



UNHCR Statement on the reception conditions of asylum-seekers under the Dublin procedure

Issued in the context of a reference for a preliminary ruling addressed to Court of Justice of the European Union by the French Council of State lodged on 18 April 2011 – CIMADE and GISTI v. Ministry of the Interior (Case C-179/11).

1. Introduction

1.1. The French Council of State has requested a preliminary ruling from the Court of Justice of the European Union (the Court) concerning the applicability of the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers (Reception Conditions Directive)¹ to asylum-seekers awaiting the determination of the State responsible for examining their asylum claims under the Council Regulation 343/2003/EC (Dublin II Regulation).²

1.2. The questions posed by the French Council of State are as follows:³

(1) *Does Council Directive 2003/9/EC of 27 January 2003 guarantee the minimum reception conditions to which it refers to applicants in respect of whom a Member State in receipt of an application for asylum decides, under Council Regulation (EC) No 343/2003 of 18 February 2003, to refer a request to another Member State which it deems to have jurisdiction to examine that asylum application, throughout the duration of the procedure for taking charge of them or for taking them back by that other Member State?*

(2) *If the answer to that question is in the affirmative:*

(a) *Does the obligation, incumbent on the first Member State, to guarantee the minimum reception conditions cease at the moment of the acceptance decision by the State to which the referral was made, upon the actual taking charge or taking back of the asylum seeker, or at some other date?*

(b) *Which Member State should thus assume the financial burden of providing the minimum reception conditions during that period?*

¹ Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers* [OJ L 31/18, 6.02.2003], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF>.

² Council of the European Union, *Council Regulation 343/2003/EC 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* [OJ L 50/1, 25.02.2003], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0343:EN:NOT>.

³ C-179/11, *Reference for a preliminary ruling from the Conseil d'État (France) lodged on 18 April 2011 — CIMADE, GISTI v. Ministre de l'Intérieur, de l'Outre-Mer, des Collectivités Territoriales et de l'Immigration* [OJ C 186/13, 25.06.2011], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:186:0013:0014:EN:PDF>.

1.3. This request for a preliminary ruling represents a critical opportunity for the Court to clarify whether asylum-seekers under the Dublin II procedure⁴ are entitled to benefit from the minimum reception conditions of the Reception Conditions Directive and thereby to remedying the material difficulties that many of these people face as a result of the partial application of that instrument in certain Member States.⁵ In so doing, the Court will also contribute to addressing a source of disparities in practice across the EU.⁶

1.4. The Office of the United Nations High Commissioner for Refugees (UNHCR) has a direct interest in this matter, as the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and for seeking permanent solutions to the problem of refugees.⁷ According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto”.⁸ This supervisory responsibility is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees (1951 Convention)⁹ and Article II of the 1967 Protocol relating to the Status of Refugees (1967 Protocol).¹⁰

1.5. UNHCR’s supervisory responsibility has been reflected in European Union law, including by means of a general reference to the 1951 Convention in Article 78 (1) of the

⁴ For the purpose of that Statement, the expression “Dublin II procedure” designates the procedure to determine the State responsible for the examination of the asylum claim under the Dublin II Regulation and until the person concerned is effectively on the territory of that State.

⁵ This has been documented by a number of reports referred to in the present Statement. See below footnote 6. Furthermore, it should be pointed out that even when asylum-seekers under the Dublin II procedure benefit from the standards set out in the Reception Conditions Directive, they often still face, in practice, the same difficulties as those encountered by other asylum-seekers owing to the overall lack of satisfactory reception conditions. See, Transnational Advisory and Assistance Network for Asylum-Seekers under a Dublin Process, *Final Report*, December 2009-May 2011, p. 12, at: <http://www.dublin-project.eu/dublin/Dublin-Project>.

