



**Submission by the Office of the United Nations High Commissioner for Refugees
in the case of
*AHMED ALI and Others v. the Netherlands and Greece***

1. Introduction*

1.1 By letter of 9 November 2009, the European Court of Human Rights (“the Court”) invited the Office of the United Nations High Commissioner for Refugees (“UNHCR”)¹ to submit a written intervention as a third party in the case of *Ahmed Ali v. the Netherlands and Greece* and 13 other cases lodged against the Netherlands and Greece.² 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.³ 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”)⁴ obliges States Parties to cooperate with UNHCR in the exercise of its functions.

1.3 Part 1 of this submission addresses transfer procedures under the Dublin II Regulation⁵ and remedies available against such transfers. Part 2 examines the legal status and concrete situation of asylum-seekers in Greece, including under Dublin II, while Part 3 sets out the procedure for transfer from the Netherlands under Dublin II and remedies available against transfer decisions. Part 4 examines the interrelationship between obligations under Dublin II and those under international law. Finally, Part 5 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 Regulation⁶ 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 State⁷ 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

* 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 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. *Statute of the Office of the United Nations High Commissioner for Refugees*, UNGA Resolution 428(V), Annex, UN Doc. A/1775, 1950, para. 1, <http://www.unhcr.org/refworld/docid/3ae6b3628.html>. Paragraph 8 of its Statute confers responsibility upon UNHCR for supervising the application of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”), 189 UNTS 137, <http://www.unhcr.org/refworld/docid/3be01b964.html>, Art. 35 of which obliges States to cooperate with UNHCR in the exercise of its mandate.

² See Appl. Nos. 26494/09, 28631/09, 29936/09, 29940/09, 30416/09, 31930/09, 32212/09, 32256/09, 32729/09, 32758/09, 33212/09, 34565/09, 36092/09, 37728/09.

³ *Statute of the Office of the United Nations High Commissioner for Refugees*, UNGA Resolution 428(V), Annex, UN Doc. A/1775, 1950, para. 1, <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

⁴ 189 UNTS 137, <http://www.unhcr.org/refworld/docid/3be01b964.html>.

⁵ 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/3e5cflc24.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”).

⁶ Dublin II Regulation, Recitals 3 and 4, Art. 1.

⁷ Dublin II Regulation, Art. 3(1).

effective procedure.⁸ Under Dublin II, responsibility may, inter alia, be attributed to a State “where it is established ... that an asylum-seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country....”⁹ 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 irregular entry into Greece via the “Eurodac” database, established under the Eurodac Regulation,¹⁰ 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.¹¹ 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, responsibility for examining the asylum claim is transferred to Greece.¹² 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”.¹³ 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”.¹⁴

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

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

3.1.1 UNHCR remains concerned that asylum-seekers face serious challenges in accessing and enjoying protection in Greece in line with international and European standards.¹⁵ Asylum-seekers in Greece, including those returned to Greece under Dublin II, face multiple hurdles securing access to asylum procedures and international protection. They may be subject to arrest, detention and/or deportation as illegal migrants (even if registered as asylum-seekers). Reception arrangements are grossly inadequate, including for vulnerable persons and children, obliging large numbers of asylum-seekers to live in destitution. Asylum-seekers lack access to interpretation, legal advice and representation, are almost certain to have their claims rejected, are rarely able to secure an effective remedy against negative decisions, and do not have adequate protection against *refoulement*. Further, asylum-seekers in Greece experience obstacles in trying to secure access to international complaint mechanisms. In addition, in UNHCR’s view, the changes in the asylum procedure introduced July 2009¹⁶ 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 currently working on proposals to set up a new asylum system, these measures have yet to be formulated, legislated and implemented, a process which may take some years.

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

⁸ Dublin II Regulation, Recitals 4, 5, 12 and 15; Art. 3(1) *et seq.*

⁹ Dublin II Regulation, Art. 10(1).

¹⁰ 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”).

¹¹ Eurodac Regulation, Arts. 4(1), 8(1).

¹² Dublin II Regulation, Arts. 16(4) and 16(1).

¹³ *Ibid.*, Art. 19(2).

