UNHCR ORAL SUBMISSIONS

IN JOINED CASES OF NS (C-411/10) and ME and Others (C-493/10)

Hearing of the Court of Justice of the EU

Luxembourg, 28 June 2011

UNHCR's oral submissions were provided in two parts. This text includes both parts of the oral submissions as they were prepared before delivery at the hearing.

PART 1

1. Mr President, Members of the Court, Advocate General, UNHCR has a long tradition of appearing as an intervener in cases raising important points of asylum law before the European Court of Human Rights and before supreme courts of several Member States. This is the first time it has appeared in a reference before this Court and it is very pleased to do so.

2. May I begin by saying something about UNHCR's expertise and authority regarding international and European refugee and asylum law. UNHCR has a mandate to provide international protection to refugees and persons of concern, and to supervise the application of international Conventions for their protection, as we have explained in our written observations. In *MSS*[1] the Grand Chamber of the European Court of Human Rights (ECtHR) attached at §349 "critical importance" to UNHCR's views. The EU asylum acquis acknowledges UNHCR's supervisory responsibility, and recognises UNHCR's independent role, both in assisting applicants and states. See for example, Article 21 of the Procedures Directive, and Recital 15 of

[1] ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011, 30696/09.

the Qualification Directive which indicates that "Consultations with UNHCR may provide valuable guidance for Member States when determining refugee status ..."

3. In light of UNCHR's acknowledged authority, independence and expertise, and given the recognition of its role in the relevant EU legislation itself, I would respectfully submit that UNHCR's views are entitled to respect before this Court.

4. May I now move onto Questions 2 to 4. Our core submission is this:

> If there is a real risk that the responsible member state under Art 3(1) Dublin Regulation cannot guarantee the fundamental rights of an asylum applicant, then (a) the sending state cannot by transferring the individual discharge its own obligations towards that applicant and (b) must instead accept responsibility for determining the claim, which Art 3(2) Dublin Regulation enables it to do.

We make the following seven arguments in this first part in support of this core submission.

5. **Our first argument** concerns the primacy of fundamental rights. As the Court has heard, the Dublin Regulation, as secondary EU legislation, must be read as subject to fundamental rights, not the other way around.

6. **Second,** as the Court has also heard, the Dublin Regulation is intended to promote, not undercut, the fundamental rights of asylum-seekers by providing for one single and effective determination of the claim.

7. It follows – and this is **our third argument** – that the duty of sincere co-operation and solidarity between Member States cannot lead to a conclusive presumption of safety. Nor can it justify the exclusion of effective judicial protection by the courts of Member States.

(1) As you have heard, the principle of effective judicial protection of EU rights, let alone fundamental rights, is itself derived from the duty of sincere co-operation.

(2) Moreover, as this Court held in *Petrosian*[2] at §48, justice cannot be sacrificed for the sake of efficiency under the Dublin Regulation.

(3) As to the Commission's power to bring infringement proceedings, that was never an answer to the doctrine of direct effect, and is no answer now. The Commission's power is complementary to the right of effective judicial protection.

Nor does Protocol 24 assist. It is concerned with persecution of a Member State's own nationals, rather than the fundamental rights of third country nationals. Even then, it stops short of a conclusive presumption. Protocol 24 should not be extended by analogy to the present context because it is inconsistent with Art 3 of the Refugee Convention, an Article which is non-reservable (under Art 42 of the Refugee Convention). And of course compliance with the Refugee Convention is a condition of EU competence to legislate in asylum matters.

8. **Our fourth argument** is that the duty of co-operation among Member States takes its place within the overarching framework of respect for fundamental rights, and certainly does not displace or dilute them. We accept that the duty of co-operation justifies a <u>rebuttable</u> presumption of compliance, but no more than that. The presumption may be rebutted as follows.

(1) In general, the burden of proof rests <u>initially</u> on the individual. He must raise a claim that the country is non-compliant with fundamental rights. If he doesn't do so, the Member State can in general transfer.

(2) We say "in general" because where there is reliable evidence of non-compliance that is known, or ought to have been known, by a transferring Member State, that evidence will rebut the presumption of compliance by itself. It will shift the burden onto the Member State to verify the position and prove compliance with

[2] ECJ, *Petrosian*, 29 January 2009, Case C-19/08.

fundamental rights in the receiving Member State, by full and proper reasons with full and proper disclosure.

