THE
DUBLIN II REGULATION

A UNHCR DISCUSSION PAPER

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Haut Commissariat des Nations Unies pour les réfugiés

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Cover photos: UNHCR

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April 2006

This paper was researched and written by Laura Kok, in cooperation with the UNHCR Regional Representation in Brussels. Appreciation is expressed to the numerous persons throughout the European Union and Norway who agreed to be interviewed for this study.

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EXECUTIVE SUMMARY

More than two years after the entry into force of the Dublin II Regulation and before the Commission's first evaluation of its implementation, this study seeks to provide insight into the operation of the system by bringing together first-hand accounts from 104 respondents in 22 countries. On the basis of this research, UNHCR makes a number of recommendations with the underlying aim of improving the protection and well-being of refugees and asylum-seekers within the framework of the Dublin II system.

The Dublin II Regulation is a system for determining responsibility for examining asylum claims. It does not contain any mechanism to ensure that responsibilities are shared in a balanced or equitable manner. UNHCR has repeatedly expressed concern that implementation of Dublin II could result in serious imbalances in the distribution of asylum applicants among Member States. In particular the criterion of illegal border crossing might place a disproportionate responsibility on States at the external borders of the Union, notably those along the Eastern and Southern borders.

The impact of the Dublin II Regulation on the distribution of asylum applications in the European Union needs further study. The overall number of asylum applications in the European Union fell by about 46% in 2005 when compared to 2001, to the lowest level since 1988.[1] According to the best estimates available to UNHCR, of 237,840 asylum applications filed in the EU-25 in 2005, approximately 15% were subject to determination of responsibility under Dublin II. These applications may be registered in two or more Member States, suggesting that there may be considerable double-counting of asylum applications, and that the actual number of applicants is lower than the figure cited above.

There is no consensus on what would constitute a 'fair' allocation of asylum applications within the EU. The number of applications varies widely from one Member State to another. In 2005, the largest number of claims was filed in France, followed by the U.K., Germany, Austria, Sweden, Belgium and the Netherlands.[2] However, the situation is different if one compares the number of asylum applications to the size of the population in the country concerned, which could be one indicator of capacity to receive asylum applicants. By that measure, the countries with the largest share in 2005 were Cyprus and Malta, followed by Austria, Sweden, Luxemburg and Belgium.[3] These were the only EU Member States to receive more than one application per thousand inhabitants in 2005. The average for the EU-25 was 0.5 applications per thousand.

In the absence of comprehensive public data on the operation of the Dublin II system, UNHCR can only rely on the partial data shared with it by States for the first six months

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1 UNHCR, *Asylum Levels and Trends in Industrialized Countries, 2005,* available on www.unhcr.org.

2 Ibid, page 9.

3 Ibid. The number of asylum applications per 1,000 inhabitants in 2005 was as follows: Cyprus: 9.3; Malta: 2.9; Austria: 2.7; Sweden: 1.9; Luxemburg: 1.7; Belgium: 1.5.

of 2005, and which it has been permitted to publish (see Annex II). Unfortunately, no data was made available by France, and only partial data by Malta, Norway and Sweden. These figures show that States located at the European Union's Eastern and Southern external borders indeed receive more incoming transfers under Dublin arrangements than the outgoing transfers they effect.

During the period for which UNHCR has statistics available, incoming transfers far exceeded outgoing transfers in Greece, Hungary, Italy, Poland, Slovakia and Spain. In comparison, outgoing transfers exceeded incoming in the Czech Republic, Finland and U.K.. In other countries, such as Austria, Germany and the Netherlands, which are among those receiving the largest number of asylum applications, the ratio of incoming to outgoing transfers is approximately equal. Dublin II appears to have had little impact on Cyprus and Malta, the countries with the highest ratio of asylum-seekers to population, which might have its reason in the fact that irregular onward movement from island States would by definition be very difficult.

According to the data available only about 30% of the accepted requests for transfer were actually effected. The relatively low number of transfers may encourage governments to make increasing use of detention. However, asylum-seekers may also adapt to the system by avoiding asking for asylum and being registered in Member States at the periphery of the EU, but seeking instead to pass unnoticed through those States. If they are not registered and fingerprinted in the countries they transit, it is difficult to implement the Dublin II arrangements.

The study revealed numerous divergent approaches and gaps in State practice under the Regulation. Some concerns, such as certain procedural safeguards, the application of the principle of the best interest of the child or of the so-called 'sovereignty' and 'humanitarian' clauses would benefit from expert discussion and principled political and legal guidance. Others, such as the definition of family members, suspensive effect of appeals or provisions concerning time limits and transfers, would require amendment of the Dublin II Regulation in order to fill the gaps and resolve ambiguities and inconsistencies. If the system is to operate effectively in allocating responsibility and ensuring protection for those in need, these political and legal challenges must be met.

Among the recommendations, UNHCR highlights three issues as most pressing:

- Examination of asylum claims: Some Member States do not undertake a full and fair examination of asylum claims of persons who are returned to their territory under the Dublin II Regulation. This is a cause for grave concern. All Member States are bound to respect the principle of *non-refoulement*. There should not be scope for States to divest themselves of this obligation by treating certain claims under Dublin II as implicitly withdrawn. Similarly, if the safe third country notion is applied to Dublin claims, this must be done in full compliance with the *non-refoulement* principle and other requisite standards.

- Legal remedies: Asylum-seekers should have access to an effective legal remedy against transfer decisions, including the right to request suspensive effect of appeals if this is not automatic. The applicant should always be permitted to stay in the Member State's territory until a decision on an application for suspensive effect is taken. This is of particular importance in view of the existing differences in Member States' interpretation of the refugee definition as well the possible application of national safe third country rules, which may have serious consequences for the asylum-seekers.

- Family unity: The provisions which assign responsibility based on the presence of family members in a Member State should be revised, to ensure respect for the right to family life and a more consistent approach to family reunification. A broader interpretation of what constitutes a family as well as of the right to family reunification would not only reduce the hardship faced by asylum-seekers but could also serve States' interests in achieving consistent decision-making and minimising secondary movements.

Other important issues are addressed in the Concluding Recommendations. It is hoped that this research will inform the report of the Commission, as well as the deliberations of the Council and Parliament on the future of the Regulation. Pursuant to the Amsterdam Treaty, the Tampere Conclusions and Hague Programme, these efforts should be guided by the aim of achieving the full and inclusive application of the 1951 Refugee Convention and other relevant international instruments, both in letter and in spirit.

Though this study focuses on the Dublin II Regulation and does not examine practice under other instruments, for instance the Directive on Reception Conditions, the research revealed some gaps in implementation of the various instruments. UNHCR recommends that the European Commission look carefully at this matter, in particular when evaluating the implementation of the Directive on Reception Conditions.

1. INTRODUCTION

1.1 Aim and Context of the Study

On 18 February 2003, the Council of the European Union adopted the "*Council Regulation (EC) No 343/2003 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*"[4] (hereinafter referred to as the "Dublin II Regulation"). The main purpose of the Dublin II Regulation is to determine rapidly the Member State responsible for examining an asylum application, so as to guarantee effective access to the asylum procedure[5] and to prevent abuse in the form of multiple asylum applications.

This study looks at State practice in the application of the Dublin II Regulation, from the point of view of compliance with international refugee law and to ascertain whether the object and purpose of the Regulation are met. It further assesses the impact of the Regulation on the affected individuals, and contains recommendations for future practice, including suggested amendments to the Regulation itself.[6]

One important issue which the study was not able to address is the application of the "safe third country" notion, under which Member States – notwithstanding the Dublin II Regulation – send asylum-seekers to third countries without examining the substance of their claims. The research did not yield enough information for a thorough analysis of this practice, which UNHCR urges the Commission to examine carefully in the context of its monitoring of both the Dublin II Regulation and the Asylum Procedures Directive.[7]

This study devotes particular attention to the following aspects of implementation of the Dublin II Regulation:

- Access to the asylum procedure;
- Procedural safeguards during the procedure;
- Effective access to an appeal or judicial review;
- Interpretation and application of criteria for determining responsibility linked to humanitarian considerations, i.e. the best interest of the child and family reunification;
- Use and interpretation of the 'humanitarian clause' and the 'sovereignty clause';

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4 OJ L 50/1, 25.02.2003. The full text of the Dublin II Regulation is reproduced in Annex I.

5 See Recital 4 of the Preamble; see also 1.3.2 "*Overview of the Dublin II Regulation*".

6 The study does not contain a comprehensive review of relevant domestic legislation and jurisprudence, nor of the existing body of research into Dublin II. Comprehensive statistical data on the application of the Regulation were not available to UNHCR and therefore could not be analyzed in this study. In the absence of data on the financial cost of implementation of the Dublin II Regulation, the study was unable to draw any conclusions as to its cost effectiveness.

7 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.

- Timeframes for determination of responsibility;
- Reception conditions and detention practice;
- Conditions of removal.

Each chapter is divided into three sections: (i) a brief description of the relevant legal provision(s), (ii) observations on the national practice, and (iii) conclusions. Individual cases are used to illustrate best practices as well as problem areas. Some illustrations show the practice of a number of Member States, while others may simply reflect exceptional cases.

Article 28 of the Dublin II Regulation provides that the Commission shall report to the European Parliament and the Council on the application of this Regulation and, where appropriate, shall propose the necessary amendments, at the latest in March 2006. UNHCR hopes that this discussion paper will provide useful input for the Commission's report, and will contribute to strengthening of the refugee protection system in the European Union.

1.2 Methodology

This study was conducted using interviews (in person or by telephone) as well as field visits to four Member States facing different challenges: the Netherlands, Slovakia, Spain and Sweden. During the field visits and in the course of telephone interviews the researcher interviewed Government officials involved in Dublin cases, NGOs, UNHCR staff, lawyers, asylum-seekers and staff at detention and reception facilities in 21 EU Member States and Norway. Estonia, Latvia and Malta as well as Iceland were not included due to the limited time available for the interviews and the relatively low numbers of Dublin cases in those countries (see Annex II for indicative statistics). Denmark was not taken into consideration as it was, at the time of the research, not bound by the Regulation.[8]

Candidates for interview were mainly identified by UNHCR offices. In some instances, non-UNHCR respondents suggested additional interviewees. Staff in detention and reception centres assisted in identifying asylum-seekers for interview, including both persons awaiting transfer as well as Dublin II returnees.

Four semi-structured questionnaires were used for telephone and face-to-face interviews. The questionnaires were developed on the basis of the Dublin II Regulation and several recurring themes which had emerged from reporting by UNHCR offices.[9] In total, 104 interviews were carried out, of which 51 by telephone and 53 in person. Interviews were used rather than written questionnaires, in order to achieve a high response rate, and thus to ensure a balanced and representative study.

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[8] See 1.3.1 "*Genesis of the Dublin II Regulation*".

[9] In addition, the Churches' Commission for Migrants in Europe (CCME), Caritas, the Jesuit Refugee Service (JRS), and the European Council on Refugees and Exiles (ECRE) provided information for the development of the questionnaires.

Before each interview, the Dublin II Regulation, a list of topics and a short introduction to the research were sent to the respondent. Dublin II State authorities also received the 'terms of reference' of the study and a formal request for statistical data. The average duration of each interview was 1½ hours. After each interview, a draft interview report was sent to respondents, and comments, clarifications, additions or corrections were invited and provided in most cases.

1.3 Genesis and Overview of the Dublin II Regulation

1.3.1 Genesis of the Dublin II Regulation

In 1985, Belgium, France, Germany, Luxembourg and the Netherlands decided, by signing the Schengen Agreement,[10] to create a territory without internal borders. In 1995, the Convention implementing the Schengen Agreement[11] entered into force. It abolished the internal borders of the signatory States and created a single external border where immigration checks would be carried out in accordance with a single set of rules. To ensure the free movement of persons within the Schengen area, flanking measures with respect to external border controls, asylum and immigration were part of the Convention. Chapter 7 of Title 2 provided for rules concerning the determination of responsibility for the processing of applications for asylum.

On 15 June 1990, the (then) 12 Member States of the European Communities signed the "*Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities*" (hereinafter referred to as the "Dublin Convention").[12] Since the provisions of the Dublin Convention and Chapter 7 of Title 2 of the Convention implementing the Schengen Agreement were almost identical, the Contracting Parties to the latter signed the Bonn Protocol[13] according to which the rules on the responsibility for asylum applications laid down in the Convention implementing the Schengen Agreement were no longer applicable, with the entry into force of the Dublin Convention on 1 September 1997.

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[10] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 14 June 1985.

[11] Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 19 June 1990.

[12] OJ C 254/1, 19.08.1997.

[13] "*Protokoll zu den Konsequenzen des Inkrafttretens des Dubliner Übereinkommens für einige Bestimmungen des Durchführungsübereinkommens zum Schengener Übereinkommen"*, 26 April 1994 (Bonn Protocol of 26 April 1994 on the consequences of the entry into force of the Dublin Convention for certain provisions of the Schengen Convention); see also Article 142 of the Convention implementing the Schengen Agreement.

Less than two years later, on 1 May 1999 the Amsterdam Treaty[14] came into effect. Under Title IV concerning visa, asylum, immigration and other policies related to free movement of persons, Member States agreed to adopt specific asylum instruments, including "*criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States.*"[15]

The European Council, in the Conclusions from its meeting in Tampere, Finland on 15/16 October 1999, confirmed the obligations of the Amsterdam Treaty and "*agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention*", which "*should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application*".[16]

Several months later the European Commission launched a wide-ranging debate concerning the Dublin concept on the basis of a working paper entitled "*Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an asylum application submitted in one of the Member States.*"[17] In this paper the Commission questioned the general approach taken by the Dublin Convention and suggested several alternative options, in particular to allocate responsibility according to where the first asylum claim is lodged. However, due to the unwillingness for a change in approach expressed by most Member States, the "*Proposal for a Council Regulation 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*"[18] took over the provisions of the Dublin Convention with only minor amendments.

On 18 February 2003, the Council adopted the Dublin II Regulation. It entered into force on 17 March 2003 and applies to asylum applications lodged as from 1 September 2003 and, from that date, to any request to take charge of or take back asylum-seekers, irrespective of the date on which the asylum application was made.[19]

The Regulation, which replaces the Dublin Convention,[20] is binding in its entirety and directly applicable in all Member States.[21] Denmark did not originally take part in the adoption of the Regulation and was not bound by it.[22] The Dublin II Regulation became, however, applicable to Denmark on 1 April 2006 after the entry into force of an

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14 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related Acts. OJ C 340, 10.11.1997.
15 Article 63(1) lit. a of the Treaty establishing the European Community.
16 Council Document SN 200/99, 15/16 October 1999.
17 SEC(2000) 522 final, 21.03.2000.
18 COM(2001) 447 final, 26.07.2001.
19 Article 29 of the Dublin II Regulation.
20 Article 24(1) of the Dublin II Regulation.
21 Article 230 of the Treaty establishing the European Community.
22 See Recital 18 of the Preamble.

Agreement with the European Community.[23] Based on a Council Decision of 15 March 2001[24] the Dublin II Regulation also applies to Iceland and Norway.[25] On 26 October 2005 the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland was signed. With the extended ratification period required, that Agreement is not expected to enter into force before 2008.

The Commission, in its Regulation (EC) No 1560/2003[26] of 2 September 2003, laid down detailed rules for the application of the Dublin II Regulation, in particular with respect to the transfer procedures and the implementation of the 'humanitarian clause'. These are built on implementing guidelines which had been developed in the context of the Dublin Convention.

1.3.2 Overview of the Dublin II Regulation

The main objectives of the Dublin II Regulation, as outlined in the Preamble and the Commission proposal for the Regulation, are:

- to ensure that asylum-seekers have effective access to procedures for determining refugee status,
- to prevent abuse of asylum procedures in the form of multiple applications for asylum submitted simultaneously or successively by the same person in several Member States,
- to determine as quickly as possible the Member State responsible for the examination of an asylum claim.

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[23] Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member States by a third-country national and Council Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 66/38, 08.03.2006. See also information concerning its entry into force, OJ L 96/9, 05.04.2006. The 'Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway', OJ L 57/16, 28.02.2006, had not yet entered into force when this study went to print.

[24] Council Decision of 15 March 2001 concerning the conclusion of an Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway (2001/258/EC), OJ L 93/38, 03.04.2001.

[25] This report henceforth uses the terminology of the Dublin II Regulation which refers to "Member States". However, it is noted that in this context the term may encompass non-Member States of the EU taking part in the Dublin II Regulation.

[26] Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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, OJ L 222/3, 05.09.2003.

The criteria governing responsibility for examining the asylum claim of a third-country national must be applied in the order in which they are presented in the Regulation.[27] According to these criteria, responsibility shall lie with the Member State:

- where a family member[28] of an unaccompanied minor is legally present provided that this is in the best interest of the minor (Article 6);
- where a family member of the applicant is residing as a refugee or as an asylum-seeker whose application has not yet been the subject of a first decision regarding the substance (Articles 7 and 8);
- that has issued a residence document or visa (Article 9);
- where the asylum-seeker has entered the territory of the Member States irregularly (Article 10);
- which allowed a third-country national into its territory without a visa (Article 11);
- where the asylum claim was lodged in an international transit area of an airport (Article 12);
- where the first asylum application was lodged, if none of the above-mentioned criteria apply (Article 13);
- which is responsible for the largest number of asylum-seeking family members or for the application of the oldest of them, if applying the other criteria would result in the family being separated (Article 14).

Any Member State shall retain the right, pursuant to its national laws, to send an asylum-seeker to a third country, in compliance with the provisions of the Geneva Refugee Convention[29] (Article 3(3)).

Apart from these criteria, 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 ('sovereignty clause' – Article 3(2)) and may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations respectively ('humanitarian clause' – Article 15).

If the Member State where an asylum-seeker lodged his/her application for asylum establishes, based on the aforementioned criteria, that another Member State is responsible for determining the claim, the former may request the Member State deemed responsible to take back or take charge of the asylum-seeker (Articles 16-20).

A request to take back may be made if the asylum-seeker had previously lodged an application for asylum which is still pending, has been withdrawn or rejected in another Member State. A request to take charge may be made where the asylum-seeker did not make an asylum application in the State concerned, but where responsibility attaches on one of the above-mentioned criteria. It is important to distinguish between taking back

[27] See Article 5(1) of the Dublin II Regulation.
[28] For the definition of 'family members' see Article 2, sub-paragraph (i), of the Dublin II Regulation.
[29] Convention Relating to the Status of Refugees of 28 July 1951 as amended by the Protocol Relating to the Status of Refugees of 31 January 1967 (hereinafter referred to as "1951 Refugee Convention").

and taking charge, as the Dublin II Regulation sets different timeframes for these requests.

The 'Eurodac' database, set up under Council Regulation (EC) No. 2725/2000[30], is a tool for implementation of the Dublin II Regulation. Eurodac is a repository of fingerprints of asylum-seekers, irregular border crossers and illegal residents. It serves to establish the identity of these persons and to ensure an effective application of the Dublin Convention and the Dublin II Regulation.