⁶ Odysseus Academic Network for Legal Studies on Immigration and Asylum in Europe, *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States*, October 2006, at: <http://www.unhcr.org/refworld/docid/484009fc2.html>; European Commission, *Report from the European Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers*, 26 November 2007, at: <http://www.unhcr.org/refworld/docid/48abd56cd.html>; Transnational advisory and assistance network for asylum-seekers under a Dublin process, *Final Report, December 2009-May 2011*, p. 12. It should be noted that the European Commission, in its recast proposals for the Dublin Regulation and Reception Conditions Directive, has also proposed insertion of a new recital in each instrument which would clarify that entitlements under the Reception Conditions Directive are applicable to asylum-seekers in the Dublin system.

⁷ 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/3ae6b3628.html>.

⁸ *Ibid.*, paragraph 8(a).

⁹ 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>. According to Article 35(1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of th[e 1951] Convention.”

¹⁰ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

Treaty on the Functioning of the European Union (TFEU),¹¹ as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy.”¹² Secondary European Community legislation also emphasizes the role of UNHCR. For instance, Recital 15 of 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 (Qualification Directive) states that consultations with UNHCR “may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention”.¹³ The supervisory responsibility of UNHCR is specifically articulated in Article 21 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (Asylum Procedures Directive).¹⁴

1.6. While the 1951 Convention does not mention asylum-seekers explicitly, several of its provisions are applicable to them as explained below.¹⁵ Moreover, the lack of reception conditions may affect the access of the persons concerned to a fair and efficient asylum procedure¹⁶ and their ability to submit and argue their claim under that Convention. Finally, the Reception Conditions Directive applies to applications for asylum defined as applications for protection under the 1951 Convention.¹⁷

1.7. Against this background, Part 2 of this Statement addresses the need to interpret the Reception Conditions Directive in accordance with the 1951 Convention, while Part 3 outlines the interactions between that Directive and the Charter of Fundamental Rights of the European Union (the Charter).¹⁸ Part 4 explains UNHCR’s views on the legal issues arising from the questions posed to the Court by the French Council of State.

¹¹ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, [OJ C 115/47, 9.05.2008], at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

¹² European Union, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340/134, 10.11.1997] at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

¹³ 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* [OJ L 304/12, 30.09.2004], Recital 15, at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF>.

¹⁴ 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* [OJ L 326/13, 13.12.2005], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>. Article 21(c) in particular obliges Member States to allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.”

¹⁵ See below paragraphs 2.2 and 4.1.3.

¹⁶ UNHCR, *Reception Standards for Asylum-Seekers in the European Union*, July 2000, p. 3, at: <http://www.unhcr.org/refworld/docid/3ae6b3440.html>.

¹⁷ Reception Conditions Directive, Article 2(b).

¹⁸ European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, [OJ C 364/1, 18.12.2000], at: <http://www.unhcr.org/refworld/docid/3ae6b3b70.html>.

2. The Reception Conditions Directive and the 1951 Convention

2.1. The TFEU creates an explicit obligation for EU secondary legislation on asylum to conform to the 1951 Convention.¹⁹ The primacy of the 1951 Convention is further recognized in European Council Conclusions and related Commission policy documents, which affirm that the Common European Asylum System is based on the “full and inclusive application” of the 1951 Convention.²⁰ It follows that the transposition of the Reception Conditions Directive into the national legislation of EU Member States, all of which are States Parties to the 1951 Convention and therefore bound by its obligations, must also be in line with the 1951 Convention.²¹

2.2. As mentioned above,²² the 1951 Convention, complemented by the 1967 Protocol, does not explicitly mention or address the treatment of asylum-seekers. However, there is nothing in the 1951 Convention, which says that its provisions only apply to refugees formally recognized through a national asylum procedure. Recognition of refugee status does not make the person a refugee but declares him or her to be one.²³ In fact, key provisions of the 1951 Convention apply before a formal recognition of refugee status. If this were not the case, important provisions of the 1951 Convention, notably Article 33 setting out the principle of *non-refoulement* and Article 31 providing that refugees generally should not be penalized for irregular entry, would be rendered meaningless. The 1951 Convention therefore remains an important point of departure for

¹⁹ TFEU, Article 78(1) provides that the policy on asylum “must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”.