¹⁴ *Ibid.*, Art. 3(2). Art. 15 also permits assumption of responsibility for assessing a claim and “on humanitarian grounds”.

¹⁵ For further details see below and Annex 1 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 these cases concern 13 Somali nationals and one Eritrean national, Annexes 2 and 3 of the submission contain UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea, April 2009, at <http://www.unhcr.org/refworld/docid/49de06122.html>, and UNHCR’s “Displacement and International Protection Needs of Somalis, in Particular from Mogadishu”, Oct. 2009. Given one of the applicants is an Iraqi national belonging to the “Mandean” religious minority, Annex 4 contains para. 309 of UNHCR’s Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers, April 2009, stating that the situation of Sabaeen-Mandaeans in Iraq remains of serious concern as they continue to be singled out by Sunni and Shi’ite extremists and criminals on the basis of their religion, profession and (perceived) wealth, at <http://www.unhcr.org/refworld/docid/49f569cf2.html>.

¹⁶ 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).

from arrest and summary deportation. They are exposed to the same long waiting periods before a decision is made on their asylum claim. If a final decision has been taken in the asylum case of a Dublin transferee or deadlines for appeal have expired, then the transferee is detained and receives a deportation and detention order, with no opportunity in practice to re-open the case or challenge the negative first instance decision.

3.2 The existence of a risk of *refoulement* or expulsion from Greece

3.2.1 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 *refouler* 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*.¹⁷

3.2.2 In the case of Greece, UNHCR has stated that problems in respect of access to and quality of the asylum procedure and inadequate reception conditions may give rise to the risk of direct or indirect *refoulement*.¹⁸ It is against this background that UNHCR continues to recommend that governments refrain from returning asylum-seekers to Greece under the Dublin II Regulation.¹⁹

3.2.3 In particular, UNHCR has significant concerns regarding the practice of removals from Greece to Turkey. UNHCR has received numerous reports of attempted or actual deportation to Turkey and documented 27 such cases (involving a total of over 550 persons) between April 2008 and September 2009. 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.

3.2.4 While no Dublin transferees were included in documented cases of deportation from Greece to Turkey, there are no safeguards in place which could ensure Dublin transferees are exempt from such practices. To the police implementing arrests, Dublin transferees cannot be distinguished, based on their documentation, from other asylum-seekers and are thus exposed to the same risk of removal. In four cases recorded by UNHCR, the individuals concerned 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.

3.3 Access to asylum procedures in Greece

3.3.1 Persons transferred to Greece under Dublin II,²⁰ face problems which may hinder or preclude their efforts to register (or re-register) their application for asylum.²¹ 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

¹⁷ 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.

¹⁸ 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; *K.R.S. v. UK*, Appl. No. 32733/08, 2 Dec. 2008, at <http://www.unhcr.org/refworld/docid/49476fd72.html>, p. 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.

¹⁹ See above footnote 15.

²⁰ 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.

²¹ 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.

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.

3.3.2 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, Dublin transferees are detained for up to 24 hours at the airport without a detention order. Since mid-2009, when new procedures entered into force,²² the transferee is then released after a maximum period of 24 hours with a police notice informing him/her to 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 submit 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 are registered on only one day a week, with approximately 20 applications registered on each of these days, although up to 2,000 persons may be queuing to apply for asylum. The number of accepted applications at Petrou Ralli has dropped from 300-350 before October 2009 to 20 registered applications per week since October. At the same time, applications outside Athens have increased.²³ 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.²⁴

3.4 Access to reception assistance and its quality

3.4.1 Accommodation for registered asylum-seekers, including Dublin transferees, is officially available in just 12 reception centres. These are generally understaffed, under-resourced, and lacking appropriate support services and material conditions. Eight of the 12 centres are intended for unaccompanied and separated children. With 811 reception places in total available and nearly 15,928 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.²⁵

3.4.2 Among Dublin transferees, UNHCR has recorded a number of vulnerable cases,²⁶ 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 Austria²⁷ 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.

3.4.3 Like other asylum-seekers, Dublin transferees may be subject to round-ups and further 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-

²² Presidential Decree No. 81/2009, above footnote 16.

²³ 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.