1.4 Past UNHCR Comments Concerning the Dublin System

UNHCR welcomed the 1990 Dublin Convention at the time of its adoption because it established a mechanism, among State Parties to the 1951 Refugee Convention, whereby an asylum claim would be adjudicated by one of them. The Dublin Convention was expected to ensure that claims were considered promptly and fairly and would reduce duplicate claims. At the same time, UNHCR cautioned that the significant differences among the Member States' asylum procedures might perpetuate some of the very problems the Dublin Convention sought to solve.[31]

With the entry into force of the Dublin Convention on 1 September 1997, UNHCR reiterated its view that the adoption of agreements aimed at identifying the country responsible for examining an asylum request was the most satisfactory way to address the problem of "refugees in orbit," and to provide guarantees that an asylum request will be examined in substance. UNHCR was, however, concerned that the application of the "safe third country" notion by the State determined to be responsible might result in chain deportations and, ultimately, instances of *refoulement*. Furthermore, UNHCR urged Member States to adopt a broad interpretation of persons to be considered members of the same family.[32]

In the discussion preceding the adoption of a successor to the Dublin Convention, UNHCR stressed that the interest of the asylum-seeker to have his/her claim determined fairly and promptly must remain a central consideration, and proposed to change the approach taken by the Dublin Convention. Responsibility should lie primarily with the State to which the application has been submitted, unless the applicant already has a connection or close link with another State and, therefore, it appears fair and reasonable that s/he request asylum there. Furthermore, it was stressed that the credibility of any

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[30] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention., OJ L 316/1, 15.12.2000. 'Eurodac' started operations on 15 January 2003 (see 'Commission Communication regarding the implementation of Council Regulation (EC) No 2725/2000 'Eurodac'', OJ C 5/2, 10.01.2003).

[31] See 'UNHCR Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions)', 16 August 1991.

[32] See UNHCR, 'Implementation of the Dublin Convention: Some UNHCR Observations', May 1998.

mechanism for transfer of responsibility was contingent upon the existence of harmonised standards in substantive and procedural areas of asylum.[33]

In February 2002 UNHCR issued comments on the Draft Dublin II Regulation.[34] In addition to the positions outlined above, the Office proposed that only the following meaningful links with one of the Member States should result in a transfer of responsibility: family connections, cultural ties, knowledge of the language, the possession of a residence permit, and the applicant's previous periods of residence in the State in question. UNHCR expressed concern that the criterion of illegal border crossing could result in serious imbalances in the distribution of asylum applicants among Member States. Such imbalances would not only pose problems to States situated at the external borders of the European Union, but could also have negative consequences for the protection of asylum-seekers and refugees. Concern was expressed about the lack of suspensive effect of appeals against decisions on transfer of responsibility. On a more positive side, the humanitarian exceptions, the provisions relating to unaccompanied minors, and improvements with respect to the criterion of family unity were appreciated.

The Dublin system is based on the assumption that all Member States respect the principle of *non-refoulement* and can thus be considered as 'safe' for third-country nationals.[35] It further assumes that legal and practical harmonisation in the field of asylum has already been achieved. In practice, however, Member States still implement a variety of reception practices, and are far from a common interpretation of the refugee definition and a common approach to the granting of international protection. This is illustrated by the wide range of recognition rates in different Member States for asylum-seekers from a particular country or region. These disparate practices result *inter alia* in secondary movements, as asylum-seekers try to find protection.

UNHCR is concerned that the lack of harmonisation and inconsistent interpretation of the refugee definition contained in Article 1 A of the 1951 Refugee Convention may lead to direct and indirect *refoulement*. The Dublin II Regulation cannot supersede international refugee and human rights law, but must be applied and interpreted in accordance with these bodies of law.[36]

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[33] See UNHCR, 'Revisiting the Dublin Convention – Some reflections by UNHCR in response to the Commission staff working paper', January 2001.

[34] UNHCR's Observations on the European Commission's Proposal for a Council Regulation 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 (COM(2001) 447 final)', February 2002.

[35] Recital 2 of the Preamble of the Dublin II Regulation.

[36] See in this context also *T.I. vs. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, 7 March 2000.

2. OBSERVATIONS

2.1 Procedure for Determining the Member State Responsible for Examining the Asylum Claim

2.1.1 Information on the Dublin II Regulation provided to Asylum-Seekers by the Authorities

Legal Provision

In Article 3(4) the Dublin II Regulation obliges Member States to inform the asylum-seeker, in writing and in a language that he or she may reasonably be expected to understand, about the application of the Regulation, its time limits and its effects.

National Practice

This research examined the form, timing, language and content of information available on Dublin II in different countries, to assess whether it was provided in a way that enabled asylum applicants to understand and respond appropriately.

Most Member States provide asylum-seekers with written information on Dublin II. Some do not seem to do this, for instance Cyprus, Lithuania, Luxembourg, Portugal and Spain,[37] although the Luxembourg authorities stressed that they intend to compile a leaflet in future.[38] Sometimes responsibilities are not clear. In Lithuania, the authorities said that it is the Red Cross' responsibility to provide information on Dublin II after the decision that another Member State is responsible is served on the applicant. The Red Cross, on the other hand, said that under an agreement with the Ministry of Interior, lawyers must provide this information to asylum-seekers, but not necessarily in writing.[39]

The written information appears to vary widely in both format and content, is sometimes hard for asylum-seekers to understand, and does not always cover all aspects of the Dublin II Regulation. In Belgium, for instance, asylum-seekers receive written information on the asylum procedure which includes (brief) mention of the effects of Dublin II, but does not explain the criteria or time limits of the procedure.[40]

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[37] Interview with an Administrative Officer of the Asylum Service (Cyprus) on 30 September 2005, with the Head of the Asylum Affairs Division of the Migration Department (Lithuania) on 27 September 2005, with the Head of the Dublin Unit and the Asylum Interviewing Unit (Luxembourg) on 30 September 2005, with the acting Head of the Asylum and Refugees Department (Portugal) on 16 September 2005, and with UNHCR (Spain) on 20 September 2005.

[38] Interview with the Head of the Dublin Unit and the Asylum Interviewing Unit (Luxembourg) on 30 September 2005.

[39] Interview with the Head of the Asylum Affairs Division of the Migration Department (Lithuania) on 27 September 2005 and with the Red Cross (Lithuania) on 22 August 2005.

[40] Belgian information leaflet, "General information on the asylum procedure".

Illustration 1:

Excerpt from Belgium's information brochure for asylum-seekers

"Dublin II: As soon as you have lodged your asylum application, the Aliens Office checks whether or not Belgium is responsible for its processing. If Belgium is responsible, the application will be examined by the AO *[Aliens Office]*. If it is not, you will be granted a laissez-passer enabling you to travel to the country responsible for processing your asylum application. You will receive a decision of refusal of residence together with an order to leave the territory or a decision of refusal of entry into the territory together with an order to be turned back."

In contrast, the Netherlands distribute a 14-page brochure devoted to Dublin II.[41] In the Dutch and Swedish leaflets, no reference is made to the possibility of reunification with family members who are asylum applicants, nor to humanitarian considerations, while materials in some other States do include these topics.[42] In a French leaflet prepared jointly by the government, UNHCR and the NGO *Forum Refugiés*, but not distributed systematically, reference is made to the possibility of reunification with family members residing as refugees or as asylum applicants in one of the Member States.[43] However, information provided in France varies, as individual *Préfectures* may compile their own leaflets.[44] In Finland information might also vary, as police stations compile their leaflets independently.[45] The Irish leaflet states (in bold and underlined) that the asylum-seeker is invited to make written representations to the Office of the Refugee Applications Commissioner and that: '[t]he Commissioner shall take into consideration all relevant matters known to him or her, including any representations made by you on your behalf when deciding whether your application will be transferred'.[46] The U.K. authorities noted that, at the start of each Dublin procedure, a letter is sent to the applicant indicating that consideration is being given to the application of the Dublin II Regulation. This letter contains information on the reasons for applying Dublin II, and the applicable time limits. No reference is made to family reunification possibilities.[47]

41 Dutch information leaflet, "Which country is responsible for your asylum application?"

42 Dutch information leaflet, "Which country is responsible for your asylum application?" and Swedish information sheet, "Facts about…..The Dublin Regulation, June 2004".

43 French information leaflet, "Guide for asylum-seekers, 2005" and information from UNHCR (France).

44 Interview with the NGO *Forum Réfugiés* (France) on 24 August 2005: According to Forum Réfugiés, the information would only be available in about 50 percent of the cases.

45 Interview with the Head of the Dublin Section (Finland) on 27 September 2005.

46 'Information Leaflet for Applicants for Refugee Status in Ireland', Office of the Refugee Applications Commissioner, September 2003.

47 Interview with an Executive Officer of the Third Country Unit and a Policy Officer of the European Asylum Policy Unit of the Asylum and Appeals Policy Directorate (U.K.) on 10 November 2005.

Another aspect that varies widely is the number of languages in which the information is available. For example, in France the leaflet is available only in three languages, while the Irish leaflet is available in 26 languages.[48]

Conclusions: Information for asylum-seekers

The availability of accurate and readily comprehensible information is a prerequisite for the effective exercise of rights in any administrative procedure, especially one as complex as the Dublin II Regulation. Efforts should be made to harmonize the practice of Member States in this regard and to ensure that asylum-seekers receive the necessary information in a timely manner.

The information provided should at a minimum encompass the key components of the Dublin II procedure, and the applicant should be encouraged to bring forward all relevant information. It is important to provide information to each asylum-seeker in a language which he or she actually understands. Assumptions that an asylum-seeker understands the official language of his or her country of origin or of the country of asylum may be incorrect.

It would have been beyond the scope of this study to assess all information provided to asylum-seekers in Dublin procedures with respect both to general comprehensibility and the accuracy of translations.[49] However, given the cultural and educational diversity of asylum-seekers as well as the challenges of translating technical and legal terms, an evaluation of whether the information provided to asylum-seekers is sufficiently complete and actually understood by them could usefully be undertaken by the European Commission.

2.1.2 The Decision to Transfer

Legal Provision

Pursuant to Article 19(1) and (2), and 20(1)(e) of the Dublin II Regulation, the Member State in which the asylum claim was lodged shall notify the applicant of the decision not to examine the asylum claim, and to transfer him or her to the responsible State. The decision shall set out the grounds on which it is based and contain details of the time limit for carrying out the transfer and, if necessary, information on the place and date at which the applicant should appear, if s/he is travelling to the responsible State by his/her own means.

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[48] Interview with Senior Government Officials (France) dealing with Dublin II and related questions on 6 October 2005 and with the Head of the Dublin Unit (Assistant Principal) (Ireland) on 26 September 2005.

[49] The Irish Refugee Council expressed its concern about the quality of the translation found in the Irish leaflets (interview with the Irish Refugee Council on 20 September 2005). Also a social worker of the Red Cross in Spain observed that hardly any returnee is aware of the reason for being transferred to Spain (interview with the Red Cross at Barajas Airport (Spain) on 22 September 2005).

National Practice

The research revealed that the decision to transfer an applicant to another State has varying implications for the outcome of the asylum application. In some countries the decision results in the application being declared inadmissible. This is the case in Austria, Czech Republic, Finland, Germany and Slovakia.[50] The Greek authorities stated that they intend also to adopt this approach in new asylum legislation.[51] In other countries – Italy, the Netherlands and Sweden – the application is rejected.[52] The Belgian authorities issue a decision – the so-called 'Annex 26q' – stating that Belgium is not responsible for the application; this decision includes an order to leave the territory.[53] A similar approach is taken in Cyprus, Hungary, Lithuania, Luxembourg, Norway and Portugal.[54]

The legal basis and grounds for the transfer appear to be included in the decisions of Member States, as required by the Regulation. However, in the U.K., while making general references to the Dublin II Regulation and relevant provisions in national law, the decision does not explain why a particular Member State has been found responsible for examining the claim.[55] In a minority of cases, for instance in the Belgian and Dutch decisions, reference is made to the date on which the responsible State accepted to take responsibility for the claim.[56]

[50] Interview with the Head of Legal and Dublin Unit (Austria) on 16 September 2005, with the Head of the Dublin Section of the Department for Asylum and Migration Policies (Czech Republic) on 29 September 2005, with the Head of the Dublin Section (Finland) on 27 September 2005, with the Chief of the Section for management of Dublin II / Eurodac (Germany) on 6 October 2005, and with the Head of the Dublin Station (Slovakia) on 5 September 2005.

[51] Interview with the Head of the Dublin Unit (Greece) on 7 October 2005. The new asylum legislation refers to a revision of the Presidential Decree nr. 61/1999 incorporating all the EU asylum directives and provisions of the Dublin II Regulation.

[52] Interview with the Head of the Dublin Unit (Italy) on 4 October 2005, with the Head of the Dublin Unit and a Policy Officer of the Staff Directorate for Implementation and Policy (The Netherlands) on 2 September 2005, with the Principal Administrative Officer of the Swedish Migration Board, Stockholm Region, Asylum Division Arlanda Airport, on 25 August 2005.

[53] Interview with the Head of the Dublin Cell (Belgium) on 30 September 2005.

[54] Interview with an administrative officer of the Asylum Service (Cyprus) on 30 September 2005, with the Head of Dublin Unit (Hungary) on 6 October 2005, with the Head of the Asylum Affairs Division of the Migration Department (Lithuania) on 27 September 2005, with the Head of the Dublin Unit and the Asylum Interviewing Unit (Luxembourg) on 30 September 2005, with a lawyer of the Dublin Unit (Norway) on 28 September 2005, and with the acting Head of the Asylum and Refugees Department (Portugal) on 16 September 2005.

[55] Information from UNHCR (U.K.).

[56] Interview with the Head of the Dublin Cell (Belgium) on 30 September 2005 and with the Head of the Dublin Unit and a Policy Officer of the Staff Directorate for Implementation and Policy (The Netherlands) on 2 September 2005.

Illustration 2:

Dublin II decisions in the Netherlands: an example of good practice

In principle, a Dublin II decision in the Netherlands includes the following:

- the decision to reject the request for asylum;
- the course of the procedure, indicating: the date(s) of the interview(s) and the date that the fingerprints were taken; whether the asylum-seeker used the opportunity to comment on and correct the first interview report (regarding identity, nationality and travel route) and the report of the Dublin interview; the fact that another Member State is responsible for examining the claim derived from the aforementioned investigations; the date by which the asylum-seeker could respond to the fact that another Member State might be held responsible in the Dublin process; date that the intended negative decision was issued; reference to the date on which the State deemed responsible accepted the claim;
- the reasoning used by the authorities to counter any arguments brought forth by the asylum-seeker for having his/her asylum claim examined in the Netherlands (e.g. regarding the presence of relatives or other humanitarian issues);
- consequences of the decision, namely that legal stay ends at the moment of notification of the decision;
- appeal possibilities (address of appeal body, time limit for appeal, time limit for requesting suspensive effect).

A separate letter containing notification of the transfer to the State responsible sets out the legal basis and the time limit for transfer and informs the Dublin claimant that transfer details will follow.

Source: Interview with the Head of the Dublin Unit and a Policy Officer of the Staff Directorate for Implementation and Policy (the Netherlands) on 2 September 2005.

Some respondents reported that their countries' decisions also contain references to personal circumstances and humanitarian issues which were raised by the applicant. In contrast, Hungarian authorities said that any personal circumstances would be raised by the Dublin claimant on appeal, which is why specific reference to these grounds in the first instance decision is not necessary.[57] Spanish authorities are obliged to take a decision on the admissibility of an asylum claim within 60 days if the claim is filed inland, which may be extended to 90 days in Dublin cases. The asylum-seeker is notified in person of the extension; according to the Spanish authorities, it is usually during this notification that applicants bring forth humanitarian or medical grounds to which the competent authorities would respond orally at that time. Therefore it is deemed unnecessary to refer to these personal circumstances once more in the decision.[58]

[57] Interview with the Head of Dublin Unit (Hungary) on 6 October 2005.
[58] Interview with the Head of the Dublin Unit (Spain) on 20 September 2005.

The Irish Refugee Council mentioned that in some cases the asylum-seeker was transferred to another country without having received a decision at all. One such case reportedly involved the police responsible for the transfer withholding the written decision, apparently to prevent abscondment.[59] However, the Irish asylum authorities said that transferring an asylum-seeker without notification of the decision would be "unusual".[60]

In all Member States, the decision or notice of decision to reject, declare inadmissible or otherwise refrain from processing the claim sets out the right to appeal and the time limits for doing so.

Conclusions: Dublin II decisions

There are noteworthy differences in the form and content of Dublin II decisions issued by States. Some do not fully comply with the requirements of the Regulation, as set out in Articles 19(1) and 20(1)(e) of the Dublin II Regulation. It is important that decisions are worded in a manner which enables the asylum-seeker to appreciate the consequences, to utilise available means of redress, and to prepare for his or her departure to the responsible Member State.

UNHCR recommends that Articles 19(1) and 20(1)(e) of the Dublin II Regulation be amended to require Member States to provide decisions in writing, in a language which the asylum-seeker understands. Since an applicant, particularly if not represented by counsel, may not be aware of appeal possibilities, decisions should contain information on review or appeal possibilities. Furthermore, it should be made clear in the decision that the substance of the asylum application has not been examined.

2.2 Appeal Rights under Dublin II

Legal Provision

Pursuant to Article 19(2) and 20(1)(e) of the Dublin II Regulation, the decision not to examine the asylum claim but to transfer the applicant to the responsible Member State may be subject to an appeal or a review. However, appeal or review 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.

[59] Interview with the Irish Refugee Council on 20 September 2005.
[60] Interview with the Head of the Dublin Unit (Assistant Principal) (Ireland) on 26 September 2005.

National Practice

Even though the Regulation does not oblige Member States to offer an appeal or a review of the transfer decision under Dublin II, all Member States do so. The question remains, however, as to whether this right may effectively be exercised.

The Dublin II Regulation expressly excludes generalized suspensive effect of appeal or review. Nonetheless, all Dublin II appeals in Portugal automatically have suspensive effect.[61] In Germany, Ireland, Lithuania, and Luxembourg suspensive effect may in principle be requested, but appears difficult to secure in practice.[62] In Norway suspensive effect would, for example, be granted in case of very serious illness or risk of chain *refoulement*.[63] The Spanish authorities stated that the reason for not granting suspensive effect might be that Dublin transfers are only to Member States where the applicant may expect to receive the same treatment as in Spain.[64]

In order to be granted suspensive effect in Belgium, an asylum-seeker must fulfill the following three conditions: serious grounds that would justify the annulment of the decision in dispute; evidence that the transfer is imminent; and that the transfer would be likely to cause serious harm which would be difficult to repair.[65] According to the Flemish Refugee Council, the third criterion is often a hindrance because of the restrictive approach taken to its interpretation.[66]

Problems have arisen where suspensive effect was not granted and the decision to transfer was overturned on appeal. In September 2005, for example, an asylum-seeker was transferred from Austria to Poland, after which the decision to transfer him was overturned. The opinion of the Polish authorities was that the State which overturned the decision (Austria) should be responsible for cost of the transfer back to its territory. The Austrian authorities reportedly failed to respond to a Polish request to cover the costs, resulting in the asylum-seeker being required to pay for the transfer himself.[67] According to UNHCR (Germany), in a number of cases in Germany the appeal has been declared unfounded or inadmissible as soon as the transfer was carried out.[68]

In certain countries, for instance in the Czech Republic, Finland, France, Germany and Luxembourg, the lodging of an appeal may be difficult because the transfer takes place

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61 Interview with the acting Head of the Asylum and Refugees Department (Portugal) on 16 September 2005 and with the Portuguese Refugee Council on 29 August 2005.