(3) In this way the burden is shared. The concept of a shared burden is particularly important given the inherent vulnerability of asylum-seekers as a class, as recognised by the ECtHR in *MSS*[3], and given the difficulties that asylum-seekers will have in marshalling evidence. There will typically be a stark imbalance of resources and knowledge as between the Member State and the individual.

(4) Moreover, a shared burden is the approach of the ECtHR in *MSS*[4]:

> (§352) The Court considered that because "the general situation was known to the Belgian authorities … the applicant should not be expected to bear the entire burden of proof." And that
>
> (§359) "... it was in fact up to the Belgian authorities ... not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to <u>first verify</u> how the Greek authorities applied their legislation on asylum in practice."

9. **Our fifth argument** concerns the standard of proof. UNHCR submits that this should be the familiar standard of "substantial grounds for believing there to be a real risk". Real risk is the governing criterion. We note that Belgium supports this approach. But a number of Member States contend for a much higher standard, a threshold of exceptionality and manifest gross breach on the basis of compelling or incontrovertible evidence. They have based that contention upon the duty of sincere co-operation. But that duty does not require such a demanding standard of proof. It gives rise to a rebuttable presumption of compliance but no more, as I have explained.

10. In any event the contention for a higher standard of proof is contrary to principle.

    a. The standard of substantial grounds for a real risk has been embedded in the case law of the ECtHR, at least since

[3] ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011, 30696/09.
[4] Ibid.

Soering[5] was decided over two decades ago. Moreover, the ECtHR considering Dublin returns, in *TI*[6], *KRS*[7], *MSS*[8] has continued to apply that standard of proof; in *MSS*[9] it rejected the call by Belgium for "convincing" demonstration of risk (§326) and by the UK for a situation of wholesale exceptionality (§331).

[EU law cannot confer lesser protection than the ECHR where the fields of application are the same. See the *Bhosphorus*[10] ruling, and now Art 52 of the Charter.]

b. The Qualification Directive lays down the same standard in Art 2(e), and Art 19.2 Charter speaks of a "serious risk".

c. Nor is there anything to suggest that an individual must show a risk personal to himself rather than to a class to which he belongs, for reasons which the Claimant has set out in his speech.

d. Finally, general reports will suffice where they show real risks of breaches of fundamental rights in respect of a class of persons of which the individual is a member. *MSS*[11] provides conclusive support for this - a leading judgment from the Belgian courts had required personal evidence (§150). The ECtHR disagreed at §359. That surely accords with common sense. Anything else would be elevate form

[5] ECtHR, *Soering v United Kingdom*, 7 July 1989, 14038/88.
[6] ECtHR, *T.I.v United Kingdom*, 7 March 2000, 43844/98.
[7] ECtHR, *K.R.S. v United Kingdom*, 2 December 2008, 32733/08.
[8] ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011, 30696/09.
[9] Ibid.
[10] ECJ, *Bhosphorus*, 30 July 1996, C-84/95.
[11] ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011, 30696/09.

(the *nature* of the report) over substance (what the report *in fact* shows).

11. **Our sixth argument** is that, in circumstances where transfer is precluded, the Member State must accept responsibility for the claim. Limbo is not permitted for two reasons – first it is contrary to the objectives of the Dublin Regulation and second, it is contrary to the fundamental right to dignity and to asylum. As Switzerland accepts, in these circumstances, the discretion in Art 3(2) becomes a duty.

12. We respectfully disagree with Germany where the Federal Government doubts the existence of the right to asylum. UNCHR makes three points.

    a. First, it is clear that Art 18 of the Charter recognises a right to asylum. The right is based upon the modern constitutional traditions of Member States, upon the Refugee Convention and upon Art 78 TFEU. The right is given specific expression by the asylum Directives. But it cannot be reduced to those instruments – secondary law, stipulating <u>minimum standards,</u> cannot govern the scope of a general principle and a fundamental right.

    b. As Advocate General Madouro said in *Elgafaji*[12] at §21 "The Qualification Directive pursues the objective of developing a fundamental right to asylum which follows from the general principles of Community law which, themselves, are the result of constitutional traditions common to the Member States …".