²⁰ Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, paragraph 13, at:

http://www.europarl.europa.eu/summits/tam_en.htm?redirected=1; Council of the European Union, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13 December 2004, 2005/C 53/01, of *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13 Dec. 2004, paragraph 1, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF>; European Commission, *Commission Green Paper on the Future Common European Asylum System (COM(2007) 301 final)*, 6 June 2007, COM(2007) 301 final, paragraph 1, at:

http://ec.europa.eu/justice_home/news/intro/doc/com_2007_301_en.pdf; European Commission, *Policy Plan on Asylum: an integrated approach to protection across the EU*, COM(2008) 360, 17 June 2008, part 1.1, at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>. The Policy Plan recognizes the fundamental role played by the 1951 Convention in the existing Treaty provisions and those resulting from the Lisbon Treaty. See also Council of the European Union, *European Pact on Immigration and Asylum*, 24 September 2008, 13440/08, p. 11, at: <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf>, in which the European Council reiterates that “any persecuted foreigner is entitled to obtain aid and protection on the territory of the European Union in application of the Geneva Convention [...]”

²¹ For UNHCR’s remarks on the Reception Conditions Directive, see: UNHCR, *Comments on the European Commission Proposal for a Council Directive Laying Down Minimum Standards on the Reception of Applicants for Asylum in Member States (COM (2001) 181 final)*, 1 July 2001, at: <http://www.unhcr.org/refworld/docid/3c6a6ce14.html>.

²² See above paragraph 1.6.

²³ For an explanation of the declaratory nature of the refugee status determination UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, re-edited 1992, paragraph 28, at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

considering certain standards of treatment for the reception of asylum-seekers, not least because asylum-seekers may well be refugees.

2.3. In general, the Conclusions of UNHCR's Executive Committee,²⁴ which includes EU Member States, as well as the Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) and subsequent Guidelines on International Protection²⁵ issued by UNHCR, should also be taken into account in interpreting the provisions of the EU asylum *acquis*. These documents provide authoritative guidance on the interpretation and application of provisions of the 1951 Convention.

3. The Reception Conditions Directive and the Charter

3.1. Respect for fundamental rights, including the right to dignity and the right to asylum²⁶ has long been recognized as a general principle of EU law.²⁷ Such general principles occupy the same position as Treaty provisions in the hierarchy of EU law, and govern the validity and interpretation of secondary European Community legislation, as well as national implementing measures.

²⁴ The Executive Committee of the High Commissioner's Programme (ExCom) was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions. Its terms of reference are found in United Nations General Assembly Resolution 1166(XII) which states *inter alia* that it is "to advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office." This includes issuing Conclusions on International Protection (often referred to as "ExCom Conclusions"), which address issues in the field of refugee protection and serve as "international guidelines to be drawn upon by States, UNHCR and others when developing or orienting their policies on refugee issues". See UNHCR, *General Conclusion on International Protection*, 13 October 1989, No. 55 (XL) - 1989, paragraph (p), at: <http://www.unhcr.org/excom/EXCOM/3ae68c43c.html>. ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 85 States are Members of the Executive Committee.

²⁵ UNHCR issues "Guidelines on International Protection" pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook and provide authoritative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

²⁶ Advocate General Maduro states that the "fundamental right to asylum (...) follows from the general principles of Community law", Opinion of Advocate General Poiares Maduro in case C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, 9 September 2008, paragraph 21. The fact that the right to asylum in EU law preceded the Charter is also clarified by the Explanations to the Charter of Fundamental Rights of the European Union, which provide that this right has been based on Article 63 of the Amsterdam Treaty. *Explanations relating to the Charter of Fundamental Rights* [OJ C 303/17, 14.12.2007], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>.

²⁷ *Kadi v. Council of the European Union and Commission of the European Communities*, 3 September 2008, C-402/05 P and C-415/05, paragraph 283. See also T. Tridimas, *The General Principles of EU Law*, Oxford European Community Law Series, 7 June 2007.

