Athens, the number has increased to approximately 300 asylum claims per month, due to the change of the procedures at 1st instance.

[26] The "pink card" documents the registration of an asylum claim and as such provides proof of the holder's legal residence. The issuance of the "pink card" is provided for in art. 5 of Presidential Decree 220/2007.

[27] UNHCR has intervened in written to the authorities on the issue of access to Petrou Ralli, UNHCR letter to Secretary General for Public Order, Ministry of Civil Protection, ref. no. GRATH/HCR/056, 21 April 2010.

[28] ATIMA, First Conclusions and Recommendations. See note 21.

[29] UNHCR, *Observations on Greece as a country of asylum*. See note 14, page 7.

[30] See Answer given by Mr Barrot on behalf of the European Commission, to the European Parliament: http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-5426&language=LV.

[31] For international standards see, UNHCR Executive Committee, Conclusions No. 8 (XXVIII), 1977, para. (e); No. 15 (XXX), 1979, para. (i); No. 71 (XLIV),1993, paras. (i), (k), (l); No. 74 (XLV), 1994, para (i) and generally UNHCR, *"Asylum Processes (Fair and Efficient Asylum Procedures)"*, above footnote 20. For European standards, see *Council Directive 2005/85/EC of 1 Dec. 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 Jan. 2006, 2005/85/EC, at http://www.unhcr.org/refworld/docid/4394203c4.html; Council of Europe, Parliamentary Assembly Resolution 1471 (2005), *"Accelerated Asylum Procedures in Council of Europe Member States"*, Oct. 2005, at http://www.unhcr.org/refworld/docid/43f349e04.

intensified, namely through the readmission protocol between Greece and Turkey. Under this agreement, the Greek authorities are able to return detained third country nationals illegally staying in Greece (including asylum-seekers who were unable to file an application and rejected asylum-seekers) originating from countries neighbouring Turkey, such as Iraq, Iran and Syria.[32]

3.2.6. The continuing lack of guarantees for asylum-seekers, including lack of information regarding rights and procedures, as well as legal aid and the practices deterring asylum-seekers from entering the procedure (prolonged detention, accelerated examination of the claim, extremely low recognition rates) might lead to the return of an significant number of asylum-seekers under the readmission agreement with Turkey, and subsequently to *refoulement*. The same concerns apply to official deportations directly to main countries of origin (e.g., Iraq, Pakistan, Iran, Sri Lanka, Syria, etc.) for that purpose.

3.3. **Access to reception assistance and its quality**

3.3.1. Accommodation for registered asylum-seekers, including Dublin transferees, is officially available in just 12 reception centres throughout Greece. These are generally understaffed, under-resourced, and lacking appropriate support services and material conditions. Seven of the 12 centres are intended for unaccompanied and separated children. With 865 reception places in total available[33] and 15,925 asylum applications made in 2009 alone, capacity is clearly grossly insufficient. As a result, many asylum-seekers have no shelter or other State support. Single adult male asylum-seekers have virtually no chance of staying in a reception centre, as places there are reserved for families or vulnerable individuals. Registered asylum-seekers do not receive any financial allowance to cover daily living expenses, despite relevant provisions to this effect in Greek law.[34]

3.3.2. Among Dublin transferees, UNHCR has recorded a number of vulnerable cases[35] where no accommodation was offered, even though the few places available are intended for such persons. Transcripts of interviews by the Austrian Red Cross and Caritas Austria[36] indicate that only one out of 14 Dublin transferees managed to obtain accommodation in a reception centre. The others were left unassisted and were living on the streets, in parks, in public gardens, and in abandoned houses, or in overpriced and overcrowded shared rooms.

3.3.3. Like other asylum-seekers, Dublin transferees may be subject to round-ups and detention, including in police detention centres, even though these are inappropriate for holding people for longer than a few days. The European Committee for the Prevention of Torture (CPT) has reported allegations of ill-treatment and poor general conditions.[37] Detainees do not have access to information, legal counselling or interpreters, except in the few facilities where services are provided by NGOs or others through limited EC-funded projects. Even in these locations, services are not available to all who need them.

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[32] Under this Protocol, returns are allowed through the land border in Evros and recently also through the port of Izmir.
[33] 340 places for unaccompanied minors and 525 places for adults and families.
[34] Presidential Decree 220/2007, transposing the EU Reception Conditions Directive, Art. 1, para. 16, and Art. 12.
[35] This includes persons with mental health problems and a female victim of trafficking.
[36] Austrian Red Cross/Caritas Austria, "The Situation of Persons Returned by Austria to Greece under the Dublin Regulation: Report of a joint Fact-Finding Mission to Greece May 23–28 2009", Aug. 2009, at http://www.unhcr.org/refworld/pdfid/4a93fbbf2.pdf, pp. 50–81.
[37] Report to the Government of Greece 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 23 to 29 Sept. 2008", CPT/Inf (2009) 20, 30 June 2009, at http://www.unhcr.org/refworld/pdfid/4a49fb732.pdf, p. 12. See also, Council of Europe, *Recommendation Rec(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum-seekers*, 16 April 2003, at http://www.unhcr.org/refworld/docid/3f8d65e54.html for further information on applicable standards.