²⁴ 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 21. 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>.

²⁵ Presidential Decree 220/2007, transposing the EU Reception Conditions Directive, Art. 1, para. 16, and Art. 12.

²⁶ This includes persons with mental health problems and a female victim of trafficking.

²⁷ 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/4a93fbf2.pdf>, pp. 50–81.

treatment and poor general conditions.²⁸ Detainees do not have access to information, legal counselling and interpreters, except in the few facilities where services are provided by NGOs or others through limited EC-funded projects. Even in these locations, these services are not available to all who need them.

3.4.4 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*,²⁹ 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. 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 3.³⁰ The latter practice appears to continue.

3.4.5 Since July 2009, a new legislative framework regulating administrative detention of irregularly staying foreigners adopted in Greece³¹ 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. In September and October 2009, to maximize use of the limited detention spaces, numerous detainee transfers took place, notably from the islands to detention facilities in the Evros region, where UNHCR has observed that safeguards against deportations to Turkey are inadequate.

3.5 The effectiveness of Dublin transferees' access to procedures in Greece and international complaint mechanisms

3.5.1 Dublin transferees face the same problems as other asylum-seekers regarding the asylum procedure and quality of decisions. These include shortcomings in training and expertise of the examining authorities, long waiting periods for interviews, inadequate availability and use of country of origin information by the examining authorities, lack of access to legal advice,³² severe deficiencies in the provision of interpretation, and interviews conducted with inadequate confidentiality.³³ 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 used in a large majority of cases, including for persons from countries in conflict which generate significant numbers of refugees.

3.5.2 Overall protection rates remain extremely low in Greece. In 2008, 0.06 per cent of cases decided at first instance were afforded protection.³⁴ The same year, the Appeals Board reached a positive decision in 24 per cent of cases reviewed at appeal.³⁵ 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.³⁶ The situation has not improved significantly in 2009. Eurostat data for Jan.-Sept.

²⁸ "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.

²⁹ *S.D. v. Greece*, Appl. No. 53541/07, 11 June 2009, at <http://www.unhcr.org/refworld/docid/4a37735f2.html> (in French only).

³⁰ *Tabesh v. Greece*, Appl. No. 8256/07, 26 Nov. 2009, at <http://www.unhcr.org/refworld/pdfid/4b1e58e72.pdf> (in French only).

³¹ 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.

³² 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.

³³ See UNHCR, "Observations on Greece", above footnote 15.

³⁴ 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>.

³⁵ *Ibid.*

³⁶ Source: UNHCR, 2008 Global Trends, Annexes, at <http://www.unhcr.org/4a375c426.html>.

2009 first instance decisions in Greece show a small increase in the protection rate to 1.07 per cent, in contrast to a first instance protection rate for the five countries listed above of 28.1 per cent over the same period.

3.5.3 Unhindered access to international complaint mechanisms such as available 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 pursuing their protection claims also create obstacles to the pursuit of applications to the Court, including requests for interim measures. The situation is particularly acute for persons in detention or who have to live in the streets, as is the case for many transferees.

3.5.4 In 2009, there were 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.³⁷ 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 after they arrived in Greece. Provisional Eurostat data nevertheless indicate there were some 15,900 persons who applied for asylum in Greece in 2009, putting the country among the "top 10" 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.³⁸

3.5.5 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 under Rule 39 are "both practical and effective".³⁹ As the Court has also ruled, "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".⁴⁰ It has further found that it must have automatic suspensive effect.⁴¹

3.5.6 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, Dublin II transfers should be suspended until such time as such access is assured.

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

4.1 Overview of the asylum procedure in the Netherlands

4.1.1 Under Dutch law, asylum requests must be filed at designated centres in the Netherlands.⁴² In these application centres, the Immigration and Naturalization Service (*Immigratie en Naturalisatie Dienst*, IND) investigates applications and prepares decisions on behalf of the State Secretary for Justice. In the Schiphol airport application centre, asylum-seekers are, under the Aliens' Act 2000 ("Dutch Aliens' Act"), denied entry to the Netherlands and detained to prevent them from absconding.⁴³

³⁷ See *Sharifi v. Italy and Greece* (Appl. No. 16643/09).

³⁸ From 1 January 2009 to 22 February 2010, approximately 600 Rule 39 requests were made to the Court for interim measures to stay Dublin transfers to Greece. 63 per cent were granted.

³⁹ *K.R.S. v. UK*, above footnote 18, p. 18. See also *Soering v. UK*, 1/1989/161/217, 7 July 1989, at <http://www.unhcr.org/refworld/docid/3ae6b6fec.html>, para. 87.

⁴⁰ *Conka v. Belgium*, Appl. No. 51564/99, 5 Feb. 2002, at <http://www.unhcr.org/refworld/docid/3e71fdfb4.html>, paras. 75 and 83.

⁴¹ *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.

⁴² See Aliens' Decree, Art. 3.108, sub 2, in conjunction with Aliens' Regulation (*Voorschrift Vreemdelingen*), Art. 3.42.

⁴³ In the Ter Apel and Zevenaar centres, asylum-seekers are formally admitted to the territory and are can go out of the centre.

4.1.2 Under the regular procedure, a decision on an asylum application must be taken within six months of the formal request.⁴⁴ As soon as possible after an application has been lodged, the asylum-seeker is interviewed to ascertain his/her identity and travel route; fingerprints are taken and the Eurodac database consulted, but no substantive questions regarding the application are asked.⁴⁵ After the first interview, the Council for Legal Support automatically appoints a lawyer for each asylum-seeker.⁴⁶ After a six-day rest period,⁴⁷ the IND holds a second interview on the substantive grounds for asylum. If the IND intends to reject the application, a written draft decision will be communicated to the asylum-seeker,⁴⁸ who has four weeks to submit a reaction to the draft decision,⁴⁹ after which the IND will take a final decision. An appeal to the Regional Court against such a decision may be submitted within four weeks. An appeal against a Regional Court judgment may be lodged with the Council of State within four weeks.⁵⁰

4.1.3 The IND may decide to treat an application under an accelerated procedure lasting 48 working hours, if it believes it can be decided without difficulty within that period. In such cases, the second substantive interview takes place as soon as possible after the first. Before the second interview, the asylum-seeker has the right to two hours of consultation with a legal aid provider. The quality of legal aid which can be provided under such tight deadlines is necessarily very limited. If the IND intends to reject the application, a draft decision is communicated to the asylum-seeker, who has, together with the legal aid provider, three hours to submit a reaction before a final decision is issued. If the latter is negative, an appeal to the Regional Court must be filed within a week. A further appeal must be filed with the Council of State within a week.

4.2 The Dutch Aliens' Act and the Dublin II Regulation

4.2.1 The Dutch Aliens' Act provides that an asylum application “shall be rejected if (a) another country which is party to the Refugee Convention is responsible for processing the application by virtue of a treaty or a resolution of an international organization binding on such country and the Netherlands ...”.⁵¹ This provision gives practical effect to the Dublin II Regulation in the Netherlands. The wording “shall be rejected” would appear to imply that the rejection is imperative, but in practice asylum-seekers have a possibility to rebut the presumption of safety of the country to which they are to be returned. The Aliens' Circular, a set of policy guidelines, stipulates that the Netherlands may assume responsibility for asylum applications, even though another State is deemed to have primary responsibility for doing so, in two sets of circumstances: if there are “tangible or specific indications” that a Member State is not fulfilling its international obligations⁵² and in order to reunite family members on humanitarian basis.⁵³ The analysis below assesses whether this possibility of rebuttal is effective in practice.

4.3 Possibilities for rebutting a presumption of safety

4.3.1 If, based on the first interview, the IND assessment indicates that another State is responsible, the IND does not undertake a substantive interview but a so-called “Dublin interview” to give the individual an

⁴⁴ Aliens' Act 2000 (*Vreemdelingenwet 2000*), Art. 42. This term can exceptionally be extended for a further six months.

⁴⁵ Aliens' Decree (*Vreemdelingenbesluit*), Arts. 3.109 and 3.110.

⁴⁶ As provided for under Aliens' Decree, Art. 3.113.

⁴⁷ Aliens' Decree, Art. 3.111.

⁴⁸ Aliens' Act, Art. 39.

⁴⁹ Aliens' Decree, Art. 3.115.

⁵⁰ Aliens' Act, Art. 69.

⁵¹ Aliens' Act, Art. 30(1)(a). (Unofficial UNHCR translation).

⁵² Aliens' Circular (*Vreemdelingencirculaire*), C3/2.3.6.2, states: “In principle, in application of the principle of inter-State trust, it is assumed that the Member States conform to the obligations of the 1951 Refugee Convention and of Article 3 of the European Convention on Human Rights, unless there are tangible or specific indications (*concrete aanwijzingen*) that the country to which the asylum-seeker is to be transferred is not conforming to such obligations (see paragraphs 2 and 15 of the preamble to Regulation 343/2003). If there are tangible or specific indications that a Member State will not conform to its international obligations, the possibility exists for the Netherlands to take responsibility for the asylum application on the basis of Article 3(2) of Regulation 343/2003. The distinction between a request to take over or to take back is of no importance. It is incumbent upon the asylum-seeker to make plausible that in his case there are facts and considerations on the basis of which the assumption of respect for international obligations by States Parties to the Refugee Convention and the European Convention on Human Rights is not applicable. This will be the case if the asylum-seeker provides plausible or credible information indicating that the asylum procedure in the responsible Member State will not investigate or establish that the asylum-seeker comes within the terms of the Refugee Convention or of Article 3 of the European Convention on Human Rights.” (Unofficial UNHCR translation).

⁵³ Aliens' Circular C3/2.3.6.3.

opportunity to rebut the presumed safety of the country deemed responsible. The asylum-seeker is asked why he or she decided not to stay in the country presumed responsible and is given the opportunity to relate his or her experiences in that country. As indicated above, the asylum-seeker has a right to legal representation at this stage. If, after the interview, the Netherlands decides not to assume responsibility, a negative decision is issued applying the Dublin II Regulation.⁵⁴

4.3.2 An asylum-seeker may appeal any negative decision, including one concluding another country is responsible for determining the claim.⁵⁵ In the latter case, the appeal has no suspensive effect,⁵⁶ although the Regional Court may be asked to issue an interim measure suspending expulsion. Such requests are in principle accepted.⁵⁷ If the Regional Court dismisses the appeal, the asylum-seeker may appeal to the Council of State. At this stage, an interim measure suspending expulsion may again be requested if the intended date of transfer is known. Before such time, according to standard case law of the Council of State, there is no imminent threat of expulsion and thus no basis to consider an interim measure. General administrative law allows a decision to be taken by a Regional Court without a hearing⁵⁸ and this possibility can be used to request an interim measure to suspend expulsion. If a negative decision is taken, an applicant may legally be expelled from the country. Either party may lodge an appeal against a decision taken without a hearing with the same (deciding) court.⁵⁹

4.4 Dutch case law in Dublin cases

4.4.1 It is unclear to UNHCR how the IND applies the standards set out in the Circular. There is neither statistical information on the number of occasions the Netherlands has assumed responsibility for assessing asylum claims, nor on how the IND interprets the criteria for assuming such responsibility.⁶⁰ This lack of information hinders the determination of whether or not the procedure is fair and 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 Member States.

4.4.2 Among the Regional Courts, Zwolle⁶¹ has in recent years granted interim measures and upheld appeals citing deficits in the Greek asylum procedure. Reasons for such decisions include low recognition rates in Greece, unavailability of legal aid or interpreters, length of procedures, lack of reception facilities, the specific Greek interruption procedure, and the fact that the European Commission launched an infringement procedure (subsequently discontinued) against Greece for violation of the Dublin II Regulation based on its previous “interruption” practice.⁶² The Regional Court has viewed the shortcomings in the Greek asylum procedure as tangible or specific indications that Greece was not respecting its international obligations as required by the Aliens' Circular for the transfer of responsibility. It held on a number of occasions that the State Secretary could not rely upon “inter-State trust” without further and proper justification.

4.4.3 By contrast, the Council of State – since 2001 the highest court of appeal in the Netherlands – has consistently annulled such Regional Court decisions, generally finding that applicants have not provided

⁵⁴ See also, Council of State, judgment of 13 March 2003, 200300008/1, confirming that there is no requirement to conduct a full refugee status determination if another country has been found to be responsible for examining an asylum request.

⁵⁵ Aliens' Circular, C3/2.3.3.

⁵⁶ Aliens' Act, Art. 82(2) and 82(4); Aliens Circular, C22/5.

⁵⁷ Two exceptions to this rule are “where grounds related to public order or national security prevail, or where there is a danger that return to the country of origin or a third country will become impossible, e.g., due to the limited validity of a travel document or of a visa therein.” See Aliens Circular, C22/5.3. (Unofficial UNHCR translation).

⁵⁸ General Administrative Law Act, Art. 8:54.

⁵⁹ General Administrative Law Act, Art. 8:55.

⁶⁰ In Jan. 2010, the State Secretary of Justice was asked in Parliament to provide information on the number of Dublin transfers to Greece over the previous six months; the number of cases in which the Netherlands assumed responsibility under Art. 3(2) of the Regulation; and the monitoring duties of Dutch civil servants accompanying asylum-seekers being transferred to Greece. At the time of writing, no answers had yet been provided.

⁶¹ For a long time, Zwolle was the only Regional Court dealing with Dublin cases, although the Regional Court Almelo now also deals with Dublin cases. Numerous Regional Court decisions in favour of the applicant have been issued. See e.g. in Zwolle, 11 Jan. 2007, Awb 06/49925; in Zwolle, 22 Jan. 2007, Awb 06/46365; in Zwolle, 18 March 2007, Awb 06/50884; in Zwolle, 19 March 2007, Awb 07/2757; in Assen, 25 March 2008, Awb08/8134; in Rotterdam, 26 Feb. 2008, Awb 08/6599; in Zwolle, 10 Feb. 2009, Awb 08/40340; in Almelo, 27 Feb. 2009, Awb 08/44697.

⁶² Under this practice (which Greece later changed in response to the infringement action), the claims of all Dublin II transferees were treated as “interrupted”, with almost no practical opportunity for the files to be re-opened, which effectively denied those claimants any opportunity to have their claims examined in substance in the EU.

tangible or specific indications that Greece would violate the obligation of *non-refoulement* and that the Secretary of State may thus rely on the principle of “inter-State trust” vis-à-vis Greece. Leading case law from 2008 and 2009 of the Council of State holds that reports on conditions in Greece for asylum-seekers and the difficulties they face in accessing an asylum procedure generally do not contain tangible or specific indications that Greece will, in the specific case of an applicant, violate the principle of *non-refoulement*.⁶³ In addition, the Council of State has found that condemnation of Greece by the Court for a violation of Articles 3 and 5 of the European Convention on Human Rights is not in itself an indication that every asylum-seeker who is to be transferred under the Dublin II Regulation to Greece will suffer a human rights violation.⁶⁴ The Council of State has also found that the incomplete transposition and implementation by Greece of the relevant EU Directives is not in itself a ground for not relying on the principle of “inter-State trust”. It has stated that complaints that Greece has not completely or properly implemented EU law ought to be raised in Greece with the Greek authorities.⁶⁵

4.4.4 In UNHCR's view, the rebuttable presumption of the safety of Greece is not adequately implemented in the Netherlands. Rather, the situation in Greece would warrant that the Dutch authorities assume responsibility for assessing an asylum claim in accordance with its own standards, as set out in the Circular, of tangible or specific indications that a Member State – i.e. Greece – is not fulfilling its international obligations.⁶⁶ Respect for the concept of “inter-State trust” does not necessarily provide a 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 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

⁶³ See e.g. Council of State, 29 Dec. 2008, 20085917/1, “2.5.1 The general documents on which the Regional Court based its decision ... describe in general terms the position of foreigners who seek international protection in Greece, the conditions under which they are being received, the way in which they are treated, and the functioning of the Greek asylum procedure. These documents do not, however, contain tangible or specific indications that the shortcomings as described result in a violation of Greece's *non-refoulement* obligations vis-à-vis such aliens, including aliens transferred on the basis of the (Dublin) Regulation.” See, similarly, Council of State, 2 Feb. 2009, 200806716/1, “2.6 ... If, despite existing shortcomings in the asylum procedure of the Member State concerned, there are no tangible or specific indications that that Member State will take action with a view to the forced removal of the asylum-seeker concerned, then there are no grounds to believe that that Member State will act contrary to the *non-refoulement* obligations mentioned in the Aliens Circular.” (Unofficial UNHCR translation).

⁶⁴ Council of State, 3 Nov. 2009, 200905828/1/V3, “2.7.1 The Section considers that ... the general documents submitted by the alien do not contain tangible or specific indications that Greece will remove Iraqi asylum-seekers, such as the applicant, in contravention of its *non-refoulement* obligations. ... 2.8.7 While from the documents submitted by the alien it can be inferred that on occasion transferred asylum-seekers have been detained in Greece under undesirable, and in certain aspects worrisome, conditions, yet these documents do not imply that asylum-seekers who are to be transferred by the Netherlands to Greece under the Regulation will be systematically subjected to treatment which can be qualified as inhuman.” (Unofficial UNHCR translation). For two recent cases, see footnotes 29 and 30.

⁶⁵ Council of State, 25 Nov. 2009, 200905898/1V3, “2.5.1 With reference also to the decision of the European Court of Human Rights of 2 Dec. 2008 in Appl. No. 32733/08, *K.R.S. v. UK* [see above footnote 18], the Section considers that in principle the alien has to bring this complaint forward to the Greek authorities. Moreover, the Directives invoked by the alien do not give rise to the conclusion, contrary to what is stated by the alien, that the State Secretary can no longer rely on the principle of inter-State trust if and when Greece does not fully respect or implement these Directives. This would only be different if the defects in implementation were of such a nature, also taking into account the personal situation of the alien, that he, after the transfer, would find himself in a position contrary to the prohibitions on *refoulement* as laid down, in particular, the 1951 Convention and ECHR, Article 3, while not having access to an effective remedy. The alien has not made such a situation plausible on the basis of the documents submitted by him.” (Unofficial UNHCR translation).

⁶⁶ The Dutch State Secretary of Justice appeared to acknowledge the existence of problems in Greece in July 2009 when she informed Parliament that the Netherlands and Greek authorities had agreed on practical arrangements regarding the transfer of asylum-seekers for whom Greece has accepted responsibility. State Secretary of Justice answering Parliamentary Question No. 3318, 2 July 2009, Parliamentary Documents 2008–2009, Appendix 7001 (Tweede Kamer 2008–2009, Aanhangsel 7001). Arrangements include informing Greece at least ten days in advance of the upcoming transfer of asylum-seekers; transferring no more than 40 persons per week; and a Dutch official accompanying each transfer so the transfer process proceeds smoothly. It has also been agreed that asylum-seekers transferred to Greece by the Netherlands under Dublin are to be allowed to lodge an asylum application at Athens airport upon arrival. To date, UNHCR does not have information on the practical effects of the above arrangements.

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,

[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.⁶⁷

5.2 In UNHCR's view, Dublin 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 lead to real risks of violations of Article 3 of the European Convention. 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.⁶⁸ 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 legal obligations. If States were not to make use of Article 3(2) in such circumstance, 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.⁶⁹

6. Conclusion

6.1 In conclusion, since the *K.R.S. v. UK* judgment in 2008, UNHCR's most recent position paper and other objective sources provide independent background material 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*.

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 during detention.⁷⁰ The new legislative framework adopted in July 2009 has not helped alleviate concerns; indeed the situation has deteriorated notably with respect to efficiency in the asylum system.⁷¹ Until reform of the Greek asylum system is put in place, 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 should apply Article 3(2) of the Dublin II Regulation. Such an approach would ensure that the Netherlands complies with its obligations under international law.

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⁶⁷ *T.I. v. UK*, above footnote 18, 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 18, p. 16.

⁶⁸ 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.

⁶⁹ 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.

⁷⁰ See e.g. *S.D. v. Greece* and *Tabesh v. Greece* above, respectively at footnotes 29 and 30.

⁷¹ *Ibid.*, p. 15.