3.2. With the coming into force of the Lisbon Treaty on 1 December 2009 which establishes that the legal nature of the Charter's provisions is that of primary legislation within the Union's legal order,²⁸ this position has been reinforced.

3.3. Article 51 of the Charter provides that the provisions of the Charter "are addressed to ... the Member States only when they are implementing Union law". This is explained further in the Explanations Relating to the Charter, which constitute a source of interpretation of the Charter as explicitly required by Article 6(1) of the Treaty on the European Union, in relation to Article 51.²⁹ The Charter is intended to bind the Member States in the same circumstances as those in which the Court has held that the general principle of protection of fundamental rights binds Member States, whenever a Member State acts within the scope of EU law.

3.4. Accordingly, the Member States are bound to respect the fundamental rights of asylum-seekers when they are applying the instruments of the EU asylum *acquis*, including the Reception Conditions Directive and the Dublin II Regulation. Both instruments expressly stipulate that they respect fundamental rights.³⁰

3.5. More particularly, the Reception Conditions Directive further recites that "it seeks (...) to promote the application of Articles 1 and 18 of the said Charter".³¹ Therefore besides the general commitment to respect fundamental rights, the Reception Conditions Directive set out as its very purpose the promotion of two specific rights of the Charter, namely the right to dignity and the right to asylum.

3.6. Accordingly, it can be argued that the minimum standards of the Reception Conditions Directive further elaborate the content of these two rights for asylum-seekers in the EU.

4. UNHCR's views on the issues raised by the questions referred to the Court

4.1. The obligation to provide adequate reception conditions to all asylum-seekers under international refugee and human rights law

4.1.1 States are responsible for respecting and ensuring the human rights of everyone on their territory and within their jurisdiction. International and regional human rights law, as well as applicable refugee protection standards, are therefore relevant in the context of defining what constitutes adequate reception standards for asylum-seekers.

²⁸ TFEU, Article 6(1).

²⁹ See above footnote 26. In relation to Article 51, the Explanations provide as follows: "As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493)..." [Emphasis added].

³⁰ Reception Conditions Directive, Recital 5, and Dublin II Regulation, Recital 15.

³¹ Reception Conditions Directive, Recital 5.

4.1.2 UNHCR submits that, further to the general considerations outlined above,³² many of the 1951 Convention provisions apply to asylum-seekers.

4.1.3 The benefits provided under the various provisions of the 1951 Convention are structured so as to establish different levels of applicability depending on the nature of the refugee's sojourn or residence in the country. The rights which apply to refugees physically in or lawfully in the territory of the concerned State are applicable to asylum-seekers including Articles 3 (non-discrimination), Article 4 (Freedom of religion), Article 7(1) (Exemption from reciprocity), Article 8 (Exemption from exceptional measures), Article 13 (Movable and immovable property), Article 18 (Self-employment), Article 20 (Rationing), Article 22 (Public education), Article 26 (Freedom of movement), Article 27 (Identity papers), Article 31 (Non penalisation of refugees unlawfully in the country of refuge), Article 32 (Expulsion) and Article 33 (*Non-refoulement*).

4.1.4 The standards of treatment required by the 1951 Convention are therefore a useful starting point in the context of defining reception standards for asylum-seekers from the perspective of international refugee law.

4.1.5 Furthermore, as underlined by the ExCom Member States, applicable international human rights law and standards play a central part in the development and implementation of reception policies.³³ There is a minimum core content of human rights, which applies to everyone in all situations. Article 25 of the Universal Declaration of Human Rights (UDHR) recognizes the right of everyone to a standard of living adequate for his or her health and well-being and that of his or her family, including food, clothing, accommodation and medical care and necessary social services. More specifically, the International Covenant on Economic, Social and Cultural Rights (ICESCR) spells out basic principles that help set out the framework for reception standards in the area of economic and social rights.³⁴ An adequate standard of living includes the provision of food, clothing and accommodation to those asylum-seekers who are unable themselves to secure these.³⁵ The International Covenant on Civil and Political Rights (ICCPR) likewise provides standards relevant to reception conditions for asylum-seekers, namely protection against arbitrary detention, the prohibition on inhuman or degrading treatment, and the right to recognition everywhere as a person before the law. Both the ICESCR and the

³² See above paragraph 2.2.