3.3.4. In 2009, the Court twice found violations of both Articles 3 and 5 of the European Convention on Human Rights. In *S.D. v. Greece*,[38] concerning a Turkish asylum-seeker detained in holding centres for foreigners in Greece while his asylum application was pending, the Court ruled that the conditions in which he was held were unacceptable, constituted degrading treatment and thus a violation of Article 3.[39] The Court also found there had been a violation of Article 5 because his detention was unlawful and he had been unable to challenge its lawfulness under Greek law. In *Tabesh v. Greece*, the Court found that the detention of the applicant, an Afghan asylum-seeker, in a police detention facility for three months in 2006–07, constituted degrading treatment under Article 3.[40]

3.3.5. During his visit to detention facilities in Greece in February 2010, the Council of Europe Commissioner for Human Rights concluded that asylum-seekers, including those transferred under the Dublin Regulation, "face extremely harsh living conditions in Greece".[41] UNHCR has found evidence that asylum-seekers are systematically detained in mostly overcrowded facilities, where alleged ill-treatment by police officers occurs.[42] Following a very recent visit to the detention facility in the Athens International Airport on 20 May 2010, UNHCR observed appalling detention conditions. UNHCR described the atmosphere as suffocating, noting the detainees had no access to any open space and there was no toilet inside the cells.[43]

3.3.6. Since July 2009, a new legislative framework regulating administrative detention of irregularly staying foreigners adopted in Greece[44] has allowed for a maximum detention period of six months, with the possibility of an extension to 12 months. Around the time the law came into force, the police made large-scale arrests of undocumented migrants. The combination of the new provisions and mass arrests strained existing facilities, resulting in unprecedented overcrowding and material shortcomings in police and coast guard detention centres.

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[38] *S.D. v. Greece*, Appl. No. 53541/07, 11 June 2009, at http://www.unhcr.org/refworld/docid/4a37735f2.html (in French only).

[39] The Court found that detention conditions in Greece, particularly for foreigners, have violated Article 3 of the ECHR also in *Peers v. Greece (2001), Appl. No. 28524/95, 19 April 2001, para. 75; Dougoz v. Greece, Appl. No. 40907/98, 3 March 2001, paras. 48 and 49; Kaja v. Greece, Appl. No. 32927/03, 27 July 2006, paras. 49 and 50.*

[40] *Tabesh v. Greece*, Appl. No. 8256/07, 26 Nov. 2009, at http://www.unhcr.org/refworld/pdfid/4b1e58e72.pdf (in French only), para. 44. The latter practice appears to continue. Recent reports from Amnesty International, Medecins Sans Frontieres, the Council of Europe Commissioner for Human Rights, UNHCR and the Hellenic League for Human Rights (HLHR) have shown concern over the situation of asylum-seekers in Greece, namely due to detention conditions. In its report "The Dublin II Trap: Transfers of Asylum Seekers to Greece" (March 2010), Amnesty International claimed that detained asylum-seekers or irregular migrants were held in conditions of severe overcrowding and that the material conditions of detention were inadequate, lacking hygiene and security. Amnesty International, "The Dublin II Trap: Transfers of Asylum Seekers to Greece", March 2010, p. 14, at: http://www.amnesty.org/en/library/info/EUR25/001/2010/en. Following a visit to the detention facility in the Athens International Airport on 30 April 2010, Médecins sans Frontières (MSF) have also highlighted the extreme overcrowding of the facilities, to the point that detainees often sleep seated on the floor, as there is not enough space to lie down. Detainees have no direct access to toilets or showers; they are allowed to visit the toilets twice per day. These conditions were considered "inhumane" by MSF, due to the utter lack of personal hygiene and extremely poor sanitary conditions. Press Release (in Greek only) at:
http://www.msf.gr/index.php?option=com_content&task=view&id=2283&Itemid=235.

[41] See note 16.

[42] UNHCR, *Observations on Greece as a country of asylum*, see note 144, pages 8 – 9.

[43] After a survey of the detention conditions of migrants in the regions of Evros and Rodopi in November 2009, the Hellenic League for Human Rights concluded that "all the detention facilities in the prefectures of Evros and Rodopi lack the basic infrastructures and thus fall below minimum standards required by the law, concerning the number of detainees, their feeding, healthcare, cleaning etc." Hellenic League of Human Rights, *Report on the detention of immigrants without legal documents in Rodopi and Evros*, December 2010, at http://www.hlhr.gr/papers/report-hlhr2009-detention.pdf.

[44] Greek Law 3772/2009, Art. 48, para. 2, amending the General Migration Law 3386/2005 concerning administrative deportation and detention procedures, Art. 76, para. 3.

3.4. **The effectiveness of Dublin transferees' access to asylum procedures in Greece and to international complaint mechanisms**

3.4.1. Dublin transferees face the same problems as other asylum-seekers regarding the asylum procedure and quality of decisions. These include difficult and limited access to the asylum procedure, shortcomings in training and expertise of the examining authorities,[45] long waiting periods for interviews, inadequate availability and use of country of origin information by the examining authorities,[46] lack of access to legal advice,[47] severe deficiencies in the provision of interpretation,[48] and interviews conducted with inadequate confidentiality.[49] Generally, decisions contain neither sufficient references to the facts nor detailed legal reasoning, but rather standardized grounds for rejection, referring to economic motivations for leaving the country of origin. Such reasoning is cited in a large majority of cases, including for persons from countries in conflict which generate significant numbers of refugees.

