



Amnesty International's Comments on the Commission Proposals for a Directive laying down Minimum Standards for the reception of asylum seekers (Recast) (COM(2008) 815 final)

and

on the Commission Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast) (COM(2008) 820 final).

1. General remarks

In December 2008, the Commission presented three new legislative proposals in the field of asylum. These are the first of a series of no less than 7 new proposals that are expected in this field by the end of 2009. With the publication of the proposals the Commission has officially started the so-called second phase of harmonization in the field of asylum in order to attain a coherent, comprehensive and integrated Common European Asylum System (CEAS), which according to the 2004 Hague Programme should be completed by 2010, a deadline which has de facto been postponed to 2012 by the Head of States and Government in the European Pact on Immigration and Asylum adopted on 16 October 2008¹. The Commission has clearly set out the objectives of the CEAS in its Policy Plan on Asylum².

The three proposals recasting the Dublin³ and EURODAC⁴ Regulations and the Directive on reception conditions for asylum-seekers⁵ fit within the objective to achieve "better and harmonized standards of protection through further alignment of Member States' asylum laws". These should be followed later this year by Commission Proposals recasting the Asylum Procedures Directive and the Qualification

¹ See European Council, European Pact on Immigration and Asylum, Doc 13440/08, Chapter IV.

² See COM(2008)360 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. *Policy Plan on Asylum. An integrated approach to protection across the EU*, Brussels, 17 June 2008.

³ See COM(2008)820 final, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

⁴ See COM(2008)825 final, Proposal for a Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No [...] [establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

⁵ See COM(2008)815 final, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers.

Directive. According to the Commission this important legislative programme should not only be based on the still standing Tampere commitment of a “full and inclusive interpretation of the Geneva Refugee Convention” but also the “evolving jurisprudence of the European Court of Human Rights and the full respect of the Charter of Fundamental Rights” should be a constant reference for this strategy. Other important objectives of the CEAS include increased practical cooperation, which should be covered by the recently proposed European Asylum Support Office (EASO)⁶ and the support of internal and external solidarity of the EU with regard to refugee situations. This should be dealt with in a proposal on an EU resettlement programme expected later this year. The comments in this document only relate to the recast Commission proposal on the reception of asylum-seekers Directive (hereafter “recast proposal on the Reception Conditions Directive”) and the recast Commission proposal on the Dublin Regulation (hereafter “recast proposal on the Dublin Regulation”).

Amnesty International has consistently called upon all stakeholders to develop high standards of protection in the framework of the CEAS that comply with international refugee and human rights law and standards. While practical cooperation will indeed be a necessary component for achieving harmonization of asylum policies and creating a level playing field within the EU, it is of the utmost importance to ensure that this will be based on a solid legal framework at EU level that ensures high standards of protection. The assessment of the first phase EU asylum instruments has not been positive from a protection perspective. Many stakeholders, including UNHCR and Amnesty International have on various occasions pointed to the generally low level of standards laid down in EU asylum legislation and to the fact that certain aspects are even at odds with international refugee and human rights law and standards. The evaluation of the application of the Dublin Regulation⁷ in the Member States and of the implementation of the Reception Conditions Directive⁸ and the Qualification Directive⁹ has shown that there is a need for further legislative harmonization in order to address the protection gaps in the EU. As a result, Amnesty International welcomes the initiative taken by the Commission to present amendments to the existing EU asylum legislation and encourages the European Parliament and the Member States to engage in a constructive discussion in order to establish a CEAS that effectively offers protection to those in need of it and that can serve as an example to other regions in the world.

Generally speaking, both proposals contain a number of important and necessary improvements of the current system that will not just enhance the efficiency of the system but also add crucial safeguards for those applying for asylum within the CEAS.

In Amnesty International's view, such positive amendments in the recast proposal on the Dublin Regulation include:

- extension of the scope of the Dublin Regulation to include beneficiaries of subsidiary protection allowing family reunification for the latter categories under Dublin criteria
- new explicit obligations for states to take back an applicant who was transferred erroneously or after a successful appeal (Article 28(3)) and to bear the financial costs for transfers (Article 29)

⁶ See COM(2009)66 final, Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office. See also Amnesty International EU Office, “Amnesty International's response to the Commission Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office (Com(2009) 66 fina)”, April 2009. Available at www.amnesty-eu.org.

⁷ See COM(2007)299 final, Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system.

⁸ See COM(2007)745 final, Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

⁹ See UNHCR, Asylum in the European Union. A study of the Implementation of the Qualification Directive, November 2007.

- the obligation for Member States to give the opportunity of a personal interview with a qualified person (Article 5)
- the obligation on Member States to inform asylum-seekers of the objectives of the Dublin Regulation, the procedure and time-limits to be followed by Member States (Article 4)
- the discretionary clause (Article 17) which includes the possibility for Member States to request at any time another Member State to take over responsibility to bring together family members or on humanitarian grounds and the obligation of the requested Member State to reply to such a request within two months
- the introduction of an explicit provision guaranteeing a right to an effective remedy (Article 26) and a temporary suspension mechanism (Article 31)

With regard to the recast proposal on the Reception Conditions Directive, Amnesty International in particular welcomes

- the extension of the personal scope of the directive to applicants for subsidiary protection (Article 2(a)) and clarification of its geographical scope by explicitly including transit zones in the scope (Article 3(1))
- the extension of the definition of family members (Article 2 (c))
- the obligation for Member States to ensure access to the labour market no later than six months after the application for international protection was lodged (Article 15 (1)) as it will promote integration and self-sufficiency of asylum-seekers
- the limitation of circumstances in which reception conditions can be entirely withdrawn (Article 20) as this will contribute to prevent asylum-seekers from becoming destitute
- the strengthening of safeguards for vulnerable groups (Article 21-24)
- the introduction of strengthened reporting requirements for Member States with regard to the implementation of the standards laid down in the directive (Article 27 and Annex I)

However, Amnesty International remains concerned with regard to provisions in both proposals that risk condoning extensive use of detention of asylum-seekers. At the same time a more ambitious approach with regard to the protection of vulnerable asylum-seekers within the CEAS could be pursued.

These concerns are further elaborated in this document. Amnesty International does not aim to present a comprehensive analysis of all amendments to the Reception Conditions Directive and the Dublin Regulation proposed by the Commission but rather to develop a horizontal thematic approach and focus on those amendments in both proposals dealing with

- detention of asylum-seekers (part 2),
- safeguards with regard to vulnerable asylum-seekers (part 3)
- the right to an effective remedy (part 4).
- the temporary suspension mechanism in the recast proposal on the Dublin Regulation (part 5).

2. Detention of asylum-seekers

Detention of asylum-seekers is a cross-cutting issue in both proposals. While the relevant provisions are clearly modeled on the corresponding provisions on detention of irregularly staying third country nationals for the purpose of removal in the return directive¹⁰, the two proposals define specific grounds for detention of asylum-seekers and insert specific safeguards with regard to the detention of vulnerable groups of asylum-seekers. Both the grounds for detention and the additional safeguards for asylum-seekers are inspired by the UNHCR guidelines on detention of asylum-seekers¹¹ as well as the Recommendation of the Committee of Ministers of the Council of Europe on “measures of detention of asylum seekers”¹². It should be noted that these recommendations and guidelines aim to inform states’ practice but do not constitute binding legal norms. While they include a number of important principles that protect asylum-seekers against arbitrary detention, with regard to the possible grounds for detention of asylum-seekers, both texts may inspire an undesirably broad practice of detention. EU legislation should not promote such practice. The European Parliament and the Council have a unique opportunity to set a standard which clearly endorses the principle that detention of asylum-seekers shall in all circumstances be exceptional, be for the shortest time possible and shall only be resorted to as a measure of last resort and never as a first response.

Amnesty International is opposed to the detention of asylum-seekers apart from in the most exceptional circumstances as prescribed by international law and standards. Detention for immigration control purposes is inherently undesirable; it places undue hardship on asylum-seekers and in the great majority of cases can be replaced by less repressive alternatives. Amnesty International believes that the use of detention is not conducive to good integration in the country of asylum as the first experience of the asylum-seeker is one of deprivation of liberty, which can often be prolonged; it also delays the start of such integration. Non-custodial alternatives to detention are very effective in achieving the legitimate purposes for which they can be used, while being less restrictive to asylum-seekers’ rights.

On the basis of international law and standards, essential criteria can be identified for the use of detention. Detention will only be lawful when the authorities can demonstrate in each individual case that it is necessary and proportionate to the objective to be achieved, that it is on grounds prescribed by law and that it is for one of the specified reasons which international and regional standards recognize as legitimate grounds for detaining asylum-seekers. Any asylum-seeker held in detention must be promptly brought before a judicial authority and be provided with an effective opportunity to challenge the lawfulness of the decision to detain. Detention should also be for the shortest possible time.

While these principles are largely reflected in the relevant provisions in the Commission proposals, Amnesty International believes that these provisions should be amended to further restrict the use of detention and instead promote the use of alternatives to detention.

2.1. Grounds for detention

The recast Commission proposal on the reception conditions Directive identifies four grounds for detention of asylum-seekers, while the recast Commission proposal on the Dublin Regulation adds the Dublin-specific ground of a significant risk of absconding from a transfer to another Dublin state.

¹⁰ See Articles 15, 16 and 17 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ* 2008 L 348/98.

¹¹ UNHCR, UNHCR revised guidelines on applicable criteria and standards relating to the detention of asylum seekers (February 1999).

¹² Council of Europe, Recommendation Rec(2003)5 of the Committee of Ministers to Member States on measures of detention of asylum seekers.

➤ **Recast proposal on the Reception Conditions Directive**

Four grounds for detention of asylum-seekers are laid down in the new Article 8 (2). According to this provision, “an applicant for international protection may only be detained to a particular place (1) in order to determine, ascertain or verify his identity or nationality; (2) in order to determine the elements on which his application for asylum is based which in other circumstances could be lost; (3) in the context of a procedure to decide on his right to enter the territory or (4) when protection of national security and public order so requires”. While this is largely based on the abovementioned UNHCR guidelines and the Council of Europe Recommendations, these grounds risk being interpreted so broadly so as to not properly reflect the general presumption against detention under international refugee and human rights law.