62 Interview with the NGO *Flüchtlingsrat NRW* on 26 August 2005, with UNHCR (Germany) on 26 August 2005, with Refugee Legal Service (Ireland) on 9 September 2005, with the Head of the Asylum Affairs Division of the Migration Department (Lithuania) on 27 September 2005, and with the Head of the Dublin Unit and the Asylum Interviewing Unit (Luxembourg) on 30 September 2005.

63 Interview with the NGO *NOAS* (Norway) on 26 August 2005.

64 Interview with the Head of the Dublin Unit (Spain) on 20 September 2005.

65 Article 17(2) of the 'Coordinated Laws of the Council of State'.

66 Interview with the Flemish Refugee Council on 16 August 2005.

67 Interview with the Head of the Dublin Office (Poland) on 3 November 2005, in which it was also stated that the Polish authorities could not pay for the transfer because the asylum-seeker's claim had already been rejected in Poland and therefore a decision to cover the costs would be lacking legal basis.

68 Interview with UNHCR (Germany) on 26 August 2005.

on the same day or shortly after that on which the asylum-seeker is notified of the transfer decision, allowing very little time to prepare an appeal.[69]

Illustration 3:

Transfer practice in the Czech Republic

The day before the intended notification of the decision on transfer under Dublin II, Czech authorities request an NGO to be present during the notification. While the request states the date, time and place of the notification, it does not identify the person concerned. The next day, the asylum-seeker receives the decision in person in the reception facility where s/he is staying. According to the Czech authorities, during this notification process an officer of the Interior Ministry asks the person whether s/he wishes to make an appeal.[71] If the asylum-seeker wishes to do so, s/he has about 30 minutes to prepare the appeal. This short time causes evident problems, which are aggravated if the attending NGO is not already familiar with the case.

Source: Interview with the Organization for Aid to Refugees (OPU) (Czech Republic) on 23 August 2005 and with the Society of Citizens Assisting Migrants (SOZE) (Czech Republic) on 26 August 2005.

Conclusions: Appeal rights

UNHCR appreciates that all Member States, in their national legislation, allow for appeal or review of a transfer decision, even though this is not expressly required by the Regulation. The right to an effective remedy is indeed important, as Dublin II decisions may have serious consequences for the outcome of a person's asylum claim, in view of the continued divergence in the asylum practice of the participating States. This is particularly the case with respect to differences in the interpretation of the refugee definition as well as the possible application of national safe third country rules. Moreover, an effective remedy could strengthen accountability and improve the quality of decision-making under Dublin II.

For a remedy to be effective, it must be possible for the applicant to request suspensive effect of the appeal and to remain in the territory until a decision on the application for suspensive effect is taken. UNHCR recommends the inclusion in the Dublin II Regulation of a positive obligation to provide for these safeguards, which would also broadly reflect current practice in most Member States.

In case of (re)transfer in the event of a successful appeal against an already enforced Dublin II decision, UNHCR recommends clarification that the asylum-seeker should not have to bear any related costs.

[69] Interview with the NGO *OPU* (Czech Republic) on 23 August 2005, with the Finnish Refugee Advice Centre on 13 September 2005, with the NGO *Forum Réfugiés* (France) on 24 August 2005, with UNHCR (Germany) on 26 August 2005 and with a lawyer (Luxembourg) on 16 August 2005.

[70] Interview with the Head of the Dublin Section of the Department for Asylum and Migration Policies (Czech Republic) on 29 September 2005.

2.3 Application of key Dublin II Criteria

The criteria in Articles 6-14 of the Dublin II Regulation are intended to provide the basis for a rational, consistent and humane method of determining the State responsible for examining an asylum claim. However, the research identified a number of problems in the application of these criteria, which should be addressed in any review of the Regulation's content and implementation. Where these criteria are not interpreted in a uniform manner by the different Member States, or in accordance with a plain reading, the objectives of the Dublin II Regulation and some of its inherent principles, such as the best interest of the child or the right to family reunification, may be undermined.

2.3.1 Application of Article 6 regarding Unaccompanied Minors

Legal Provision

Article 6 provides that if an unaccompanied minor[71] applies for asylum, responsibility rests with the Member State where a member of his/her family[72] is legally present, provided that this is in the best interest of the minor. The aim of this provision is to avoid the situation where a child stays alone in one Member State, when a family member able to take care of him/her is legally residing in another.[73] In the absence of family members legally staying in a Member State, the State where the minor has lodged his/her asylum application shall be responsible.

National Practice

Despite Article 6, practice shows that minors may be or remain separated from family members. The research encountered several examples where States had attempted to remove children in violation of Article 6 or had actually done so.

[71] For the definition of an 'unaccompanied minor' see Article 2, sub-paragaph (h), of the Dublin II Regulation.

[72] For the definition of 'family members' see Article 2, sub-paragraph (i), of the Dublin II Regulation; see also 2.3.2 below.

[73] Proposal for a Council Regulation 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, COM(2001) 447 final, 26.07.2001, p. 12.

Illustration 4:

Correction by a Court of an incorrect application of Article 6

On 23 August 2004, a Somali minor applied for asylum in the Netherlands. During his Dublin interview he revealed that his mother was legally residing in the Netherlands. The Minister nonetheless sought the boy's transfer to Spain, where he had previously applied for asylum. The minor appealed this decision. In her defence, the Minister argued that while the minor raised the residence of his mother during his interview, he had failed to refer to the legal basis, i.e. Article 6, at the earliest possible stage. She claimed that Article 6 was invoked for the first time on appeal and could therefore not be considered. In addition, the Minister stated that Article 6 was not applicable in this case because Spain had never requested the Netherlands to take charge of the minor. Her third argument was that Spain had agreed to the transfer, which would absolve the Netherlands of its responsibility. The Court rejected the Minister's arguments and held the Netherlands responsible for determining the asylum claim.

Source: Judgment of the District Court The Hague of 27 January 2005, Awb 04/51294 and Awb 04/51293.

Illustration 5:

Failure to apply Article 6

According to an NGO report, a 17-year old Eritrean boy submitted his asylum claim in Germany on 15 October 2003. Although he was registered by the German authorities as a minor, his age was disputed due to the fact that he had already served in the Eritrean army, despite reports of forced recruitment of minors there. During his interview he informed the authorities that his father, a former refugee, was a German citizen residing in Germany. Nonetheless, the authorities intended to transfer the boy to Italy where he had applied for asylum. The transfer failed because the boy jumped out a window, seriously injuring himself. Nearly two weeks later, a second attempt to transfer the boy was made, this time with an escort of eight persons. In Italy, on 13 August 2004, the boy applied for a visa for family reunification with his father in Germany. The German authorities issued a permit to enter the German territory valid for one month followed by permission to remain until December 2006.

Source: Interview with the German NGO Pro Asyl on 29 August 2005.

Where the minor has no family member legally staying in a Member State, the second paragraph of Article 6 allocates responsibility to the State where the application is lodged. A plain reading of this provision and the Dublin II Regulation as a whole would indicate that this overrides a request to take charge of an unaccompanied minor for any

other reason. This interpretation is confirmed by the authorities of all Member States except the Czech Republic.[74] However, the Greek and Hungarian authorities[75] reported that they received frequent requests from other States to take charge of minors based, for example, on irregular border crossing or the issuance of a visa, which seems to be confirmed by the following example.

Illustration 6:

Interpretation of Article 6

An asylum-seeker from Iraq arrived in Finland via Greece and Sweden. In Finland he was registered as a 16-year old unaccompanied minor. Eurodac showed that he had been registered as an asylum-seeker in Sweden. Sweden had asked Greece to take charge of the applicant based on Article 10(1) of the Dublin II Regulation, i.e. irregular border crossing. Finland sent a similar request to Greece, which agreed to take charge of the minor. According to the Finnish Refugee Advice Centre, the age of the applicant was not in dispute, but the fact that the minor had travelled from Greece to Sweden and Finland independently was considered sufficient to demonstrate his maturity and to justify a transfer to Greece. The Finnish authorities confirmed that a special interview had been carried out to determine the maturity of the applicant who appeared to be 'very mature and independent'. The applicant's appeal against this decision was rejected by the Helsinki Administrative Court on 19 January 2006.

Source: Interview with the Finnish Refugee Advice Centre on 13 September 2005 and information from the Head of the Dublin Section (Finland).

Article 6 does not explicitly require a "best interest" determination in all transfers involving unaccompanied minors, but links such determination to situations where the minor may be reunited with his/her parents or guardian. Pursuant to Article 3(1) of the Convention on the Rights of the Child[76] some Member States, such as Ireland, Italy and Slovenia, nevertheless reason that *all* transfers involving separated children must be guided by the best interest of the child, thus including transfers to the State where a minor has lodged a previous asylum application. According to the Irish official, a 'taking back' transfer from Ireland to another Member State is permitted only after contact between the

[74] The Czech authorities stated that Czech Republic would reserve the right to request another Member State to take charge of a separated child on grounds other than family reunification. However, in practice, they have not done so (interview with the Head of the Dublin Section of the Department for Asylum and Migration Policies (Czech Republic) on 29 September 2005).

[75] Interview with the Head of the Dublin Unit (Greece) on 7 October 2005 and with the Head of Dublin Unit (Hungary) on 6 October 2005.

[76] Article 3(1) reads as follows: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*."

social services in Ireland and the social services in the destination country.[77] Norway generally exempts all unaccompanied minors from the application of the Dublin II Regulation.[78]

Several respondents pointed out that the authorities do not always (adequately) determine what is in the best interest of the child.[79] In Luxembourg, for example, reunification of a separated child with nuclear family members is, without any further examination, always deemed to be in the best interest of the child.[80] Concerns have also been expressed in regard to the U.K.'s reservation to the Convention on the Rights of the Child,[81] which could undermine the principle that the rights protected by the Convention apply to all children within a jurisdiction, irrespective of nationality or status.

Another problem which came to light during the interviews related to age assessment. Some respondents expressed concern regarding the impact of inaccurate age determination[82] which could – in the case of an over-estimation of the age of the asylum-seeker – deprive a minor of his right to family reunification. Difficulties arise also where the alleged minor gives different ages in two Member States.[83] The Slovak authorities have accepted requests for taking charge of a person who did not claim to be a minor in Slovakia, but claimed to be of minor age in another Member State, assuming that they were dealing with an adult.[84]

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77 Interview with the Head of the Dublin Unit (Assistant Principal) (Ireland) on 26 September 2005, with the Head of the Dublin Unit (Italy) on 4 October 2005, and with the Head of the Dublin and Eurodac Office (Slovenia) on 19 October 2005.

78 Interview with a lawyer of the Dublin Unit (Norway) on 28 September 2005 and with the NGO *NOAS* (Norway) on 26 August 2005.

79 Interview with UNHCR (Austria) on 9 September 2005, with UNHCR (Brussels) with regard to Luxembourg on 10 August 2005, and with UNHCR (Greece) on 18 August 2005.

80 Interview with the Head of the Dublin Unit and the Asylum Interviewing Unit (Luxembourg) on 30 September 2005.

81 Interview with a lawyer (U.K.) on 13 September 2005. The reservation reads: *"The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time"* (http://www.ohchr.org/english/countries/ratification/11.htm#reservations).

82 Interview with UNHCR (Austria) on 9 September 2005, with the Finnish Refugee Advice Centre on 13 September 2005, with the Refugee Legal Service (Ireland) on 9 September 2005, with the Irish Refugee Council on 20 September 2005, with UNHCR (Brussels) with regard to Luxembourg on 10 August 2005, with the NGO *NOAS* (Norway) on 26 August 2005 and with UNHCR (Poland) on 30 September 2005.

83 Interview with the Head of the Dublin Station (Slovakia) on 5 September 2005 and with UNHCR (Hungary) on 16 September 2005.

84 Interview with the Head of the Dublin Station (Slovakia) on 5 September 2005.

Conclusions: Unaccompanied minors

Article 6 of the Dublin II Regulation recognizes the particular vulnerability of children who are not accompanied by an adult responsible for them by law or custom. The research identified a number of instances where States failed properly to apply Article 6. More specific guidance from the European Commission would be warranted with respect to the application of this article.

In this context and in compliance with Article 3 of the Convention on the Rights of the Child, it should be clarified that the 'best interest' principle should be a primary consideration in *all* actions concerning children, regardless of whether a family member of the minor is staying legally in the territory of the EU. While this approach, without providing an explicit entitlement, is reflected in Article 15(3) of the Dublin II Regulation – the 'humanitarian clause' – it should also be part of Article 6, and not subject to any exception.

2.3.2 Application of Articles 7, 8 and 14, regarding Family Members

2.3.2.1 Application of Articles 7 and 8 (Refugees and Asylum-Seekers)

Legal Provision

Article 7 allows for reunification of an asylum-seeker with family members who are recognized refugees in another Member State, regardless of whether the family was previously formed in the country of origin.

Under Article 8 the responsibility lies with the Member State where the asylum-seeker has a family member whose application has not yet been subject of a first decision regarding the substance.

In both cases the family reunion is only possible if the family members to be reunited so desire. While according to the proposal for the Regulation Article 7 seeks to protect family unity, the underlying principle of Article 8 is that examination of all asylum claims from one family by a single Member State will contribute to consistent decisions.[85]

[85] Proposal for a Council Regulation 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, COM(2001) 447 final, 26.07.2001, p. 13.

The definition of 'family members' in Article 2(i) of the Dublin II Regulation includes insofar as the family already existed in the country of origin:

- the spouse of the asylum-seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;
- the minor children of couples referred to above or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;
- the father, mother or guardian when the applicant or refugee is a minor and unmarried.

National Practice

In the application of Articles 7 and 8, the research identified three main areas of inconsistent practice, namely marital status, proof of family links and the status of the family members with whom unification is requested.

The first question concerns the narrow scope of the definition of family members in Article 2(i), particularly where it speaks of the spouse or partner of the asylum-seeker. The relationship is not always recognized when a couple is not legally married, or married in a religious as opposed to civil or officially documented ceremony.[86] According to German authorities, Germany does recognize marriages under other cultures and codes.[87] This was, however, contested by the NGO *Flüchtlingsrat NRW*.[88] On the other hand, the U.K. authorities assert that if a couple married in the U.K., it must be a civil ceremony in order to be recognized for family unification purposes under Dublin II. If the wedding took place in the country of origin, religious ceremonies also would be taken into consideration.[89]

Secondly, proving the family link seems to cause difficulties.[90] Austrian, Belgian and Swedish authorities stressed that documentation is not required if the statements of the persons involved are consistent and credible.[91] The Czech authorities seem to place more emphasis on documentation as a means of establishing the family bond.[92] The Norwegian authorities confirmed that some Member States refuse requests for family reunification if a marriage is not documented.[93] The Greek authorities also acknowledged difficulties if

[86] Interview with the NGO *Asylkoordination* (Austria) on 11 August 2005.
[87] Interview with the Chief of the Section for management of Dublin II / Eurodac (Germany) on 6 October 2005.
[88] Interview with the NGO *Flüchtlingsrat NRW* (Germany) on 26 August 2005.
[89] Interview with a Senior Case Worker of the Third Country Unit (U.K.) on 15 November 2005.
[90] This has been observed in all types of cases involving family reunification, including Articles 6 and 14.
[91] Interview with the Head of Legal and Dublin Unit (Austria) on 16 September 2005, with the Head of the Dublin Cell (Belgium) on 30 September 2005, and with the Principal Administrative Officer of the Swedish Migration Board, Stockholm Region, Asylum Division Arlanda Airport, on 25 August 2005.
[92] Interview with the Head of the Dublin Section of the Department for Asylum and Migration Policies (Czech Republic) on 29 September 2005.
[93] Interview with a lawyer of the Dublin Unit (Norway) on 28 September 2005.

there is no documentation available, while noting that most requests based on family grounds have been accepted by other Member States.[94] The Polish authorities also mentioned that Member States generally respond positively to such requests.[95] Similarly, a Spanish NGO confirmed that all cases regarding reunification with a family member in Spain have been successful so far.[96]

The authorities may require DNA testing to prove the family link. The Irish authorities said that a DNA test is used only as a last resort.[97] The U.K. authorities said they might have recourse to a DNA test, if documentary evidence is not available.[98] Norway stated that some Member States demand a high standard of proof of the family link before agreeing to take charge of an individual, which is why in such cases a DNA test is used.[99]

A third important issue concerns the status of the family member with whom reunification is requested. Under Article 7, the family member must be residing as a refugee. The text does not contemplate reunification with beneficiaries of subsidiary protection although they are included in the Qualification Directive.[100] As a consequence, this article is rarely applied in Finland, where most grants of protection are of subsidiary status.[101] The Netherlands, by contrast, has taken a broader approach to Article 7 and accepts responsibility for an asylum claim when family members are residing in the Netherlands either with refugee status or on subsidiary protection grounds.[102]

Article 8 allows for reunification with a family member who is an asylum-seeker whose application has not yet been the subject of a first decision on the substance. Interpretation of the article varies among Member States, particularly those which implement admissibility procedures. Belgium, for instance, assumes responsibility for claims when the family member is awaiting review of a negative admissibility decision.[103]

2.3.2.2 Application of Article 14 (Family Procedures)

Legal Provision

Article 14 deals with the situation where several family members submit an asylum application in the same Member State simultaneously or around the same time, and where the application of the Dublin II Regulation would lead to the separation of the family. In

94 Interview with the Head of the Dublin Unit (Greece) on 7 October 2005.
95 Interview with the Head of the Dublin Office (Poland) on 3 November 2005.
96 Interview with the NGO *Rescate* (Spain) on 21 September 2005.
97 Interview with the Head of the Dublin Unit (Assistant Principal) (Ireland) on 26 September 2005.
98 Interview with a Senior Case Worker of the Third Country Unit (U.K.) on 15 November 2005.
99 Interview with a lawyer of the Dublin Unit (Norway) on 28 September 2005.
100 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 refugee or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12, 30.09.2004.
101 Interview with the Head of the Dublin Section (Finland) on 27 September 2005 and the Finnish Refugee Advice Centre on 13 September 2005.
102 Working Instruction 2003/32 (*Tussentijds Bericht Vreemdlingencirculaire* TBV 2003/32) of 27 August 2003.
103 Interview with the Head of the Dublin Cell (Belgium) on 30 September 2005.

this situation, responsibility is assigned based on two criteria: Either the Member State which is, according to the Regulation, responsible for the largest number of family members or, failing this, the Member State responsible for the oldest family member, shall be responsible for determining the asylum claims of all family members.

National Practice

The evaluation of Article 14 showed that this provision is rarely applied. Several States noted their limited or lack of experience with this article.[104] Nevertheless some instances of family separation were revealed. The Polish authorities, for instance, referred to a case in which the German authorities had requested Poland to take back a wife and the Czech Republic to take back her husband instead of applying Article 14 and requesting either Poland or the Czech Republic to take back one spouse and to take charge of the other.[105]

Illustration 7:

Application of Article 14 which would result in family separation

A family from Armenia received a negative decision on their asylum claim in Germany. The father alone was returned to the country of origin, while the mother and children stayed in Germany. The father subsequently returned to Germany and moved, with his family, to Belgium, where the family filed a new asylum application. The Belgian authorities requested Germany to take back all family members. However, Germany only accepted responsibility for the mother and the children, and refused to take back the father, as he had previously been removed to his country of origin. Belgium ultimately took charge of the whole family, in order to avoid separating them.