[12] Opinion of Advocate General Maduro, *Elgafaji*, 9 September 2008, C-465/07.

c. Second, the travaux show that the weaker phrase "right to seek asylum" was rejected and the existing text – a right to asylum - was adopted. See Dr. Gil-Bazo's Article at Annex 21 of our [written] submissions, approved by Judge Lenaerts writing extra-judicially.

d. Third, the Qualification Directive at Recital 10 speaks of the "right to asylum of applicants and their accompanying family members" making it clear that it is a right of individuals to receive asylum - rather than a prerogative of States to grant it. Again Judge Lenaerts shares this view.

13. UNCHR submits that the right to asylum under Art 18 embraces the following elements (a) access to fair and efficient asylum procedures (with proper interpreters and trained determining personnel, and access to representative groups including the UNHCR), and an effective remedy (with appropriate legal aid); (b) treatment in accordance with adequate reception and (where necessary) detention conditions and (c) the grant of asylum in the form of refugee or subsidiary protection status when the criteria are met. The right thus overlaps with Art 1 and Art 47, as well as Art 4 and 19(2), but is not to be subsumed into those rights; nor are they to be subsumed into Art 18 (contrary to the European Commission's approach).

14. **The seventh and final argument** concerns the question of when transfer is precluded. UNHCR submits that a real risk of a breach of fundamental rights, including (but not limited to) serious breaches of the minimum standards laid out in the EU Asylum Directives, will preclude transfer.

15. UNHCR accepts that not every breach of every minimum standard in the Directives will suffice. But there is no basis for the German Govt's view that breaches of secondary legislation are completely irrelevant.

16. A breach may be serious in three ways:

a. First, because of the general importance of the minimum standard
b. Second, because of the nature, basis or degree of the breach;
c. Third, because of the impact on the individual.

17. May I give the following examples in our first category of seriousness - which concern the importance of the standard in question.

i. Consider mandatory detention programmes, other than where justified as necessary, for limited periods of time in appropriate conditions, or consider detention solely because the individual has claimed asylum.
[Procedures Directive 18) [DIGNITY ASYLUM IDT];
ii. Consider material reception conditions that do not ensure protection of health and subsistence
[Reception Directive Art 13(2) – DIGNITY, ASYLUM]
iii. Consider excessively short time frames in accelerated procedures, precluding the possibility of proper scrutiny
[ASYLUM]
iv. Consider non-suspensive procedures (Art Procedures Directive) or remedies (Art 47 Charter)
[ASYLUM; JUDICIAL PROTECTION]

18. Examples in our second category of seriousness - which concern the nature, basis or degree of the breach of the minimum standards, are as follows

i. consider the duty to give asylum seekers identity cards within three days - Reception Directive Art 6. If the Member State were doing that after 4 days, that would not preclude transfer. But what if the Member State simply wasn't doing that at all, with all the attendant risks for the safety of the applicant?
[DIGNITY ASYLUM]

ii. or consider a discriminatory withdrawal of material reception conditions
[DIGNITY EQUALITY]

iii. or consider a combination of cumulative breaches - reduced reception conditions (sufficient to ensure dignity) BUT with accelerated procedures

19. Our third category of seriousness concerns the impact on the individual. Consider

i. absence of emergency health care for a traumatised or injured claimant –
[Reception Directive Art 15 DIGNITY ASYLUM]

ii. the omission of a personal interview in the case of an illiterate applicant
[Procedures Directive Art 10]

In all these circumstances UNHCR would submit that transfer would be precluded.

20. I would like to end by saying something about the Commission's approach to this question. The Commission rightly concludes in its written observations that Art 3(2)

of the Regulation requires a Member State to take responsibility where there is a serious risk that the Member State otherwise responsible will violate the minimum standards necessary to ensure effective access to the asylum process. However, in UNHCR's view, the Commission's approach is overly narrow.

a. In particular, the Commission wrongly subsumes the inviolable right to dignity into the right to asylum. Yet both the Qualification Directive and Reception Directive are intended to promote both Art 1 and 18.

b. Further, the Commission submits that "a balance must be struck between the rights of the applicant not to be exposed to treatment in a Member State in which his right to asylum is jeopardised and that of the other Member States to insist on the normal operation of the Dublin system." With respect, there is no room for such a balance. A breach of the right to asylum is breach of primary law which cannot be "balanced" against the "normal" operation of the Dublin Regulation.