The **first detention ground** allows Member States to detain an asylum-seeker in order to “determine, ascertain or verify his identity or nationality”. This goes beyond what is allowed under the UNHCR guidelines which only mention the verification of identity in cases where identity may be undetermined or in dispute. In Amnesty International’s view this ground should at a minimum be brought in line with UNHCR guidelines and simply state “in order to verify identity where it is undetermined or in dispute”. The notions ascertain or determine should be deleted as they do not seem to have any added value with regard to the possibility for Member States to verify identity. The reference to verification of nationality in the context of an asylum application is unfortunate in particular where applicants claim protection from persecution or risk of serious harm caused by state actors in their country of origin. Verification of nationality would in most cases only be possible through contacting the authorities of the country of origin of the applicant which contradicts the need for asylum bodies to respect the confidentiality of the asylum applicant and the asylum application as such. In order to ensure that safeguards with regard to confidentiality of the asylum applicant are respected while his or her identity is being verified, an additional safeguard should be introduced stating “in order to verify identity without prejudice to the obligation to respect the principle of confidentiality in the context of asylum procedures and without otherwise endangering the safety of the asylum-seeker”. It should be noted that such a principle of confidentiality is inherent in Article 22 of the asylum procedures directive which prohibits Member States to “directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum”¹³.

Amnesty International recommends amending this detention ground as follows: “in order to verify identity where it is undetermined or in dispute and without prejudice to the obligation to respect the principle of confidentiality in the context of asylum procedures and without otherwise endangering the safety of the asylum-seeker”.

The **second detention ground** allows Member States to detain an asylum-seeker in order to determine the elements on which his application for asylum is based which in other circumstances could be lost. Amnesty International believes that this ground for detention could be adjusted in order to safeguard the exceptional nature of detention in the context of asylum procedures. As it is currently formulated there is no limit to which elements are considered to be the “basis of his application for asylum” nor does it include any limitation as to how long an asylum-seeker can be detained in order to establish those elements which in other circumstances could be lost. This ground could potentially allow for all asylum-seekers to be detained for the purpose of determining their protection needs. It also allows for detention of asylum applicants at any stage of the asylum procedure, including when an asylum applicant has already entered the territory and has lodged an asylum claim.

¹³ See Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005 L 326/13.

In line with UNHCR guidelines on detention, this ground should be amended to clarify that detention for the establishment of the elements on which the application is based is not permissible beyond the stage of a preliminary interview and can not be used to justify detention for the total duration of the asylum procedure and could not extend to a determination of the merits of the claim for example¹⁴. As soon as the basic elements which otherwise will be lost are established, detention no longer serves a legitimate purpose and the applicant needs to be released. Obviously, detention in the context of a preliminary interview should always be for the shortest possible time and delays in conducting such a preliminary interview should never justify a continuation of detention. This is clearly reflected in the new Article 9(1) according to which “delays in the administrative procedure that can not be attributed to the asylum-seeker shall not justify a continuation of detention”.

Amnesty International recommends inserting a clear limitation in Article 8(2) (b) of the recast proposal on the Reception Conditions Directive so as to ensure that detention based on the need to determine elements of the asylum application can only be possible in the context of a preliminary interview.

The **third detention ground** mentioned in Article 8(2) (d) allows Member States to detain an asylum-seeker “in the context of a procedure, to decide on his right to enter the territory”.

In particular with regard to the detention of asylum-seekers the principle of necessity and proportionality of detention must always prevail. This is consistent with the approach taken by the UN Human Rights Committee in a number of cases where it held that the notion of arbitrariness must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice and that detention “could be considered arbitrary if it is not necessary in all the circumstances of the case”¹⁵. In Amnesty International’s view, this means that in the context of the discussion on the Recast proposal on the Reception Conditions Directive, detention can only be used for the purpose of taking a decision on the asylum application if it is necessary to prevent absconding and if it is demonstrated in each individual case that non custodial alternatives are not sufficient¹⁶. This fundamental principle, enshrined in Article 8 (2) of the Commission recast proposal risks being undermined by the third ground of detention which is in fact not related to the purpose of determining protection needs but is exclusively inspired by immigration control considerations. It is exactly that approach which could lead to systematic detention of asylum seekers, in particular at the border of EU Member States.

As far as the third ground of detention would allow systematic detention solely on the basis of the irregular entry of the asylum-seeker, Amnesty International believes that this is at odds with Article 31 of the Geneva Refugee Convention. This provision imposes a prohibition “ to impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in the territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”. This Article does not only apply to persons who ultimately obtain refugee status but also applies to persons who claim refugee status in good faith¹⁷.

Article 31 (2) of the Geneva Refugee Convention only allows states to apply restrictions to the movement of refugees and asylum-seekers that are necessary and only until their status has been regularized. According to authoritative commentators regularization means that the asylum-seeker

¹⁴ See UNHCR Guidelines on detention, Guideline 3 (ii).

¹⁵ See Human Rights Committee, *A. v. Australia*, CCPR/C/59/D/560/1993, par. 9.2, Human Rights Committee, *C. v Australia*, CCPR/C/76/D/900/1999 and Human Rights Committee, *Samba Jalloh v. Netherlands*, CCPR/C/74/D/794/1998, par. 8.2.

¹⁶ This is also reinforced by the proposed Article 8 (1) which explicitly states that “Member States shall not hold a person in detention for the sole reason that he/she is an applicant for international protection in accordance with Council Directive 2005/85/EC”.

¹⁷ See G. Goodwin-Gill and J. McAdam, “The Refugee in International Law”, Oxford University Press, 2007, p.265.

has complied with all legal formalities in order to have his or her asylum application examined.¹⁸ In many cases the distinction between administrative detention as a restriction of movement allowed under Article 31 (2) and a penalty which is prohibited under Article 31 (1) will be difficult to make in practice. Detention of asylum-seekers because of irregular entry into the territory is therefore only possible if the asylum-seeker does not present herself/himself without delay to the authorities and does not demonstrate that his or her unauthorized entry or presence is related to his or her search for protection. If this is the case, Article 31 (2) only allows restrictions to movement that are necessary. This was mainly intended to allow authorities to verify the identity of the asylum-seeker. It does not present a separate basis for restriction of movement beyond such an initial verification and can not justify deprivation of liberty during the entire asylum procedure. It should be noted that detention for the purpose of verification of identity is already covered by Article 8 (2) (a) of the proposal.

In order to reconcile the right to asylum as laid down in Article 18 of the EU Charter of Fundamental Rights with the legitimate aim of the Member States to control their borders, detention of asylum-seekers is not the only solution available to the Member States. Alternatives to detention such as regular reporting requirements or accommodation in open reception centers will in the large majority of cases be sufficient to ensure that asylum-seekers remain at the disposal of the asylum authorities to enable them to take a decision on their application.

Article 8(2) (c) of the recast proposal, could also be interpreted broadly as meaning that all asylum-seekers could be the subject to detention even in the absence of any ground for believing that he or she is seeking unlawful entry to the territory. This could potentially cover the duration of the entire asylum procedure. Indeed, as it is formulated in the Commission proposal, the provision does not seem to take into account that asylum-seekers may seek lawful entry into the territory of the Member States and present themselves at the border while complying with entry conditions. In such cases it is hard to see why detention would be necessary in order to decide on their right to enter the territory as such decision could in any case be taken without resorting to detention.

It should also be noted that according to recital 9 of the Return Directive “in accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, a third country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right to stay as asylum seeker had entered into force”¹⁹. As a result, until a final decision has been taken on their asylum application, asylum-seekers can not be considered as staying illegally on the territory. This is also in line with jurisprudence of the UN Human Rights Committee with regard to Article 12 of the ICCPR, according to which a person who has duly presented an application for asylum is considered to be lawfully within the territory²⁰.

Consequently, under Community law, it is even questionable whether asylum-seekers who do not comply with entry conditions but who in good faith present themselves to the authorities upon arrival in order to lodge an asylum application could be considered to seek “unauthorized entry” and be lawfully detained within the meaning of Article 5 (1) (f) first limb ECHR²¹. As those who apply for

¹⁸ “A focus on the purpose and context of Article 31(2) suggests that “regularization” of status occurs when a refugee has met the host state’s requirements to have his or her entitlement to protection evaluated”. As the term regularization has to be understood as meaning that “regularization occurs when the asylum seeker satisfies all legal formalities requisite to refugee status verification” this also implies that “there is a general right to freedom of movement in the host state once the asylum claim is formally lodged”, see J. Hathaway, “The Rights of Refugees under International Law”, Cambridge University Press, 2005, p 417-419.

¹⁹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98.

²⁰ See Human Rights Committee, *Celepi v. Sweden*, CCPR/C/51/D/456/1991, par. 9.2 .

²¹ Article 5 (1) f ECHR: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:... the lawful arrest or detention of a person to

asylum must be considered as staying legally on the territory during the examination of the asylum application as a result of the EU Return Directive and the EU Asylum Procedures Directive, it would be contradictory to at the same time detain such asylum-seekers in the context of a procedure to decide on their right to enter. Finally, UNHCR EXCOM Conclusions No. 44 and its guidelines on detention do not include the possibility to detain asylum-seekers in order to decide on their right to enter the territory. Although states have a legitimate right to control entry to their territory, such right is precisely limited by their obligations under international refugee and human rights law, including the right to be free from arbitrary detention.

Amnesty International recommends deleting Article 8(2) (c) of the recast proposal on the Reception Conditions Directive.

The **fourth detention ground** mentioned in Article 8(2) allows Member States to detain an asylum-seeker “when protection of national security and public order so requires”. Amnesty International is concerned that this formulation is open to wide interpretation. Therefore, it should be further qualified in order to ensure a strict interpretation of the need to detain “when protection of national security and public order so requires”. It should be noted that the concept of “protection national security and public order” is copied from UNHCR Guidelines but remain so far unclear under EU asylum legislation and therefore require further clarification²². What constitutes a threat to national security and public order needs to be interpreted restrictively and in accordance with the principle of proportionality. Furthermore, as detention is a serious interference with the fundamental right to liberty, detention on this basis should only be possible whenever an asylum-seeker constitutes a genuine, present and sufficiently serious threat to the fundamental interest of the Member State. The threat should equally be based on the individual conduct of the person and not on general assumptions based on nationality or country of origin²³.

Amnesty International recommends amending Article 8(2) (d) of the recast proposal on the Reception Conditions Directive to include an explicit reference to a serious and present threat to national security and public order based on the individual conduct of a person.

➤ **Recast proposal on the Dublin Regulation**

The recast proposal on the Dublin Regulation also adds a ground for detention of asylum-seekers relating to carrying out Dublin transfers. According to Article 27 (2) Member States may detain, when it proves necessary and on the individual assessment of each case, an asylum-seeker who is subject of a decision of transfer to the responsible Member State but only if there is a significant risk of him/her absconding. Although this can be considered as the fifth ground of detention in the Commission proposals, Amnesty International welcomes the safeguards that have been included in this provision to ensure that detention for the purpose of effecting a transfer under the Dublin Regulation remains exceptional. The Commission’s evaluation of the application of the Dublin Regulation has revealed a growing use of detention in the Member States in order to transfer asylum-

prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition”.

²² According to Article 23 (4) (m) of the Asylum Procedures Directive, an accelerated asylum procedure can be applied *inter alia* when “the applicant is a danger to the national security or public order of the Member State”. Although equally vague, at least a danger to national security or public order is required in the context of the Asylum Procedures Directive. See OJ 2005 L 326/13.

²³ Article 27 of EU Directive 2004/38/EC of 29 April 2004 on the on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC includes these elements in order to assess whether an EU national poses a threat to public policy or public security of a Member State. See OJ 2004 L 158/77.

seekers to another Member State²⁴. Certain Member States detain asylum-seekers before a decision to transfer an asylum-seeker has been made²⁵. The proposed Article 27(4) addresses this issue by making detention in the context of Dublin transfers possible only where a decision to transfer the asylum-seeker to the responsible Member State has been taken.

Amnesty International welcomes this approach but is concerned that the reference to “without prejudice to Article 8 (2) of the Directive (.../.../EC) in Article 27(2) seems to contradict Article 27 (4) according to which “detention pursuant to paragraph 2 may only be applied from the moment a decision of transfer to the responsible Member State has been notified to the person concerned”.

Moreover, the reference to Article 8(2) of the recast proposal on the Reception Conditions Directive is superfluous as those grounds should only apply where detention is necessary in order to take a decision on the asylum application, whereas detention in the context of Dublin can only serve the purpose of transferring an asylum-seeker to the responsible Member State. The only ground for detention mentioned in Article 8(2) of the recast proposal on the Reception Conditions Directive that may be relevant also in the context of Dublin transfer is where protection of national security and public order would be seriously threatened²⁶.

Amnesty International recommends deleting the words “without prejudice to Article 8(2) of Directive” in Article 27(2).

Although the Commission proposal limits detention to cases where there is a “significant risk of absconding”, the Commission proposal leaves considerable room for Member States to define what a risk of absconding is. According to the new Article 2 (l) risk of absconding means “the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer decision may abscond”. Such a definition is open to wide interpretation. It allows Member States to consider every asylum-seeker subject to a transfer decision to present a risk of absconding and therefore risks encouraging systematic detention in such cases. In order to prevent any automatic presumption of absconding Article 2(l) should be amended in order to state clearly that the mere fact of being subjected to a transfer decision can never justify detention. Competent authorities should in each individual case demonstrate that the person concerned will not comply with the transfer decision and will effectively abscond. The definition of risk of absconding is the same that is used in Article 3(7) of the Return Directive²⁷. However, it should be noted that the latter definition must be interpreted in light of recital 6 of its preamble stating that “according to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of illegal stay”. Amnesty International believes that a similar restriction should be introduced in the definition of the risk of absconding in the recast proposal on the Dublin Regulation .

Amnesty International welcomes the explicit reference to a “significant” risk of absconding in Article 27(3) of the recast proposal on the Dublin Regulation as the term “significant” requires the existence of serious indications that the asylum-seeker will effectively abscond. Amnesty International recommends to add to Article 2(l) of the recast proposal on the Dublin Regulation on the definition of the risk of absconding: “These reasons can not be solely based on the mere fact of being subject to a decision of transfer to another Member State”.

²⁴ See COM(2007)299 final, at p. 9.

²⁵ See UNHCR, The Dublin II Regulation – A UNHCR Discussion Paper, April 2006, p. 52-53.

²⁶ However, see the comments on Article 8(2) (d) of the recast proposal on the Reception Conditions Directive above.

²⁷ See Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98.

2.2. Alternatives to detention

➤ Recast proposal on the Reception Conditions Directive

Amnesty International in particular welcomes the obligation for Member States in Article 8(3) to ensure that rules dealing with alternatives to detention of asylum-seekers are laid down in national legislation. Practice shows that systems such as reporting to the authorities, the deposit of a financial guarantee or accommodation in a reception centre are effective alternatives to detention of asylum-seekers. International treaty bodies and legal standards already make clear that in order to ensure that detention of asylum-seekers, refugees and other migrants is strictly necessary and proportional, states must make alternative measures effectively available. The wealth of potential alternative measures available to states means that a policy of blanket detention of irregular migrants without the use of less restrictive measures, becomes increasingly disproportionate and unjustifiable in international human rights law. International human rights treaty bodies have recognized that detention of migrants and asylum-seekers is only justified where less restrictive means have been found to be insufficient in the individual circumstances of the person concerned. For instance, the Human Rights Committee has emphasized in its consideration of individual cases that states must prove the necessity and proportionality of a detention order by first considering less restrictive alternative measures²⁸. UNHCR guidelines on detention of asylum-seekers equally state that “where there are monitoring mechanisms which can be employed as viable alternatives to detention...these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case.

Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved their lawful and legitimate purpose²⁹. Alternative measures to detention that are available to states include registration and documentation requirements, bail, bond and surety³⁰, reporting requirements and the use of open, semi-open centres and directed residence. While states must ensure that such alternatives to detention are available, they must equally ensure that these alternative measures are made available without discrimination of particular groups of non-nationals. This also means that states must take into account the particular situation of asylum-seekers such as their inability to provide large sums of money for bail. Alternative measures must not be imposed or rejected arbitrarily or on a discriminatory basis.

Amnesty International strongly supports the explicit obligation for Member States to provide for alternative measures to detention in Article 8(3) of the recast proposal on the Reception Conditions Directive.

²⁸ See UN Human Rights Committee, *Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, 6 November 2003, par. 9.3. The case concerned a complaint of arbitrary detention made by an Afghan refugee woman and her young children, where a mother and her two children were detained over two years and ten months on the basis of their unlawful presence in Australia. The Committee concluded that since less intrusive measures were not considered, the detention of the complainant and her children without appropriate justification was found to be arbitrary and contrary to Article 9(1) ICCPR. See also *Baban v. Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, par. 7.2. and *C v Australia*, CCPR/C/76/D/900/1999, 13 November 2002, par. 8.2.

²⁹ See UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999), Guideline 3.

³⁰ Bail, bond and surety usually involve a sum of money being pledged in order to ensure an individual's appearance at official appointments or hearings, while their case is being processed. Bail requires the deposit of a sum of money which is returned if the individual appears or is otherwise forfeited. Bond is a written agreement with the authorities where the individual promises to fulfil their duties, such as appearing at interviews or hearings and sometimes includes the deposit of a sum of money by the individual or a third person. A surety is a third person who vouches for the appearance of the individual concerned and agrees to pay a set amount of money if the individual absconds. See also Amnesty International, “Irregular migrants and asylum-seekers: alternatives to immigration detention”, AI Index: POL 33/001/2009.

➤ **Recast proposal on the Dublin Regulation**

For the reasons set out above, Amnesty International welcomes the corresponding provision in Article 27(3) of the Commission proposal on the Dublin Regulation which imposes an obligation on Member States to take into consideration alternatives to detention to prevent a significant risk of absconding. This is particularly the case in cases where another Member State is requested to take charge of an asylum applicant under the Dublin Regulation. Take charge cases concern cases where another Member State than the state where the asylum application was lodged is responsible for examining the claim and where the individual concerned has not necessarily demonstrated clear opposition to comply with the transfer decision. This may be different in take back-cases where an applicant has voluntarily withdrawn from the asylum procedure in the responsible Member State and travelled to another Member State. However, the asylum-seeker concerned may have legitimate reasons for applying in another Member State, for instance because his or her rights as an asylum-seeker are not sufficiently protected in the responsible Member State or because his or her chances of effectively receiving protection are de facto non-existent.

Amnesty International strongly supports the explicit obligation for Member States to provide for alternative measures to detention in Article 27(3) of the recast proposal on the Dublin Regulation.

2.3. Judicial review of detention

Under international human rights law anyone held in detention must be brought promptly before a judicial authority and be provided with an effective opportunity to challenge the lawfulness of the decision to detain him or her³¹. Detention should also be for the shortest possible time.

➤ **Recast proposal on the Reception Conditions Directive**

Amnesty International believes that generally Article 9 of the Reception Conditions proposal contains the necessary safeguards with regard to judicial review. This provision clearly states the principle that detention shall be ordered for the shortest period possible and provides for a review by a judicial authority of detention while the detention decision shall be ordered in writing. Moreover, Article 9 (1) usefully states that delays in the administrative procedure that cannot be attributed to the asylum-seeker shall not justify continuation of detention.

However, Amnesty International believes that certain paragraphs could be improved in order to better reflect obligations of Member States under international human rights law and standards with regard to the right of a person to challenge the decision to detain him or her.

First, Article 9 (2) of the proposal should be amended to align it with Article 5(2) of the European Convention on Human Rights and Fundamental Freedoms which guarantees that “everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons of that arrest and of any charge against him”. A similar guarantee is laid down in Article 9(2) of the International Covenant on Civil and Political Rights (ICCPR). The purpose of Article 5(2) ECHR is to ensure that everyone who is deprived of his or her liberty is not only immediately informed of the reasons for his or her detention but also that this is done in clear, non-technical language that he or she can understand³². This is also reflected in the UNHCR Guidelines on detention which state that “if detained, asylum-seekers should be entitled to receive prompt and full communication of any order of

³¹ Article 9(4) ICCPR and Article 5(3) ECHR.

³² See European Court of Human Rights, *Conka v. Belgium*, Application No. 51564/99, judgment of 5 February 2002, par. 50. See also European Court of Human Rights, *Saadi v. The United Kingdom*, Application No. 13229/03, Judgment of 29 January 2008, par. 84 where the Court held found that general statements “could not replace the need under Article 5§2 for the individual to be informed of the reasons for his arrest or detention”.

detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand”³³. The proposed wording in the Commission proposal could in practice lead to information being given in a language that the asylum-seeker does not actually understand and therefore resulting in a failure to fulfill obligations under the ECHR and the ICCPR.

The reference to “a language which they are reasonably supposed to understand” in Article 9(2) of the recast proposal on the Reception Conditions Directive unnecessarily dilutes the guarantee that is laid down in international human rights law and should therefore be replaced by “a language which he or she understands”.

Second, according to Article 9(5) “continued detention shall be reviewed by a judicial authority at reasonable intervals of time either on request of the asylum seeker or ex officio”. This provision is ambiguous as it seems to limit the guarantee of a judicial review simply to situations of “continued detention”. While this can generally be understood as any detention beyond the maximum period of detention determined in the detention order in accordance with par. 3, it is nowhere defined in the Commission proposal. As it stands, Article 9(5) may lead to confusion and should be clarified.

Where a detention decision is initially taken by an administrative authority, Article 9(2) guarantees a “confirmation by a judicial authority within 72 hours” which could be interpreted as a form of judicial review (although the terminology used in par. 2 is “confirmed” and not “reviewed”). However, in a situation where the initial detention decision is ordered by a judicial authority (which should be the rule according to Article 9(2)) the directive only guarantees a judicial review at regular intervals in cases of “continued detention”. As the judicial authority can autonomously determine the maximum period of detention, the asylum-seeker may be – under the current wording of the Commission proposal - denied judicial oversight of the deprivation of his or her liberty for a considerably long period (i.e. the maximum duration of detention laid down in the initial detention order).

In order to clarify this provision and to fill this potential gap, Amnesty International recommends to delete the word “continued” in Article 9(5) so as to ensure that judicial review is guaranteed at regular intervals both in cases where the initial decision to detain was taken by a judicial authority and where such decision was taken by an administrative authority.

Under international human rights law, everyone who is deprived of his or her liberty must be entitled to take proceedings before a court, in order to have the lawfulness of the detention order reviewed³⁴. Article 9(5) should be clarified to ensure that asylum-seekers have the opportunity to challenge the detention order whenever new elements arise which question the lawfulness of the detention order in addition to an ex officio review of the detention order at regular intervals as provided by the Commission proposal.

Amnesty International recommends to amend Article 9(5) of the recast proposal on the Reception Conditions Directive as follows: “The detention shall be reviewed ex officio by a judicial authority at reasonable intervals of time and on request of the asylum-seeker whenever new elements arise affecting the lawfulness of detention”.

Third, it should be noted that the Commission proposal does not lay down a maximum time period of detention of asylum-seekers but only includes the guarantee that detention shall be ordered for the shortest possible period (Article 9(1)). Furthermore the consequence of this approach in combination

³³ See UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999, Guideline 5(i).

³⁴ See Article 9(4) ICCPR “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful” and Article 5(4) ECHR “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

with Article 9(3) is that the maximum period of detention shall be determined by either the judicial authority or the administrative authority in the detention order. This will have to be done in the framework of the provisions in national legislation with regard to the maximum duration of detention of asylum-seekers. However, where such legislation does not provide for a maximum duration of detention of asylum-seekers, a reasonable approach will have to be established through jurisprudence or administrative practice, which may lead to very varying results as to what is considered “as short as possible”. Where national legislation does provide for a maximum duration of detention, there may be no distinction between the maximum period of detention for asylum-seekers and for irregular migrants.

Moreover, the maximum period of detention laid down in national legislation may be excessive. As a result of the adoption of the return directive, Member States are under an obligation to determine a maximum period of detention in national legislation for the purpose of removal. According to this directive detention could last for a period of in principle six months which could be extended with another 12 months in certain circumstances. These are unacceptably long periods of detention in the case of return of irregular migrants and would be equally excessive in the context of an asylum procedure and inconsistent with the principle of proportionality.

Amnesty International recommends to explicitly state in the preamble of the recast proposal on the Reception Conditions Directive that the maximum period of detention as laid down in Article 15 of the Return Directive only applies with regard to the removal of irregularly staying third country nationals and should not inform national administrations and judicial authorities when specifying the maximum period of detention for asylum-seekers on a case-by-case basis.

➤ **Recast proposal on the Dublin Regulation**

Article 27 (5)-(9) of the Commission Proposal on the Dublin Regulation are very similar to Article 9(5) of the Reception Conditions Proposal. The same procedural guarantees with regard to judicial review should apply when an asylum-seeker is detained for the purpose of transfer to another Member State under the Dublin Regulation. As a result, Articles 27(7) and (8) should be amended accordingly.

Article 27(7) of the recast proposal on the Dublin Regulation should be amended so as to ensure that asylum-seekers are promptly informed of the reasons for their detention “in a language they understand” to better reflect the requirement in Article 5(2) ECHR and Article 9 ICCPR.

In Article 27(8) the word “continued” should be deleted in order to ensure that the right to challenge a decision to detain is guaranteed regardless of whether the detention has been ordered by judicial authorities or administrative authorities. Article 27(8) should also include a reference to the right of the asylum-seeker to challenge the lawfulness of his detention before a court whenever new elements arise.

Amnesty International recommends to amend Article 27(8) of the recast proposal on the Dublin Regulation as follows: “The detention shall be reviewed ex officio by a judicial authority at reasonable intervals of time and on request of the asylum-seeker whenever new elements arise affecting the lawfulness of detention”.

The recast proposal on the Dublin Regulation does not explicitly determine a maximum time limit of detention for the purpose of effecting a transfer to another Member State. As it is the case for the recast proposal on the Reception Conditions Directive, Article 27 (7) of the recast proposal on the Dublin Regulation states that the decision to detain an asylum-seeker shall contain the “time period of its duration”. Although the principle of proportionality will have to be taken into account, this may

potentially lead to arbitrary and diverging practices in Member States. Moreover, a specific problem arises with regard to the duration of detention as a result of Article 28 of the recast proposal on the Dublin Regulation according to which transfer of an applicant shall be carried out at the latest within six months of acceptance of the request or of the final decision on an appeal or review where a suspensive effect is granted in accordance with Article 26(3). The European Court of Justice has recently interpreted this provision as meaning that, when national legislation provides for a suspensive effect of an appeal, the period of 6 months for implementing the transfer starts to run as from the time of the judicial decision which rules on the merits of the procedure³⁵. According to the new Article 27(4) of the recast proposal on the Dublin Regulation, detention “may only be applied from the moment a decision of transfer to the responsible Member State has been notified to the person concerned in accordance with Article 25, until that person is transferred to the responsible Member State”. The combined effect of Article 28(1) and Article 27(4) leads to a *de facto* maximum period of detention of 6 months.

Amnesty International considers such a time limit excessive, in particular as it would only serve the purpose of implementing a transfer of an asylum-seeker between two Member States or states associated to the Dublin Regulation. Judicial review of the detention decision may be one of the safeguards against excessive periods of detention, but this will to a large extent depend on the approach taken by national courts. Moreover, Article 27(4) of the recast proposal on the Dublin Regulation only refers to the notification of the transfer decision as the starting point of detention and does not take into account an appeal that may have been introduced against the transfer decision. Finally, whereas Article 9(1) of the recast proposal on the Reception Conditions Directive includes an explicit safeguard for asylum-seekers against continuation of detention for reasons that can not be attributed to asylum-seekers, this is not the case in the recast proposal on the Dublin Regulation.

In Amnesty International’s view, detention for the purpose of implementing Dublin transfers between two Member States should be avoided as much as possible and where it is exceptionally necessary to detain an asylum-seeker in this context it should only be allowed for an extremely short time limit.

In order to strengthen these principles in the recast proposal on the Dublin Regulation, Amnesty International recommends to:

- *amend Article 27(4) as follows: Detention pursuant to paragraph 2 may only be applied from the moment a decision of transfer to the responsible Member State has been notified to the person concerned in accordance with Article 25 or from the moment of the final decision on an appeal or review in accordance with Article 28(1). The words “until that person is transferred to the responsible Member State” should be deleted.*
- *add to Article 27(5): “Delays in the administrative procedure that cannot be attributed to the asylum-seeker shall not justify a continuation of detention”.*
- *Add the following recital to the preamble: “Implementing a transfer decision between two Member States should normally not require any detention measure. Where detention for the sole purpose of implementing a transfer decision is exceptionally necessary, Member States shall ensure that detention is for the shortest possible time. The maximum time period for transferring asylum-seekers to the responsible Member State as laid down in Article 28 shall not be interpreted as a reasonable maximum time limit for detention in this context.*

³⁵ See European Court of Justice, Case C-19/08, *Migrationsverket v. Petrosian*, Judgment of 29 January 2009.

2.5. Conditions of detention

➤ Recast proposal on the Reception Conditions Directive

Amnesty International welcomes the guarantees laid down in Article 10 of the Commission proposal on Reception Conditions, in particular as regards the prohibition to detain asylum-seekers in prison accommodation, the obligation to ensure that asylum-seekers in detention have the opportunity to establish contact, including visitation rights, with legal representatives and family members and ensure the opportunity of UNHCR and competent national, international and non-governmental organizations and bodies to communicate with and visit applicants in detention areas. These are important safeguards, in particular to ensure that lawyers and organizations assisting asylum-seekers have effective access to their clients.

Nevertheless, the provision could be improved by adding a specific reference to the need for such conditions of detention to be humane and to respect the dignity of the person. The latter is explicitly referred to in the UNHCR Guidelines on detention of asylum-seekers and could usefully be included as a binding EU standard. Moreover, it should be noted that a number of specific requirements under the UNHCR Guidelines or standards set by other human rights treaty bodies such as the CPT are not explicitly mentioned in the provisions on detention in the recast proposal on the Reception Conditions Directive such as:

- the opportunity to make regular contact and receive visits from religious and social counsel and the availability of facilities in detention centers to enable such visits
- the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities
- the opportunity to continue further education or vocational training
- the opportunity to exercise religion and to receive a diet in keeping with their religion
- the opportunity to have access to basic necessities (beds, shower facilities, etc.)
- access to a complaints mechanism where complaints may be submitted either directly or confidentially to the detaining authority
- appropriate training for staff of detention centres, including in the field of interpersonal and intercultural communication and on recognizing possible symptoms of stress reactions displayed by detained persons (whether post-traumatic or induced by socio-cultural changes)
- sufficient living space in the detention facility for the numbers involved³⁶

Guideline 10 on conditions of detention of UNHCR's revised guidelines on detention of asylum-seekers as well as the CPT's standards with regard to foreigners detained under aliens legislation³⁷ could be usefully referred to in the preamble to ensure that Article 10 of the Commission proposal must be understood to encompass these standards.

³⁶ The necessity of such a standard was illustrated recently in the case of Lampedusa where, due to a sudden change in policy, according to which asylum-seekers and migrants arriving in Lampedusa were no longer transferred to the Italian mainland, at a certain point over 2000 persons were held in a center that had a maximum capacity of 850 leading to inhumane conditions in the centre. See also Amnesty International EU Office, Letter to Commissioner Barrot on the situation of asylum-seekers and migrants in Lampedusa, 28 January 2009, available at www.amnesty-eu.org.

³⁷ See European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, "The CPT Standards. "Substantive sections of the CPT's General Reports", CPT/Inf/E (2002) 1 - Rev. 2006.

Amnesty International also welcomes the obligation in Article 10 (1) that detention shall only be carried out in specialized detention facilities as this would also contribute to ensuring legal certainty with regard to the nature of the facility where asylum-seekers are accommodated. Lack of clarity as to the legal status of the centre in which asylum-seekers are being held may lead to violations of fundamental rights such as the availability of regular judicial review of the detention measure. As soon as asylum-seekers are deprived of their liberty, all procedural guarantees with regard to the lawfulness and necessity of the detention measure as well as with regard to judicial review of such decision must apply.

Amnesty International believes that the requirement to detain asylum-seekers only in specialized detention facilities will help to avoid situations where asylum-seekers are de facto subjected to detention without access to the range of guarantees set out in the directive and in international standards to prevent arbitrary detention.

➤ **Recast proposal on the Dublin Regulation**

According to Article 27 (12) of the Commission Proposal amending the Dublin Regulation Member States must ensure that the same safeguards with regards to conditions of detention and detention of vulnerable groups and persons with special needs apply in the context of Dublin transfers. The observations with regard to Article 10 of the recast proposal on the Reception Conditions Directive above, apply vice-versa.

2.5. Detention of vulnerable groups

➤ **Recast proposal on the Reception Conditions Directive**

Article 11 of the recast proposal on the Reception Conditions Directive usefully strengthens the safeguards for vulnerable groups and asylum-seekers with special needs against detention. Amnesty International particularly welcomes the absolute prohibition of detention of unaccompanied minors as an EU standard and the presumption against detention of minors in Article 11(1). This is an important step that builds on the jurisprudence of the European Court of Human Rights. In the judgement in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* concerning the detention of a five-year old unaccompanied child originating from Congo, the Court found that the conditions of detention were such that they amounted to inhuman and degrading treatment as prohibited under Article 3 ECHR. The fact that the unaccompanied minor was detained together with adults whereas alternatives for detention were available was particularly taken into consideration. As the Court explicitly pointed to the fact that the minor's detention caused her considerable distress, it concluded that "the second applicant's detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment"³⁸. The Court equally found a violation of Article 5 §1 of the ECHR as the conditions of detention were not adapted to the position of extreme vulnerability in which the applicant found herself as a result of her position as an unaccompanied foreign minor.

It is Amnesty International's position that detention of other vulnerable people who have sought asylum, including torture survivors, pregnant women, those with serious medical conditions, the mentally ill and the elderly should also be prohibited. This is because detention of such vulnerable groups may seriously damage their health and because a detention environment is generally considered unsuitable to accommodate their needs. Article 11(5), according to which detention of persons with special needs is not allowed unless a qualified professional certifies that detention will not negatively impact on their health is crucial in this respect. It sets a useful tool for Member States

³⁸ See European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, Application No. 13178/03, judgment of 12 October 2006, par. 58.

to ensure that, if used exceptionally, detention of asylum-seekers with special needs does not lead to a deterioration of their medical and mental condition. Innovative as it may be in the context of EU legislation it should be noted that Article 11(5) merely reflects existing standards on detention of asylum-seekers adopted by UNHCR³⁹.

Amnesty International supports the prohibition of detention of unaccompanied children and recommends to extend this prohibition to other categories of vulnerable asylum-seekers in Article 11(5) of the recast proposal on the Reception Conditions Directive.

➤ **Recast proposal on the Dublin Regulation**

As it is the case with the Reception Conditions proposal, Article 27 of the recast proposal on the Dublin Regulation includes a clear prohibition of detention of unaccompanied minors, while minors shall generally not be detained unless it is in their best interests. However, other asylum-seekers with special needs do not seem to receive the same protection against detention as in the context of the Reception Conditions Directive. Article 27(12) only guarantees that asylum-seekers detained enjoy the same level of reception conditions for detained applicants as those laid down in Article 10 and 11 of the recast proposal on the Reception Conditions Directive.

The clear presumption against detention of other categories of vulnerable asylum-seekers in order to carry out transfers between Member States is lacking in the Commission proposal on the Dublin Regulation. However, in the case of vulnerable asylum-seekers such as victims of torture and traumatized asylum-seekers, detention remains equally undesirable in the context of Dublin transfers between Member States.

Amnesty International recommends amending Article 27 of the recast proposal on the Dublin Regulation to include a clear presumption against detention to other categories of vulnerable asylum-seekers.

3. Vulnerable asylum-seekers

Improving the safeguards with regard to persons with special needs is a cross-cutting objective of the two Commission proposals. Evaluation of the Reception Conditions directive had identified major deficiencies in addressing special needs as being “the most serious concern in the area of reception of asylum seekers”⁴⁰. The identification of asylum-seekers with special needs and the lack of reception conditions that are specifically designed to meet asylum-seekers special needs in some Member States are areas of concern. Amnesty International welcomes the acknowledgement in the recast proposal on the Reception Conditions Directive that the safeguards for asylum-seekers with special needs within the CEAS need to be tackled at both levels.

The categories of asylum-seekers who shall always be considered as persons with special needs are defined non-exhaustively in Article 21 of the recast proposal on the Reception Conditions Directive and include vulnerable persons such as: minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of trafficking, persons with mental health problems and persons who have been subjected to torture, rape or other serious forms

³⁹ See UNHCR Guidelines on detention of asylum seekers, Guideline 7 on detention of vulnerable persons: “In the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being. In addition there must be regular follow up and support by a relevant skilled professional. They must also have access to services, hospitalisation, medication counselling etc. should it become necessary”.

⁴⁰ See COM(2007)745 final, p. 9.

of psychological, physical or sexual violence. The Commission proposal furthermore acknowledges that in particular (unaccompanied) children and traumatized asylum-seekers and victims of torture or violence require reception conditions that are adapted to their special needs and ensure access to specialized treatment, health care, housing facilities and education of minors.

The inclusion of victims of trafficking and persons with mental health problems in the list of persons with special needs allows to take their special needs better into account within the context of the application of the discretionary clause in the recast proposal on the Dublin Regulation which includes a reference to humanitarian and compassionate reasons⁴¹. Nevertheless, Amnesty International believes that the recast proposal could be strengthened to better protect vulnerable asylum-seekers within the Dublin system⁴².

Whereas unaccompanied minors and minors are part of the larger group of vulnerable asylum-seekers who are considered to have special needs, the Commission proposals focus in particular on improving the standards with regard to children. These will be dealt with separately in these comments.

3.1. Children and Unaccompanied children

➤ Recast proposal on the Reception Conditions Directive

The Commission Proposal includes in Article 22 and 23 a very important reinforcement of Member States' obligation to consider the best interests of children a primary consideration when implementing the directive. Article 22 (1) usefully adds in line with Article 27 of the UN Convention on the Rights of the Child, that the standard of living to be ensured should be adequate for the child's physical, mental, spiritual, moral and social development. As a child's well-being goes beyond satisfaction of mere material needs, the provision would usefully confirm this important principle in EU-legislation.

Furthermore, Article 22(2) usefully and non-exhaustively lists the factors Member States need to take into account in order to assess the best interest of the asylum-seeking child in the framework of the directive⁴³. The factors listed in this provision reflect to a certain extent the recommendations of the UN Committee on the Rights of the Child in its general comment No (6) and will support Member State to develop higher protection standards for asylum-seeking children in their legislation as well as in practice.

The new obligation in Article 23(3) for Member States to establish procedures in national legislation for tracing the family members of unaccompanied minors as soon as possible after an application for protection is lodged, but always in the best interest of the child, equally reflects already existing international human rights standards with regard to children⁴⁴. Establishing procedures to trace family members of the unaccompanied minor is the most effective way for states to comply with their obligation under international law to ensure as soon as possible family reunification provided it is in the child's best interest.

⁴¹ See Article 17(1) of the Recast Proposal on Dublin.

⁴² See below.

⁴³ These include (a) family reunification possibilities; (b) the minor's well-being and social development, taking into particular consideration the minor's ethnic, religious, cultural and linguistic background, (c) safety and security considerations, in particular where there is a risk of the child being a victim of trafficking and (d) the views of the minor in accordance with his/her age and maturity.

⁴⁴ See Article 22(2) UN Convention on the Rights of the Child and UN Committee on the Rights of the Child, General Comment No (5) (2005), par. 31

Furthermore the safeguards with regard to children are also strengthened through the extension of the definition of family member beyond the nuclear family in Article 2 (c) to include

- the married minor children of couples,
- the father, mother or guardian of the applicant where the latter is a minor and unmarried or where he or she is a minor and married but it is in his or her best interest to reside with his or her father, mother or guardian
- and the minor unmarried siblings of the applicant, when the latter is a minor and unmarried or when the applicant or his or her siblings are minors and married but it is in the best interest of one or more of them that they reside together.

Amnesty International welcomes this extension of the definition of family member in the context of the EU asylum acquis, in particular as such extension is necessary to ensure reunification of family members who are residing in different Member States, including as a result of the application of the Dublin Regulation. At the same time, as such extended definition only applies where it is in the best interest of the child and the extended family members to be considered as such, the definition also allows for an application which takes into account the best interest of the child in all circumstances.

However, the proposed definition in Article 2 (c) of the Commission Proposal still only applies “insofar as the family already existed in the country of origin”. Such a limitation excludes from the scope of the directive those families who may have been formed during flight either in a transit country, or after arrival in an EU Member State. This may lead to situations where family members who have been dependent on the assistance and care of their relatives are not considered as such under EU asylum legislation and therefore may be confronted with a number of administrative and legal obstacles that can be avoided. This also seems to contradict the overall aim in the recast proposal on the Dublin Regulation to maintain family unity as much as possible.

Amnesty International recommends deletion of the reference to the country of origin in Article 2 (c) of the recast proposal on the Reception Conditions Directive as well as in Article 2 (i) of the recast proposal on the Dublin Regulation.

➤ **Recast proposal on the Dublin Regulation**

The Commission proposal significantly strengthens the safeguards with regard to children and unaccompanied children within the Dublin mechanism through various provisions. Amnesty International particularly welcomes the following amendments to the Dublin Regulation:

- the extension of the definition of family members in Article 2 (i) of the recast proposal as it corresponds to the extension of the definition of family member in the recast proposal on Reception Conditions⁴⁵
- the introduction of a new Article 6 that precedes the hierarchy of criteria for determining the Member State responsible aims to ensure that the best interests of the child shall always be a primary consideration for Member States when applying the Dublin Regulation and the obligation for Member States to ensure that an unaccompanied minor is assisted/represented with respect to all procedures provided in this Regulation. Together with the general obligation in the new Article 5 of the recast proposal to give an opportunity to applicants of a personal

⁴⁵ However, as for the definition of family members in the Recast proposal on Reception Conditions, the limitation to families in so far as they already existed in the country of origin should also be deleted. Moreover, it should be noted that according to Article 9 of the Recast Proposal on the Dublin Regulation responsibility is determined on the basis of where an asylum seeker has a family member who has been allowed to reside as a person granted international protection in a Member State, “regardless of whether the family was previously formed in the country of origin”.

interview in the process of determining the responsible Member State, this is an important tool to ensure that the best interests of the unaccompanied children are effectively taken into account.

- the obligation for Member States to establish procedures for tracing family members or other relatives present in other Member States of unaccompanied children in the context of Dublin procedures (Article 6 (4) recast proposal). Tracing procedures are an important tool to better ensure reunification of unaccompanied minors with their family members or relatives within the EU where this would be in their best interest.
- the important derogation to the principle set out in the new Article 7(2) of the Regulation according to which the responsible Member State must be determined on the basis of the situation obtaining when the asylum-seeker first lodged his/her application for international protection. Amnesty International believes that the proposal to determine the responsibility of the Member State, on the basis of the situation obtaining when the asylum-seeker lodged his/her most recent application for international protection in order to ensure respect for family unity and the best interests of the child, significantly contributes to the protection of family life and children in particular. Research on the application of the Dublin Regulation has shown that strict application of the Dublin criteria can lead to separation of families and can put children in a vulnerable position where this could have been avoided⁴⁶.
- determination of the Member State responsible for examining the application of an unaccompanied child not only where a member of his or her family is legally present but also where a relative is legally present who can take care of the child where it is in his or her best interest or, in the absence of such a family member or a relative, in the Member State where the unaccompanied child has lodged his or her most recent application provided again that it is in his or her best interest (Article 8(2) and (4) of the recast proposal). Amnesty International believes that the latter principle will help to avoid discussions between Member States over the interpretation of the current Article 6 of the Dublin Regulation while at the same time determining responsibility in the best interest of the unaccompanied minor concerned. This should, of course, necessarily include an assessment of the availability of concrete safeguards for unaccompanied minors in the Member State concerned.

Amnesty International welcomes the amendments in the recast proposal on the Dublin Regulation aimed at strengthening the protection of (unaccompanied) children within the Dublin system and in particular Article 6 and 6(4), Article 7(2) and 8 of the proposal.

3.2. Other categories of vulnerable asylum-seekers.

➤ Recast proposal on the Reception Conditions Directive

In addition to safeguards for (unaccompanied) minors as highlighted above, the Commission proposal strengthens the safeguards for other categories of asylum-seekers with special needs at the level of material reception conditions, identification procedures and access to specific treatment for victims of torture or traumatized asylum-seekers.

Amnesty International in particular welcomes the obligation in the new Article 21(2) for Member States to establish procedures in national legislation with a view to identifying, as soon as an application has

⁴⁶ See UNHCR, "The Dublin II Regulation. A UNHCR Discussion Paper", April 2006, p. 21.

been lodged, whether an applicant has special needs and the nature of these needs. This obligation to establish identification procedures is at the same time accompanied by the obligation to ensure support for persons with identified special needs and appropriate monitoring of their situation throughout the asylum procedure. Research on the implementation of the Reception Conditions Directive has shown that a large number of Member States do not have a specific procedure in place in order to identify asylum-seekers with special needs⁴⁷. This is inter alia based on a narrow reading of the current Article 17 of the Reception Conditions Directive as not including an obligation for Member States to provide for such an identification procedure. Early identification is particularly important with regard to traumatized asylum-seekers and victims of torture and violence. A functioning identification procedure is crucial in order to ensure that such categories have access to appropriate and qualified treatment as soon as possible and that their specific situation and how it might affect their performance in status determination procedures are properly taken into account in the asylum procedure.

Access to adequate treatment is improved in Article 24 of the Commission proposal which strengthens Member States' obligations to ensure that those who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment and in particular access to rehabilitation services that should allow for obtaining medical and psychological treatment. The obligation for those working with victims of torture to have continued training concerning the needs of these categories of asylum-seekers and to be bound by confidentiality rules provided for in national law is equally an important tool for maintaining high standards of treatment of these vulnerable asylum-seekers. This is a welcome and necessary improvement of EU standards which will effectively address an existing protection gap.

Amnesty International also welcomes the specific reference in Article 18 (2) to the obligation for Member States to take into consideration gender, age specific concerns and the situation of persons with special needs in relation to applicants within accommodation centers and the premises used for housing applicants during the examination of asylum applications lodged at the border. The observance of the special needs of asylum-seekers as a cross-cutting obligation in the implementation of standards with regards to material reception of asylum-seekers could be an important tool to mainstream, where possible, measures to address such needs in practice. This is again particularly important with regard to the accommodation of asylum-seekers who have been subject to traumatic experiences or torture.

The identification of special needs as soon as an asylum application has been lodged as safeguarded under New Article 17(2) will obviously also affect the quality of the asylum procedure⁴⁸. This is particularly relevant with regard to traumatized asylum-seekers as they may face obstacles in sharing all or part of their traumatic experience with asylum authorities at an early stage in the examination of their asylum application. As this may significantly influence the final decision on their asylum application, it is of crucial importance to develop systems that are capable of identifying those needs at the earliest possible stage. At the same time, it is important to make a clear link between the identification procedure as established in the recast proposal on the Reception Conditions Directive and the need for specific safeguards to be taken into account in asylum procedures with respect to traumatized asylum-seekers and victims of torture and violence. Identification as an asylum-seeker with special needs should logically trigger the application of specific procedural guarantees to be established within the context of the Asylum Procedures Directive and vice-versa. With regard to the position of victims of torture in the asylum procedure, it should be noted that the Manual on Effective Investigation and Documentation of Torture and Other cruel, Inhuman or Degrading Treatment or

⁴⁷ See Academic Network for Legal Studies on Immigration and Asylum in Europe, "Comparative overview of the implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States", October 2006, p.76.

⁴⁸ See Amnesty International, Pharos and Vluchtelingenwerk Nederland, Response of the CARE FULL Initiative to the Green Paper on the future Common European Asylum System, Amsterdam, 24 August 2007.

Punishment (the Istanbul Protocol) is a particularly useful tool⁴⁹. It provides for a set of principles and guidelines for dealing with torture victims, and in particular the use of medico-legal reports⁵⁰ which are relevant in the context of asylum procedures and which should underpin the relevant provisions in the forthcoming proposal amending the Asylum Procedures Directive⁵¹.

However, even with specific identification procedures in place, the need for specific reception conditions and treatment may only become clear at a later stage in the asylum procedure. In order to ensure that special needs of asylum-seekers are accommodated within the CEAS regardless of when those special needs are properly detected, Article 21(2) should include an explicit reference to the fact that Member States must ensure support for and appropriate monitoring of persons with special needs, regardless of when these special needs have been identified⁵².

Amnesty International welcomes the proposal to include an obligation for Member States to establish procedures identifying asylum-seekers with special needs and the strengthened provisions with regard to Member States' obligations to ensure access to adequate treatment of these categories of asylum-seekers. Amnesty International recommends amending Article 21(2) of the recast proposal on the Reception Conditions Directive to guarantee that the obligation to ensure support for persons with special needs throughout the asylum procedure and to provide for appropriate monitoring of their situation is applicable regardless of when these special needs have been identified.

➤ **Recast proposal on the Dublin Regulation**

With regard to other groups of asylum-seekers with special needs (outside the category of (unaccompanied) children), the safeguards in the Commission proposal mainly relate to ensuring that the responsible Member State receives adequate information about the mental and physical condition of the asylum-seeker concerned for the sole purpose of the provision of care and treatment (Article 30 (4)). This aims to serve the important new principle that only persons who are fit for transfer shall be transferred (Article 30 (1)). Moreover, the general obligation in Article 30 (4) for the responsible Member States to “ensure that those special needs are adequately addressed, including in particular any essential medical care that may be required” further strengthens the safeguards for asylum-seekers with special needs after they have been transferred. As a result of this provision, Member States will also under the Dublin Regulation have an obligation to ensure that any special needs, including but not limited to, any specific medical needs, of asylum-seekers are effectively and adequately addressed in the responsible state after a transfer has been carried out.

Positive as these additional safeguards may be, the relevant provisions in the Commission proposal only take into account the special needs of the asylum-seeker to be transferred, i.e. at the stage following the decision of transfer. However, at present, in particular where specialized treatment is required for torture victims and traumatized asylum-seekers, such treatment or facilities may simply not be available in the responsible Member State, whereas it may be available in the transferring

⁴⁹ The Istanbul protocol was drafted by international NGO's in 1999 but has since been used by the UN Office of the High Commissioner for Human Rights as an official training tool while the UN General Assembly referred to the “Istanbul Principles” in a 2001 resolution. The Protocol elaborates on the legal obligations under the UN CAT to investigate alleged cases of torture and other forms of ill-treatment and provides an important tool to gather evidence of such practices.

⁵⁰ For an overview of how medico-legal reports are being used in EU Member States see M. Wijnkoop, “Country Assessments: how to EU Member States deal with medico-legal reports in asylum procedures?” in CARE FULL, Medico-legal reports and the Istanbul Protocol in asylum procedures, 2006, Pharos/ Amnesty International/ Dutch Council for Refugees, Utrecht/Amsterdam.

⁵¹ The Commission's proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office also includes an explicit reference in Article 6(4) to the need to develop special training activities on the “identification of the signs and symptoms of torture” which underlines the importance of identification procedures. See Com(2009) 66 final.

⁵² See also UNHCR, “UNHCR Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers (COM (2008) 815 final of 3 December 2008)”, March 2009.

Member State⁵³. In such cases it would be counterproductive to effect the transfer at all costs as it may not only result in a serious breach of the applicants' human rights, as it may damage his or her health, but also creates an additional burden on the responsible Member State where it is clear from the outset that the latter is not capable to provide the necessary treatment⁵⁴. In order to avoid such situations it would be necessary to make the availability of such facilities and treatment an integral part of the criteria to determine the Member State responsible for the examination of the claim. Taking these elements into account at the earliest possible stage in the Dublin procedure would obviously increase both the protection of the individuals concerned and the efficiency of the Dublin system in such cases. In Amnesty International's view such a proactive approach could effectively be achieved through:

- the addition of a new provision modeled on the new Article 11 with regard to dependent relatives that introduces the concept of the Member State considered to be "the most appropriate for keeping them together or reunifying them". In order to ensure that the special needs of traumatized asylum-seekers or medical cases are effectively part of the determination of the responsible state the similar notion of "most appropriate for providing him or her care or treatment" could be inserted.
- the addition of a paragraph to the proposed Article 17(2) which provides for the possibility for Member States to request, at any time, another Member State to take charge of an applicant in order to reunite family members, even if the requested Member State is not responsible under the Dublin criteria. The Member State requested must in such cases give a substantiated decision on the request within two months which enhances the effectiveness of the discretionary clause. Such possibility in Article 17(2) could usefully be extended to the case of asylum-seekers with special needs in order to provide Member States lacking adequate capacity with the possibility of asking a Member State that is better equipped to deal with these specific needs to take over responsibility for an asylum-seeker.

Amnesty International recommends to amend Article 11 of the recast proposal on the Dublin Regulation to include a general reference to asylum-seekers with special needs and Article 17 (2) of the recast proposal on the Dublin Regulation to include the possibility for Member States to request other Member States with appropriate facilities to deal with asylum-seekers requiring specific treatment or facilities.

4. Right to an effective remedy

➤ **Recast proposal on the Dublin Regulation.**

The recast proposal on the Dublin Regulation substantially strengthens the safeguards for asylum-seekers to challenge transfers under the Dublin Regulation. Whereas availability of an effective remedy against Dublin transfers currently depends on provisions in national legislation, the proposal introduces an obligation under EU law to provide for an effective remedy in fact and in law against a transfer decision before a court or tribunal. Within a period of seven working days of the appeal or review, the court or tribunal will have to decide, *ex officio*, whether or not the transfer of the applicant

⁵³ The Commission in its evaluation report on the implementation of the Reception Conditions Directive stated that "while special housing needs are in principle addressed, adequate access to health care has its limitations, e.g. no effective access to medical care, lack of specific care (in particular for victims of torture and violence) and insufficient cost cover". See COM(2007) 745 final, Report from the Commission to the Council and to the European Parliament on the application of Directive 2009/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Brussels, 26 November 2007.

⁵⁴ The importance of such guarantees was tragically illustrated in the case of I., a Chechen asylum seeker who was transferred from Belgium to Poland, and died *inter alia* because of a lack of proper communication between the Belgian and Polish authorities and the lack of adequate treatment in Poland. See ECRE, "The Dublin Regulation: Twenty voices – twenty reasons for change", AD2/3/2007/ext/CN.

to the responsible Member State must be suspended pending the outcome of the appeal or the review. The right to an effective remedy is clearly established in Article 47 of the EU Charter of Fundamental Rights and the jurisprudence of the European Court of Human Rights on Article 13 ECHR in a number of cases relating to expulsion⁵⁵.

Research has revealed major differences between Member States with regard to the level of protection standards, procedural guarantees and reception conditions⁵⁶. These divergences are, of course, incompatible with the harmonized approach pursued with the construction of the CEAS⁵⁷. At the same time, Member States have so far refused to enter into a fundamental debate about the Dublin system and the human rights violations it may cause upon those subject to transfers between Member States. Rather they have put the emphasis on the fact that the Dublin Regulation is a purely operational mechanism between Member States and that each Member State is responsible for ensuring a sufficient level of protection. However, it is clear that the Dublin Regulation may impact on the fundamental rights of asylum-seekers by transferring them to situations where basic reception conditions may be lacking, necessary medical treatment or care is not available or chances of obtaining protection are non-existent.

As a result, in order to protect their human rights within the Dublin system, it is of paramount importance that asylum-seekers have access to an effective legal remedy against the decision to transfer them to another Member State. Practice today already shows that increasingly national courts and tribunals suspend transfers under Dublin to another EU Member State for lack of guarantees that the fundamental rights of the applicant will effectively be protected in the receiving state. This has recently been the case with regard to transfers of asylum-seekers to Greece, for instance. Following worrying reports by human rights organizations as well as UNHCR on the treatment of asylum-seekers in Greece, national courts and administrations in EU Member States and states associated to the Dublin system have suspended transfers to Greece in individual cases in the past⁵⁸.

In 2008 the European Court of Human Rights has taken interim measures in a considerable number of cases concerning transfers of Iraqi asylum-seekers to Greece. While these measures were ultimately not upheld in the case of *K.R.S. against the United Kingdom*⁵⁹, the Court did not fundamentally alter its approach on the application of the Dublin Regulation between EU Member States as established in *TI v UK*⁶⁰. In the latter case, the Court found that “removal to an intermediary

⁵⁵ See for instance, European Court of Human Rights, *Jabari v. Turkey*, Application No. 40035/98, judgment of 11 July 2000; *Conka v. Belgium*, Application No. 51564/99, judgment of 5 February 2002 and *Gebremedhin v. France*, Application No. 25389/05, judgment of 26 April 2007.

⁵⁶ See *inter alia*, UNHCR, “Asylum in the European Union. A study of the Implementation of the Qualification Directive”, November 2007; ECRE, “The Impact of the Qualification Directive on International Protection”, October 2008 and Academic Network for Legal Studies on Immigration and Asylum in Europe, “Comparative overview of the implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States”, October 2006

⁵⁷ According to the Commission these differences are “creating secondary movements and goes against the principle of providing equal access to protection across the EU”. See COM(2008)360 final, p.3. See also European Council, European Pact on Immigration and Asylum, Chapter IV, Doc 13440/08.

⁵⁸ The Norwegian Immigration Appeals Board announced a suspension of transfers to Greece in February 2008, see Press Release of 7 February 2008. The Swedish Migration Board suspended returns of unaccompanied minors to Greece in May 2008, see Human Rights Watch, *Stuck in a revolving door. Iraqis and Other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union*, November 2008, p. 25. The Belgian Council of Aliens Litigation suspended the transfer of an Iraqi asylum-seeker to Greece in a judgment of 10 April 2008 (9796). See also Amnesty International, Public Statement, Greece: No place for an asylum-seeker, *AI Index: EUR 25/002/2008(Public)*, 27 February 2008.

⁵⁹ European Court of Human Rights, *K.R.S. against the United Kingdom*, Application no. 32733/08, Decision of 2 December 2008. The Court’s decision referred to the fact that there was currently no risk of *refoulement* from Greece to Iran as Greece is not removing people to Iran and that there was nothing to suggest that those returned under the Dublin Regulation run the risk of onward removal to a third country where they will face ill-treatment contrary to Article 3 without being afforded a real opportunity applying for an interim measure to the European Court of Human Rights from Greek territory. As a result, in this particular case there was no reason for upholding the suspension of transfer to Greece which does not exclude that in other cases interim measures may be justified. The court also explicitly reiterated that the remedy required under Article 13 must *inter alia* be “effective” in practice as well as in law and “it must have automatic suspensive effect”.

⁶⁰ European Court of Human Rights, *T.I. v UK*, Application no. 43844/98, Decision of 7 March 2000.

country which is also a Contracting State does not affect the responsibility of the UK to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to Article 3 ECHR". The Court also stated that the United Kingdom "could not rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. This is because "where States establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights"⁶¹. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution arrangements". This is particularly the case for cooperation in the field of asylum such as the Dublin Regulation as expulsion to another Member State may indeed have serious consequences for the protection of the fundamental rights of the asylum-seeker. Given the irreversible nature of the harm that may be inflicted (directly or indirectly) on the asylum-seeker as a consequence of the transfer to another Member State or a state associated to the Dublin Regulation, an effective legal remedy against a Dublin transfer is of crucial importance to ensure that transfers between Dublin states do not breach asylum-seekers' fundamental rights.

In the recent judgment in the case of *Petrosian*, the European Court of Justice, at least indirectly, emphasized the importance of a right to an appeal with suspensive effect on the "merits of the Dublin decision"⁶². While the judgment concerns a purely technical matter, it should be noted that the Court supports its conclusion inter alia on the observance of the judicial protection guarantees provided by a Member State. The Court clearly stresses that reasons of expediency of the Dublin system should not in any way overrule the suspensive effect of a remedy at the national level and that those Member States providing for an appeal with suspensive effect should not be negatively affected by it. According to the Court "it is clear that the Community legislature did not intend that the judicial protection guaranteed by the Member States whose courts may suspend the implementation of a transfer decision, thus enabling asylum-seekers duly to challenge a decision taken in respect of them, should be sacrificed to the requirement of expedition in processing asylum applications" (par. 48). Amnesty International believes that Article 26 of the Commission proposal reflects this important principle by including a right to a remedy with a suspensive effect during maximum seven working days against a decision to transfer an applicant for international protection. The system proposed by the Commission would indeed at least allow national courts to prevent transfers from being implemented where this would result in a violation of the fundamental rights of the asylum-seeker concerned and would therefore be an important tool to enhance judicial protection of asylum-seekers within the Dublin system.

Nevertheless, the suspensive effect in Article 26 of the Commission proposal only relates to the question whether or not the applicant should be entitled to remain on the territory of the sending Member State pending the outcome of the appeal or review on the "merits of the Dublin procedure". This may unnecessarily complicate the procedures at the national level as two assessments would be carried out separately by the competent court or tribunal: while the question whether or not the applicant should be able to remain at the territory of the transferring state should be dealt with within a period of seven working days, other questions related to the correct application of the Dublin procedure could be the subject of a later decision of the Court. It would be in the interest of both the asylum applicant and the competent court or tribunal to assess both aspects in one decision. This

⁶¹ Italics added.

⁶² See European Court of Justice, Case C-19/08, *Migrationsverket v. Petrosian*, Judgment of 29 January 2009. The case concerns the Swedish procedure that allows for a system whereby a provisional judicial decision suspending the implementation of the transfer procedure can be taken pending a judicial decision on the merits of the procedure. The Court ruled that the calculation of the time limit of 6 months in Article 20 (1) (d) and Article 20(2) starts to run as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation, where the appeal has a suspensive effect. Although it does not, strictly speaking, elaborate on the question whether or not a suspensive effect is needed, it does seem to suggest that where a suspensive effect is granted, a decision on the merits of the procedure is needed in any case before a transfer can be carried out.

may require a slightly longer time-frame for the court to reach a final decision but at the same time will avoid situations whereby the court does not object to a transfer pending the appeal or review but nevertheless finally annuls the decision to transfer the asylum-seeker to another Member State.

Amnesty International welcomes the proposal to strengthen the right to an effective remedy. The system, as laid down in Article 26 of the recast proposal on the Dublin Regulation, is at a minimum required to ensure the effective protection of the fundamental rights of asylum-seekers in the context of Dublin transfers.

➤ **Recast proposal on the Reception Conditions Directive.**

Appeal rights of asylum-seekers against decisions taken with regard to benefits they are entitled to are strengthened in the new Article 25 to explicitly include decisions relating to withdrawal or reduction of benefits. At the same time it is clarified that an asylum-seeker must have, at least in the last instance, the possibility of an appeal or review in fact and in law before a judicial body, while access to legal assistance and/or representation must be ensured which shall be free of charge where the asylum-seeker can not afford the costs involved. These are welcome and necessary amendments that reinforce the safeguards for asylum-seekers against any unjustified reduction or withdrawal of their benefits during the examination of their asylum application. Together with the limitation of the circumstances in which benefits can be withdrawn and the deletion of the possibility to refuse asylum applications altogether in the new Article 20, Amnesty International believes that this will effectively help to avoid situations of destitution among asylum-seekers in EU Member States. It should be noted that the lack of appeal rights in cases of withdrawal or reduction of benefits and guarantees with regard to legal assistance in such appeal procedures was identified as an important problem in the evaluation of the implementation of the Reception Conditions Directive⁶³.

Amnesty International welcomes the extension of the grounds of appeal in Article 25 of the recast proposal on the Reception Conditions Directive to include explicitly decisions relating to withdrawing or reducing benefits for asylum-seekers and the obligation to ensure access to legal assistance and representation.

5. Temporary suspension of Dublin transfers-mechanism

The Dublin Regulation has always been presented as a purely administrative mechanism that exclusively aims at allocating responsibility for examining asylum applications between Member States. So far Member States have refused to address the issue of solidarity and responsibility-sharing between Member States seriously. At the same time, states have consistently refused to acknowledge their complicity in treating asylum-seekers below EU standards in other Member States to which asylum-seekers are being transferred.

Amnesty International believes that the discussion on both issues can no longer be avoided and therefore sees added value in the temporary suspension mechanism as proposed by the Commission in Article 31 of the recast proposal on the Dublin Regulation. Such a mechanism would function as a correction mechanism to the Dublin criteria where the application of these criteria would either result in an additional burden for a Member State that already experiences a particular pressure (Article 31(1)) or where it would result in asylum-seekers being sent back to a situation where minimum standards as laid down in the EU asylum acquis are not complied with in practice (Article 31(2)).

⁶³ See Academic Network for Legal Studies on Immigration and Asylum in Europe, "Comparative overview of the implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States, October 2006", p.53-55.

Amnesty International believes that these two important principles should be firmly integrated into the Dublin mechanism as it would finally acknowledge that asylum-seekers should not be sent back to dysfunctional asylum systems and that the respect for their fundamental rights must always be taken into account first. The obligation for Member States where asylum-seekers are present whose transfers are suspended to examine these asylum applications in Article 31(6) is a fundamental guarantee in order to avoid that asylum-seekers are left in an uncertain situation as a result of the suspension of the transfer and to ensure that their protection needs are effectively assessed.

However, in order to ensure that Member States are not rewarded for not complying with the EU asylum acquis, Amnesty International believes that the Commission proposal could be strengthened in order to ensure that the Member State affected effectively addresses the causes for the suspension of Dublin transfers. In addition to financial emergency assistance as provided for under Article 31(7) to deal with urgent situations, a review mechanism could be introduced in order to measure progress made by the affected Member States in resolving the situation that caused the suspension. The Member State concerned would be obliged to present a progress report within a fixed time limit after the suspension of transfers to the Commission indicating the measures taken to deal with the causes of the suspension and to comply with the conditions imposed by the Commission in accordance with Article 31 (4) (d). Based on the evaluation of the efforts undertaken by the affected Member State, the Commission could subsequently either launch an infringement procedure against the Member State for not complying with its obligations under the EU asylum acquis, propose to continue the financial assistance granted to the Member State concerned or suspend the financial assistance for lack of progress made or for lack of compliance with the conditions imposed by the Commission. Such amendments would allow for the Commission and the other Member States to evaluate more effectively the efforts made by the affected Member State in order to address the causes for the suspension of transfers and to keep suspension of transfers as short as possible.

Finally, the possibility to suspend transfers to a Member State where the level of protection for asylum-seekers is not in conformity with Community legislation should not only make explicit reference to the reception conditions directive or the Asylum Procedures Directive, but also to the core instrument of the CEAS, the Qualification Directive. Where Member States would not comply with minimum standards to identify refugees and beneficiaries of international protection as laid down in the Qualification Directive, this should equally trigger suspension of Dublin transfers to such Member States as this may eventually lead to serious violations of fundamental rights of refugees and beneficiaries of subsidiary protection, including refoulement.

In order to avoid that Member States would de facto be rewarded for not complying with their obligations under EU asylum legislation or for not addressing particularly urgent situations effectively, Article 31 of the recast proposal on the Dublin Regulation should be complemented with a review mechanism allowing the Commission to measure progress made in resolving the causes for suspension and to take appropriate measures vis-à-vis the Member State concerned. Article 31 should also be amended to include an explicit reference to non-compliance with minimum standards in the EU Qualification Directive as a reason to trigger suspension of Dublin transfers.

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