Source: Interview with the Head of the Dublin Cell (Belgium) on 30 September 2005.

[104] Interview with an administrative officer of the Asylum Service (Cyprus) on 30 September 2005, with the Head of the Dublin Section of the Department for Asylum and Migration Policies (Czech Republic) on 29 September 2005, with the Chief of the Section for management of Dublin II / Eurodac (Germany) on 6 October 2005, with the Head of Dublin Unit (Hungary) on 6 October 2005, with the Head of the Asylum Affairs Division of the Migration Department (Lithuania) on 27 September 2005, with the acting Head of the Asylum and Refugees Department (Portugal) on 16 September 2005, and with the Head of the Dublin Station (Slovakia) on 5 September 2005.

[105] Interview with the Head of the Dublin Office (Poland) on 3 November 2005.

Conclusions: Family unity

Family unity is a fundamental principle of refugee protection. It derives from the universally recognized right of the family to protection by society and by the State. UNHCR welcomes the fact that under Dublin II, family links play an important role in determining the Member State responsible for examining an asylum application. However, practice reveals gaps and inconsistencies in interpretation and application of the relevant provisions.

UNHCR recommends the adoption of liberal criteria as regards the definition of the family, to ensure an appropriate response to the plight of refugees. Accordingly, the notion of "family" should also encompass unmarried couples forming a genuine and stable family unit, as well dependents, including ascending relatives who have no other means of family support and adult children who are unable to look after themselves, for instance because of their state of health.

The test of family relationships should be based on a reasonable standard of proof, admitting alternative means of proof where the asylum-seeker cannot provide documentary evidence.

With respect to nuclear family, UNHCR recommends deleting the requirement in Article 2(i) that the relationship must already have existed in the country of origin, since families set up during flight and in exile also have the right to protection of their family life.

Regarding Article 7, UNHCR recommends extending the family reunification entitlement to cases where the family member is a beneficiary of subsidiary protection. This would be consistent with the importance of subsidiary protection within the emerging common EU asylum system.

Article 8 provides that family reunification may only take place if the application of the family member in another Member State has not yet been subject of a first decision on the merits of the case. This limitation should be deleted, as the right to family life should prevail over administrative and procedural considerations.

The aim of Article 14 is to establish "*a clear, binding rule for preserving the unity of the family group where the strict application of the criteria would result in designating different Member States responsible for examining the asylum applications of the various members of the family.*"[106] UNHCR recommends firm adherence to this criterion. This would enable States to deal effectively with claims which often involve similar facts and circumstances, and to minimize hardship for the families concerned, as well as secondary movements, which are likely to occur if family members are kept apart.

[106] Proposal for a Council Regulation 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, COM(2001) 447 final, 26.07.2001, p. 15.

2.3.3 Application of Article 3(2) and Article 15 ('Sovereignty Clause' and 'Humanitarian Clause')

2.3.3.1 Application of Article 3(2) ('Sovereignty Clause')

Legal Provision

In Article 3(2), the Dublin II Regulation acknowledges the right of a Member State, in the exercise of its sovereign power, to decide to examine an asylum application lodged with it, even if it is not its responsibility under the criteria set out in the Regulation. The Commission's initial Proposal for the Dublin II Regulation suggests that a Member State may make this decision for "political, humanitarian and practical considerations."[107]

By contrast with the Dublin Convention, consent of the asylum-seeker for the application of Article 3(2) is not required in the Dublin II Regulation. The fact that the individual applied for asylum in a given Member State is seen to imply consent.[108]

National Practice

The research identified widely divergent interpretation and application of Article 3(2). For instance, Austria applies the 'sovereignty clause' if there is a risk of a violation of Articles 3 and 8 of the European Convention on Human Rights (ECHR), i.e. if the asylum-seeker's transfer to another country would in itself be or result in inhuman or degrading treatment or punishment or if transfer would lead – in violation of the principle of *non-refoulement* – to chain deportation.[109] Until 1 January 2006, Austrian law also required application of this provision to all traumatized asylum-seekers.[110] In Finland and Ireland, Article 3(2) is applied to unify (extended) family members, or in cases involving persons who are ill and separated children.[111] The Luxembourg authorities referred to an elderly, ill person to whose benefit Article 3(2) was applied, while noting that such a case was "exceptional".[112] Belgium, Cyprus, Greece, Lithuania, Poland, Portugal and Slovenia do not appear to have applied Article 3(2) at all.[113]

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[107] Ibid., p. 10.
[108] Ibid.
[109] Interview with the Head of Legal and Dublin Unit (Austria) on 16 September 2005 and with UNHCR (Austria) on 9 September 2005.
[110] Article 24b of the former Asylum Law reads as follows: "*If, at the initial interview or at a further interview in the admission procedure (article 24a), medically provable facts emerge which justify the assumption that the asylum seeker could be a victim of torture or be traumatized by events connected with the occurrence which gave rise to his flight, the procedure shall be admitted and the asylum seeker may be assigned to a care facility. […]*"
[111] Interview with the Head of the Dublin Section (Finland) on 27 September 2005 and with the Head of the Dublin Unit (Assistant Principal) (Ireland) on 26 September 2005.
[112] Interview with the Head of the Dublin Unit and the Asylum Interviewing Unit (Luxembourg) on 30 September 2005 and with a lawyer (Luxembourg) on 16 August 2005.
[113] Interview with the Head of the Dublin Cell (Belgium) on 30 September, with an Administrative Officer of the Asylum Service (Cyprus) on 30 September 2005, with the Head of the Dublin Unit (Greece) on 7 October 2005, with the Head of the Asylum Affairs Division of the Migration Department (Lithuania) on 27 September 2005, with the Head of the Dublin Office (Poland) on 3 November 2005, with the

The research identified a number of instances where authorities decided to process claims rather than seek to transfer asylum-seekers to other countries under Dublin II. For instance, Finland has invoked Article 3(2) to process, through accelerated procedures, the asylum claims of Roma who have been out of their country of origin for a long time.[114] Similarly, the German authorities indicated that they could make use of the 'sovereignty clause' if it would be more expeditious and cheaper to examine (and deny) the claim in Germany and to return the asylum-seeker to his country of origin or another country, than to undertake the Dublin II process.[115] The Dutch authorities also said that the Dublin II criteria may not be applied for practical reasons, if the applicant can be directly removed to his/her country of origin.[116] Norway processes claims of citizens from certain countries (among others Moldova and Ukraine) in its accelerated procedure, instead of applying the Dublin II Regulation.[117]

Some non-governmental respondents were not aware of any cases in which Article 3(2) has been applied,[118] and also pointed out that the practice is not always transparent. Amnesty International (the Netherlands) and the Dutch Refugee Council noted that in some cases they could only guess at the underlying reasoning for applying Article 3(2).[119] However, the Dutch Foundation for Legal Aid (SRA) noted that the restrictive application of the 'sovereignty clause' is explicitly laid down in implementation guidelines issued by the competent Minister.[120]

A generous application of Article 3(2) by the Italian authorities is acknowledged by the Italian Refugee Council, while Austria and Norway are seen as interpreting this article restrictively.[121] NOAS referred to the case of a couple who had met in Norway. The authorities had already rendered a negative decision on the claim of the woman when the

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Acting Head of the Asylum and Refugees Department (Portugal) on 16 September 2005, and with the Head of the Dublin and Eurodac Office (Slovenia) on 19 October 2005. The Belgian authorities justified this practice with a generous application of Article 8 and Article 15 (interview with the Head of the Dublin Cell (Belgium) on 30 September 2005).

114 Interview with the Head of the Dublin Section (Finland) on 27 September 2005.

115 Interview with the Chief of the Section for management of Dublin II / Eurodac (Germany) on 6 October 2005. According to the NGO *Flüchtlingsrat NRW*, Article 3(2) is applied if the case can be declared manifestly unfounded based on the absence of reasons for persecution or the safe country of origin principle (interview with the NGO *Flüchtlingsrat NRW* (Germany) on 26 August 2005).

116 Interview with the Head of the Dublin Unit and a Policy Officer of the Staff Directorate for Implementation and Policy (The Netherlands) on 2 September 2005.

117 Interview with a lawyer from the Dublin Unit (Norway) on 28 September 2005.

118 Interview with the NGO *SOZE* (Czech Republic) on 26 August 2005, with UNHCR (Czech Republic) on 30 September 2005, with the Finnish Refugee Advice Centre on 13 September 2005, with the Helsinki Committee (Hungary) on 16 August 2005, with UNHCR (Hungary) on 16 September 2005, with a lawyer (Luxembourg) on 16 August, with the NGO *SRA* (The Netherlands) on 31 August 2005, with the Dutch Refugee Council on 1 September 2005, and with a lawyer (U.K.) on 13 September 2005.

119 Interview with Amnesty International (The Netherlands) on 16 August 2005 and with the Dutch Refugee Council on 1 September 2005.

120 Interview with the NGO *SRA* (The Netherlands) on 31 August 2005; see C1/2.4.2 Vreemdelingencirculaire 2000 (Aliens Circular 2000).

121 Interview with the Italian Refugee Council on 11 August 2005, with UNHCR (Austria) on 9 September 2005 and with the NGO *NOAS* (Norway) on 26 August 2005.

daughter of the couple was born. Nevertheless the authorities decided to transfer the father to Italy, where he had stayed previously, thus separating the family.[122] UNHCR (Germany) pointed out that the required approval of the Interior Minister for applying Article 3(2) limits the application of this article.[123]

Illustrations 8 and 9 show cases in which a transfer took place or was imminent, despite strong indications of emotional and psychological distress.

Illustration 8:

Transfer of a mentally ill person

An Afghan man applied for asylum in Slovakia on 21 October 2005. He left Slovakia and lodged a subsequent application in Austria on 9 December 2005. During his first asylum interview in Austria his psychological problems came to light and he was referred to a specialist, who prescribed medication. After the applicant was notified of his forthcoming transfer to Slovakia, he showed new psychological problems for which hospital treatment was required. A specialist diagnosed him with post traumatic stress disorder and recommended specialist care.

Nevertheless, the Austrian authorities applied the Dublin II Regulation and returned him to Slovakia. One week prior to the transfer the Slovak authorities received notification of the forthcoming transfer. Apart from the term 'psychosis' no further reference was made to the returnee's mental status. Two days before the transfer the Slovak authorities received information that the returnee would come by ambulance, escorted by a special Austrian team. Finally four Austrian police cars arrived at the Slovak border with the asylum-seeker. Upon arrival in Slovakia, he was admitted to hospital.

Source: Information from UNHCR (Slovakia) and UNHCR (Austria).

[122] Interview with the NGO *NOAS* (Norway) on 26 August 2005.
[123] Interview with UNHCR (Germany) on 26 August 2005.

Illustration 9:

Envisaged transfer of a mentally ill person

A Russian family applied for asylum in Germany in 2005 after having lodged a previous asylum application in Poland. The German authorities issued a decision that Poland was responsible for determining the asylum claim. The transfer was, however, cancelled due to the wife's severe depression and a personality disorder for which treatment was required.

Shortly after her release from the clinic and after the authorities established a new date for the transfer to Poland, the wife stabbed herself with a knife. She was admitted to hospital for treatment of depression with psychotic symptoms. Upon release the authorities ordered her detention, arguing that detention was justified as the transfer decision became enforceable after notification and, additionally, there was reason to believe that she would harm herself again in order to prevent transfer to Poland. Since the detention order was quashed by a Court on formal grounds, the woman was released.

According to a German lawyer, the authorities finally refrained from transferring the applicant as transfer within the required time limit would not be feasible.

Source: Judgment from the Landgericht Dortmund of 17 August 2005, 9 T 544/05, and information from a lawyer (Germany).

2.3.3.2 Application of Article 15 ('Humanitarian Clause')

Legal Provision

Article 15(1) allows States to bring together family members and other dependent relatives on humanitarian grounds, notably based on family or cultural considerations. Paragraph (2) stipulates that Member States shall normally keep or bring together an asylum-seeker with another relative present in the EU if the asylum-seeker is dependent on the assistance of the relative on account of pregnancy or a new-born child, serious illness, severe handicap or old age. According to paragraph (3) Member States shall, if possible, unite unaccompanied minors with relatives present in another Member State, unless this is not in the child's best interest.

The purpose of this article is to prevent dispersal of family members which could sometimes result from the strict application of the responsibility criteria.[124] To ensure its uniform application by the Member States the Commission laid down rules for the application of the Humanitarian Clause in Articles 11 to 14 of its Regulation (EC) No 1560/2003 of 2 September 2003.[125]

[124] Proposal for a Council Regulation 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, COM(2001) 447 final, 26.07.2001, p. 15.

[125] OJ L 222/3, 05.09.2003.

National Practice

The research concluded that practice with respect to Article 15 is divergent but overall, quite restrictive. Moreover, it appeared that the distinction between Article 3(2) (the 'Sovereignty Clause') and Article 15 (the 'Humanitarian Clause') is unclear. A plain reading of the Regulation suggests that Article 15 applies when one Member State wishes to request another to take responsibility for a case on humanitarian grounds. However, some States also invoke Article 15 in order to take responsibility for a case for humanitarian reasons, although in such a case the relevant legal basis would appear to be Article 3(2). For instance, in Ireland, if an applicant is medically unfit to travel, Article 15 is applied 'ex-officio', although this would appear to be a typical Article 3(2) case.[126]

In contrast, several Member States said they would make or accept Article 15 requests in order to reunite extended family members, in particular when elderly or ill persons are involved.[127] In addition, the Slovak authorities noted that they would also make a request in the case of legally residing family members in other Member States where neither Article 7 nor Article 8 would apply.[128] Similarly, the Spanish authorities referred to a case in which a father and his child arrived in Portugal on a visa and applied for asylum there. As the mother was working legally in Spain, the Spanish authorities accepted the request to take charge of the father and son based on Article 15.[129]

Other States reported that they had never made or received an Article 15 request. The Cypriot and Lithuanian authorities, for example, said they had no experience with this article.[130] Other States, including Finland and Ireland, reported only limited experience with Article 15.[131]

A number of respondents stated that requests based on Article 15 are usually rejected. Austrian authorities noted that some Member States deny all Article 15 requests, which in their opinion is of some concern, even if the Regulation does not compel States to accept these requests.[132] The Belgian and Luxembourg authorities agreed that most requests to apply the Humanitarian Clause are rejected by other Member States.[133] The Belgian authorities further noted that some Member States reject the request if the asylum-seeker

[126] Interview with the Head of the Dublin Unit (Assistant Principal) (Ireland) on 26 September 2005.

[127] Interview with the Head of the Dublin Cell (Belgium) on 30 September 2005, with Senior Government Officials (France) dealing with Dublin II and related questions on 6 October 2005, with the Chief of the Section for management of Dublin II / Eurodac (Germany) on 6 October 2005, with the Head of the Dublin Unit and the Asylum Interviewing Unit (Luxembourg) on 30 September 2005, with the Head of the Dublin Office (Poland) on 3 November 2005, and with the Head of the Dublin Station (Slovakia) on 5 September 2005.

[128] Interview with the Head of the Dublin Station (Slovakia) on 5 September 2005.

[129] Interview with the Head of the Dublin Unit (Spain) on 20 September 2005.

[130] Interview with an administrative officer of the Asylum Service (Cyprus) on 30 September 2005 and with the Head of the Asylum Affairs Division of the Migration Department (Lithuania) on 27 September 2005.

[131] Interview with the Head of the Dublin Section (Finland) on 27 September 2005 and with the Head of the Dublin Unit (Assistant Principal) (Ireland) on 26 September 2005.

[132] Interview with the Head of Legal and Dublin Unit (Austria) on 16 September 2005.

[133] Interview with the Head of the Dublin Cell (Belgium) on 30 September 2005 and with the Head of the Dublin Unit and the Asylum Interviewing Unit (Luxembourg) on 30 September 2005.

cannot meet a high standard of proof (e.g. birth and marriage certificates).[134] According to the Luxembourg authorities Article 15 requests are normally refused because the persons involved were unable to prove the family link.[135] The Czech authorities estimated the proportion of positive versus negative replies to be approximately equal.[136]

Non-governmental respondents could provide only limited information about the application of Article 15, with many stating that it was, to their knowledge, rarely if ever applied. However, the distinction between Article 3(2) and Article 15 appeared unclear to many non-governmental respondents.

Conclusions: The 'Sovereignty Clause' and 'Humanitarian Clause'

The 'sovereignty clause' contained in Article 3(2) is a valuable provision which allows States the flexibility to deal with claims, often of a humanitarian nature, in situations which are not explicitly provided for in the Regulation. UNHCR recommends that this Article be applied more broadly, when this is in the interest of the asylum-seeker. The 'sovereignty clause' should, however, not be used in a manner which would undermine other humanitarian provisions of the Dublin II Regulation, for instance, those pertaining to family reunification.

If the recommendation to adopt a broader definition of family members, made in the context of Articles 7, 8 and 14, is not followed, UNHCR urges Member States to use the 'sovereignty clause' to avoid separating family members. States should be encouraged to use Article 3(2) in cases where the asylum-seeker's transfer would result in hardship or potential harm, for instance for medical or other humanitarian reasons.

Where there is doubt as to whether the decision practice of the Member State responsible pursuant to the Dublin criteria complies with international refugee and human rights law, the 'sovereignty clause' should be used, in particular in order to ensure that no indirect *refoulement* will take place.

Although Article 3(2) is of general nature and falls short of specifying the circumstances in which it should be applied, it is recommended that the Commission revise the Dublin II Implementing Regulation to set out rules for the application of this provision.

Article 15 is an essential provision of the Dublin II Regulation, which allows Member States to bring together family members on humanitarian grounds. However, the application of a high standard of proof appears to limit the effectiveness of this important Article. UNHCR recommends a flexible application of Article 15 to ensure that the object and purpose of this provision are respected.

[134] Interview with the Head of the Dublin Cell (Belgium) on 30 September 2005.
[135] Interview with the Head of the Dublin Unit and the Asylum Interviewing Unit (Luxembourg) on 30 September 2005.
[136] Interview with the Head of the Dublin Section of the Department for Asylum and Migration Policies (Czech Republic) on 29 September 2005.

2.4 Time Limits for Requests, Responses and Transfers

Legal Provision

(a) Time Limits for Making Requests to Take Charge or Take Back

Pursuant to Article 17(1) the Member State in which the asylum application was lodged shall call upon another Member State to take charge of the applicant as quickly as possible and in any case within three months of the date of the application. Where the request is not made within this period, responsibility for examining the claim shall lie with the Member State in which the application was lodged.

There is no similar deadline for making a request to take back an asylum-seeker who has already filed an application in one Member State and then moved to another (Article 20).

(b) Time Limits for Responding to Requests to Take Charge or Take Back

Time limits for responding to requests to take charge are set out in Article 18(1) and (6). In general the requested Member State shall reply to requests to take charge within two months of the date on which the request was received. However, the requesting Member State may, under certain circumstances prescribed in Article 17(2), ask for an urgent reply within one month. Failure to comply with these time limits results in responsibility to take charge of the case (Article 18(7)).