21. In short – and to end at my beginning - the issues raised by these references fall to be resolved in accordance with first principles – secondary legislation must be interpreted and applied so as to give full protection for fundamental rights.

END OF PART 1

PART 2

1. Mr President, Members of the Court, Advocate General, with the Court's permission I wish to turn now to the factual element.

A. Updated Factual Information on Greek Asylum System

2. UNHCR describes the asylum situation in Greece as a humanitarian crisis. It is an extreme case that in UNHCR's respectful submission easily meets the burden, the standard, and the test, for applying Article 3(2) of the Dublin Regulation that has just been outlined. It meets those tests by some considerable distance. Most asylum-seekers receive no assistance and many, including women and children, live on the streets. In UNHCR's view the Greek asylum system does not, at present, adequately protect asylum-seekers, including Dublin transferees, against return to territories where there is a risk of persecution or serious harm. This assessment is largely based on the fact that even in cases where individuals manage (against the odds) to have access to the asylum procedure in Greece, they are not afforded a fair and effective examination of their claims, and there is an unacceptable degree of risk that persons entitled to protection are not identified as being in need of international protection and risk onward removal to danger. Lack of protection from refoulement is related to, and compounded by, inadequate reception and detention conditions for asylum-seekers that do not guarantee the standard of treatment foreseen under the 1951 Convention and under EU law.

3. The point has been made in the UK's written submission (paragraph 59), and may be made by others today, that there is now a Greek action plan to overcome difficulties. This plan, it is said, may be rapidly and effectively implemented, yet this assumes that all of the conditions are in place for its swift implementation in practice – conditions which, unfortunately, have not as yet been achieved. In UNHCR's view, this underestimates the considerable time and resources that are yet required before the necessary reforms can be achieved, and an effective asylum system brought into full operation.

4. In particular:

- In relation to **access to asylum procedures**, asylum-seekers in Greece face major obstacles. At present, no written information is given to asylum-seekers on arrival, and interpretation services are not generally available at land, air or sea borders. In-country applications can in principle be lodged at all Police Directorates but the requirement for a fixed address, in addition to the other barriers (lack of reliable information, lack of interpreters and lengthy delays) continue to pose serious obstacles to access to the asylum procedure.

- In relation to **asylum decision-making**, recognition rates for all nationalities remain far below EU national averages. In 2009, less than one percent of cases decided at first instance were granted refugee status or subsidiary protection. This remained exceptionally low in 2010, at just over 1%. In 2010 the protection rates for Afghans was 8.6 % (compared to 45% average in five EU states with highest numbers of claims); for Somalis was 12.5 % (compared to 70%) and for Iraqis was 9 % (compared to 51%).

- There has been some progress made in the first and second instance decision-making processes, and recognition rates are expected to be considerably higher in 2011. At a press conference on 18 May 2011, the Minister of Citizen Protection stated that the recognition rate for appeals in the second instance backlog was over 30%. However, official statistics on recognition rates at first and second instance have not as yet been published. The reality therefore remains that at present the number of people able to receive protection is miniscule compared to the thousands of pending applicants and appellants (the estimated backlog of appeals is 47,000). In addition, the criteria for selecting and prioritising pending claims remain unclear. Thus it is not certain that any rejected applicant will have his/her appeal dealt with in any reasonable timeframe in the short to medium term. At both first and second instance, very significant and basic practical problems remain, such that access to a full and effective asylum determination is not guaranteed.

- In the context of the expulsion procedure, the right to appeal against a deportation order, although provided for by law, is ineffective in the absence of legal aid. While appeals against negative asylum decisions are suspensive - under new legislation which was adopted in late 2010 - the process of challenging expulsion orders consists exclusively of a written procedure with strict deadlines and without automatic suspensive effect at the judicial level. In consequence, it is UNHCR's view that the Greek system does not adequately protect against *refoulement.*

- As regards **reception conditions**, the situation remains very serious. The number of available reception places has not increased since the date of UNHCR's written submission [in January 2011]. Currently, as per the latest official information by the Greek Ministry of Health and Social Solidarity, there are in total twelve reception facilities in Greece, with a total capacity of 780 places (compared to a total of 55,720 persons currently in the asylum procedure). For asylum seekers, the dire reality is that a large percentage of them are in fact homeless and live in destitution in large urban centres.