³³ UNHCR, *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 October 2002, No. 93 (LIII) - 2002, at: <http://www.unhcr.org/refworld/docid/3dafdd344.html>.

³⁴ See ICESCR General Comment No. 3 (E/C.12/1990/SR, 1990) which provides a broad definition of minimum standard: "A State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant." See also ICESCR, General Comment No. 19, (E/C.12/GC/19, 2008), paragraph 38 which states: "Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards."

³⁵ Article 11(1) of the ICESCR guarantees the right to an adequate standard of living.

ICCPR prohibit discrimination on the grounds, *inter alia*, of national origin or other status.³⁶ In principle, human rights apply irrespective of immigration or other status.³⁷

4.1.6 In Europe, the human rights of asylum-seekers are also protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)³⁸, which applies to everyone within the jurisdiction of the Contracting States.³⁹ Reception conditions must therefore be consistent, *inter alia*, with provisions relating to the prohibition of inhumane or degrading treatment (Article 3), the right to liberty (Article 5), the right to privacy and family life (Article 8), and the right to an effective remedy (Article 13). Importantly, the Grand Chamber of the European Court of Human Rights (ECtHR) recently held, taking into account, *inter alia*, the vulnerability of asylum-seekers, that their situation of material destitution and the prolonged uncertainty resulting from the State's failure to provide them with living conditions respectful of their dignity constituted a violation of Article 3 ECHR.⁴⁰

4.1.7 In the EU, UNHCR recalls that the Charter also provides for a series of fundamental rights, many of which are particularly relevant for the purpose of assessing the adequacy of reception conditions for asylum-seekers. In this regard, Articles 1 (human dignity), 4 (prohibition on inhuman or degrading treatment or punishment), 6 (liberty and security of person), 7 (family and private life), 8 (protection of personal data), 18 (right to asylum), 19 (protection against arbitrary expulsion and *non-refoulement*), 21 (non-discrimination), 24 (rights of the child) and 47 (right to an effective remedy) contain substantive requirements concerning the treatment of asylum-seekers. These rights are applicable where the States concerned applies the Dublin II Regulation. For instance, in the present context, Article 1 affirming that human dignity is inviolable and it must be respected. It has the effect of requiring the receiving State to grant asylum-seekers access to adequate reception conditions, including basic subsistence, to ensure respect for human dignity.

³⁶ See Article 2(2) of the ICESCR and Article 2(1) of the ICCPR. See also, ICESCR, General Comment No. 20, *Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) (E/C.12/GC/20, 2009)*, paragraph 30, which states: "The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."

³⁷ United Nations Human Rights Committee, General Comment No. 15, *The Position of Aliens under the Covenant*, UN Doc. CCPR/C/21/Rev.1 (19 May 1989), paragraph 1.

³⁸ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, at: <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>.

³⁹ *Ibid.*, Article 1.

⁴⁰ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, paragraphs 232, 233 and 263, at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

4.2. The applicability of the Reception Conditions Directive to asylum-seekers under the Dublin II procedure

4.2.1 UNHCR submits that, in the light of its wording coupled with its object and purpose, the Reception Conditions Directive applies to asylum-seekers under the Dublin II Regulation. This interpretation is further confirmed in light of the other instruments of the EU asylum *acquis* and would be compatible with international human rights and refugee law obligations.