Member States called upon to take back an applicant are, pursuant to Article 20(1)(b), obliged to reply to the request as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time limit is reduced to two weeks.

According to Article 23(1)(b), Member States may, on a bilateral basis, establish administrative arrangements with the aim of shortening time limits relating to the transmission and the examination of requests to take charge of or take back asylum-seekers.[137]

(c) Time Limits for Effecting the Transfer to the Member State Responsible

The time limits for effecting transfers in cases of *taking charge* and *taking back* are set out in Article 19(3) and Article 20(1)(d) respectively. In general the transfer is to be effected as soon as practically possible and at the latest within six months of acceptance of the request to take charge or take back. However, under certain circumstances stipulated in Articles 19(4) and 20(2) the six-month period may be extended to up to

[137] For instance, Austria has concluded such bilateral agreements with Hungary, Slovakia and Slovenia. An agreement with the Czech Republic signed in December 2005 has not yet entered into force. An agreement with Germany, signed in 1999 under the Dublin Convention, is still applied but has to be brought in accordance with Article 23 of the Dublin II Regulation (interview with the Head of the Legal and Dublin Unit (Austria) on 16 September 2005).

eighteen months. Where transfer does not take place within the specified period, the Member State which failed to effect the transfer becomes responsible to examine the asylum claim.

National Practice

(a) Time Limits for Making Requests to Take Charge or Take Back

The research noted that the absence of a time limit for submitting requests to take back asylum-seekers sometimes in results in long delays before such requests are submitted, with corresponding hardship for the individuals concerned. In the Netherlands, for example, in some cases it took more than three months from the moment the asylum claim was lodged for the authorities to make a request to another State to take back the individual.[138]

(b) Time Limits for Responding to Requests to Take Charge or Take Back

The research brought to light two problematic situations. The first concerns a Member State's request for extension of the time limits, and the second, the refusal of a request after the deadline.

The Italian authorities stressed that a one-month (or in the case of a Eurodac hit, two-week) deadline for reply is often not sufficient, considering the high volume of Dublin II cases which Italy must process. It was further stated that requests from Italy for extension of the time limits are sometimes granted by other Member States.[139] The French authorities stressed that the principle of good governance lies at the basis of State practice, implying that some flexibility regarding requests for extension should be allowed.[140] The Dutch authorities, on the other hand, said that requests for extensions would not be granted.[141] The Slovak authorities shed some light on the context in which such requests could be made, and confirmed that Slovakia has accepted the requested extension of time limits in special take charge cases, one in relation to a minor and another involving family members due to be transferred to Germany and France respectively.[142]

Where the request to take back / charge was rejected by a Member State after the time limit has lapsed, this has not always led to a refusal to accept the belated negative reply by the requesting State. On some occasions, Poland challenged responsibility after the time limit for a reply had lapsed, claiming not to have received the request before,

[138] Judgment from the District Court of The Hague of 26 October 2004, Awb 04/29046 and judgment from the District Court of The Hague of 6 December 2004, Awb 04/38811.
[139] Interview with the Head of the Dublin Unit (Italy) on 4 October 2005.
[140] Interview with Senior Government Officials (France) dealing with Dublin II and related questions on 6 October 2005.
[141] Interview with the Head of the Dublin Unit and a Policy Officer of the Staff Directorate for Implementation and Policy (The Netherlands) on 2 September 2005.
[142] Interview with the Head of the Dublin Station (Slovakia) on 5 September 2005.

resulting in Slovakia taking charge.[143] French authorities stated that they had been quite flexible regarding the time limits for responses, but recently became stricter.[144] The Austrian authorities put forth the maintenance of good working relations with Italy as a reason for allowing a denial of responsibility even after the time limit has passed.[145] By contrast, Austria and Belgium stated that Member States breaching the procedural time limits have, in accordance with the Regulation, always accepted responsibility for the asylum-seeker.[146] The Greek and Belgian authorities conceded they had missed several deadlines for responding to requests, primarily due to a lack of resources.[147] The French and Polish authorities were not always able to comply with the time requirements in case an urgent reply was requested.[148]

(c) Time Limits for Effecting the Transfer to the Member State Responsible

Again, replies from Member States show that practice varies. The Czech Republic would probably accept the asylum-seeker even if the transfer is not carried out within the timescale set out in the Regulation.[149] In contrast, the Polish authorities noted that several people were transferred to Poland after the time limit for transfer had passed; these persons were therefore returned to the sending State.[150] The Swedish authorities would refuse a request to extend the time limit for transfer if the grounds for the request, such as ill health of the asylum-seeker, are not provided for in the Regulation.[151] The German authorities considered it unjust that the Regulation does not allow for an extension of time limits, if the delay obviously lies beyond the power of the transferring State, for example in case of illness.[152] The Belgian authorities asserted that Belgium would assume responsibility if the time requirements for a transfer are not met.[153] By contrast, the Flemish Refugee Council (Belgium) said it had encountered several cases where the procedural deadlines had lapsed, but the authorities nonetheless intended to proceed with the transfer. However, in all cases the transfer was rejected by the State deemed responsible.[154]

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143 Interview with the Head of the Dublin Station (Slovakia) on 5 September 2005.
144 Interview with Senior Government Officials (France) dealing with Dublin II and related questions on 6 October 2005.
145 Interview with the Head of Legal and Dublin Unit (Austria) on 16 September 2005.
146 Interview with the Head of Legal and Dublin Unit (Austria) on 16 September 2005 and with the Head of the Dublin Cell (Belgium) on 30 September 2005.
147 Interview with the Head of the Dublin Unit (Greece) on 7 October 2005 and with the Head of the Dublin Cell (Belgium) on 30 September 2005.
148 Interview with Senior Government Officials (France) dealing with Dublin II and related questions on 6 October 2005 and with the Head of the Dublin Office (Poland) on 3 November 2005.
149 Interview with the Head of the Dublin Section of the Department for Asylum and Migration Policies (Czech Republic) on 29 September 2005.
150 Interview with the Head of the Unit of Administrative Proceedings Coordination with Foreigners in Investigation Department of Border Guards Headquarters (Poland) on 21 October 2005.
151 Interview with the Principal Administrative Officer of the Swedish Migration Board, Stockholm Region, Asylum Division Arlanda Airport, on 25 August 2005.
152 Interview with the Chief of the Section for management of Dublin II / Eurodac (Germany) on 6 October 2005.
153 Interview with the Head of the Dublin Cell (Belgium) on 30 September 2005.
154 Interview with the Flemish Refugee Council (Belgium) on 16 August 2005.

Illustration 10:

Delay in processing a Dublin claim

A Russian family applied for asylum in Norway on 5 April 2003. Following the rejection of their request, they returned to Russia on 24 July 2004. The family was reportedly arrested in Russia and, after bribing authorities for their release, fled to Belgium where they applied for asylum on 21 September 2004. The request to Norway to take the family back was made within three months and Norway agreed to take responsibility for the case. However, Belgium did not issue the decision that Norway was responsible for examining the asylum claim until one year later, on 26 September 2005.

The family appealed the decision and requested suspension of the transfer. They argued that the return would cause serious harm and disrupt the children's education, the manifest unlawfulness of the decision, their close ties with Belgium, and other grounds. The Council of State rejected the request, ruling that the alleged harm was caused by lodging a second application for asylum in another Member State [Belgium] and not by the decision in dispute, and that the family failed to meet the third criterion for granting suspensive effect, i.e. serious harm which would be difficult to repair. However, according to the Belgian Committee for Aid to Refugees, Norway finally refused to accept the family, because the Belgian authorities had missed the deadline for carrying out the transfer.

Source: Judgment of the Council of State of 6 October 2005 (nr. 149.873) (CBAR, Belgium).

The research also found a risk of *refoulement* in a case where a Member State failed to examine the application for asylum on its merits when it was obliged to take over responsibility due to the lapse of the time limits for transfer.

Illustration 11:

Failure to assume responsibility after lapse of the time limits

A West African man, who had previously worked for his country's Embassy in Belgium, returned to Belgium and applied for asylum on 22 December 2003. On 3 May 2004 the Belgian authorities issued a Dublin decision, the so-called 'annex 26 quater', stipulating Italy's responsibility as Italy had issued him a visa. The applicant appealed this decision to the Council of State arguing that Belgium was responsible for his claim because of his links with Belgium forged during his stay of several years in the country.

The Belgian authorities failed to transfer the applicant to Italy within the time limits prescribed by the Dublin II Regulation. Instead of assuming responsibility for assessing the asylum claim, the Belgian authorities issued the applicant an order to leave the territory, without his asylum claim having been assessed on the merits. His detention was ordered to enable his escorted return to his country of origin. After action by an NGO legal counselling service, the detention measure was lifted and he re-applied for asylum.

Source: Information from Belgian Committee for Aid to Refugees (CBAR).

Conclusions: Time limits

Procedures to determine the State responsible for the examination of an asylum claim should be as short as possible, in order to minimize hardship for the persons concerned. Spending months in the Dublin II process before the substantive asylum procedure begins can lead to anxiety and uncertainty and may exacerbate the effects of past trauma.

Though the time limits provided for in the Regulation are shorter than those in the Dublin Convention, they remain quite long. At present, applicants may wait many months or even a year for transfer. UNHCR recommends reduction of the time limits for the transfer of an applicant. Consideration should also be given to shortening the three-month time limit for filing a request to another Member State to take charge of an applicant. The absence of a time limit for filing a request to take back an asylum-seeker does not contribute to an efficient asylum procedure. UNHCR suggests amending Article 20, to introduce a reasonable time limit in this case as well.

2.5 Transfers

Legal Provision

The Dublin II Regulation stipulates in Article 20(1)(d) that the transfer of an applicant shall be carried out in accordance with national law of the requesting Member State. It is otherwise silent on the manner in which transfers should be carried out, but leaves open the possibility for the European Commission to adopt supplementary rules on this matter.[155]

Article 7 of the Commission's Dublin II Implementing Regulation[156] covers practical arrangements for transfers, stipulating that transfers may be carried out at the request of the asylum-seeker by a specified date, by supervised departure or under escort. According to Article 8(2) of the Implementing Regulation, the Member State organizing the transfer shall decide, in consultation with the Member State responsible, on the time of arrival and, where necessary, on the details of the handover to the competent authorities.

National Practice

(a) Responsible Authorities

In most Member States the immigration authorities and/or the police or border guards are responsible for effecting transfers. In some Member States, the police or border guards only participate if an escort is required, for instance where a first attempt to transfer has failed, or if the authorities anticipate difficulties during the transfer.[157] The possibility of hiring a private company to carry out an escort seems to have been proposed only in the U.K..[158]

(b) Escorts and the Use of Coercive Measures

The majority of transferees appear to be escorted, supervised or accompanied to the land border or to the airport, but not necessarily during flights. Some Member States allow for

[155] Article 19(5) and Article 20(4) of the Dublin II Regulation.

[156] Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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, OJ L 222/3, 05.09.2003.

[157] Interview with the Flemish Refugee Council (Belgium) on 16 August 2005, with the Head of the Dublin Section of the Department for Asylum and Migration Policies (Czech Republic) on 29 September 2005, with the NGO *SOZE* (Czech Republic) on 26 August 2005, with the Head of Dublin Unit (Hungary) on 6 October 2005, with the Head of Unit of Administrative Proceedings Coordination with Foreigners in Investigation Department of Border Guards Headquarter (Poland) on 21 October 2005, with the Head of the Dublin and Eurodac Office (Slovenia) on 19 October 2005, and with the Principal Administrative Officer of the Swedish Migration Board, Stockholm Region, Asylum Division Arlanda Airport, on 25 August 2005.

[158] Interview with a Policy Officer of the European Asylum Policy Unit of the Asylum and Appeals Policy Directorate (U.K.) on 10 November 2005.

unescorted transfers in the case of voluntary compliance.[159] Respondents pointed out that escorts could be needed if the individual had refused to cooperate with a previous transfer or if it is presumed that the person will not cooperate, or for security reasons. In addition, escorts could be requested by the receiving State or the carrier.

With respect to the use of force, some Member States referred to general rules in their national legislation.[160] The Polish authorities emphasized the principle of proportionality in Polish legislation.[161] Escorted transfers from Austria may be accompanied by a member of the Human Rights Advisory Board composed of human rights experts from universities, NGOs and Ministries, on notification from the competent authorities of an un-cooperative asylum-seeker.[162]

Several NGOs noted the speed with which some escorted transfers take place.[163] Staff at a Spanish reception centre, for example, noted that Dublin II claimants are hardly given time to pack and say good-bye to friends and family.[164] According to a U.K. lawyer, rapid transfers may cause transferees to feel trapped, which in turn might lead to violence and/or the use of coercive measures by the authorities.[165]

(c) Erroneous Transfers

Interviews revealed that States have in some cases transferred the wrong person.[166] The Greek authorities claimed to have received the 'wrong' person more than once in cases where the person intended to be transferred had absconded, and another person, whose transfer was scheduled at a later point in time, was transferred instead, without any prior notification from the sending State.[167]

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[159] Interview with the Head of Legal and Dublin Unit (Austria) on 16 September 2005, with the Head of the Dublin Cell (Belgium) on 30 September 2005, with the Head of the Dublin Section (Finland) on 27 September 2005, with the NGO *Forum Réfugiés* (France) on 24 August 2005, with the Head of the Dublin Unit (Italy) on 4 October 2005, with the NGO *NOAS* (Norway) on 26 August 2005, with the Head of the Dublin Office (Poland) on 3 November 2005, with the Chief of the Police Station at the Office for Aliens and Refugees (Spain) on 22 September 2005, and with a Policy Officer of the European Asylum Policy Unit of the Asylum and Appeals Policy Directorate (U.K.) on 10 November 2005.

[160] Interview with the Aliens Police (Zwolle, The Netherlands) on 31 August 2005, with the Head of Unit of Administrative Proceedings Coordination with Foreigners in Investigation Department of Border Guards Headquarter (Poland) on 21 October 2005, and with a lawyer (U.K.) on 13 September 2005.

[161] Interview with the Head of Unit of Administrative Proceedings Coordination with Foreigners in Investigation Department of Border Guards Headquarter (Poland) on 21 October 2005.

[162] Interview with UNHCR (Austria) on 9 September 2005.

[163] Interview with the NGO *Asylkoordination* (Austria) on 11 August 2005, with the NGO *OPU* (Czech Republic) on 23 August 2005, with the NGO *SOZE* (Czech Republic) on 26 Augustus 2005, with the Dutch Refugee Council on 1 September 2005, with the NGO *NOAS* (Norway) on 26 August 2005, and with a lawyer (U.K.) on 13 September 2005.

[164] Interview with staff from the reception centre *Alcobendas* (Spain) on 23 September 2005.

[165] Interview with a lawyer (U.K.) on 13 September 2005.

[166] Interview with the Head of Legal and Dublin Unit (Austria) on 16 September 2005 and with the Head of the Dublin Cell (Belgium) on 30 September 2005.

[167] Interview with the Head of the Dublin Unit (Greece) on 7 October 2005.

Though in most cases persons wrongly transferred have been returned to the State from which they were transferred, return cannot be taken for granted. In January 2005, Poland received from Germany the brother of a person who was due to be transferred. In this case, the transfer was based on a take back request, but due to destroyed fingerprints in Germany, the comparison of the person was based on a picture only. Despite sending the wrong person, Germany reportedly refused to take him back.[168]

Illustration 12:

Erroneous transfer

A Sudanese asylum-seeker from the Darfur region claimed asylum in the U.K. in December 2003. He was placed in an Immigration Removal Centre where the authorities informed him about his intended transfer to Italy, as it was alleged that he had been there before and Italy had accepted to take him back. Despite his efforts to refute this allegation, he was sent to Italy in July 2004. On arrival in Italy, it became evident that the British authorities had sent the wrong person. In October 2004, the U.K. authorities were informed by the Italian authorities of the erroneous transfer, requesting that arrangements be made for his return. In addition, they stated that the person concerned would not be entitled to any form of support during his stay in Italy. Nevertheless, the British authorities declined to make arrangements for the return. As the applicant was not entitled to government support in Italy he lived in an abandoned train coach and under a bridge in Rome, reduced to begging and scavenging. Finally, in March 2005 after a Court intervention, he could return to the U.K. where he was recognized as a refugee under the 1951 Refugee Convention.

Source: Interview with a lawyer (U.K.) on 13 September 2005.

It is, however, not always a State which is to blame for an erroneous transfer. The Spanish authorities pointed to a case in which a woman forged the travel document of her husband by replacing his photo with the picture of another man. While the husband was elsewhere looking for work, the woman and the other man were transferred to Germany.[169] A similar case has been seen in Sweden when an applicant enabled a friend to travel to Sweden in his/her place.[170]

(d) Sharing of Relevant Information

The Spanish authorities mentioned that the U.K. would not always inform the Spanish police about upcoming transfers. This causes coordination problems and above all delays and hardship on arrival in Spain, as reception arrangements must be made on the spot.[171]

[168] Interview with the Head of the Dublin Office (Poland) on 3 November 2005.
[169] Interview with the Head of the Dublin Unit (Spain) on 20 September 2005.
[170] Interview with the Principal Administrative Officer of the Swedish Migration Board, Stockholm Region, Asylum Division Arlanda Airport, on 25 August 2005.
[171] Interview with the Chief of the Central Border Division (Spain) on 22 September 2005.

According to UNHCR (Hungary), France would inform Hungary about an upcoming transfer, but not of the precise date and time.[172] Similarly, the Greek authorities reported five transfers over the last year which were carried out without prior notification of the date and time of the transfer.[173]The Italian authorities asserted that roughly 5% of transfers from other Member States (including unaccompanied minors) are not notified in advance.[174]

Though the case below was dealt with under the Dublin Convention, it illustrates the vital need to share information between Member States on cases to be transferred:

Illustration 13:

Consequences of failure to share relevant information

A Ukrainian asylum-seeker was transferred with his wife and son from the Netherlands to Spain where he arrived on 19 August 2003. In the Netherlands it was known that the man was schizophrenic as well as suicidal. Eleven days after his transfer to Spain, he committed suicide. This incident caused public consternation and the question was raised whether the Netherlands had provided sufficient information to the Spanish authorities on his condition. In her written answer to Parliamentary questions, the Netherlands Immigration Minister admitted mistakes in the preparatory stage of the transfer, while denying failure to transfer medical information. Nevertheless, this incident resulted in modification of the work instructions, indicating that the Immigration Service, the Aliens Police, the 'Royal Military Police' and the representative of the asylum-seeker must inform the latter of his/her own responsibility to obtain his/her medical file and to transfer his/her medical records. However, the difficulty of placing this responsibility on the shoulders of people with psychological problems is evident. In addition, on the European level, the Netherlands calls for a uniform approach to transfers of persons with a medical condition.

Source: Report of a written exchange of information (Verslag van een schriftelijk overleg), Second Chamber of Parliament, 19 637, nr. 985.