- At present, children often have to remain in detention for prolonged periods of time. In the Evros region, cases of children in detention facilities living under extremely harsh circumstances and in mixed detention facilities with adults, for periods up to three months, have been reported by UNHCR. Many children abscond from the centres because of the limited type and quality of services available to them. Follow up and care in these cases is extremely difficult, due to problems with the guardianship system.

- In relation to **detention conditions**, the situation remains extremely grave. The detention facilities in the Athens area and elsewhere in Greece are routinely overcrowded, affording extremely poor conditions that continue to fall short of the necessary human rights standards and legal safeguards for detainees. In general, the facilities are ordinary police cells that are not designed to host persons for prolonged periods of time. Civilian staff are basically absent from those facilities.

- Individual arriving in Greece via Turkey are frequently detained in degrading and severely overcrowded conditions. The situation is no better than a year ago, given an increase in the numbers being detained following the deployment of the Frontex-led 'rapid border intervention team' (RABIT). While basic medical care and counselling is more readily available since the deployment of EU-funded mobile teams by the Ministry of Health in March 2011, the basic conditions have not substantially improved.

- There have been some improvements at the detention conditions at Athens International Airport, largely due to a reduction in numbers being detained there, but these improvements do not alter the overall disturbing picture.

5. For the reasons cited above, it is UNHCR's view that the Greek system overall does not protect adequately the right to asylum and the right to human dignity. It is UNHCR's view that the Greek situation is evidently an extreme one, which readily meets the burden, the standard, and the test, for triggering Article 3(2) of the Dublin Regulation, by some considerable distance.

6. The current Greek reform efforts are supported by UNHCR through its practical engagement in the process. However, the implementation of these reforms will take further extensive time, effort, and financial and other resources.

7. It is against this background that UNHCR upholds its position that transfers to Greece under the Dublin Regulation should not take place until such time as these deficiencies are addressed.

B. Article 3(2) of the Dublin Regulation and Article 51 of the Charter

8. In the submission of UNHCR, a decision under Article 3(2) of the Dublin Regulation falls within the scope of EU law for the purposes of Article 51 of the Charter. In common with most other interveners, UNHCR relies in this connection on Article 6(1) TEU and the Explanations in relation to Article 51. It follows that, in making such a

decision, a Member State must comply with fundamental rights. This is a separate and independent obligation to that which applies to the receiving Member State, and is wholly consistent with the central underlying purpose of the Dublin Regulation.

9. A decision to invoke Article 3(2) brings with it an obligation to take responsibility for the asylum claim and to ensure effective access to the asylum process in accordance with the right to asylum and the Reception, Qualification and Procedures Directives. This is manifestly a process that falls within the scope of EU law. It is not an opt-out provision, but a discretion that is fundamental to the operation by Member States of the scheme of the Regulation, which provides for cooperation between Member States with a view to sharing the examination of applications for asylum between them, consistent always with protection of fundamental rights in an asylum context. To interpret it otherwise would be to undermine the purpose and objectives of the Common European Asylum System, and, in leaving national discretion unconstrained by general principles and fundamental rights, would give rise to inconsistencies and possible arbitrariness in the application of EU asylum law.

10. For these reasons, and the reasons advanced in its written submission, UNHCR submits that what may be termed the absolutist position of Ireland, UK, and Italy on this point should be rejected. The position of Belgium, although nuanced, is hardly of comfort to affected asylum seekers, as, according to Belgium, it is only when a Member State executes the transfer following a refusal to invoke article 3(2) that fundamental rights must be respected. This leaves the key exercise of discretion untouched, and places the asylum seeker in a precarious procedural position in seeking any preventive remedy prior to his transfer. Similarly, the converse position of the Czech Republic, which says that a positive decision to take responsibility under Article 3(2) will fall within the scope of EU law but a decision to decline to do so will not, lacks coherence and should be rejected.