4.2.2 First, Article 3(1) of the Reception Conditions Directive clearly indicates that it shall apply to “all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum seekers”. In the light of the definition of an “application for asylum” provided for in Article 2(b), there is nothing to suggest that persons in the Dublin II procedure would be excluded from the scope of the Reception Conditions Directive. On the contrary, the Dublin II Regulation replicates the exact wording of that definition and can only apply where the person concerned has lodged an application for asylum, as unambiguously stated in Article 4(1) of the Regulation. Furthermore, the person concerned is not required to lodge another asylum application upon transfer to the responsible State, unless his/her application is considered to have been withdrawn there. Finally, the condition that the persons concerned must be allowed to remain on the territory as asylum-seekers cannot be interpreted as excluding those under the Dublin II Regulation. According to Article 2(d) of that Regulation and Article 2(c) of the Reception Conditions Directive, asylum-seekers are considered as such as long as a final decision has not been taken on their claim. This, combined with the obligation of the Member States under Article 3(1) of the Dublin II Regulation to examine the asylum application, clearly demonstrates that any decision on the admissibility of the application taken by the Transferring State on the basis of the Dublin II Regulation is irrelevant. Furthermore, Article 2(j) of the Regulation suggests that the duration and the purpose of the visa and the residence authorization issued during the period required to determine the responsible Member State under the Dublin II Regulation may differ from those issued during the examination of an asylum application. However, in both instances, the persons concerned are allowed to remain on the territory of the State in question as asylum-seekers and are considered as such throughout the Dublin II procedure as the terminology of the Dublin II Regulation consistently attests. The above further demonstrates that the Dublin system is merely intended to determine the State responsible for the examination of an asylum claim and that it does not affect the status of the persons concerned as asylum-seekers under EU law.

4.2.3 Secondly, Article 3 of the Reception Conditions Directive only excludes two specific cases from its scope, namely the “requests for diplomatic or territorial asylum submitted to representations of Member States” and the situation where the *Council*

*Directive 2001/55/EC of 20 July 2001*⁴¹ applies. This should therefore be understood as an exclusive list.

4.2.4 Thirdly, in situations where the Member States intended to exclude the persons in the Dublin II procedure from the scope of an instrument of the EU asylum *acquis*, they did so expressly, for example as per Recital 29 of the Asylum Procedures Directive.⁴² This is further confirmed by the corresponding provision in the Dublin II Regulation, which provides that the determination of the responsible State falls outside the scope of the examination of an asylum application.⁴³

4.2.5 Fourthly, the Dublin II Regulation does not contain any provision excluding the persons concerned from the benefit of the Reception Conditions Directive. This is particularly significant as the Dublin II Regulation was adopted after the Reception Conditions Directive. Thus, had there been an intention to exclude applications covered by the Dublin II Regulation from the Reception Conditions Directive's scope, such an exclusion could have been expressed in its explicit provisions.

4.2.6 Fifthly, the Dublin II Regulation does not contain any specific reception conditions, which could prevent the risk of destitution amounting to degrading treatment⁴⁴ during the time that responsibility for the concerned person's asylum claim is being determined.⁴⁵ This is thus regulated by the Reception Conditions Directive. Comprehensive deprivation of reception conditions could result in degrading treatment, even for a limited period. If the period required to determine responsibility becomes protracted and reception is denied during that time, the risk of destitution in conditions amounting to degrading treatment increases, without any safety mechanism in the Dublin II Regulation that could prevent or limit this. This increased danger is not theoretical, given that the Dublin II procedure may last up to several months. In this respect, the ECtHR found in its recent *M.S.S.* ruling that a situation of destitution of several months could amount to degrading treatment.⁴⁶ In this regard, depending on the gravity of the treatment and the degree of vulnerability of the person concerned, the duration may even be irrelevant to conclude that the treatment in question is in breach of Article 3 ECHR.⁴⁷

⁴¹ Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences* [OJ L 212/12, 07.08.2001], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF>.

⁴² Asylum Procedures Directive, Recital 29: "This Directive does not deal with procedures governed by Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national".

⁴³ Dublin II Regulation. Article 2(e).

⁴⁴ *M.S.S. v. Belgium and Greece*, paragraphs 263-264.

⁴⁵ Beside the right to have his/her asylum claim examined, enshrined in Article 3(1), and the right to be informed contained in Articles 3(4) and 4(4).