Both UNHCR (Germany) and the German NGO *Flüchtlingsrat NRW* expressed their concern about whether the German authorities provide all medical documentation.[175] The Italian authorities called for clear prior notification of returnees with medical problems and confirmed that this is currently not always provided.[176] The Polish authorities stated

[172] Interview with UNHCR (Hungary) on 16 September 2005.
[173] Interview with the Head of the Dublin Unit (Greece) on 7 October 2005.
[174] Interview with the Head of the Dublin Unit (Italy) on 4 October 2005.
[175] Interview with UNHCR (Germany) on 26 August 2005 and interview with the NGO *Flüchtlingsrat NRW* (Germany) on 26 August 2005.
[176] Interview with the Head of the Dublin Unit (Italy) on 4 October 2005.

that medical conditions as well as information about the treatment are usually supplied by the sending Member States.[177]

Conclusions: Transfers

The research noted that Member States make relatively little use of the possibility to enable asylum-seekers to travel voluntarily to the responsible State. In order to increase the likelihood of voluntary compliance with transfer decisions, the Dublin II Regulation should provide for better information for and counselling of the persons concerned.

UNHCR recommends including a provision in the Dublin II Regulation or its Implementing Regulation according to which Member States shall conduct an enforced or escorted transfer only if there are clear indications that the applicant will not return voluntarily. Enforced or escorted transfers should in any event be undertaken in a humane manner, in full respect for human rights and dignity. Should use of force be necessary, it should be proportionate and undertaken in a manner consistent with human rights law. UNHCR suggests inclusion in the Regulation of a provision reflecting these conditions. In this connection, reference could usefully be made to the Council of Europe's Guidelines on Forced Return, which represent a comprehensive and widely-accepted benchmark.[178]

With respect to erroneous transfers, UNHCR recommends to clarify the obligation for the Member State having conducted the transfer to accept the applicant back, and to cover the costs.

The sharing of information in advance of organized transfers is essential, and would serve the interests of States as well as of the individuals. At a minimum, this should encompass dates, times, arrival points, family members in the receiving State (where applicable) and special needs of the transferee. Medical information should be passed on after consent of the person and/or representative is obtained. UNHCR recommends amending the provisions on information-sharing in the Commission Regulation implementing the Dublin II Regulation accordingly.

2.6 Access to the Asylum Procedure upon Transfer to the Responsible State

Legal Provision

According to Article 16(1)(b), the Member State responsible for examining an asylum claim shall be obliged to complete the examination of the application for asylum. In Recital 12 of the Preamble, reference is made to Member States' obligations under instruments of international law, and in Recital 15 it is stated that the Regulation

[177] Interview with the Head of Unit of Administrative Proceedings Coordination with Foreigners in Investigation Department of Border Guard Headquarters (Poland) on 21 October 2005.
[178] See Council of Europe, "Twenty Guidelines on Forced Return", September 2005.

"*observes the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union*"[179], particularly the right to asylum guaranteed by Article 18.

National Practice

(a) Access to a First Instance Procedure

A main concern uncovered by the research was the fact that the substance of an asylum seeker's claim is not in all cases examined in the responsible State. This would clearly undermine one of the main purposes of the Dublin II system.

This risk exists in Greece, where Article 2(8) of Presidential Decree No. 61/1999 allows the General Secretary of the Ministry for Public Order to interrupt an asylum procedure in case of "arbitrary departure" of the asylum-seeker from his/her place of residence. If the asylum-seeker reappears within three months from the date the interruption decision was issued and submits substantial proof that his/her absence was due to reasons of "*force majeure*", the case may be re-opened and an examination on its merits will follow.[180] However, so far only circumstances such as serious health problems, hospitalization and being forced to leave a home as a result of weather conditions have been recognized as circumstances of "*force majeure*".[181]

If the applicant re-appears after three months, which is usually the case for Dublin II transferees, the claim is not examined further. It is important to note that the Greek General Secretary of the Ministry of Public Order may decide to interrupt the procedure after accepting responsibility for a Dublin II transfer and even after the arrival of the transferee. In such cases, an interruption decision may be issued shortly after arrival. In effect, the decision to interrupt strips the asylum-seeker of his/her asylum-seeker status, turning him/her into an illegal resident at risk of deportation.[182] The asylum-seeker may apply for a revocation of the interruption decision to the Secretary General of the Ministry of Public Order.[183] According to the Greek Council for Refugees more than 30 requests for review have been lodged, none of which has been granted.[184]

The rejection of a request to review the interruption decision may be appealed to the Council of State.[185] However, as legal aid is not foreseen in law and pro-bono lawyers are

[179] Charter of Fundamental Rights of the European Union, OJ C 364/1, 18.12.2000.
[180] Presidential Decree No. 61/1999, Refugee Status Recognition Procedure, Revocation of the Recognition and Deportation of an Alien, Entry Permission for the Members of his Family and Mode of Cooperation with the United Nations High Commissioner for Refugees (unofficial translation by UNHCR) and interview with Greek government official on 7 October 2005.
[181] Interview with the Greek Council for Refugees on 26 September 2005.
[182] Panayiotis N. Papadimitriou and Ioannis F. Papageorgiou, 2005, "*The New 'Dublinners': Implementation of the European Council Regulation 343/2003 (Dublin II) by the Greek Authorities*", Journal of Refugee Studies 18 (3): 309-310.
[183] Interview with the Greek Council for Refugees on 26 September 2005.
[184] Interview with the Greek Council for Refugees on 26 September 2005.
[185] Interview with the Head of the Dublin Unit (Greece) on 7 October 2005.

scarce, the lodging of an appeal is difficult in practice.[186] As a consequence a Dublin II returnee may find himself or herself at risk of removal from Greece to his/her country of origin, without any substantive examination of the claim.

Illustration 14:

Consequences of Greece's interruption practice

A Sudanese national fled the Darfur region following the onset of the civil war, leaving behind his wife and children. All males in his village older than 11 years of age were reportedly killed. In June 2003 he entered Greece illegally, resulting in his arrest and detention for three months. After his release he applied for asylum in Athens. However, after sleeping in the streets for two weeks, he decided to go to the U.K. where, according to a friend, the reception situation would be better. In the U.K. he applied for asylum. The authorities requested Greece to take him back in accordance with the Dublin II Regulation. Upon return to Greece, he was detained and the authorities notified him of the interruption of his asylum procedure due to his departure. His request for re-examination of his claim based on the developments in Sudan was rejected on the ground that it concerned a repeat application similar to his first application, although his original claim had never been examined on the merits.

Source: UNHCR (Greece), interview with the asylum-seeker in May 2005.

In light of this practice, Norway refrains from effecting transfers in "taking back" cases to Greece, awaiting the opinion of the European Commission on this matter.[187] The Aliens Appeals Board in Sweden has expressed concern and may decide on a case-by-case basis to process an asylum claim in Sweden rather than to send the person back to Greece.[188] A Dutch District Court has quashed transfer decisions in relation to Greece where the Dutch authorities failed to justify why, in their opinion, transfer would *not* constitute a risk of indirect *refoulement*.[189] In another case, the Netherlands Immigration Service (IND) requested the Court to grant a request for suspensive effect while waiting for the views of the European Commission on the Greek practice.[190] The Helsinki Administrative Court (Finland) has quashed several transfer decisions in relation to Greece. In these cases, the Finnish Directorate of Immigration would only make a new transfer decision in cases where the Greek authorities explicitly agree to process the application upon return. In other cases, which are still pending, a position from the European Commission regarding the situation in Greece is awaited.[191]

[186] Interview with UNHCR (Greece) on 18 August 2005.
[187] Interview with a lawyer from the Dublin Unit (Norway) on 28 September 2005.
[188] Interview with the Swedish Aliens Appeals Board on 24 August 2005.
[189] Judgment from the District Court of The Hague of 29 September 2004, Awb 04/30154, judgment from the District Court of The Hague of 10 February 2005, Awb 04/57933 and Awb 04/57395, Awb 04/57932 and Awb 04/57934, and judgment from the District Court of The Hague of 29 June 2005, Awb 05/22711 and Awb 05/22709.
[190] Judgment from the District Court of The Hague of 7 July 2005, Awb 05/18270.
[191] Interview with the Head of the Dublin Section (Finland) on 27 September 2005.

In Ireland, the Refugee Legal Service and the Irish Refugee Council have expressed concern in respect of unhindered access to a comprehensive examination of asylum applications of Dublin II claimants.[192] According to the Irish authorities, under Section 11(10-11) of the Refugee Act 1996, an application is deemed to have been withdrawn if an asylum-seeker disappears during the asylum procedure or fails to report to the immigration officer when required. Furthermore, the report that the application is deemed to have been withdrawn shall include a recommendation that the applicant should not be declared to be a refugee (as set out in Section 13 of the Refugee Act 1996). There is no right to appeal the decision that the application is deemed withdrawn. Instead, at the discretion of the Minister for Justice, Equality & Law Reform, the applicant may submit a new application under Section 17(7) of the Refugee Act 1996.[193] However, according to the Refugee Legal Service, the chance that the case will be re-opened appears negligible. A refusal to re-open the case may be appealed to the High Court.[194]

Illustration 15:

Practice resulting in rejection of a claim without comprehensive examination

A young woman who claimed to be under 18 years of age arrived in Ireland on 19 February 2005 and applied for asylum. Her asylum interview was scheduled for 28 February. On 27 February, she left for the U.K. where she applied for asylum again. The U.K. authorities sent her back to Ireland where she visited the Office of the Refugee Applications Commissioner (ORAC) on 29 March. At ORAC the woman received a letter informing her that her asylum claim submitted in Ireland on 1 March was rejected and that she could seek permission from the Minister of Justice, Equality and Law Reform to re-apply for asylum under Section 17(7) of the Refugee Act 1996.

As the woman maintained that she had been in the U.K. on 1 March and therefore could not have had applied in Ireland on the same date, several telephone conversations between the Irish Refugee Council (IRC) and ORAC followed. Finally, ORAC stated that the case had been withdrawn from the system as a consequence of not attending the interview on 28 February. ORAC directed the woman to the Ministerial Decisions Unit. On 4 August her application to re-enter the system under Section 17(7) was rejected, with the proviso that if she could prove to be a minor (as she had claimed), the decision would be re-evaluated.

Source: Interview with the Irish Refugee Council on 20 September 2005.

With respect to Luxembourg, UNHCR (Brussels) has expressed concern regarding the new asylum law (to be adopted in early 2006). If an asylum-seeker fails during a two-

[192] Interview with the Refugee Legal Service (Ireland) on 9 September 2005 and with the Irish Refugee Council on 20 September 2005.
[193] Information from the Deputy Director of the Asylum Policy Division, Department of Justice, Equality and Law Reform (Ireland).
[194] Interview with the Refugee Legal Service (Ireland) on 9 September 2005.

month period to renew his or her registration, the application for asylum is considered to have been withdrawn regardless of the state of the procedure. Consequently, access to a comprehensive examination of a claim in the case of the return of a Dublin II claimant to Luxembourg is no longer guaranteed, unless the applicant is able to present new facts or elements.[195]

(b) Access to a Second Instance Procedure

In some Member States it is possible to render a negative decision on the substance of an asylum claim in the absence of the applicant.[196] The authorities in Austria, Belgium, Hungary, the Netherlands, Portugal and Spain reported that a negative decision may be issued if a substantive interview has been carried out, even if the individual is no longer present. The negative decision is notified either to the last known address, generally to the applicant's lawyer (in the Netherlands), to the lawyer or the Office of Immigration and Nationality (in Hungary) or in a government bulletin (in Spain).[197] As time limits for appeal generally start from the moment of notification, the asylum-seeker will, due to his/her absence, have no opportunity to have his/her case assessed in second instance.

In Norway, in contrast, it is not possible to reach a negative decision in the absence of the applicant. The case is closed if an asylum-seeker disappears before a decision is taken or notified, and would be re-opened upon return. Notification would then take place upon return, meaning that the Dublin returnee has an opportunity to have his/her case assessed in second instance. Even if the asylum-seeker absconds after the notification of a negative decision, and fails to meet the time limit for appeal due to abscondment, Section 31 of the National Public Administration Act provides for a decision on appeal in special circumstances, if the appeal is made within one year.[198]

The situation in Sweden is similar. A negative decision cannot be notified in the asylum-seeker's absence. Upon return to Sweden the asylum-seeker is notified and the time limits for appeal start to run.[199] According to the Spanish NGO *ACCEM*, the Asylum Office in Spain recently introduced a new practice under which a Dublin returnee, who already had been notified of the negative decision before leaving Spain, was again notified of the same decision upon return, resulting in a renewal of the time limit for an appeal.[200]

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[195] Information from UNHCR (Brussels).

[196] This is in line with Article 20 of the Asylum Procedures Directive (OJ L 326/13, 13.12.2005); see, however, also UNHCR's comments on Article 20 in 'UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status').

[197] Interview with the Head of Legal and Dublin Unit (Austria) on 16 September 2005, with the Head of the Dublin Cell (Belgium) on 30 September 2005, with the Head of the Dublin Unit (Hungary) on 6 October 2005, with the Head of the Dublin Unit and a Policy Officer of the Staff Directorate for Implementation and Policy (The Netherlands) on 2 September 2005, with the acting Head of the Asylum and Refugees Department (Portugal) on 16 September 2005, and with the Deputy Director of the Asylum Office (Spain) on 21 September 2005.

[198] Interview with a lawyer from the Dublin Unit (Norway) on 28 September 2005.

[199] Interview with the Principal Administrative Officer of the Swedish Migration Board, Stockholm Region, Asylum Division Arlanda Airport, on 25 August 2005.

[200] Interview with the NGO *ACCEM* (Spain) on 23 September 2005.

Conclusions: Access to asylum procedures

One of the principal aims of the Dublin II system is to ensure effective access to an asylum procedure and thus to a full and fair assessment of the claim. Article 16(1)(b) obliges the responsible State to complete the examination of an asylum application. Member States are also bound by obligations under instruments of international law.

Even though Article 3(3) allows Member States, if this is in compliance with the 1951 Refugee Convention, to send an asylum-seeker to a third country, this should, in order to prevent indirect *refoulement*, only be done after a careful examination of the safe third country criteria as set out by UNHCR in its comments on the Asylum Procedures Directive.[201]

If an asylum-seeker absconds and the Member State closes his or her file without substantive examination of the claim and does not re-open the case upon return under Dublin II, this is tantamount to denial of the responsibility attributed under the Dublin II system. This practice creates a real risk of direct or indirect *refoulement*. In order to close this protection gap, an explicit provision in the Dublin II Regulation is needed which would impose a positive obligation on responsible States not to remove an asylum-seeker before a substantive examination of the claim has taken place.

If a negative first instance decision was issued during the absence of an asylum-seeker from the territory, and the asylum-seeker is returned to that State under Dublin II after the time limit for appeal has lapsed, the applicant should nonetheless be given access to an appeal or review procedure. This safeguard is needed to avoid possible serious consequences of incorrect first instance decisions, and to ensure compliance with the principle of *non-refoulement* contained in Article 33 of the 1951 Refugee Convention and Article 3 of the European Convention on Human Rights.

2.7 Reception Conditions and Detention

Legal Provision

(a) Reception conditions

The Dublin II Regulation does not contain any provision with respect to reception conditions of asylum-seekers. However, according to Article 3 of the Reception Conditions Directive[202], the latter shall apply to all third country nationals and stateless

[201] UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, ASILE 64, of 9 November 2004), 10.02.2005, p. 35.

[202] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L 31/18, 06.02.2003.

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 in the territory as asylum-seekers.

The Dublin II Regulation also does not address the issue of legal aid. While the right to legal assistance and representation is contained in Article 15 of the Asylum Procedures Directive,[203] according to Recital 29 of the Preamble of that Directive, procedures governed by the Dublin II Regulation are excluded from its scope.[204]

(b) Detention

As far as detention is concerned, the Asylum Procedures Directive stipulates in Article 7(3) that Member States may, when it proves necessary, for example for legal reasons or reasons of public order, confine an applicant to a particular place in accordance with their national law. The Dublin II Regulation does not deal with detention.

National Practice

(a) Reception conditions

The research showed that some States offer the full range of reception arrangements to asylum-seekers who are subject to Dublin II. However, in other States the conditions of reception and benefits differ for asylum-seekers in the Dublin II procedure and those in the regular procedure. The Austrian NGO *Asylkoordination* and UNHCR (Austria) referred to the case of several minor Dublin claimants who had no access to education even after the three-month time limit mentioned in Article 10 of the Reception Conditions Directive.[205] A distinction is made in Norway, where asylum-seekers who are subject to Dublin II receive less financial assistance than others.[206] According to the Norwegian authorities, because asylum-seekers subject to Dublin II will only stay for a short period of time, they are lodged in designated transit facilities and not integrated into the regular reception system.[207] UNHCR (France) noted that Dublin II claimants receive a temporary document which gives access only to emergency reception facilities, and are not entitled to the financial assistance which is provided to asylum-seekers in an ordinary procedure.[208]

Whether a Dublin II returnee is entitled to reception facilities after transfer depends on the stage of his/her asylum procedure. Generally speaking, in most Member States the

[203] 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.
[204] The legal analysis whether this is in contradiction with Article 3 ("Scope") of the Asylum Procedures Directive goes beyond the purpose of the present study.
[205] Interview with the NGO *Asylkoordination* (Austria) on 11 August 2005 and with UNHCR (Austria) on 9 September 2005.
[206] Interview with a lawyer of the Dublin Unit (Norway) on 28 September 2005 and interview with the NGO *NOAS* (Norway) on 26 August 2005.
[207] Interview with a lawyer of the Dublin Unit (Norway) on 28 September 2005.
[208] Information from UNHCR (France).

Dublin II transferee is entitled to reception facilities if the procedure is still pending or if he or she never applied for asylum in the responsible country before.

In most Member States a Dublin II returnee may be detained if the claim was rejected with legal force and/or a deportation order was issued. A renewed entitlement to reception facilities could arise if the Dublin II returnee re-applies for asylum, but this may be subject to conditions as is for example the case in Belgium and the Netherlands.[209] Exceptions to this general practice came to light during the interviews. In Slovakia, Dublin II returnees may be detained based on illegal crossing of the Slovak border.[210] In addition, Dublin II returnees who absconded during the first asylum procedure are not entitled to financial support upon return.[211] According to UNHCR (Germany) the German authorities may bring criminal charges against a Dublin returnee because s/he left the German territory irregularly.[212] According to UNHCR (Greece), Dublin II returnees are always detained upon return if the case was interrupted, as this deprives a person of a legal status, which is a ground for detention.[213]

(b) Detention

The interviews confirmed that State authorities increasingly rely on detention in order to avoid possible abscondment of asylum-seekers who are subject to Dublin II. For example, the Belgian authorities indicated that fewer than 10% of the asylum-seekers subject to Dublin II leave voluntarily and thus the risk of abscondment is perceived as high. Consequently, in March/April 2005, the government introduced the possibility to detain Dublin II claimants awaiting transfer. As of late 2005, about 23% of Dublin claimants were detained in Belgium.[214] Other authorities mentioned percentages between 5% and 40% for asylum-seekers detained while awaiting transfer.[215]

Where national law provides a specific ground for detention of asylum-seekers awaiting transfer, the most common is flight risk.[216] The study showed that detention pending

[209] Interview with the Flemish Refugee Council (Belgium) on 16 August 2005 and COA (Agency for the reception of Asylum-seekers) newsletter of 2 January 2006 (The Netherlands).