3.4.2. In research published by UNHCR in 2010, an audit of 202 case files and decisions found that all but one of the first instance decisions reviewed were negative, and contained a standard phraseology (not exceeding three paragraphs). The 201 negative decisions did not set out a summary of the material facts; did not reference any relevant country of origin information or other oral or documentary evidence considered; did not specify what aspects of any evidence gathered was considered to be credible or to lack credibility; and did not apply any legal reasoning with regard to any facts. There was no other information in the case files which provided any evidence of the application of legal reasoning to the facts; and the facts, as stated in the application form, were severely limited. The only difference between one decision and another was the name of the applicant, the named country of origin and the stated time limit for lodging an appeal.[50] In the framework of its monitoring activity, UNHCR has often noted that in some negative first instance decisions, the fact that the claimant for international

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[45] Greece does not require interviewers to hold a specific qualification in refugee and/or human rights law or to have relevant experience upon recruitment and do not provide compulsory training for them upon recruitment. UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. A UNHCR Research Project on the Application of Key Provisions of the Asylum Procedures Directive in selected Member States*, March 2010, available at: http://www.unhcr.org/refworld/docid/4bab55752.html , Section 5, page 17.

[46] *"In ADA in Greece, during the 49 interviews observed, no interviewer asked any specific question which was indicative of prior knowledge of the relevant circumstances relating to the application, and country of origin maps were not referred to."* UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, note 45, Section 5, footnote 229, page 50.

[47] See Anagnostou and Psychogiopoulou, "Supranational Rights Litigation, Implementation and the Domestic Impact of Strasbourg Court Jurisprudence: A Case Study of Greece", Juristras, 2008, at http://www.juristras.eliamep.gr/wp-content/uploads/2008/09/casestudygreece.pdf, p. 7.

[48] In its research published in 2010, UNHCR observed that in several cases, without guidance from the interviewer, the interpreter advised applicants and instructed them as to how to complete the application form. For example, UNHCR witnessed an interpreter instruct the applicant to write on the application form that she came to Greece "for a better life". During nine interviews observed, the interpreter was not able to ensure appropriate communication because of the interpreter's poor language and interpreting skills. There is no official procedure for the recruitment of interpreters in Greece, nor job description setting out minimum qualifications. UNHCR was informed that in Aliens Directorate in Athens, prospective interpreters submit a Curriculum Vitae and are recruited without any interview to assess their suitability for the job. Moreover, the Asylum and Security Departments outside Athens confront severe shortages of interpreters and reportedly use any available interpreter who can understand applicant's language. See UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, note 45, Section 5, pages 35, 40, 43.

[49] "*UNHCR observed 49 personal interviews at the ADA in Athens, Greece. It was clear that no steps were taken to ensure the confidential conditions of interviews. Three to four interviews were conducted simultaneously in one large noisy room measuring approximately 20 x 10 metres. The room contained the four desks of the interviewers and about 13 more desks belonging to other police officers responsible for fingerprinting and interpreters of the Department. There were approximately 30 persons present in the room whilst interviews were being conducted.50 People were moving around for fingerprinting and other procedural matters. On occasions, the noise was so loud that communication between the applicant and the interpreter or the interpreter and the interviewing police officer was difficult.*" See UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, note 45, Section 5, page 10. See also note 14, UNHCR, *Observations on Greece as a country of asylum*.

[50] See note 45, Chapter 3, page 18, March 2010, available at: http://www.unhcr.org/refworld/docid/4bab55752.html .

protection asked for asylum in another EU country and has been returned to Greece under Dublin II Regulation is used as a reason to reject the claim as abusive.[51]

3.4.3. Overall protection rates remain extremely low in Greece. In 2008, 0.06 per cent of cases decided at first instance were afforded protection.[52] The same year, the Appeals Board reached a positive decision in 24 per cent of cases reviewed at appeal.[53] The figure of 0.06 per cent at first instance in 2008 diverges significantly from practice at first instance in other EU Member States receiving similarly large numbers of applications. By comparison, in the five countries (France, the UK, Italy, Sweden and Germany) which, along with Greece, received the largest number of applicants in Europe in 2008, the average protection rate at first instance was 36.2 per cent.[54] The situation did not improve significantly in 2009. Eurostat data for 2009 first instance decisions in Greece show a small increase in the protection rate to 0.98 per cent,[55] in contrast to a first instance protection rate for the five countries listed above of 25.33 per cent over the same period.

3.4.4. Unhindered access to international complaint mechanisms such as those under the European Convention on Human Rights, including access to Rule 39 interim measures, is in UNHCR's view not effectively guaranteed for asylum-seekers or Dublin transferees in Greece. UNHCR considers that the conditions described above which hinder or prevent asylum-seekers from pursuing their protection claims also create obstacles to the pursuit of applications to the European Court of Human Rights, including requests for interim measures. The situation is particularly acute for persons in detention or those who have to live in the streets, as is the case for many transferees.

3.4.5. In 2009, there were just nine Rule 39 requests to the Court introduced by applicants present in Greece, of which four were successful. Of these four, only one was introduced by a lawyer in Greece. This case concerned a Turkish national of Kurdish origin who had applied for asylum in Greece. Of the other three successful requests, one was made to the Court by a lawyer in Italy for six out of 32 applicants who had been trying to seek asylum in Greece and Italy.[56] The other two cases were lodged by lawyers outside Greece on behalf of persons in Greece, and involved Afghan asylum-seekers transferred from the Netherlands to Greece under Dublin II. Dutch lawyers acting for those asylum-seekers had unsuccessfully applied for Rule 39 measures while they were still in the Netherlands, but were able to obtain such measures for their clients by the time they arrived in Greece. From 1 January to 3 May 2010, there is no record of a request by an applicant present in Greece aimed at suspending his expulsion from Greece. Eurostat data nevertheless indicate there were 15,925 persons who applied for asylum in Greece in 2009, putting the country among the "top 7" countries in terms of asylum applications in Member States. Given the relatively high number of applications, one would expect a proportionately higher number of Rule 39 requests to be made from Greece in line with the situation in other Member States.[57]

3.4.6. In the context of Dublin transfers to Greece, the Court has affirmed that Greece is required to ensure that the right of a transferee to lodge an application with the Court and request interim measures

[51] One of the formulations used is the following: "*Having been in X country in breach of his/her obligation as an asylum-seeker and having applied for asylum there, shows that the claim is abusive*".
[52] The "protection rate" is the percentage of positive decisions for refugee status and subsidiary protection against the total number of substantive first instance decisions for a given period. See UNHCR statistics at http://www.unhcr.org/pages/49c3646c4d6.html.
[53] See note 52.
[54] UNHCR, 2008 Global Trends, Annexes, at http://www.unhcr.org/4a375c426.html.
[55] In 2009, in Greece out of the 14,355 first instance decisions taken, only 165 were positive (35 decisions granting refugee status, 105 decisions granting subsidiary protection and 25 granting humanitarian status). Eurostat, http://epp.eurostat.ec.europa.eu/portal/page/portal/population/publications/migration_asylum.
[56] See *Sharifi v. Italy and Greece* (Appl. No. 16643/09).
[57] From 1 January 2009 to 03 May 2010, approximately 765 Rule 39 requests were made to the Court for interim measures to stay Dublin transfers to Greece. Sixty-seven per cent were granted.

under Rule 39 are "both practical and effective".[58] As the Court has also ruled in other cases "the remedy required by Article 13 must be "effective" in practice as well as in law" and must take "the form of a guarantee and not of a mere statement of intent or a practical arrangement".[59] It has further found that it must have automatic suspensive effect.[60]

3.4.7. UNHCR respectfully submits that any presumption that Greece is able to fulfil its international obligations vis-à-vis Dublin transferees and asylum-seekers must be assessed in light of the information above. Further, as asylum-seekers readmitted to Greece do not enjoy "practical and effective" access to international remedies. In the light of the foregoing information, UNHCR believes that Dublin II transfers to Greece should be suspended until such time as such access is assured.

3.5. The existence of a risk of *refoulement* or expulsion from Greece

3.5.1. The obligation of states not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened is a cardinal protection principle enshrined in Article 33 of the 1951 Convention. In addition, international and European human rights law prohibits the return of a person to a risk of torture and cruel, inhuman or degrading treatment or punishment. The duty not to *refoule* applies, *inter alia*, to asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a state which could have the effect of returning a person to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes refusal of entry at the border, interception, and indirect *refoulement*.[61]

3.5.2. In the case of Greece, UNHCR has stated that problems in respect of poor access to and quality of the asylum procedure and inadequate reception conditions may give rise to the risk of direct or indirect *refoulement*.[62] It is against this background that UNHCR continues to recommend that governments refrain from returning asylum-seekers to Greece under the Dublin II Regulation.[63]

3.5.3. As well, while reports of refusal of entry and removal of unregistered asylum-seekers to Turkey at border points have decreased, UNHCR in the past has documented its significant concerns regarding the practice of removals from Greece to Turkey. Between April 2008 and September 2009, UNHCR has received numerous reports of attempted or actual deportation to Turkey and documented 27 such cases (involving a total of over 550 persons). Over 500 of those concerned were subsequently located by UNHCR, its partners, relatives or friends of the removed individuals. Some (including Turkish nationals) were in Turkey, some had been removed from Turkey to their country of origin, and some had re-entered Greece. There is evidence that until May 2009, Greece has engaged in removing individuals to Turkey and from there they have been removed to Afghanistan.[64]

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[58] *K.R.S. v. UK*, Appl. No. 32733/08, 2 Dec. 2008, para. 18 at http://www.unhcr.org/refworld/docid/49476fd72.html. See also *Soering v. UK*, 1/1989/161/217, 7 July 1989, at http://www.unhcr.org/refworld/docid/3ae6b6fec.html, para. 87.

[59] *Conka v. Belgium*, Appl. No. 51564/99, 5 Feb. 2002, at http://www.unhcr.org/refworld/docid/3e71fdfb4.html, paras. 75 and 83.

[60] *Gebremedhin [Gaberamadhien] v. France*, Appl. No. 25389/05, 26 April 2007, at http://www.unhcr.org/refworld/docid/46441fa02.html, para. 66. See also, *Mamatkulov and Askarov v. Turkey*, Appl. No. 46827/99 and No. 46951/99, 4 Feb. 2005, at http://www.unhcr.org/refworld/docid/42d3ef174.html, para. 124.

[61] UNHCR, "Note on International Protection", 13 Sept. 2001, A/AC.96/951, pp. 5-6. See also, "Summary Conclusions: The Principle of *Non-Refoulement*", July 2001, at: http://www.unhcr.org/refworld/docid/470a33b00.html; UNHCR Submission in *T.I. and the UK*, Appl. No. 43844/98, 4 Feb. 2000, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42f7737c4&page=search

[62] The prohibition of indirect or "chain *refoulement*" has been recognised by the Court, see *T.I. v. UK*, Appl. No. 43844/98, 7 March 2000, at: http://www.unhcr.org/refworld/docid/3ae6b6dfc.html, in which the Court stated that "the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention", p. 15; See also note 57, *K.R.S. v. UK*, para. 16; *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, 22 Sept. 2009, at http://www.unhcr.org/refworld/docid/4ab8a1a42.html, paras. 88–89.

[63] See note 144.

[64] UNHCR, *Observations on Greece as a country of asylum*, see note 14, pp. 4-5.

3.5.4. In four cases recorded by UNHCR, the individuals affirmed that they had expressed their wish to seek asylum to the Greek authorities, but were not registered as asylum-seekers. It appears that many of those affected did not receive information about their right to seek asylum or about procedures for doing so. During his visit to Greece in February 2010, the Council of Europe Commissioner for Human Rights was informed by Greek refugee lawyers of collective expulsions to Turkey that have reportedly occurred in December 2009, January and February 2010. There is concern that asylum-seekers returning to Greece by virtue of the Dublin II Regulation may face such risks, jeopardizing their rights under the Convention.[65]

4. Procedure for transfer from Belgium under the Dublin II Regulation and remedies available against transfer decisions

4.1. Brief Overview of the Asylum Procedure in Belgium

4.1.1. Under Belgian law, asylum requests are governed by the "Aliens Act"[66] and must be filed at the Aliens Office in Brussels or at the border. In the latter case, asylum-seekers are transferred to and detained in a closed "extra-territorial" centre (Transit Centre 127) at Brussels Airport. In both cases, the Aliens Office ("*Office des Etrangers*") carries out certain investigations into asylum applications and prepares decisions on behalf of the State Secretary for Asylum and Migration (Ministry of Internal Affairs), as set out below.

4.1.2. The Aliens Office registers the asylum claim and determines whether Belgium is responsible for examining the asylum claim under the Dublin II Regulation.[67] The asylum-seeker is interviewed to ascertain his/her identity and travel route; fingerprints are taken and the Eurodac database[68] is consulted, but no substantive questions regarding the asylum application (concerning fear of persecution in case of return to country of origin) are asked. The asylum-seeker has no right to legal representation at this stage, and Dublin interviews are undertaken by officials of the Aliens Office without a lawyer being present. The Aliens Office checks the health of the asylum-seeker and the reasons why she/he chose to lodge an asylum claim in Belgium and not in some other country.

4.1.3. If Belgium declares itself responsible under the Dublin II Regulation, the case is transferred to the General Commissariat for Refugees and Stateless Persons ("*Commissariat général aux réfugiés et apatrides*" (CGRA)), which examines the claim on substantive grounds and decides whether or not to grant refugee status or subsidiary protection. An appeal against negative decisions lies with the Council for Aliens Law Litigation ("*Conseil du Contentieux des Etrangers*" (CALL)). The CALL may uphold, revise, or annul (and send back for review) CGRA decisions, using its full jurisdiction ("*plein contentieux*").[69]

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[65] See note 16.

[66] Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Aliens' Act), https://dofi.ibz.be/fr/reglementering/belgische/wet/Loi_derniere_version.pdf (in French, version of 11 May 2010). See also, Arrêté Royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

[67] The Aliens Act provides in Art. 51/5 §1 that "as soon as an alien has introduced an asylum application at the border or within the territory, the Minister or his/her delegate (the Aliens Office) shall proceed with the determination of the State responsible for the examination of the asylum claim, in application of the European Regulation binding on Belgium." This provision gives practical effect to the Dublin II Regulation in Belgium. Art. 51/5 §2 of the Aliens Act contains a sovereignty clause similar to Art. 3(2) of the Dublin II Regulation.

[68] See note 8.

[69] The CALL is an administrative court established by the Law of 15 September 2006 and has assumed competencies of the Council of State in matters of litigation regarding aliens as well as competencies from the former Appeal Commission for Refugees. In appeals against decisions by the CGRA, it has full jurisdiction; in appeals against decisions by the Aliens Office it has limited jurisdiction. See Art. 39/2 of the Aliens Act.

4.2. **Application of the Dublin II Regulation**

Aliens Office

4.2.1. If the Aliens Office determines that Belgium is not responsible for the examination of the asylum claim, it requests that the Member State it deems responsible takes over the application. If this Member State accepts explicitly or tacitly (i.e. without a reaction within two months of the request), the Aliens Office delivers a decision refusing stay or entry, together with an order to leave the territory or an expulsion order. The asylum application is in such cases not transferred to the CGRA. The Aliens Office may place the asylum-seeker in detention pending the outcome of the procedure to determine the Member State responsible.[70] Except for unaccompanied minors (who are held in special open observation centres) and families with children (who are held in semi-open "return houses"), asylum-seekers are systematically detained from the moment the transfer decision is notified. The term of detention must be limited to the time strictly necessary to proceed with the transfer.[71]

4.2.2. The criteria applied by the Aliens Office to determine when to make use of the sovereignty clause under Article 3(2) of the Dublin II Regulation are not clear: they are neither laid down in law or in a Royal Decree. There is no publicly available statistical information on the number of times that Belgium has assumed responsibility for assessing asylum claims under this clause, nor on how the Aliens Office interprets the criteria for assuming such responsibility. The lack of information hinders determination of whether or not the operation of the Dublin II procedure in Belgium is fair or adequate. It is not possible to know whether, and if so on what grounds, asylum-seekers in Dublin cases have been successful in rebutting the presumption of safety of Greece or other Dublin States.

4.2.3. Decisions by the Aliens Office in cases where applicants had argued that a return to Greece would result in serious harm, generally find it sufficient simply to refer to the fact that Greece has ratified the 1951 Convention, the European Convention on Human Rights, and that as a member of the European Union it is bound to apply the minimum standards on asylum agreed in relevant EU Directives and Regulations.

Council for Aliens Law Litigation and Council of State

4.2.4. Decisions by the Aliens Office, including expulsion orders and Dublin II responsibility and transfer decisions, may be contested by lodging an appeal for "cancellation" and/or "suspension" before the CALL within 30 days of the notification of the decision or within 15 days if the asylum-seeker is detained.[72] These appeals have no automatic suspensive effect and are limited to a review of the legality of the decision. As part of this review of legality, however, the law provides that an urgent suspensive appeal ("*recours en extrême urgence*") may be presented within five days (including at least three working days) of the notification of the contested decision to deport.[73] Suspensive effect may then be granted if two conditions are met: (i) the applicant must prove that the execution of the decision is imminent and (ii) that it would cause serious harm that would be difficult to remedy ("*un préjudice grave difficilement réparable*"). In case of an urgent appeal, the CALL must examine the appeal within 48 hours and make its decision within 72 hours.[74]

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[70] Art. 51/5 §1 al 2 of the Aliens Act provides that an asylum-seeker may be detained for one month: (i) if she/he possesses an expired stay permit or visa in a State party to the Dublin Regulation; (ii) if she/he has no valid entry documents and declares she/he has stayed in a Dublin State; or (iii) if her/his fingerprints are found in the Eurodac database. The one-month term of detention may be extended for a second month if the transfer request is found to be particularly complex.

[71] Art. 51/5 §3 al 4 Aliens Act.

[72] Arts. 39/57 and 39/59 of the Aliens' Act. The CCE may cancel a decision of the Aliens' Office in case of violation of substantial legal forms ("formes, *soit substantielles, soit prescrites à peine de nullité*") or an excess or abuse of power ("*excès ou détournement de pouvoir*").

[73] Art. 39/82 of the Aliens' Act.

[74] Art. 39/82 §4 of the Aliens' Act and Arts. 39, 42 and 43 of Royal Decree of 21 December 2006 (procedure regulations).

4.2.5. A further appeal for administrative cancellation of the decision to transfer ("*en cassation administrative*") may be brought before the Council of State ("*Conseil d'Etat*") within 30 days of the notification of the judgment of the CALL.[75] This appeal will be found admissible only if it raises important legal questions. The appeal may result in cancellation if the decision was taken in violation of a law or of substantive legal formalities ("*forme substantielle ou prescrite à peine de nullité*"). This further appeal procedure does not have suspensive effect and appears not to permit effective challenges.[76] The Council of State pronounces its judgment in principle within eight days on admissibility, while a final decision on the merits has to follow within six months.

4.3. Possibilities for rebutting a presumption of safety – Belgian jurisprudence in Dublin II cases

4.3.1. While the reasoning of the Aliens Office is uniform regardless of whether the decision is taken in French or Dutch, the jurisprudence of the CALL[77] has in general been broadly divided along linguistic lines and the decision-making in Dublin II cases is a good example of this trend. The French-speaking chambers of the CALL have been more inclined to suspend transfers to Greece than the Dutch-speaking chambers (which deal with the vast majority of Dublin II cases), which do not generally do so. The development of the case law of the CALL in Dublin II cases can be summarized as falling within two periods, that before January 2009 and that afterwards.

4.3.2. The difficulties of lodging an asylum claim in Greece were first raised before the CALL in April 2008, in a case where a transfer request had remained unanswered by the Greek authorities.[78] The court noted that the Aliens Office had not sought to obtain any guarantee that the asylum-seeker would be able to lodge an asylum claim and pursue an asylum procedure in Greece. It required the Aliens Office to seek such guarantees in each individual case. In the absence of any monitoring of transfers, however, the fulfillment of this obligation remained a purely formal guarantee, the main consequence of which was to lengthen the Dublin II procedure.

4.3.3. In January 2009, the Aliens Office abandoned the practice of asking for a specific guarantee of treatment upon the arrival in Greece. The CALL endorsed the change, noting the transposition into Greek law of the EU "Qualification"[79] and "Procedures"[80] Directives. It ruled:

> "The Council does not exclude that the Greek national asylum law as it existed in the past was possibly not in accordance with standards under international and supranational rules of law. In casu it should, however, be noted that the Greek authorities have meanwhile transposed [the different Directives] into national law. There are no indications that this transposition has taken place incorrectly. Moreover, Greece is a full member of the European Union and is bound by the

[75] Art. 14 and 19 of the coordinated laws of 12 January 1973 on the Council of State; Art. 3 §1 Royal Decree of 30 November 2006.
[76] See e.g., Council of State judgment (in Dutch) No. 187.659 of 3 November 2008 (Arrest van de Raad van State, Afdeling Bestuursrechtspraak), in which the Council of State declared the appeal against a CALL judgment inadmissible by lack of merit since the applicant had already been transferred to Greece under the Dublin II Regulation. Responding to the argument "absence of an effective remedy", it stated that the present appeal for administrative cancellation can not prevent the execution of a decision taken in violation of article 3 ECHR since this decision has already been executed (unofficial translation from Dutch).
[77] The CALL has separate chambers which decide in one of the two languages.
[78] CALL judgment No. 9 796 of 10 April 2008.
[79] European Union: Council of the European Union, 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, 19 May 2004, 2004/83/EC, available at: http://www.unhcr.org/refworld/docid/4157e75e4.html.
[80] European Union: Council of the European Union, Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 13 December 2005, 2005/85/EC, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF.

same international conventions as Belgium ... so that in principle there is no reason to assume that the requesting party would benefit from fewer guarantees in Greece than in Belgium regarding the treatment of her asylum claim."[81]

4.3.4. In a few cases, however, a transfer was suspended by the Council due to a possible failure on the part of the Greek authorities and the absence of a guarantee that the asylum claim would be effectively registered in Athens.[82]

4.3.5. Otherwise, Belgian jurisprudence in Dublin cases remained constant throughout 2009 and the CALL strengthened the reasoning of its decisions by referring to the December 2008 decision of the ECtHR in *K.R.S. v. UK*.[83] Despite the availability of information showing the continuation of the asylum crisis in Greece throughout 2009 and the protection gaps in the Greek asylum system, the CALL maintained its position that an applicant had "to submit tangible information from which could be deduced *prima facie* that his assertion regarding the 'serious harm difficult to remedy' is more than a mere hypothesis".[84]

4.3.6. In the face of some divergence in decision-making within the CALL, the Council decided to meet in general assembly of the Francophone and Dutch-speaking chambers to harmonize its position. This resulted in judgments in three "Dublin II Greece cases" on 26 March 2010.[85] These represent the latest position of the CALL in Dublin II cases and confirm the earlier position taken by the Dutch-speaking chambers. The reasoning is as follows: Greece is an EU Member State, is a State of law, is a party to the ECHR and the 1951 Convention, and is moreover bound by EU instruments on asylum and migration. Based on the principle of inter-State trust, the presumption must be that Greece will abide by its obligations under these instruments.[86] This presumption is in principle rebuttable and it is up to the asylum-seeker to produce elements of proof to show that there are serious reasons to believe that she/he will be exposed to a real risk of treatment violating Article 3 ECHR in case of transfer to Greece.[87] A mere reference to sources of general information is not enough to rebut the presumption that Greece will abide by its obligations. The asylum-seeker must give concrete indications that he/she faces a real risk of treatment in violation of Article 3 ECHR in case of transfer to Greece. When such elements of proof are produced, it is up to the government to raise potential doubts.[88] In order to verify the existence of such a risk (of treatment in violation of article 3 ECHR), one should examine the foreseeable consequences of the expulsion taking into account (1) the general situation in the country of destination (Greece) and (2) the personal circumstances of the asylum-seeker.[89]

4.3.7. The two judgments in French are slightly different from the judgment in Dutch language, in that the French judgments take note that under certain circumstances the ECtHR does not exclude that a complainant may belong to a group which is systematically exposed to mistreatment and that such persons are not required to establish the existence of any other particular characteristics which would distinguish them personally, if to do so would render illusory the protection afforded by Article 3

[81] CALL judgment No. 21 980 of 26 January 2009 (unofficial translation from Dutch).
[82] CALL judgments Nos. 25 959 and 25 960 of 10 April 2009, No. 28 804 of 17 June 2009, No. 35 658 of 10 December 2009 and No. 35 752 of 12 December 2009.
[83] See note 57.
[84] CALL judgment No. 35 222 of 1 December 2009.
[85] CALL judgments Nos. 40 963 (in Dutch), 40 964 and 40 965 (in French) of 26 March 2010.
[86] See note 57, *K.R.S. v. UK*, para. 17.
[87] *N. v. Finland*, 38885/02, Appl. No. 38885/02, 26 July 2005, at: http://www.unhcr.org/refworld/docid/437dcf4ea.html, para. 167.
[88] *Y. v. Russia*, Appl. No. 20113/07, 4 December 2008, at: http://www.unhcr.org/refworld/docid/493e39922.html, para. 77.
[89] *Y. v. Russia*, See note 88, para. 78; *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008, paras. 128-129; *N. v. Finland*, see note 87, para. 167; *Vilvarajah and Others v. The United Kingdom*, Appl. Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991, available at: http://www.unhcr.org/refworld/docid/3ae6b7008.html, para. 108.

ECHR.[90] The French-language judgments also elaborate on the position with regard to the risk of *refoulement.* In cases of transfer to States which are party to the ECHR, the transferring state remains responsible for considering a "risk of indirect *refoulement*" and cannot renounce its responsibility through reference to the system established by the Dublin II Regulation. However, the transfer of an asylum-seeker from Belgium to Greece in application of article 3.1. of the Dublin II Regulation could only constitute a violation of Article 3 ECHR on the double condition that the asylum-seeker demonstrates (1) the existence of serious grounds for a real risk that he/she will be victim of torture or inhumane treatment in his/her country of origin or in any other country, AND (2) that he/she cannot find protection from *refoulement* to that country in the intermediary State responsible for the examination of his/her refugee claim.

4.3.8. Civil courts in Belgium (first instance and appeal tribunals) have also become involved in the question of Dublin II transfers to Greece as a result of submissions made opposing detention measures, or even in summary proceedings to protect subjective rights. This case law is varied and unsettled. Decisions from the civil courts in detention cases have sometimes relied on the argument that a return to Greece might result in a violation of Article 3 ECHR, but while such decisions may have put an end to detention measures, they have left transfer decisions intact. The Brussels Appeal Court has recently ruled that detention was not legal because the end result of the detention, i.e. the transfer to Greece, would constitute a violation of Article 3 ECHR. It found that there existed a probability bordering on certainty, that the applicant would become a victim of treatment contrary to Article 3 ECHR, namely, that he would end up in detention in Greece under inhumane or degrading conditions.[91] With regard to the burden of proof, the Court of Appeal considered that the Belgian authorities had provided no elements to rebut evidence brought by the applicant in the form of general statements regarding structural deficits in the asylum system in Greece.[92]

4.3.9. In UNHCR's view, the rebuttable presumption of the safety of Greece for asylum-seekers is not adequately implemented in Belgium. Rather, the situation in Greece would warrant Belgian authorities assuming responsibility for assessing an asylum claim where there are tangible or specific indications that a Member State (in this case, Greece) is not fulfilling its international obligations. Respect for the concept of "inter-State trust" does not necessarily provide a sufficient justification for unqualified application of the Dublin II criteria. Rather, in UNHCR's view, States have an autonomous responsibility under international law to uphold their international obligations, which would require them, in the Dublin II context, to consider whether or not the Member State in question is able effectively and practically to uphold the rights of the asylum-seeker under international law.

5. States' international obligations under international human rights and refugee law and the Dublin II Regulation

5.1. In UNHCR's view, the arguments presented by the Belgian Council of State and/or arrangements made by the Government do not absolve a State seeking to implement the provisions of the Dublin II Regulation from upholding its obligations under international refugee and human rights law, including in particular Article 33 of the 1951 Convention and Article 3 of the European Convention on Human Rights, as well as other Articles of the latter Convention, including Articles 2, 5 and 13. As the Court ruled in *T.I. v. the United Kingdom*, a State cannot "rely automatically" on arrangements made under the Dublin Regulation, but rather,

[90] *Saadi v. Italy*, Appl. No. 37201/06, 28 February 2008, para. 132.
[91] See judgments (in Dutch) of the Brussels Court of Appeal (Arresten van het Hof van Beroep te Brussel, Kamer van Inbeschuldigingstelling) Nos. 1329 of 30 March 2010; 1407 of 1 April 2010 and 1510 of 8 April 2010. These decisions are definitive.
[92] Ibid. The Brussels Court of Appeal makes reference to *N.A. v. UK*, Appl. No. 25904/07, European Court of Human Rights, 17 July 2008; *S.D. v. Greece*, Appl. No. 5354/07, 11 June 2009 (see above footnote 38) and *Tabesh v. Greece*, Appl. No. 8256/07, 26 November 2009 (see above footnote 40).

> [w]here States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[93]

5.2. In UNHCR's view, Dublin II transfers should not take place when there is evidence showing: (1) a real risk of return/expulsion to a territory where there may be a risk of persecution or serious harm; (2) obstacles limiting access to asylum procedures, to a fair and effective examination of claims or to an effective remedy; or (3) conditions of reception, including detention, which may lead to violations of Article 3 ECHR. In these cases, UNHCR considers a State should apply Article 3(2) of the Dublin II Regulation, even if it does not bear responsibility under the criteria laid down in Articles 5–14 of the Regulation. Such an approach ensures the Member State acts fully in accordance with its primary international law obligations, including under the 1951 Convention, relevant international and European human rights law, as well as relevant EU instruments.[94] Since the Dublin II Regulation offers this possibility and given the general obligations of Member States under Article 3(1) in combination with the object and purpose of the Regulation, there is no conflict of treaty or other legal obligations. If States were not to make use of Article 3(2) in such circumstances, however, they would risk violating their international legal obligations and thus committing an internationally wrongful act as stated in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.[95]

6. Conclusion

6.1. Since *K.R.S. v. UK* in 2008, UNHCR's most recent position paper and other objective sources provide independent evidence that adequate safeguards and effective access to procedures and international protection are not generally available in Greece. In addition, inadequate reception conditions may give rise to a risk of *refoulement*, and in some circumstances, may constitute inhuman or degrading treatment.

6.2. More recent Court decisions against Greece have highlighted the serious shortcomings within the asylum system in operation there including violations of Articles 3 and 5 ECHR during detention.[96] The new legislative framework adopted in July 2009 has not helped to alleviate concerns; indeed the situation has deteriorated with respect to efficiency in the asylum system. Pending reform of the Greek asylum system, UNHCR thus continues to recommend against transfers to Greece.

6.3. In view of Greece's failure to meet the minimum standards set by the EU Directives, the breaches of rights under the European Convention on Human Rights, including Article 3, in particular in relation to the reception and detention of asylum-seekers, and the real risk of indirect *refoulement* in breach of Article 3, it is UNHCR's view that Member States refrain from transferring asylum-seekers to Greece. Such an approach would ensure that Belgium complies with its obligations under international law.

UNHCR, June 2010

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[93] See note 61, *T.I. v. UK*, , p. 15, referring to *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I, para. 67. See also, *K.R.S. v. UK*, above footnote 57, p. 16.

[94] These include in particular the Treaty on the Functioning of the EU, 13 Dec. 2007, 2008/C 115/01, Art. 78; Reception Directive 2003/9/EC; Qualification Directive 2004/83/EC; Asylum Procedures Directive 2005/85; and European Charter on Fundamental Rights, Arts. 18 and 19.

[95] International Law Commission, "Articles on the Responsibility States for Internationally Wrongful Acts", text annexed to UNGA Resolution 56/83, "Responsibility of States for Internationally Wrongful Acts", 12 Dec. 2001.

[96] See e.g. *S.D. v. Greece* and *Tabesh v. Greece* above, respectively at footnotes 38 and 39.