⁴⁶ *M.S.S. v. Belgium and Greece*, paragraph 263.

⁴⁷ *Rahimi v. Greece*, Application no. 8687/08, Council of Europe: European Court of Human Rights, 5 April 2011, paragraph 86, at: <http://www.unhcr.org/refworld/docid/4d9c3e482.html>.

4.2.7 The deprivation of reception conditions may also infringe other rights, in particular, the right for an asylum-seeker to submit and to argue an asylum claim in a fair and efficient asylum procedure.⁴⁸ Material destitution may also undermine the ability of the person concerned to pursue and to substantiate his/her claim even after the Responsible State has been determined. This has long been acknowledged by the European Commission in its proposal for the Reception Conditions Directive.⁴⁹ In the light of the above, the non-application of the Reception Conditions Directive to the asylum-seekers under the Dublin II procedure would run counter to the purpose of that instrument, which “seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter”.⁵⁰

4.2.8 Equally problematic is the impact of the deprivation of reception conditions on the ability of the person concerned to exercise his/her right to challenge the transfer decision enshrined in Article 19(2) of the Dublin II Regulation. If it is not possible for the person to access basic subsistence and other reception conditions while awaiting the outcome of an appeal against a decision to transfer, s/he may not in practice be in a position to pursue that appeal for its duration.

4.2.9 Finally, the application of the Reception Conditions Directive to persons under the Dublin II procedure would not affect the purpose of that instrument, namely the “rapid processing of asylum applications”.⁵¹ On the contrary, this may even facilitate the overall implementation of the mechanism.

4.3. Setting the boundaries of the Transferring State’s obligation to provide reception conditions to asylum-seekers under the Dublin II Regulation

4.3.1 UNHCR submits that the transferring state’s obligations to provide reception conditions to asylum-seekers under the Dublin II Regulation ceases when the transfer is effectively carried out and that the person concerned finds him or herself at the border or in the territory of the Responsible State. At this point in time the Responsible State becomes responsible for providing reception conditions under the Reception Conditions Directive.

4.3.2 This is derived from the clear wording of Article 3(1) which defines the scope of the Reception Conditions Directive and provides that it shall apply to “to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State”.

⁴⁸ UNHCR, *Comments on the proposal for a recast of the Reception Conditions Directive*, p. 1, at: <http://www.unhcr.org/4a0d6bf86.html>.

⁴⁹ The European Commission states as follows: “However, as the reduction or withdrawal of reception conditions can affect the standard of living of applicants and their ability to effectively pursue procedural guarantees, it is of the utmost importance that decisions on these issues are subject to review”.

⁵⁰ Reception Conditions Directive, Recital 5.

⁵¹ Dublin II Regulation, Recital 4.

4.3.3 The Dublin II Regulation further confirms that the transferring state remains responsible for the reception conditions of the asylum-seeker as long as he/she is in its territory. Article 2(e) restrictively defines the responsibility to examine an asylum application.⁵² Accordingly, it cannot be argued that the determination of the State in charge of such examination under that instrument also entails a shift of responsibility concerning the costs of the reception conditions of the person concerned.

4.3.4 Shifting responsibility would also pose some practical difficulties in terms of implementing some of the obligations and rights of the Member States set out in the Reception Conditions Directive. For instance, it would involve the calculation of the cost of the schooling/education of the concerned minor in the Transferring State and the determination of how the Responsible State would cover that cost. Furthermore, it is also difficult to envisage how, as per Article 16 of the Directive, the Responsible State could exercise its right to reduce and/or withdraw the reception conditions of an asylum-seeker, who is still in the territory of the Transferring State.⁵³

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⁵² Article 2(e) of the Dublin II Regulation provides that ‘examination of an asylum application’ means: “any examination of, or decision or ruling concerning, an application for asylum by the competent authorities in accordance with national law except for procedures for determining the Member State responsible in accordance with this Regulation”.

⁵³ Article 16(1) of the Reception Conditions Directive provides that the “Member States may reduce or withdraw reception conditions” in a limited number cases.