[210] Interview with a Policy Officer of the Medvedov detention centre (Slovakia) on 7 September 2005.

[211] Interview with the Head of the Dublin Station (Slovakia) on 5 September 2005.

[212] Interview with UNHCR (Germany) on 26 August 2005. The asylum-seeker has to pay a fine which can be taken out of his/her State allowance (interview with UNHCR (Germany) on 26 August 2005).

[213] Interview with UNHCR (Greece) on 18 August 2005.

[214] Interview with the Head of the Dublin Cell (Belgium) on 30 September 2005.

[215] The Norwegian authorities claimed to have detained less than 10% (January-June 2005) of the asylum-seekers awaiting transfer whereas the Swedish authorities detained approximately 20% (interview with a lawyer of the Dublin Unit (Norway) on 28 September 2005 and with the Principal Administrative Officer of the Swedish Migration Board, Stockholm Region, Asylum Division, Arlanda Airport, on 25 August 2005). The Luxembourg authorities claimed to have detained about 40% of the Dublin cases in 2005 (interview with the Head of the Dublin Unit and the Asylum Interviewing Unit (Luxembourg) on 30 September 2005). According to the Finnish authorities, 5-10% of the Dublin claimants are detained awaiting transfer (interview with the Head of the Dublin Section (Finland) on 27 September 2005).

[216] Interview with the Chief of Section for management of Dublin II / Eurodac (Germany) on 6 October 2005, with the Head of the Dublin Section (Finland) on 27 September 2005, with the Head of the Dublin Unit and the Asylum Interviewing Unit (Luxembourg) on 30 September 2005, with the NGO

transfer is even applied if Dublin II claimants indicate their willingness to return or to be transferred. The Dutch authorities noted that detention while awaiting transfer has become standard practice. In one case, a family, including at least one minor, was to be transferred to another Member State on humanitarian grounds. The family expressed its satisfaction with being reunified with extended family members, but was nevertheless detained before the transfer was carried out.[217] According to the NGO *Flüchtlingsrat NRW*, this practice is also prevalent in Germany, where Dublin II claimants are detained even if they have indicated a willingness to be transferred.[218]

The moment at which detention may be ordered varies. In Belgium, for example, detention may be ordered once the decision is notified to the applicant;[219] in Lithuania as soon as the expulsion decision is taken;[220] in Norway if the person has absconded before and there is reason to believe that s/he will do so again;[221] in Sweden if it is likely that the application will be rejected and that the person will abscond.[222] Under the previous law in Austria, a person could be detained once the decision to transfer was taken. This has changed considerably under the new law, which entered into force in January 2006, as the Aliens Police is authorized to detain a Dublin II claimant, after his/her asylum application is filed, provided that there is strong evidence that another Member State is responsible (e.g. in the case of a Eurodac match or a visa of another State in the passport).[223]

In Spain, the provisions regarding detention are not clear, resulting in divergent interpretations by judges.[224] A new law is expected to offer a clear legal basis for detention after acceptance of a request by the State deemed responsible.[225] In Slovenia a new law has been adopted authorizing detention from the moment of a Eurodac match, if the time lapse between the dates entered into Eurodac is less than three months.[226]

SRA (The Netherlands) on 31 August 2005, and with a lawyer of the Dublin Unit (Norway) on 28 September 2005. The Belgian authorities may detain a Dublin claimant awaiting transfer based on the fact that voluntary return is 'unlikely' (interview with the Head of the Dublin Cell (Belgium) on 30 September 2005. The Irish authorities noted that risk of abscondment is no ground for detention, but that if the asylum-seeker actually absconds and is caught, then detention would be possible (interview with the Head of the Dublin Unit (Assistant Principal) (Ireland) on 26 September 2005). According to a U.K. lawyer the risk of absconding is also a detention ground in the U.K. (interview with a lawyer (U.K.) on 13 September 2005).

217 Interview with the Head of the Dublin Unit and a Policy Officer of the Staff Directorate for Implementation and Policy (The Netherlands) on 2 September 2005.

218 Interview with the NGO *Flüchtlingsrat NRW* (Germany) on 26 August 2005.

219 Interview with the Head of the Dublin Cell (Belgium) on 30 September 2005.

220 Interview with the Head of the Asylum Affairs Division of the Migration Department (Lithuania) on 27 September 2005.

221 Interview with a lawyer of the Dublin Unit (Norway) on 28 September 2005.

222 Interview with Principal administrative officer of the Swedish Migration Board, Stockholm Region, Asylum Division Arlanda Airport, on 25 August 2005.

223 Interview with the Head of Legal and Dublin Unit (Austria) on 16 September 2005.

224 Interview with the Chief of the Police Station at the Aliens Office (Spain) on 22 September 2005.

225 Interview with the Head of the Dublin Unit (Spain) on 20 September 2005.

226 Interview with the Head of the Dublin and Eurodac Office (Slovenia) on 19 October 2005.

Illustration 16:

Detention used to accelerate the Dublin II procedure

A seven-year-old boy from the Republic of Congo arrived in Belgium in mid-December 2005. The man who accompanied him applied on the child's behalf for asylum. The child was detained on arrival because he held a forged passport. His adult escort was not detained. It soon emerged that the boy's mother was legally residing in France. The authorities considered the child's continued detention was justified to expedite the Dublin II process, as they could ask France for an urgent reply according to Article 17(2) of the Dublin II Regulation. However, after three weeks a Court ordered the boy's release and he was placed in a foster home. In early February 2006, France accepted the request to take charge of the case and shortly thereafter, the child was reunited with his mother in France.

Source: UNHCR (Belgium).

Conclusions: Reception and detention

It appears that the absence of reference in the Dublin II Regulation to reception conditions has been understood by some Member States as allowing them to interpret the rights of Dublin II claimants narrowly. However, without a corresponding exception in the Reception Conditions Directive, there would not appear to be a legal justification for denying Dublin II claimants the general entitlements of the Directive. An explicit reference in the Dublin II Regulation to the entitlement of Dublin II claimants to the same reception conditions as other asylum-seekers is warranted to address this gap, which can result in serious hardship and appears contrary to the objectives of the Reception Conditions Directive and the principle of a common asylum system.

UNHCR also recommends adding a provision to the Regulation addressing asylum-seekers' right to legal assistance, which under certain circumstances should be free of charge. The right to legal representation is an essential safeguard. Asylum-seekers unfamiliar with the procedure and the legal system of a foreign country may not be able to articulate an asylum claim without the assistance of a qualified counselor. Competent legal assistance is, moreover, in the interest of States, as it can help to improve the efficiency of procedures. Because asylum-seekers often lack financial resources, UNHCR favors access to free legal assistance and representation. Exceptions may be made where the applicant has adequate means, and the amounts of legal assistance provided may be limited to the average costs of legal assistance for each step in the procedure. Provision should be made for asylum-seekers with special needs (e.g. unaccompanied children, victims of torture and other traumatic experiences), who generally require additional support.

UNHCR observes a trend toward detention of Dublin II claimants, in order to ensure their transfer to the responsible State. This is of deep concern to UNHCR, since it tends to assimilate Dublin claimants to rejected asylum-seekers, with whom they are frequently detained. UNHCR remains opposed in principle to the detention of asylum-seekers, except for limited and clearly defined cases. If for exceptional reasons, as stipulated in Excom Conclusion No 44 (XXXVII) and in UNHCR's Detention Guidelines,[227] people subject to Dublin II are detained, this should always be for as short a period as possible and in line with the principle of proportionality. Allegations of flight risk should be substantiated by the authorities, and if there are no indications of such risk, detention should not be ordered. Vulnerable individuals should not be detained.

Provisions specifying the grounds on which detention may be ordered, and clarifying the entitlement to regular judicial review, would strengthen the Dublin II Regulation and provide for greater consistency in practice. Such provisions should also serve to underline that detention is not warranted in all Dublin II cases, especially where transfers are likely to be in line with the interests and preferences of applicants.

Limits on detention under Dublin II would also help to alleviate the negative consequences for States, including strains on detention capacity and the high costs involved.

[227] Excom Conclusion No 44 (XXXVII) 1986, "Detention of Refugees and Asylum-Seekers; UNHCR, "*Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers"*, February 1999

3. CONCLUDING RECOMMENDATIONS

Examination of asylum claims and legal remedies

1. A provision should be added to the Dublin II Regulation imposing an obligation on the responsible State not to remove an asylum-seeker before a full and fair examination of his or her asylum claim has taken place. If the safe third country notion is applied by the State deemed responsible, compliance with UNHCR's recommended criteria should be assured in order to avoid any risk of *refoulement*.

2. If the time limit for presenting an appeal against the rejection of the asylum application lapsed during the absence of an asylum-seeker from the territory of the State deemed responsible under Dublin II, s/he should have access to an appeal procedure upon return.

3. The Dublin II Regulation should oblige States to provide access to an effective legal remedy against transfer decisions and to remain in the Member State's territory until a decision on an application for suspensive effect is taken.

4. Relevant information about the Dublin II system should be provided to asylum-seekers, in a language they actually understand.

5. Transfer decisions should be provided in writing, in a language the asylum-seeker understands. Such decisions should contain information on how to challenge them and should state clearly that no substantive examination of the claim has been conducted.

Family reunification and principle of the best interest of the child

6. In accordance with the Convention on the Rights of the Child, the principle of the 'best interest' of the child should be a primary consideration in *all* actions concerning children, and not only when a family member is staying legally in the territory of the EU.

7. The notion of "family" should include unmarried couples forming a genuine and stable family unit as well as other dependent relatives who have no other means of support, such as adult children who are unable to look after themselves because of their state of health.

8. The requirement that the family relationship must have existed in the country of origin should be dropped, at least for nuclear family members.

9. The presence in another Member State not only of family members who have refugee status but also who are beneficiaries of subsidiary protection should be

relevant for determining the responsible State. Reunification with family members who are asylum-seekers should not be limited to those who have not yet received a first decision on the substance of their claims.

Sovereignty clause and humanitarian clause

10. The Commission should include rules for the application of the 'sovereignty clause' in the Dublin II Implementing Regulation. The 'sovereignty clause' should be applied more broadly where this is in the interest of the asylum-seeker and/or his or her family. At the same time, it should not be applied in a manner which undermines other humanitarian provisions of the Dublin II Regulation.

11. No transfers should be effected to a State where there is a risk of non-compliance with international refugee or human rights law. In such case the 'sovereignty clause' should be used.

12. The 'humanitarian clause' should be applied more flexibly in order to ensure that it has the intended positive impact on asylum-seekers.

Reception conditions and detention

13. The Dublin II Regulation should explicitly state that Dublin II claimants are entitled to the same reception conditions as other asylum-seekers, and should address their right to legal assistance and representation.

14. Among persons who are awaiting transfer under the Dublin system are asylum-seekers whose claims have not yet been examined on their merits. Their rights to reception should not be restricted. Detention should be limited to exceptional cases. Provisions specifying the grounds on which detention may be employed, and clarifying the entitlement to regular judicial review, should be included in the Dublin II Regulation.

Time limits and transfers

15. The time limits for transfers and for presenting a request to another Member State to take charge of an applicant should be reduced. A reasonable time limit for requests to take an applicant back should be established. Such measures would considerably reduce hardship for asylum-seekers.

16. Member States should only conduct an escorted transfer or make use of coercive measures if there are clear indications that the asylum-seeker refuses to return voluntarily.

17. A provision should be added to the Regulation stipulating that enforced returns should always be undertaken in a humane manner, in full respect of human rights and dignity, and that any use of force should always be proportionate.

18. Information-sharing on transfers between Member States should be improved and explicitly provided for in the Commission's Dublin II Implementing Regulation. This is in particular the case with respect to family members in the receiving State and special needs of the transferee.

Efficiency of the system and fair responsibility sharing

19. The European Commission should collect, analyse and make public statistical data on the implementation of the Dublin II Regulation, and assess the system's efficiency in terms of both human and financial costs.

20. The European Commission should analyse the distribution of asylum applicants among Member States, any potential imbalance resulting from the Dublin II system, and any possible negative consequences for the protection of refugees.

ANNEX I

I

(Acts whose publication is obligatory)

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63, first paragraph, point (1)(a),

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Having regard to the opinion of the European Economic and Social Committee [3],

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement. In this respect, and without affecting the responsibility criteria laid down in this Regulation, Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals.

(3) The Tampere conclusions also stated that this system should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

(4) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications.

(5) As regards the introduction in successive phases of a common European asylum system that should lead, in the longer term, to a common procedure and a uniform status, valid throughout the Union, for those granted asylum, it is appropriate at this stage, while making the necessary improvements in the light of experience, to confirm the principles underlying the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities [4], signed in Dublin on 15 June 1990 (hereinafter referred to as the Dublin Convention), whose implementation has stimulated the process of harmonising asylum policies.

(6) Family unity should be preserved in so far as this is compatible with the other objectives pursued by establishing criteria and mechanisms for determining the Member State responsible for examining an asylum application.

(7) The processing together of the asylum applications of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly and the decisions taken in respect of them are consistent. Member States should be able to derogate from the responsibility criteria, so as to make it possible to bring family members together where this is necessary on humanitarian grounds.

(8) The progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the Treaty establishing the European Community and the establishment of Community policies regarding the conditions of entry and stay of third country nationals, including common efforts towards the management of external borders, makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity.

[1] OJ C 304 E, 30.10.2001, p. 192.
[2] Opinion of 9 April 2002 (not yet published in the Official Journal).
[3] OJ C 125, 27.5.2002, p. 28.
[4] OJ C 254, 19.8.1997, p. 1.

(9) The application of this Regulation can be facilitated, and its effectiveness increased, by bilateral arrangements between Member States for improving communications between competent departments, reducing time limits for procedures or simplifying the processing of requests to take charge or take back, or establishing procedures for the performance of transfers.

(10) Continuity between the system for determining the Member State responsible established by the Dublin Convention and the system established by this Regulation should be ensured. Similarly, consistency should be ensured between this Regulation and Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention ([1]).

(11) The operation of the Eurodac system, as established by Regulation (EC) No 2725/2000 and in particular the implementation of Articles 4 and 8 contained therein should facilitate the implementation of this Regulation.

(12) With respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by obligations under instruments of international law to which they are party.

(13) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ([2]).

(14) The application of the Regulation should be evaluated at regular intervals.

(15) The Regulation observes the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union ([3]). In particular, it seeks to ensure full observance of the right to asylum guaranteed by Article 18.

(16) Since the objective of the proposed measure, namely the establishment of 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, cannot be sufficiently achieved by the Member States and, given the scale and effects, can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

([1]) OJ L 316, 15.12.2000, p. 1.
([2]) OJ L 184, 17.7.1999, p. 23.
([3]) OJ C 364, 18.12.2000, p. 1.

(17) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland gave notice, by letters of 30 October 2001, of their wish to take part in the adoption and application of this Regulation.

(18) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation and is not bound by it nor subject to its application.

(19) The Dublin Convention remains in force and continues to apply between Denmark and the Member States that are bound by this Regulation until such time an agreement allowing Denmark's participation in the Regulation has been concluded,

HAS ADOPTED THIS REGULATION:

CHAPTER I

SUBJECT-MATTER AND DEFINITIONS

Article 1

This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.

Article 2

For the purposes of this Regulation:

(a) 'third-country national' means anyone who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty establishing the European Community;

(b) 'Geneva Convention' means the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;

(c) 'application for asylum' means the application made by a third-country national which can be understood as a request for international protection from a Member State, under the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless a third-country national explicitly requests another kind of protection that can be applied for separately;

(d) 'applicant' or 'asylum seeker' means a third country national who has made an application for asylum in respect of which a final decision has not yet been taken;

(e) '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;

(f) 'withdrawal of the asylum application' means the actions by which the applicant for asylum terminates the procedures initiated by the submission of his application for asylum, in accordance with national law, either explicitly or tacitly;

(g) 'refugee' means any third-country national qualifying for the status defined by the Geneva Convention and authorised to reside as such on the territory of a Member State;

(h) 'unaccompanied minor' means unmarried persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;

(i) 'family members' means insofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the territory of the Member States:

(i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;

(ii) the minor children of couples referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

(iii) the father, mother or guardian when the applicant or refugee is a minor and unmarried;

(j) 'residence document' means any authorisation issued by the authorities of a Member State authorising a third-country national to stay in its territory, including the documents substantiating the authorisation to remain in the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply, with the exception of visas and residence authorisations issued during the period required to determine the responsible Member State as established in this Regulation or during examination of an application for asylum or an application for a residence permit;

(k) 'visa' means the authorisation or decision of a Member State required for transit or entry for an intended stay in that Member State or in several Member States. The nature of the visa shall be determined in accordance with the following definitions:

(i) 'long-stay visa' means the authorisation or decision of a Member State required for entry for an intended stay in that Member State of more than three months;

(ii) 'short-stay visa' means the authorisation or decision of a Member State required for entry for an intended stay in that State or in several Member States for a period whose total duration does not exceed three months;

(iii) 'transit visa' means the authorisation or decision of a Member State for entry for transit through the territory of that Member State or several Member States, except for transit at an airport;

(iv) 'airport transit visa' means the authorisation or decision allowing a third-country national specifically subject to this requirement to pass through the transit zone of an airport, without gaining access to the national territory of the Member State concerned, during a stopover or a transfer between two sections of an international flight.

CHAPTER II

GENERAL PRINCIPLES

Article 3

1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, 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. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.

3. Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention.

4. The asylum seeker shall be informed in writing in a language that he or she may reasonably be expected to understand regarding the application of this Regulation, its time limits and its effects.

Article 4

1. The process of determining the Member State responsible under this Regulation shall start as soon as an application for asylum is first lodged with a Member State.

2. An application for asylum shall be deemed to have been lodged once a form submitted by the applicant for asylum or a report prepared by the authorities has reached the competent authorities of the Member State concerned. Where an application is not made in writing, the time elapsing between the statement of intention and the preparation of a report should be as short as possible.

3. For the purposes of this Regulation, the situation of a minor who is accompanying the asylum seeker and meets the definition of a family member set out in Article 2, point (i), shall be indissociable from that of his parent or guardian and shall be a matter for the Member State responsible for examining the application for asylum of that parent or guardian, even if the minor is not individually an asylum seeker. The same treatment shall be applied to children born after the asylum seeker arrives in the territory of the Member States, without the need to initiate a new procedure for taking charge of them.

4. Where an application for asylum is lodged with the competent authorities of a Member State by an applicant who is in the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present. The latter Member State shall be informed without delay by the Member State which received the application and shall then, for the purposes of this Regulation, be regarded as the Member State with which the application for asylum was lodged.

The applicant shall be informed in writing of this transfer and of the date on which it took place.

5. An asylum seeker who is present in another Member State and there lodges an application for asylum after withdrawing his application during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Article 20, by the Member State with which that application for asylum was lodged, with a view to completing the process of determining the Member State responsible for examining the application for asylum.

This obligation shall cease, if the asylum seeker has in the meantime left the territories of the Member States for a period of at least three months or has obtained a residence document from a Member State.

CHAPTER III

HIERARCHY OF CRITERIA

Article 5

1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

2. The Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.

Article 6

Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.

In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.