11. It follows in the submission of UNHCR that a decision under Article 3(2) of the Dublin Regulation falls within the scope of EU law. As such it must be exercised in full

compliance with the obligations deriving from EU law, including the overriding obligation of Member States to protect fundamental rights in an asylum context. This last conclusion is unremarkable, and follows from this Court's established case law, as for example in *Wachauf*[13], *Lindqvist*[14], and *Kadi*[15].

C. Prevention of Indirect Refoulement

12. It follows from all that has been advanced on behalf of UNHCR that in its view respect for the provisions of Articles 18 and 19(2) of the Charter prevent the operation of a conclusive presumption that any State, including a Member State, upholds its obligations under the Dublin Regulation and other related EU instruments.

13. Furthermore, in the submission of UNHCR, any rule of law that excludes judicial scrutiny of transfer decisions for breach of the non-refoulement obligation, where the breach is alleged to arise from chain refoulement, would plainly fall foul of Article 47 of the Charter.

D. Two Aspects Specific to the Irish Reference

14. I wish to turn now to two particular aspects that, although peculiar to the Irish reference and arising from the facts as presented by the Irish High Court, UNHCR believes raise questions of general principle from an evidential viewpoint.

15. The first aspect is the Irish government's position on the standing of the Applicants. According to the Irish government, none of the applicants have standing concerning the conditions applicable to asylum seekers in Greece. In the alternative, it says that the arguments submitted by them are moot. According to the Irish government, the consideration that the applicants had limited or no exposure to the Greek asylum system, and no experience of ill treatment to date, means that they cannot complain about conditions of reception and detention at this remove.

[13] ECJ, *Wachauf*, 13 July 1989, 5/88.
[14] ECJ, *Lindqvist*, 6 November 2003, C-101/01.
[15] ECJ, *Kadi*, 3 September 2008, C-415/05.

16. In the submission of UNHCR, this submission flies in the face of this Court's established case law on anticipated breaches of fundamental rights, which itself reflects the approach of the European Court of Human Rights, and of international human rights law more generally, to cases of anticipated ill treatment. If such an argument were to be accepted, proof of prior experience of ill treatment in the receiving State would be required in all cases. This is clearly not the law, and for good reason, as, in the submission of UNHCR, such a rule of standing would very substantially erode the scope of protection and, in practice, would lead to unworkable and arbitrary differences of treatment of asylum seekers, according to whether or not they had past experience of ill treatment.

17. The second aspect is the question of how it could have been determined that no issues arose under Article 3 ECHR in the cases the subject of the reference. In this regard, and with the greatest respect to the referring Court, it is very difficult to understand how such a determination can already have been made in these cases. The reasoning of the High Court on this point appears to have been influenced by its approach and conclusions in separate challenges to proposed transfers to Greece, the subject of a separate and prior judgment on the position prior to the entry into force of the Charter. Furthermore, all of the Irish cases forming part of this reference are still at an early stage of the judicial review process, and none has yet been the subject of a full substantive hearing on the evidence.

18. More importantly, in the submission of UNHCR, it is very difficult to see how such an assumption or finding could have been arrived at having regard to the very serious cumulative objective concerns arising from the Greek asylum system. The up to date evidence and assessment of UNHCR indicates, regrettably, that very serious concerns of treatment and conduct contrary to Article 3 ECHR continue to afflict the operation of the asylum system in Greece.

19. Ultimately, the manner in which this issue is treated will be a matter for the domestic court to resolve following this reference, but as a matter of principle it

appears incongruous that any national court properly appraised of the current difficulties in Greece could approach cases of proposed transfer, in advance of hearing the specific evidence, on the basis that no issue under Article 3 ECHR can arise. In this regard, it could be no answer to the duty of a Member State to guard against anticipated treatment contrary to Article 3 ECHR that it was nonetheless under a duty to assess the danger of a breach of general principles of EU law including Article 18 and 19(2) of the Charter, cf. Case C-465/07, *Elgafaj*[16]*i.*

UNHCR
28 July 2011

[16] ECJ, *Elgafaj*, 17 February 2009, C-465/07.