Article 7

Where the asylum seeker has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a refugee in a Member State, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire.

Article 8

If the asylum seeker has a family member in a Member State whose application has not yet been the subject of a first decision regarding the substance, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire.

Article 9

1. Where the asylum seeker is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for asylum.

2. Where the asylum seeker is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for asylum, unless the visa was issued when acting for or on the written authorisation of another Member State. In such a case, the latter Member State shall be responsible for examining the application for asylum. Where a Member State first consults the central authority of another Member State, in particular for security reasons, the latter's reply to the consultation shall not constitute written authorisation within the meaning of this provision.

3. Where the asylum seeker is in possession of more than one valid residence document or visa issued by different Member States, the responsibility for examining the application for asylum shall be assumed by the Member States in the following order:

(a) the Member State which issued the residence document conferring the right to the longest period of residency or, where the periods of validity are identical, the Member State which issued the residence document having the latest expiry date;

(b) the Member State which issued the visa having the latest expiry date where the various visas are of the same type;

(c) where visas are of different kinds, the Member State which issued the visa having the longest period of validity, or, where the periods of validity are identical, the Member State which issued the visa having the latest expiry date.

4. Where the asylum seeker is in possession only of one or more residence documents which have expired less than two years previously or one or more visas which have expired less than six months previously and which enabled him actually to enter the territory of a Member State, paragraphs 1, 2 and 3 shall apply for such time as the applicant has not left the territories of the Member States.

Where the asylum seeker is in possession of one or more residence documents which have expired more than two years previously or one or more visas which have expired more than six months previously and enabled him actually to enter the territory of a Member State and where he has not left the territories of the Member States, the Member State in which the application is lodged shall be responsible.

5. The fact that the residence document or visa was issued on the basis of a false or assumed identity or on submission of forged, counterfeit or invalid documents shall not prevent responsibility being allocated to the Member State which issued it. However, the Member State issuing the residence document or visa shall not be responsible if it can establish that a fraud was committed after the document or visa had been issued.

Article 10

1. Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), including the data referred to in Chapter III of Regulation (EC) No 2725/2000, that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum. This responsibility shall cease 12 months after the date on which the irregular border crossing took place.

2. When a Member State cannot or can no longer be held responsible in accordance with paragraph 1, and where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 18(3), that the asylum seeker — who has entered the territories of the Member States irregularly or whose circumstances of entry cannot be established — at the time of lodging the application has been previously living for a continuous period of at least five months in a Member State, that Member State shall be responsible for examining the application for asylum.

If the applicant has been living for periods of time of at least five months in several Member States, the Member State where this has been most recently the case shall be responsible for examining the application.

Article 11

1. If a third-country national enters into the territory of a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for asylum.

2. The principle set out in paragraph 1 does not apply, if the third-country national lodges his or her application for asylum in another Member State, in which the need for him or her to have a visa for entry into the territory is also waived. In this case, the latter Member State shall be responsible for examining the application for asylum.

Article 12

Where the application for asylum is made in an international transit area of an airport of a Member State by a third-country national, that Member State shall be responsible for examining the application.

Article 13

Where no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it.

Article 14

Where several members of a family submit applications for asylum in the same Member State simultaneously, or on dates close enough for the procedures for determining the Member State responsible to be conducted together, and where the application of the criteria set out in this Regulation would lead to them being separated, the Member State responsible shall be determined on the basis of the following provisions:

(a) responsibility for examining the applications for asylum of all the members of the family shall lie with the Member State which the criteria indicate is responsible for taking charge of the largest number of family members;

(b) failing this, responsibility shall lie with the Member State which the criteria indicate is responsible for examining the application of the oldest of them.

CHAPTER IV

HUMANITARIAN CLAUSE

Article 15

1. Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.

2. In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a newborn child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin.

3. If the asylum seeker is an unaccompanied minor who has a relative or relatives in another Member State who can take care of him or her, Member States shall if possible unite the minor with his or her relative or relatives, unless this is not in the best interests of the minor.

4. Where the Member State thus approached accedes to the request, responsibility for examining the application shall be transferred to it.

5. The conditions and procedures for implementing this Article including, where appropriate, conciliation mechanisms for settling differences between Member States concerning the need to unite the persons in question, or the place where this should be done, shall be adopted in accordance with the procedure referred to in Article 27(2).

CHAPTER V

TAKING CHARGE AND TAKING BACK

Article 16

1. The Member State responsible for examining an application for asylum under this Regulation shall be obliged to:

(a) take charge, under the conditions laid down in Articles 17 to 19, of an asylum seeker who has lodged an application in a different Member State;

(b) complete the examination of the application for asylum;

(c) take back, under the conditions laid down in Article 20, an applicant whose application is under examination and who is in the territory of another Member State without permission;

(d) take back, under the conditions laid down in Article 20, an applicant who has withdrawn the application under examination and made an application in another Member State;

(e) take back, under the conditions laid down in Article 20, a third-country national whose application it has rejected and who is in the territory of another Member State without permission.

2. Where a Member State issues a residence document to the applicant, the obligations specified in paragraph 1 shall be transferred to that Member State.

3. The obligations specified in paragraph 1 shall cease where the third-country national has left the territory of the Member States for at least three months, unless the third-country national is in possession of a valid residence document issued by the Member State responsible.

4. The obligations specified in paragraph 1(d) and (e) shall likewise cease once the Member State responsible for examining the application has adopted and actually implemented, following the withdrawal or rejection of the application, the provisions that are necessary before the third-country national can go to his country of origin or to another country to which he may lawfully travel.

Article 17

1. Where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any case within three months of the date on which the application was lodged within the meaning of Article 4(2), call upon the other Member State to take charge of the applicant.

Where the request to take charge of an applicant is not made within the period of three months, responsibility for examining the application for asylum shall lie with the Member State in which the application was lodged.

2. The requesting Member State may ask for an urgent reply in cases where the application for asylum was lodged after leave to enter or remain was refused, after an arrest for an unlawful stay or after the service or execution of a removal order and/or where the asylum seeker is held in detention.

The request shall state the reasons warranting an urgent reply and the period within which a reply is expected. This period shall be at least one week.

3. In both cases, the request that charge be taken by another Member State shall be made using a standard form and including proof or circumstantial evidence as described in the two lists mentioned in Article 18(3) and/or relevant elements from the asylum seeker's statement, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.

The rules on the preparation of and the procedures for transmitting requests shall be adopted in accordance with the procedure referred to in Article 27(2).

Article 18

1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of the date on which the request was received.

2. In the procedure for determining the Member State responsible for examining the application for asylum established in this Regulation, elements of proof and circumstantial evidence shall be used.

3. In accordance with the procedure referred to in Article 27(2) two lists shall be established and periodically reviewed, indicating the elements of proof and circumstantial evidence in accordance with the following criteria:

(a) Proof:

(i) This refers to formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary.

(ii) The Member States shall provide the Committee provided for in Article 27 with models of the different types of administrative documents, in accordance with the typology established in the list of formal proofs.

(b) Circumstantial evidence:

(i) This refers to indicative elements which while being refutable may be sufficient, in certain cases, according to the evidentiary value attributed to them.

(ii) Their evidentiary value, in relation to the responsibility for examining the application for asylum shall be assessed on a case-by-case basis.

4. The requirement of proof should not exceed what is necessary for the proper application of this Regulation.

5. If there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility.

6. Where the requesting Member State has pleaded urgency, in accordance with the provisions of Article 17(2), the requested Member State shall make every effort to conform to the time limit requested. In exceptional cases, where it can be demonstrated that the examination of a request for taking charge of an applicant is particularly complex, the requested Member State may give the reply after the time limit requested, but in any case within one month. In such situations the requested Member State must communicate its decision to postpone a reply to the requesting Member State within the time limit originally requested.

7. Failure to act within the two-month period mentioned in paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the provisions for proper arrangements for arrival.

Article 19

1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this.

3. The transfer of the applicant from the Member State in which the application for asylum was lodged to the Member State responsible shall be carried out in accordance with the national law of the first Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken or of the decision on an appeal or review where there is a suspensive effect.

If necessary, the asylum seeker shall be supplied by the requesting Member State with a *laissez passer* of the design adopted in accordance with the procedure referred to in Article 27(2).

The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the asylum seeker or of the fact that he did not appear within the set time limit.

4. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

5. Supplementary rules on carrying out transfers may be adopted in accordance with the procedure referred to in Article 27(2).

Article 20

1. An asylum seeker shall be taken back in accordance with Article 4(5) and Article 16(1)(c), (d) and (e) as follows:

(a) the request for the applicant to be taken back must contain information enabling the requested Member State to check that it is responsible;

(b) the Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time limit is reduced to two weeks;

(c) where the requested Member State does not communicate its decision within the one month period or the two weeks period mentioned in subparagraph (b), it shall be considered to have agreed to take back the asylum seeker;

(d) a Member State which agrees to take back an asylum seeker shall be obliged to readmit that person to its territory. The transfer shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive effect;

(e) the requesting Member State shall notify the asylum seeker of the decision concerning his being taken back by the Member State responsible. The decision shall set out the grounds on which it is based. It shall contain details of the time limit on carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer except when the courts or competent bodies so decide in a case-by-case basis if the national legislation allows for this.

If necessary, the asylum seeker shall be supplied by the requesting Member State with a laissez passer of the design adopted in accordance with the procedure referred to in Article 27(2).

The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the asylum seeker or of the fact that he did not appear within the set time limit.

2. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer or the examination of the application could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

3. The rules of proof and evidence and their interpretation, and on the preparation of and the procedures for transmitting requests, shall be adopted in accordance with the procedure referred to in Article 27(2).

4. Supplementary rules on carrying out transfers may be adopted in accordance with the procedure referred to in Article 27(2).

CHAPTER VI

ADMINISTRATIVE COOPERATION

Article 21

1. Each Member State shall communicate to any Member State that so requests such personal data concerning the asylum seeker as is appropriate, relevant and non-excessive for:

(a) the determination of the Member State responsible for examining the application for asylum;

(b) examining the application for asylum;

(c) implementing any obligation arising under this Regulation.

2. The information referred to in paragraph 1 may only cover:

(a) personal details of the applicant, and, where appropriate, the members of his family (full name and where appropriate, former name; nicknames or pseudonyms; nationality, present and former; date and place of birth);

(b) identity and travel papers (references, validity, date of issue, issuing authority, place of issue, etc.);

(c) other information necessary for establishing the identity of the applicant, including fingerprints processed in accordance with Regulation (EC) No 2725/2000;

(d) places of residence and routes travelled;

(e) residence documents or visas issued by a Member State;

(f) the place where the application was lodged;

(g) the date any previous application for asylum was lodged, the date the present application was lodged, the stage reached in the proceedings and the decision taken, if any.

3. Furthermore, provided it is necessary for the examination of the application for asylum, the Member State responsible may request another Member State to let it know on what grounds the asylum seeker bases his application and, where applicable, the grounds for any decisions taken concerning the applicant. The Member State may refuse to respond to the request submitted to it, if the communication of such information is likely to harm the essential interests of the Member State or the protection of the liberties and fundamental rights of the person concerned or of others. In any event, communication of the information requested shall be subject to the written approval of the applicant for asylum.

4. Any request for information shall set out the grounds on which it is based and, where its purpose is to check whether there is a criterion that is likely to entail the responsibility of the requested Member State, shall state on what evidence, including relevant information from reliable sources on the ways and means asylum seekers enter the territories of the Member States, or on what specific and verifiable part of the applicant's statements it is based. It is understood that such relevant information from reliable sources is not in itself sufficient to determine the responsibility and the competence of a Member State under this Regulation, but it may contribute to the evaluation of other indications relating to the individual asylum seeker.

5. The requested Member State shall be obliged to reply within six weeks.

6. The exchange of information shall be effected at the request of a Member State and may only take place between authorities whose designation by each Member State has been communicated to the Commission, which shall inform the other Member States thereof.

7. The information exchanged may only be used for the purposes set out in paragraph 1. In each Member State such information may, depending on its type and the powers of the recipient authority, only be communicated to the authorities and courts and tribunals entrusted with:

(a) the determination of the Member State responsible for examining the application for asylum;

(b) examining the application for asylum;

(c) implementing any obligation arising under this Regulation.

8. The Member State which forwards the information shall ensure that it is accurate and up-to-date. If it transpires that that Member State has forwarded information which is inaccurate or which should not have been forwarded, the recipient Member States shall be informed thereof immediately. They shall be obliged to correct such information or to have it erased.

9. The asylum seeker shall have the right to be informed, on request, of any data that is processed concerning him.

If he finds that this information has been processed in breach of this Regulation or of Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1], in particular because it is incomplete or inaccurate, he is entitled to have it corrected, erased or blocked.

The authority correcting, erasing or blocking the data shall inform, as appropriate, the Member State transmitting or receiving the information.

10. In each Member State concerned, a record shall be kept, in the individual file for the person concerned and/or in a register, of the transmission and receipt of information exchanged.

11. The data exchanged shall be kept for a period not exceeding that which is necessary for the purposes for which it is exchanged.

12. Where the data is not processed automatically or is not contained, or intended to be entered, in a file, each Member State should take appropriate measures to ensure compliance with this Article through effective checks.

Article 22

1. Member States shall notify the Commission of the authorities responsible for fulfilling the obligations arising under this Regulation and shall ensure that those authorities have the necessary resources for carrying out their tasks and in particular for replying within the prescribed time limits to requests for information, requests to take charge of and requests to take back asylum seekers.

2. Rules relating to the establishment of secure electronic transmission channels between the authorities mentioned in paragraph 1 for transmitting requests and ensuring that senders automatically receive an electronic proof of delivery shall be established in accordance with the procedure referred to in Article 27(2).

Article 23

1. Member States may, on a bilateral basis, establish administrative arrangements between themselves concerning the practical details of the implementation of this Regulation, in order to facilitate its application and increase its effectiveness. Such arrangements may relate to:

(a) exchanges of liaison officers;

(b) simplification of the procedures and shortening of the time limits relating to transmission and the examination of requests to take charge of or take back asylum seekers;

2. The arrangements referred to in paragraph 1 shall be communicated to the Commission. The Commission shall verify that the arrangements referred to in paragraph 1(b) do not infringe this Regulation.

CHAPTER VII

TRANSITIONAL PROVISIONS AND FINAL PROVISIONS

Article 24

1. This Regulation shall replace the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (Dublin Convention).

2. However, to ensure continuity of the arrangements for determining the Member State responsible for an application for asylum, where an application has been lodged after the date mentioned in the second paragraph of Article 29, the events that are likely to entail the responsibility of a Member State under this Regulation shall be taken into consideration, even if they precede that date, with the exception of the events mentioned in Article 10(2).

3. Where, in Regulation (EC) No 2725/2000 reference is made to the Dublin Convention, such reference shall be taken to be a reference made to this Regulation.

Article 25

1. Any period of time prescribed in this Regulation shall be calculated as follows:

(a) where a period expressed in days, weeks or months is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the period in question;

(b) a period expressed in weeks or months shall end with the expiry of whichever day in the last week or month is the same day of the week or falls on the same date as the day during which the event or action from which the period is to be calculated occurred or took place. If, in a period expressed in months, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month;

(c) time limits shall include Saturdays, Sundays and official holidays in any of the Member States concerned.

2. Requests and replies shall be sent using any method that provides proof of receipt.

[1] OJ L 281, 23.11.1995, p. 31.

Article 26

As far as the French Republic is concerned, this Regulation shall apply only to its European territory.

Article 27

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. The Committee shall draw up its rules of procedure.

Article 28

At the latest three years after the date mentioned in the first paragraph of Article 29, the Commission shall report to the European Parliament and the Council on the application of this Regulation and, where appropriate, shall propose the necessary amendments. Member States shall forward to the Commission all information appropriate for the preparation of that report, at the latest six months before that time limit expires.

Having submitted that report, the Commission shall report to the European Parliament and the Council on the application of this Regulation at the same time as it submits reports on the implementation of the Eurodac system provided for by Article 24(5) of Regulation (EC) No 2725/2000.

Article 29

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

It shall apply to asylum applications lodged as from the first day of the sixth month following its entry into force and, from that date, it will apply to any request to take charge of or take back asylum seekers, irrespective of the date on which the application was made. The Member State responsible for the examination of an asylum application submitted before that date shall be determined in accordance with the criteria set out in the Dublin Convention.

This Regulation shall be binding in its entirety and directly applicable in the Member States in conformity with the Treaty establishing the European Community.

Done at Brussels, 18 February 2003.

For the Council

The President

N. CHRISTODOULAKIS

ANNEX II
Indicative Statistics on the Operation of the Dublin II Regulation

Incoming Requests to take Responsibility [228] *(January-June 2005)*				
	Requests	**Accepted**	**Rejected**	**Effected transfers**
Austria	1,632	892	653	281
Belgium*	1,353	1,059	324	180
Cyprus**	37	36	1	2
Czech Republic	276	192	85	66
Estonia	5	4	1	1
Finland	161	121	40	Estimate: 60
France	N/A	N/A	N/A	N/A
Germany***	3,091	2,292	808	1,453
Greece	565	526	49	176
Hungary	490	340	36	70
Iceland	3	1	3	1
Ireland	56	32	9	15
Italy	1,238	96	7	248
Latvia	0	0	0	0
Lithuania	13	10	3	16
Luxembourg	86	64	23	40
Malta	117	Est.: 66	Est.: 15	35
Netherlands	1,225	759	324	550
Norway****	3,989	3,478	500	N/A
Poland	1,461	1,280	209	850
Portugal	44	26	10	7
Slovak Republic	1,113	769	175	284
Slovenia	138	99	38	21
Spain	329	317	52	156
Sweden	1,523	1,111	391	N/A
UK	342	222	89	118
Total	**19,287**	**13,792**	**3,845**	**4,630**

* Period January-December 2005
** Period January 2005-January 2006
*** Period July-December 2005
**** Period September 2003-September 2005

[228] Provisional numbers provided by the Member States.

Outgoing Requests to take Responsibility[229] *(January-June 2005)*				
	Requests	**Accepted**	**Rejected**	**Effected transfers**
Austria	2,555	1,757	583	265
Belgium*	2,210	1,664	546	N/A
Cyprus**	4	2	2	0
Czech Republic	325	280	46	291
Estonia	1	1	0	1
Finland	592	507	86	423
France	N/A	N/A	N/A	N/A
Germany***	2,608	1,824	661	1,108
Greece	16	11	4	3
Hungary	23	7	16	6
Iceland	15	11	3	11
Ireland	261	193	28	78
Italy	354	66	4	11
Latvia	0	0	0	0
Lithuania	1	1	0	1
Luxembourg	190	174	13	160
Malta	N/A	N/A	N/A	N/A
Netherlands	932	636	145	503
Norway****	5,925	5,749	646	N/A
Poland	100	40	55	63
Portugal	19	17	3	4
Slovak Republic	138	17	66	5
Slovenia	27	8	15	3
Spain	142	50	18	14
Sweden	1,999	1,646	317	N/A
UK	1,059	974	77	1,155
Total	**19,496**	**15,635**	**3,334**	**4,105**

* Period January-December 2005
** Period January 2005-January 2006
*** Period July-December 2005
**** Period September 2003-September 2005

[229] Provisional numbers provided by the Member States.

UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés