



# UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers

(COM (2011) 320 final, 1 June 2011)



An asylum seeking woman goes for a walk outside a reception centre in Debrecen, Hungary.

## Introduction

On 9 December 2008, the European Commission presented a recast proposal<sup>1</sup> relating to Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers (“Reception Conditions Directive” or “RCD”).<sup>2</sup> This recast proposal forms part of the second phase of building a Common European Asylum System (“CEAS”) foreseen for 2012. The European Parliament adopted its position on that proposal on 7 May 2009,<sup>3</sup> but after no final agreement was reached on the text in Council, the European Commission on 1 June 2011 published an amended recast proposal (the “amended proposal” or “amended recast”) of the Reception Conditions Directive.<sup>4</sup>

In line with its mandate and supervisory responsibility,<sup>5</sup> the Office of the United Nations High Commissioner for Refugees (“UNHCR”) has observed that while there is scope for flexibility in the choice of reception arrangements to be put in place, it is important that reception measures respect human dignity and applicable international human rights law and standards in order to allow for a fair and effective examination of protection needs.<sup>6</sup>

In its 2007 evaluation<sup>7</sup> of the implementation of the Directive, the European Commission identified considerable discrepancies in Member States’ practice differences which have also been documented in the “Comparative overview of the implementation of the Directive 2003/9 of 27 January 2003” issued by the Odysseus Academic Network (“Odysseus report”) in 2006 and which relate to the implementation of the RCD.<sup>8</sup>

In its Explanatory Memorandum to the amended recast proposal, the European Commission emphasizes that the redrafting of the Reception Conditions Directive has led to “clearer concepts and more simplified rules granting Member States more flexibility in integrating

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<sup>1</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)*, 3 December 2008, COM(2008) 815 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0815:FIN:EN:PDF>.

<sup>2</sup> Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, 6 February 2003, 2001/0091 (CNS), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF>.

<sup>3</sup> European Parliament, *European Parliament legislative resolution of 7 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)*, 7 May 2009, P6\_TA-PROV(2009)0376, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2009-0376>.

<sup>4</sup> European Commission, *Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast)*, 1 June 2011, COM(2011) 320 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0320:FIN:EN:PDF>.

<sup>5</sup> As laid down in article 35 of the 1951 Convention relating to the Status of Refugees, as well as in the EU *acquis* notably in article 28 of the 1990 Schengen Implementation Agreement, Declaration 17 of the Treaty of Amsterdam, article 78(1) of the Treaty on the Functions of the European Union, article 18 of the Charter of Fundamental Rights of the EU and subsequent Directives and Regulations.

<sup>6</sup> See relevant Conclusions of UNHCR’s Executive Committee, in particular ExCom Conclusions No. 93 “Conclusion on reception of asylum-seekers in the context of individual asylum systems”, No. 44 “Detention of refugees and asylum-seekers” and No. 47 “Refugee children”, No. 105 “Conclusion on Women and Girls at Risk”, No. 107 “Conclusion on Children at Risk”, all available at: <http://www.unhcr.org/refworld/type/EXCONC.html>.

<sup>7</sup> European Commission, *Report from the Commission to the Council and the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, 26 November 2007, COM(2007) 745 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0745:FIN:EN:PDF>.

<sup>8</sup> Odysseus Academic Network, *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, available at <http://www.unhcr.org/refworld/docid/484009fc2.html>. This study was produced at the behest of the European Commission in preparation for its subsequent evaluation of the Reception Conditions Directive in 2007 (see footnote 7 above).

them into their national legal systems”, while at the same time enabling them to address “possible abuses of their reception systems” and “concerns on the financial and administrative implications of some of the proposed measures.”<sup>9</sup> It also underlines that the proposal “maintains high standards of treatment in line with fundamental rights,” particularly with regard to detention and vulnerable persons and adds that the proposal was subject to in-depth scrutiny to ensure full compatibility of its provisions with fundamental human rights, being general principles of EU law, as provided in the EU Charter of Fundamental Rights (“the EU Charter”),<sup>10</sup> as well as obligations stemming from international law.

The Commission explains furthermore that the proposal is linked to the European Asylum Support Office (“EASO”)’s founding Regulation,<sup>11</sup> noting that the EASO “could provide practical support and expertise to Member States for implementing the Directive and for identifying best practices.” UNHCR will continue its cooperation with the EASO in line with its supervisory responsibility under Article 35 of the 1951 Convention relating to the Status of Refugees (“the 1951 Refugee Convention”) and its 1967 Protocol<sup>12</sup> and as foreseen in the EASO Regulation.<sup>13</sup>

In the paragraphs below, UNHCR comments in detail on specific proposed amendments and, where previously-proposed Recast provisions were maintained, reiterates relevant aspects of its previous comments<sup>14</sup> to the European Commission’s initial recast proposal of 2008.<sup>15</sup>

### **1. Dignified standard of living” (Recital 11, 16 and 21 and article 17)**

According to the European Court of Human Rights (“ECtHR”), the present Reception Conditions Directive establishes a positive obligation to provide accommodation and decent material conditions to asylum-seekers.<sup>16</sup> The preamble of the amended recast proposal reflects this in Recitals 11, 16 and 21, requiring in all cases standards for reception of asylum-seekers that suffice “to ensure them a dignified standard of living and comparable living conditions.”<sup>17</sup>

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<sup>9</sup> Ibidem, p. 3.

<sup>10</sup> European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), available at: <http://www.unhcr.org/refworld/docid/3ae6b3b70.html>.

<sup>11</sup> European Union, *Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office*, 19 May 2010, No 439/2010, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:132:0011:0028:EN:PDF>.

<sup>12</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>; and UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

<sup>13</sup> European Union, *Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office*, 19 May 2010, No 439/2010, notably in Article 25. The EASO Regulation is available at: <http://www.unhcr.org/refworld/docid/4c075a202.html>.

<sup>14</sup> 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)*, 13 March 2009, available at: <http://www.unhcr.org/refworld/docid/49ba8a192.html>.

<sup>15</sup> See footnote 1 above.

<sup>16</sup> *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 221, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

<sup>17</sup> Ibidem, in particular paras 252 -263 where the Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and (...) considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention. See also UNHCR, *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 October 2002, No. 93 (LIII) - 2002, available at: <http://www.unhcr.org/refworld/docid/3dafdd344.html>.

This is reinforced by the findings of the Council of Europe's European Committee on Social Rights, which has stated that living conditions should be such as to enable living in keeping with human dignity.<sup>18</sup> The Commissioner for Human Rights of the Council of Europe recommended with respect to the right to housing that the requirement of dignity means that even temporary shelter (for people who are unlawfully present in a State's territory) must fulfil the demands for safety, health and hygiene, including basic amenities such as clean water, sufficient lighting and heating, and security of the immediate surroundings.<sup>19</sup> UNHCR notes that these requirements relate to the right to shelter for persons unlawfully present on a State's territory. The level of living conditions for asylum-seekers, who have a legal right under the *acquis* to remain in a Member State pending a final decision on their asylum application, should be higher and in line with Article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights<sup>20</sup> which refers to an "adequate standard of living".

## 2. Scope of the Directive (recitals 8 and 13, article 3)

UNHCR supports the extension of the proposal to all applicants for international protection, including those in territorial waters or in transit zones of a Member State as mentioned in recitals 8 and 13 and article 3 of the recast proposal. This reflects ECtHR jurisprudence, which has made clear that Member States' obligations towards persons seeking international protection are fully applicable in such areas.<sup>21</sup>

Recital 8 of the amended recast proposal states that the Reception Conditions Directive should "apply *during all stages and all types of procedures* concerning applications for international protection and *in all locations and facilities* hosting asylum-seekers" [emphasis added]. This important clarification endorses the interpretation adopted by many Member States, namely that the Directive does apply to asylum-seekers who are awaiting transfer under the Dublin II Regulation,<sup>22</sup> or who are in admissibility procedures, border procedures or any other distinct procedure, or in immigration detention or otherwise kept in a distinct location at a land border, airport, police station or elsewhere. The Odysseus report highlighted that a number of Member States had different views on the RCD's applicability in such cases.<sup>23</sup>

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<sup>18</sup> Council of Europe, *Council of Europe Standards and Guidelines in the Field of Human Rights Protection of Irregular Migrants*, Section II. A. 3, available at: <http://fra.europa.eu/fraWebsite/frc2011/docs/CoE-standards-hr-protection-irreg-migrants.pdf>; and Asylum Procedures Directive (COM(2009)554), 24 March 2011, available at: <http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29336/20111014ATT29336EN.pdf>.

<sup>19</sup> See *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Council of Europe: European Committee of Social Rights, 20 October 2009, available at: <http://www.unhcr.org/refworld/docid/4b9e37ea2.html>.

<sup>20</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>.

<sup>21</sup> *Amuur v. France*, Application no. 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, available at: <http://www.unhcr.org/refworld/docid/3ae6b76710.html>.

<sup>22</sup> *Ibid.*, footnote 7 and supported by the Opinion of Advocate General Sharpston, delivered on 15 May 2012, *CIMADE et Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration*, C-179/11, European Union: European Court of Justice, 15 May 2012, available at: <http://www.unhcr.org/refworld/docid/4fba44082.html>.

<sup>23</sup> See footnote 8 above, at p. 9 under 3. Ratione loci, 1<sup>st</sup> bullet point.

### 3. Definitions of “family members” and of “minors” (article 2)

UNHCR welcomes the proposed extension of recast article 2(c)(i), but notes that the definition of family members is still limited “in so far as the **family already existed in the country or origin**” [emphasis added]. This fails to accommodate family ties which may have been formed during flight, thus excluding them from the guarantees laid down in the Directive for example with regard to the maintenance of family unity. UNHCR supports the proposed extension of the definition of “family members” in amended recast article 2(c)(ii) to include the parents, guardian or minor siblings of unmarried minor children regardless of whether they are dependent on the applicant; in article 2(c)(i) third indent to include married minor children, where it is in their best interests to consider these persons as family members; and in article 2(c)(iii) to include parents or guardians of a minor applicant who is married, provided that the applicant is not accompanied by his/her spouse and where it is in the minor applicant’s best interests to consider these persons as family members.

A further important proposal in article 2(c)(ii) second indent would amend the definition to include minor siblings of the applicant (including where the applicant or sibling is married, if it is in the best interests of one of them to consider these persons as family members). These proposals are consistent with the 1989 UN Convention on the Rights of the Child (“CRC”), in particular article 9.<sup>24</sup>

UNHCR welcomes the proposed amended definition of “minor”<sup>25</sup> in amended recast article 2(d) to reflect the standard of the CRC, namely to include all persons under 18. This definition was endorsed by UNHCR’s Executive Committee in 2007.<sup>26</sup> Aware that a number of States have used different age limits for children, UNHCR encourages Member States to adopt the 18-year age limit under the RCD, in order to enable all children to benefit from the Directive’s safeguards, and as required by international standards.

In this connection, Recital 9, which repeats Member States’ obligation to ensure full compliance with the principle of the best interests of the child of article 3 of the CRC and the importance of family unity in accordance with the EU Charter<sup>27</sup> and ECtHR, is also specifically welcomed.

**Recommendation:** UNHCR notes that an agreement was reached between the EU institutions on the Recast of the Qualifications Directive on including the parents or adult responsible for unmarried minors in the definition of family members.<sup>28</sup> UNHCR calls on the EU institutions to give careful consideration to the adoption of a broader definition of family members as proposed in the recast Reception Conditions Directive in line with international standards.

<sup>24</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>.

<sup>25</sup> The United Nations Convention on the Rights of the Child defines a child as “a human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier”. The term minor is used to refer to a person under a certain age, the age of majority. The age depends upon national legal jurisdiction and application, but is typically 16, 18, or 21, with 18 being the most common age.

<sup>26</sup> UNHCR, *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII) - 2007, available at: <http://www.unhcr.org/refworld/docid/471897232.html>.

<sup>27</sup> See footnote 10 above.

<sup>28</sup> European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast)*, 13 December 2011, Article 2(j), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>.

#### 4. Information (article 5)

Amended recast article 5(2) requires that information on benefits and obligations relating to reception conditions be provided “in writing and [...] in a language that the applicants understand or are reasonably supposed to understand. Where appropriate, this information may also be supplied orally.”

The Odysseus report found serious shortcomings in a number of Member States in the implementation of the current obligation to provide information.<sup>29</sup> According to that report, in at least one Member State, no interpreter was made available to asylum-seekers who could not understand one of the languages in which written material was provided.<sup>30</sup> The Odysseus report indicates that other Member States do make interpreters available, but it is unclear if this is done systematically. UNHCR has also learned through its monitoring work and during participatory assessments in some Member States that asylum-seekers often do not understand the asylum procedure, because it was not explained to them in a language they understand or in a culturally appropriate manner. In UNHCR’s view, to ensure that information is effectively provided in practice in ways that can ensure full comprehension of and engagement in the asylum procedure, information should be provided in a language that the asylum-seeker actually understands in the form of written information supplemented, where necessary, with an oral explanation provided with the help of a qualified interpreter

**Recommendation:** UNHCR proposes strengthening of the wording of the provision such that amended recast article 5(2) should read: “Member States shall ensure that the information referred to in paragraph 1 is in writing and **in a language the applicants understand**. Where needed this information should also be supplied orally with the help of a qualified interpreter.”

#### 5. Documentation (article 6)

UNHCR welcomes the wording of proposed article 6(6) in the amended recast, exempting asylum-seekers otherwise from any documentary or other administrative requirements that Member States could impose before granting the rights to which they are entitled under the Directive.

#### 6. Detention (article 8 (1))

Freedom from arbitrary detention is a corollary of the fundamental right to liberty and security of the person, which is laid down in article 6 of the EU Charter, among other key European and international instruments.<sup>31</sup> UNHCR supports the proposals in amended recast article 8(1) to regulate and limit detention of persons applying for international protection, in particular by reiterating the principle that Member States shall not hold a person in detention

<sup>29</sup> See footnote 8 above, at pages 38 and 39.

<sup>30</sup> Ibidem, p. 39. According to the Odysseus report, information is made available in France in written form in only six languages, while no interpreter is made available if there is no translation of the written material available in the language used by the asylum-seeker.

<sup>31</sup> See, *inter alia*, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 9, available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 9, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>; See footnote 24 above, Article 37(b) CRC; UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I, Article 14, available at: <http://www.unhcr.org/refworld/docid/4680cd212.html>; and Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, Article 5, available at: <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>.

“for the sole reason that he/she is an applicant for international protection.” The right to asylum (article 18 of the EU Charter) coupled with the right to liberty and security of person give rise to a presumption against detention for asylum-seekers. Detention can only be justified after a careful, individual assessment based on a lawful purpose and considered necessary, reasonable in all the circumstances and proportionate to the lawful purpose pursued. UNHCR recalls article 31 of the 1951 Convention,<sup>32</sup> which stipulates that penalties<sup>33</sup> shall not be imposed on refugees and asylum-seekers for unauthorized entry or stay, provided they present themselves without delay and show good cause for their illegal entry or presence, save under exceptional circumstances.

It is noteworthy that the EU *acquis*, in the Returns Directive,<sup>34</sup> affords a number of important safeguards for people in detention without a legal right to remain in an EU Member State who are subject to imminent removal. It is all the more critical, in UNHCR’s view, that appropriate safeguards be adopted for asylum-seekers, who are present lawfully in Member State territory, and who may be entitled to international protection. This is implied, among other key principles, in the Treaty on the Functioning of the European Union (“TFEU”) which requires that EU asylum and migration policy be fair to third country nationals.<sup>35</sup>

In addition to the costs<sup>36</sup> of detention and its negative impact on asylum-seekers’ physical and mental health, UNHCR draws attention to the fact that detention, particularly where it is for extended or indeterminate periods and/or in poor conditions, can prejudicially affect the ability of people who are later granted protection to integrate successfully and swiftly in their host countries. The psychological and physical effects of detention may exacerbate the trauma suffered by some asylum-seekers in the past,<sup>37</sup> and hinder progress towards the point where they can contribute actively and positively to European society, which is contrary to the aims of states and other asylum stakeholders alike.<sup>38</sup>

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<sup>32</sup> See footnote 12 above.

<sup>33</sup> Although “detention” is not explicitly mentioned in Article 31(1) of the 1951 Convention, the term “penalties” was meant by the drafters to include detention. Article 31(2) only authorizes detention when it is necessary and under specific conditions. See UNHCR, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection [Global Consultations on International Protection/Second Track]*, 1 October 2001, para. 29, available at: <http://www.unhcr.org/refworld/docid/3bf9123d4.html>.

<sup>34</sup> European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 008 on common standards and procedures in Member States for returning illegally staying third-country Nationals*, 16 December 2008, No 2008/115/EC, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF>

<sup>35</sup> European Union, *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, 30 March 2010, [OJ C 83, ], Article 67 (2), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>.

<sup>36</sup> See European Parliament, *What system of burden-sharing between Member States for the reception of asylum seekers?* 2010, available at:

<http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=29912>, which found that the UK spends two thirds more per asylum application than Sweden and that this is likely to be connected to the use of detention in the UK, which accounts for 25% of the total cost per asylum application, while in Sweden it represents less than 4% of the total costs. See also A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees*, UNHCR, Legal and Protection Policy Research Series, April 2011, PPLA/2011/01.Rev.1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>, table 2, page 85.

<sup>37</sup> See e.g., Coffey, G.J. *et al.*, “The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum”, *Social Science & Medicine*, Vol. 70, No. 12, pp 2070-2079.

<sup>38</sup> See UNHCR and Office of the High Commissioner for Human Rights (OHCHR), *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, July 2011, para. 10, available at: <http://www.unhcr.org/refworld/docid/4e315b882.html>.

## 7. Necessity of and alternatives to detention (article 8(2))

The amended recast proposal would further limit detention of asylum-seekers by introducing in amended recast article 8(2) a *necessity test* (“When it proves necessary and on the basis of an individual assessment of each case” and “if other less coercive alternative measures cannot be applied effectively”). UNHCR would welcome the insertion of these safeguards into the text, which reflect international refugee and human rights law.

The necessity requirement emerges from the prohibition of arbitrary detention and the right to liberty of movement and freedom to choose his residence in international human rights law (Articles 9 and 12 respectively ICCPR).<sup>39</sup> Arbitrariness must be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability. Any detention or restriction on liberty to movement thus needs to be necessary in the individual case, reasonable in all the circumstances and proportionate to a legitimate objective.<sup>40</sup> The necessity and proportionality tests further require that there were not less restrictive or coercive measures, i.e. alternatives to detention that could have been applied to the individual. Several instruments further recommend that detention should only be resorted to as a measure of last resort.<sup>41</sup>

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<sup>39</sup> See footnote 31 above, *International Covenant on Civil and Political Rights*, Article 9.1: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. See also UN Human Rights Committee (HRC), *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, No. 8, available at: <http://www.unhcr.org/refworld/docid/4538840110.html>.

See footnote 31 above, *International Covenant on Civil and Political Rights*, Article 12.1: Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Article 12.3: The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. Available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>.

<sup>40</sup> This approach has been consistently applied in the following cases: UN Human Rights Committee (HRC):

*Van Alphen v. The Netherlands*, CCPR/C/39/305, 23 July 1990, para. 5.8;

*A. v. Australia*, CCPR/C/59/D/560/1993, 30 April 1997, available at:

<http://www.unhcr.org/refworld/docid/3ae6b71a0.html>;

*C. v. Australia*, CCPR/C/76/D/900/1999, 13 November 2002, available at:

<http://www.unhcr.org/refworld/docid/3f588ef00.html>;

*Samba Jalloh v. Netherlands*, CCPR/C/74/D/794/1998, 15 April 2002, available at:

<http://www.unhcr.org/refworld/docid/3f588ef3a.html>;

*Omar Sharif Baban v. Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, available at:

<http://www.unhcr.org/refworld/docid/404887ee3.html>;

*Danyal Shafiq v. Australia*, CCPR/C/88/D/1324/2004, 13 November 2006, available at:

<http://www.unhcr.org/refworld/docid/47975af921.html>.

For more detail, see Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees*, footnote 36.

<sup>41</sup> See, for example, UN Sub-Commission on the Promotion and Protection of Human Rights, *Resolution 2000/21 on the Detention of Asylum-Seekers*, 18 August 2000, 2000/21, available at:

<http://www.unhcr.org/refworld/docid/3dda66394.html>. See also the recommendation of the UN Working Group on Arbitrary Detention that “alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention”; UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, 18 December 1998, E/CN.4/1999/63/Add.3, para. 33, available at: <http://www.unhcr.org/refworld/docid/45377b810.html>. See also footnote 24 above, Article 37(b) CRC.



## 8. Grounds for detention (article 8 (3))

UNHCR welcomes the fact that the amended recast includes in article 8 (3) an exhaustive list of grounds for detention. These provisions would replace the present article 7(3), permitting confinement of an asylum-seeker for undefined “legal reasons” or “reasons of public order” and, if adopted, could contribute to more consistency and legal certainty in the use of detention.

With regard to the specific grounds, UNHCR is of the view that there are two general legal bases for detention in the asylum context, namely national security and public order, the latter essentially with the purpose of verifying identity and prevent absconding of an individual applicant. UNHCR therefore agrees with article 8 (3) (d) and proposes to place this ground first. UNHCR also agrees with the reference to “identity” in article 8 (3) (a), for instance in cases where identity is undetermined or in dispute and where there are indications that the applicant used false or forged documents and/or is uncooperative in establishing his/her identity or intends to mislead the authorities. On the other hand, the simple inability to produce identification documents should not be automatically interpreted as an unwillingness to cooperate, or an assessment that the individual is at risk of absconding. UNHCR signals, however, that whilst nationality is part of identity, it could be interpreted as relating to statelessness and consequently lead to indefinite detention of stateless persons and thus recommends deleting this notion.

As regards article 8(3) b, UNHCR notes that the text has incorporated proposed wording in its earlier comments on the 2008 recast Commission Proposal<sup>42</sup> and would like to add that in order to accommodate the legitimate interests of Member States to tackle clearly abusive claims, UNHCR would agree with this ground provided strict maximum time limits are observed in line with new article 9, so as to ensure that detention on the basis of this ground is not used for purposes of administrative convenience.

The grounds expressed in article 8 (3) (c) go, however, beyond the legitimate grounds of national security or public order. Letter (c) could, depending on its implementation and application create the risk of widespread detention in the context of border procedures and result, contrary to article 31 (1) of the 1951 Convention<sup>43</sup>, in the penalization of asylum-seekers, who enter the EU in an irregular manner. In UNHCR’s view, it is important for national legislation and administrative practice to recognise the specific legal situation of asylum-seekers, who are claiming the fundamental human right to asylum,<sup>44</sup> which entitles them to safeguards additional to those of other aliens, who enter or are otherwise present in an EU Member State in an irregular manner. UNHCR therefore urges the deletion of letter (c).

UNHCR has worked extensively with EU Member States recently on the issue of possible alternatives to detention.<sup>45</sup> Such approaches have also been examined by the EU Agency for

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<sup>42</sup> See footnote 14 above.

<sup>43</sup> Article 31(1) provides that: “*The Contracting States shall not 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 their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*” See also footnote 12 above.

<sup>44</sup> Article 18 EU Charter, see footnote 10 above, and UN General Assembly, Article 14 *Universal Declaration of Human Rights*, see footnote 31 above.

<sup>45</sup> See UNHCR and Office of the High Commissioner for Human Rights (OHCHR), *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*,

Fundamental Rights.<sup>46</sup> In this connection, UNHCR welcomes the proposal in amended recast article 8(4) for rules at national level providing for alternatives to detention. However, UNHCR recalls that reception in open facilities should be the norm; that alternatives to detention should be applied first and detention should only be used as a last resort.<sup>47</sup> Moreover, where alternatives to detention are laid down in national legislation, authorities also need to ensure through administrative arrangements their effective implementation whenever they are justified.

**Recommendation:** UNHCR proposes to place article 8 (3) (d) as a first ground, to delete article 8 (3) c and to redraft article 8(3) as follows:

[...] (a) when protection of national security or public order so requires;

(b) in order to determine or verify his/her identity;

(c) in order to determine, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention.

### 9. Guarantees for detained asylum-seekers (article 9)

UNHCR welcomes the wording of amended recast article 9(1), which limits the period of detention to the shortest possible duration based on the principle of proportionality. UNHCR equally welcomes the safeguards proposed in amended recast articles 9 (2) and 9(3) respectively, foreseeing that the detention decision shall be ordered by judicial authorities, or by administrative authorities. In the latter case, detention should be confirmed by a judicial authority within 72 hours. UNHCR supports the requirement that the order should be in writing, specifying the grounds and its duration, as foreseen in amended recast article 9(3); an arrangement which would allow effective exercise of the right to an effective remedy where needed. The requirement for immediate release of the asylum-seeker in case of unlawful detention is essential, to prevent arbitrary detention and uphold basic principles of fundamental rights.

However, UNHCR notes that the obligation in amended recast article 9(3) to inform detained asylum-seekers immediately of “the reasons for detention (...) in a language they understand or are reasonably supposed to understand” is only partially in line with article 5(2) of the European Convention on Human Rights<sup>48</sup> (“ECHR”) which states that “everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.” This provision has been interpreted by the ECtHR in *Fox, Campbell and Hartley v. The United Kingdom*<sup>49</sup> and in *Saadi v. the United Kingdom*<sup>50</sup>

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July 2011, available at: <http://www.unhcr.org/refworld/docid/4e315b882.html>; and UNHCR Regional Round Table on Alternatives to Detention, Regional Representation for Western Europe, Brussels 16.11.2011, available at: <http://www.unhcr.be/nl/unhcr-in-belgie/campagnes/conference-regionale-sur-les-alternatives-a-la-detention.html>.

Further regional roundtables are previewed. Moreover, UNHCR’s Executive Committee has on many occasions, dating back to 1977, raised concern about detention practices and has recommended that any reception arrangements put in place by states parties must respect human dignity and applicable human rights standards. The *Agenda for Protection* also calls on States to “more concertedly [...] explore alternatives to detention of asylums-seekers and refugees.”

<sup>46</sup> European Agency for Fundamental Rights, *Detention of third country nationals in return procedures*, 30 November 2010, available at: <http://www.unhcr.org/refworld/docid/4ecf77402.html>.

<sup>47</sup> See footnote 45 above.

<sup>48</sup> See footnote 31 above.

<sup>49</sup> *Fox, Campbell and Hartley v. The United Kingdom*, Application nos. 12244/86; 12245/86; 12383/86, Council of Europe: European Court of Human Rights, 30 August 1990, available at: <http://www.unhcr.org/refworld/docid/3ae6b6f90.html>.

as meaning that the person must be told in simple and non-technical language about the reasons for detention so that he/she can, if necessary, challenge its lawfulness before a court and that, for instance, general statements are not sufficient. Provision of information in a language that the person “is reasonably supposed to understand” may therefore not meet the requirement of article 5(2) ECHR.

UNHCR supports the strengthened requirements for regular judicial review of detention. These should help ensure on the one hand that detention is proportionate, only imposed or prolonged when necessary, and in line with the permissible grounds; and on the other hand, that all procedural safeguards are respected. In this respect, the ECtHR has in recent cases, including in *Lokpo & Touré v. Hungary*<sup>51</sup>, underlined the requirement for proportionality, which is implied by the requirements for the duration of detention to be limited, and used only for permitted purposes in law under amended recast article 9. The entitlement for asylum-seekers to request judicial review of detention whenever new circumstances arise or information becomes available, under amended recast article 9(4), provides a further safeguard to ensure its ongoing lawfulness. The proposed wording would be in accordance with article 5(4) of the ECHR.<sup>52</sup>

UNHCR welcomes the provision in amended recast article 9(5) which foresees free legal assistance and representation, in cases of appeal or review of a detention order, where asylum-seekers cannot afford the costs involved and in so far it is necessary to ensure their effective access to justice. UNHCR also supports the requirement for such arrangements for access to assistance to be laid down in national law.

## 10. Conditions of detention (article 10)

Conditions of detention should ensure humane treatment with respect for the inherent dignity of the person.<sup>53</sup> UNHCR recommends separate detention facilities for asylum-seekers apart from convicted criminals or prisoners on remand.<sup>54</sup> This recommendation is based on the premise that most asylum-seekers have committed no crime; by contrast, they have a lawful

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<sup>50</sup> *Saadi v the United Kingdom*, Application no. 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008, available at: <http://www.unhcr.org/refworld/docid/47a074302.html>.

<sup>51</sup> *Lokpo et Touré v. Hungary*, Application no. 10816/10, Council of Europe: European Court of Human Rights, 20 September 2011, available at: <http://www.unhcr.org/refworld/docid/4e8ac6652.html>.

<sup>52</sup> See footnote 48 above, 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”.

<sup>53</sup> See Universal Declaration of Human Rights (Article 10), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 11), International Covenant on Civil and Political Rights (Article 10), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 17), and CRC (article 37 (c)). See also: UN Human Rights Committee, General Comment No. 21: *Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, available at <http://www.unhcr.org/refworld/docid/453883fb11.html>, and UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: resolution / adopted by the General Assembly*, 9 December 1988, A/RES/43/173, available at <http://www.unhcr.org/refworld/docid/3b00f219c.html>.

<sup>54</sup> See footnote 41, UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, 28 December 1999, E/CN.4/2000/4, Annex II: Deliberation No. 5, “Situation regarding immigrants and asylum-seekers”, Principle 9, available at: <http://www.unhcr.org/refworld/docid/3b00f25a6.html>; Council of Europe: Committee of Ministers, *Recommendation Rec(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers*, 16 April 2003, para. 10, available at: <http://www.unhcr.org/refworld/docid/3f8d65e54.html>; United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, para. 8, available at: <http://www.unhcr.org/refworld/docid/3ae6b36e8.html>; See footnote 53 above, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

right to remain in the territory while their claims are being processed,<sup>55</sup> and may be in need of international protection.

UNHCR acknowledges that this requirement may create some logistical difficulties for States which use some common facilities, or some common areas between separate facilities, for asylum-seekers as well as other people, who have committed criminal offences. UNHCR notes, however, that it is important that the principle of separate facilities in general be observed. This requirement, which reflects the specific legal status and situation of asylum-seekers, was recognized, *inter alia*, by the ECtHR in *Saadi v. the United Kingdom*.<sup>56</sup> This consideration is reflected in the present proposal, which in recast article 10(1) prohibits the use of prison accommodation to detain asylum-seekers, and limits their confinement to “specialised detention facilities”.<sup>57</sup>

UNHCR welcomes the guarantee of access to asylum-seekers in detention for UNHCR, UNHCR’s implementing partners as well as legal advisors and NGOs, as proposed in amended recast articles 10(2) and 10(3) respectively, subject to security or public safety, provided that access is thereby not severely limited or rendered impossible (article 10(4)).

UNHCR further welcomes the exclusion of unaccompanied and separated children (“UASC”) from the derogation of article 10 (6)(a), which stipulates that applicants for international protection can be put for a reasonable period which will be as short as possible in prison accommodation if accommodation in specialized detention facilities is temporarily not available and based on Article 8 (2) and (4) are deemed not effective in the individual case.

## 11. Detention of vulnerable groups (article 11)

UNHCR supports the establishment of specific safeguards for vulnerable asylum-seekers in detention, as proposed in amended recast article 11. It is noted in this connection that the Returns Directive<sup>58</sup> includes specific safeguards for vulnerable persons in detention without a legal right to remain in an EU Member State, underlining the pressing need for similar provisions for asylum-seekers, lawfully in Member State territory, who may be entitled to international protection. The fact that asylum-seekers in some cases remain in detention for extended periods adds to the urgency of the need to provide specific arrangements for those who are vulnerable.

UNHCR welcomes limits on the detention of children<sup>59</sup> and unaccompanied and separated children in particular as they are among the most vulnerable of asylum-seekers.<sup>60</sup> This

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<sup>55</sup> See 1951 Refugee Convention and 1967 Protocol, footnote 12, Article 26, which foresees that States shall accord to refugees lawfully in their territory the right to choose their place of residence and to move freely within the territory subject to any regulations applicable to aliens generally in the same circumstances. This provision applies to recognized refugees, but it may also apply to asylum seekers who are lawfully within the territory – that is, those who have applied for asylum regardless of whether they entered the territory with or without authorization.

<sup>56</sup> *Saadi v. United Kingdom*, see footnote 50 above, At para 74, the ECtHR recalled that “the place and conditions of detention should be appropriate, bearing in mind that ‘the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country’” (also see footnote 21 above, *Amuur v. France*, at para. 43).

<sup>57</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *The CPT standards, “Substantive” sections of the CPT’s General Reports*, October 2006, in particular p. 40, para. 28, available at <http://www.cpt.coe.int/en/documents/eng-standards-scr.pdf>.

<sup>58</sup> See footnote 34 above, Article 16(3).

<sup>59</sup> Recent case law of the ECtHR on the undesirability of detention of children in families has repeatedly found that detention of children, including with their parent(s) may amount to inhuman and degrading treatment (see for instance, *Popov v. France*; Application nos. 39472/07 and 39474/07, J 19 January 2012 (French only) and *Kanagaratnam and others v. Belgium*, Application no. 15297/09, 13 December 2011).

provision in the amended recast, as indicated in the Commission's explanatory memorandum, took account of discussions in the Council regarding cases of abduction of children by traffickers, where it was put that accommodation in closed centres could be in the best interest of the UASC. UNHCR believes that other, more effective strategies and facilities can be conceived and operated to prevent the danger of abduction, such as counselling, guardianship and care arrangements and/or safe houses specially designed for this purpose.<sup>61</sup>

UNHCR supports the proposed article providing that persons with special needs shall in principle not be detained, as set out in recast article 11(1). The requirement for regular monitoring of vulnerable persons in detention would help ensure that pressing medical and other needs can be identified, addressed and mitigated in a timely and professional fashion. In this way, it is hoped that some of the serious negative effects of detention on children and other vulnerable people – extensively documented by experts worldwide in recent years<sup>62</sup> –

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<sup>60</sup> UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b3360.html>, in particular paras. 7.6 and 7.7 which read: "Children seeking asylum should not be kept in detention. This is particularly important in the case of unaccompanied children. States which, regrettably and contrary to the preceding recommendation, may keep children seeking asylum in detention, should, in any event, observe Article 37 of the Convention of the Rights of the Child, according to which detention shall be used only as a measure of last resort and for the shortest appropriate period of time". See also paras. 61 and 62 of General Comment No.6 (2005) of the Committee on the Rights of the Child, thirty-ninth session, 17 May – 3 June 2005, *Treatment of Unaccompanied and separated children outside their country of origin*, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement>.

See also *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 13178/03, Council of Europe: European Court of Human Rights, 12 October 2006, available at: <http://www.unhcr.org/refworld/docid/45d5cef72.html>, where the ECtHR held that the detention of a five year old child amounted to a breach of Article 3 of the ECHR and also took into account Articles 3, 10, 22 and 37 of the CRC. In particular it held that "other measures could have been taken that would have been more conducive to the best interests of the child guaranteed by Article 3 of the Convention on the Rights of the Child. These included her placement in a specialised centre or with foster parents".

<sup>61</sup> UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>, para. (i) 60-63; UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994, available at: <http://www.unhcr.org/refworld/docid/3ae6b3470.html>, Chapter 4 pp. 86-88.

<sup>62</sup> *The mental health consequences of detention*, presentation made by Dr. Madelyn Hicks, MD, MRC Psych, Institute of Psychiatry, King's College London, UK during the Regional Round Table on Alternatives to Detention in Brussels on 16/11/2011 (see footnote 45 above), available at: <http://www.unhcr.be/nl/unhcr-in-belgie/campagnes/conference-regionale-sur-les-alternatives-a-la-detention.html>. In her presentation Dr. Hicks provided references to Coffey GJ, Kaplan I, Sampson RC, Tucci MM. *The meaning and mental health consequences of long-term immigration detention for people seeking asylum*. *Social Science & Medicine* 40: 2070-2079. 2010; Cohen J. *Safe in our hands?: a study of suicide and self-harm in asylum seekers*. *J Forensic and Legal Medicine* 15: 235-244. 2008; Ichikawa M, Nakahara S, Wakai S. *Effect of post-migration detention on mental health among Afghan Asylum seekers in Japan*. *Australian and New Zealand J of Psychiatry* 40: 341-346. 2006; Keller AS et al. *Mental health of detained asylum seekers*. *Lancet* 362: 1721-1723. 2003; Lorek A et al. *The mental and physical health difficulties of children held within a British immigration detention center: a pilot study*. *Child Abuse & Neglect* 33: 573-585. 2009; Mares S, Jureidini J. *Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues*. *Australian and New Zealand J of Public Health* 28: 520-526. 2004 ; Mares S, Newman L, Dudley M, Gale F. *Seeking refuge, losing hope: parents and children in immigration detention*. *Australasian Psychiatry* 10: 91-96. 2002; Newman LK, Steel Z. *The child asylum seeker: psychological and developmental impact of immigration detention*. *Child and Adolescent Psychiatric Clinics of North America* 17: 665-683. 2008; Physicians for Human Rights and The Bellevue/NYU Program for Survivors of Torture. *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*. Cambridge, Massachusetts: Physicians for Human Rights. 221 pages. 2003; Robjant K, Hassan R, Katona C. *Mental health implications of detaining asylum seekers: systemic review*. *British J of Psychiatry* 194: 306-312. 2009; Silove D, Austin P, Steel Z. *No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia*. *Transcultural Psychiatry* 44: 359-393. 2007; Steel Z et al. *Impact of immigration detention and temporary protection on the mental health of refugees*. *British J of Psychiatry* 188: 58-64. 2006; Steel Z, Momartin S, Bateman C, Hafshejani A, Silove DM. *Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia*. *Australian and New Zealand J of Public Health* 28: 527-536. 2004; Sultan A, O'Sullivan K. *Psychological disturbances in asylum seekers held in long term detention: a participant-observer account*. *Med J Austr* 175: 593-596. 2001.

will be avoided in the EU. Combined with other provisions which foresee mechanisms for identifying people with special needs, including in amended recast article 22, such provisions should ensure that the basic rights and human dignity of detained asylum-seekers will be observed more consistently.

Whereas detention of families with children should where possible be avoided, UNHCR acknowledges the proposed safeguards for detention of families in article 11(3) respecting the principle of respect for family life under article 8 of the ECHR and the best interests of the child noted in Article 11.1 and 2.

UNHCR furthermore supports amended recast article 11(4), which requires accommodation and common space for female asylum-seekers which are separate from those for men.

**Recommendation:** UNHCR believes that other more effective strategies and facilities can be conceived and operated than detention to prevent the danger of abduction of UASC such as counselling guardianship and care arrangements and/or safe houses specially designed for this purpose.

## 12. Schooling and education of minors (article 14)

UNHCR welcomes the provisions in the amended recast requiring access to education for children aged up to 18 years, which shall be provided no later than three months following an asylum application.

## 13. Access to the labour market (article 15)

In its explanatory memorandum, the European Commission refers to the aim of facilitating access to the labour market and emphasizes the benefits of employment for both the asylum-seeker and the host States. The proposed reduction to six months of the maximum period after which Member States shall provide access to the labour market was supported by UNHCR in its response<sup>63</sup> to the EC Green Paper of 2007.<sup>64</sup> States taking part in UNHCR's Executive Committee, as well as in the Global Consultations on International Protection, have recognized that reception arrangements can be beneficial both to the State and to the asylum-seeker where they provide an opportunity for the asylum-seeker to attain a degree of self-reliance.<sup>65</sup> Moreover, in cases where an applicant is ultimately granted protection, earlier access to the labour market can facilitate the integration process and his/her earlier positive contribution to society.<sup>66</sup>

<sup>63</sup> UNHCR, *UNHCR's Response to the European Commission's Green Paper on the Future Common European Asylum System*, September 2007, available at: <http://www.unhcr.org/refworld/docid/46e159f82.html>.

<sup>64</sup> European Commission, *Commission Green Paper on the Future Common European Asylum System (COM(2007) 301 final)*, 6 June 2007, COM(2007) 301 final, available at: <http://www.unhcr.org/refworld/docid/466e5a972.html>.

<sup>65</sup> See UNHCR, *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17, available at: <http://www.unhcr.org/refworld/docid/3bfa81864.html>, and UNHCR, *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, see footnote 17 above. See also page 1 of the report of the Meijers Standing Committee of experts on international immigration, refugee and criminal law, *CM1102 Redraft of Commission proposals recasting the Reception Conditions Directive (COM(2008)815) and the Asylum Procedures Directive (COM(2009)554)*, 24 March 2011, available at: <http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29336/20111014ATT29336EN.pdf>.

<sup>66</sup> According to the *Commission staff working document accompanying the proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers - Impact Assessment {COM(2008) 815 final} {SEC(2008) 2945}* (3 December 2008, SEC/2008/2944 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:2944:FIN:EN:PDF>), granting

UNHCR notes the Commission's proposal to include the possibility for Member States to extend the limit for accessing the labour market for a further 6 months (leading to a maximum of 12 months) in order to facilitate agreement between EU institutions. UNHCR would encourage Member States to allow early and effective access of asylum-seekers to the labour market when implementing this provision.

The Commission's evaluation<sup>67</sup> of the implementation of the RCD found that additional limitations imposed on asylum-seekers who have in principle been granted access to the labour market might considerably hinder such access in practice. Examples of such limitations include the requirement to apply for work permits, restriction of access to certain sectors of the economy and on the amount of authorized working time. Proposed article 15(2) states that Member States "shall decide the conditions for granting access to the labour market (...) while ensuring effective access". This provision would improve the current situation, provided it is implemented in line with the article's objective.<sup>68</sup>

#### 14. Access to material reception conditions (article 17)

The Commission's evaluation and the related Odysseus report reveal that a number of Member States have, under the current Directive, provided financial allowances which are too low to cover subsistence. The amounts have only rarely been commensurate with the minimum social support provided to nationals.<sup>69</sup> Article 17(5) of the amended recast proposes to strengthened guarantees of access to material assistance at a level which provides an adequate standard of living, by imposing an obligation for Member States to ensure that the amount shall be determined on the basis of "points of reference established by Member States either by law or practice to ensure adequate standards of living for nationals, such as the minimum level of social welfare assistance". The second sentence of article 17(5) states that Member States may grant less favorable treatment to asylum applicants compared to nationals where it is "duly justified." Applied correctly, these provisions should enable Member States the flexibility required to provide reception conditions at a reasonable level of support, having regard to the local cost of living and other relevant factors, without exceeding national budgetary capacities.

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earlier access to the labour market promotes the social inclusion and self-reliance of asylum seekers, and avoids the loss of existing skills and dependency. For the host State, it brings increased tax revenues and savings in accommodation and other support costs (cost savings being a stated aim of the joint statement) and reduces illegal working.

<sup>67</sup> See footnote 7 above, at page 8, para. 3.4.3.

<sup>68</sup> See footnote 8 above. Examples of conditions which can be considered to have unduly restricted access to the labour market can be found in the Odysseus network synthesis report. For example:

- the practice in Luxembourg: "l'autorisation d'occupation temporaire, une fois délivrée, est limitée à un employeur déterminé et pour une seule profession". See Odysseus Academic Network, *Country Report Luxembourg*, 2006, p. 34, available at: [http://ec.europa.eu/home-affairs/doc\\_centre/asylum/docs/luxembourg\\_2007\\_en.pdf](http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/luxembourg_2007_en.pdf);

- the practice in the Netherlands: "After these six months an asylum-seeker can work for a maximum of 12 weeks every 52 weeks. (...) this limitation of 12 weeks per year in practice seriously impedes the possibilities of an asylum-seeker to take up work". See Odysseus Academic Network, *Country Report The Netherlands*, p. 48, available at:

[http://ec.europa.eu/home-affairs/doc\\_centre/asylum/docs/netherlands\\_2007\\_en.pdf](http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/netherlands_2007_en.pdf). Reportedly, the maximum period has now been extended to 24 weeks out of 52;

- the practice in Cyprus: "asylum-seekers are only allowed to work in the agricultural sector, as the Labour Office of the Ministry of Labour and Social Insurance does not give them access to any other sector or industry". See Odysseus Academic Network, *Country Report Cyprus*, p. 29, available at:

[http://ec.europa.eu/home-affairs/doc\\_centre/asylum/docs/cyprus\\_2007\\_en.pdf](http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/cyprus_2007_en.pdf).

<sup>69</sup> See footnote 7 above, at page 6, para. 3.3.2. The EC Report on the application of the RCD reported that in some Member States, financial allowances were "very often too low to cover subsistence" in Cyprus, France, Estonia, Austria, Portugal and Slovenia. See also footnote 8 above.

UNHCR supports the amended recast article 17(5), which should raise the standard of material reception conditions in those Member States where current levels are insufficient. It is noted that the current provision and practice, in which asylum-seekers in many cases receive substantially lower levels of support than nationals, could be at variance with the principle of non-discrimination enshrined in various human rights instruments.<sup>70</sup> It also raises concerns about their practical ability to pursue their claims without legally binding and enforceable guarantees of adequate support.

If asylum procedures can be operated swiftly and efficiently, with the requisite safeguards in place, reasonable levels of material assistance should not represent an excessive burden on the asylum state, nor an incentive for misuse of the system.

### **15. Specific reception conditions (article 18)**

UNHCR welcomes the provisions in amended recast article 18, in particular amended article 18(3), which obliges Member States to take into account gender and age considerations when accommodating applicants for international protection.<sup>71</sup> The organization also particularly supports amended recast article 18(4), which sets out the obligation of Member States to prevent incidences of sexual and gender-based violence. While existing criminal law provisions would be expected to provide similar safeguards for those at risk of such crimes, this provision recognizes the particular vulnerability of asylum-seekers and recalls the importance of proactive steps to prevent this form of serious harm.

The wording of article 18(8) affirms that “in duly justified cases, Member States may exceptionally set modalities for material reception conditions *different* from those provided for in this article, for a reasonable period which shall be as short as possible.” UNHCR suggests that such “different” modalities, especially for persons with special needs under article 22, should not be interpreted as “lesser” reception entitlements.

### **16. Reduction or withdrawal of material reception conditions (article 20)**

UNHCR welcomes the deletion of the possibility for refusing of material reception conditions in the case where an asylum-seeker might have failed to demonstrate that his/her claim was made as soon as reasonably practicable after arrival in the Member State as set forth in article 16(2) of the current Directive and article 20(2) of the initial recast proposal of 2008.<sup>72</sup>

However, UNHCR regrets the reintroduction of the possibility for withdrawing of material reception conditions and the retention of the possibility for reducing of material reception conditions in cases of subsequent applications. In UNHCR’s view, reception conditions should not be reduced or withdrawn in case of a subsequent application unless there are serious reasons for believing that the subsequent application was made in bad faith, and/or solely to prolong stay in a Member State in order to obtain benefits. Withdrawal or reduction of material reception conditions in cases of subsequent applications should only be possible

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<sup>70</sup> See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Article 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19, available at: <http://www.unhcr.org/refworld/docid/47b17b5b39c.html>, which in paragraph 38 states, based on the principle of non-discrimination, that asylum-seekers “should enjoy equal treatment in access to non-contributory social security schemes including reasonable access to health care and family support consistent with international standards”.

<sup>71</sup> See also UNHCR, *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, footnote 17 above.

<sup>72</sup> The amended wording conforms to Article 31(1) of the 1951 Convention on illegal entry or stay.



if the determining authority has rejected the asylum application on the basis of an adequate and complete examination of its substance (in line with the Qualification Directive<sup>73</sup>) and further to a personal interview. When the claim is considered as a subsequent application following an explicit withdrawal of the application, reduction or withdrawal of material reception conditions should be possible only if the applicant has been informed of the consequences of the explicit withdrawal.<sup>74</sup> Material reception conditions should be re-established once the subsequent application is considered to be admissible following a preliminary, examination that establishes that there are new elements or findings which significantly add to the likelihood of the applicant qualifying for international protection, including in the form of a significant change in the personal circumstances of the applicant, or a significant change in the situation in the country of origin.<sup>75</sup> The preliminary examination must be conducted within reasonable time limits.

The requirement for provision of minimal material reception conditions to all asylum-seekers has been strengthened by requiring Member States to ensure health care in accordance with article 19 (recast article 20(3)) in all circumstances. UNHCR welcomes this proposed amendment, as well as omission of the wording which limited such minimum entitlements to “emergency” healthcare only. These changes, if adopted, should help prevent serious health issues arising for asylum-seekers in EU Member States.

### **17. Persons with special reception needs (articles 21 and 22)**

UNHCR welcomes the proposal in amended recast article 21(1) to include victims of trafficking and persons with mental health illnesses or post traumatic disorders in the list of vulnerable persons.

UNHCR welcomes the provision in the last sentence of article 21, which imposes an obligation on Member States to “take into account in national legislation (...) the specific situation of vulnerable groups,” and in article 22 (1), to “establish mechanisms for identifying vulnerable persons”. In strengthening the wording of the current Directive, these changes, if adopted, will provide a valuable tool for ensuring in practice that the claims of vulnerable asylum-seekers can be presented effectively, with all information and evidence required to enable the authorities to render an informed and accurate decision.

UNHCR notes that this provision, correctly implemented, would help to address one of the main shortcomings identified in the implementation of the Reception Conditions Directive to date. The Commission’s 2007 report on the Directive’s application lists nine Member States which do not have an identification procedure in place and states: “Identification of vulnerable asylum-seekers is a core element without which the provisions of the RCD aimed at special treatment of these persons will lose any meaning.”<sup>76</sup>

It should furthermore be noted that for a number of reasons, including shame or lack of trust, asylum-seekers may be hesitant to disclose certain experiences immediately. This may be the case, amongst others, for persons who have suffered torture, rape or other forms of psychological, physical or sexual violence. UNHCR notes that later disclosure of such

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<sup>73</sup> See footnote 28 above.

<sup>74</sup> Article 12 (1)(a) of the European Union: European Commission, *Amended proposal for a Directive of the European Parliament and the Council on common procedures for granting and withdrawing international protection status (Recast)*, 1 June 2011, COM(2011) 319 final, Article 12 (1)(a), at: <http://www.unhcr.org/refworld/docid/4e3941c22.html>.

<sup>75</sup> *Ibidem*, Article 40(2).

<sup>76</sup> See footnote 7 above.

experiences should not be held against asylum-seekers, nor inhibit their access to any special support measures or necessary treatment. Special needs resulting from such experiences should ideally be identified at an early stage of the process, as they may otherwise inhibit severely the applicant's ability to communicate effectively, and the authorities' ability to gather evidence.

Early identification of vulnerability and special needs, at the earliest practicable stage, could be critical to the quality of the asylum determination. In this context, UNHCR welcomes that Article 24 (1) of the Amended proposal for an Asylum Procedure Directive<sup>77</sup> permits Member States to use the mechanism of article 22 (1) to identify applicants in need of special procedural guarantees.

UNHCR welcomes the wording of the last sentence in amended recast article 22(1), which foresees that regardless of when such needs are identified, Member States shall ensure support for persons with special needs throughout the asylum procedure, and shall provide for appropriate monitoring of their situation. This is in line with the formulation previously suggested by UNHCR in its comments to the first recast proposal.

### **18. Separated or unaccompanied children (articles 23 and 24)**

UNHCR welcomes the incorporation of a requirement for a Best Interest Assessment and Determination for unaccompanied children in amended recast articles 23(2) and 23(3). This will help ensure that Member States' practices and treatment of children adheres to their obligations under article 3 of the UN Convention of the Rights of the Child.<sup>78</sup>

UNHCR furthermore welcomes the wording of new article 24(1), which requires the appointment as soon as possible of a qualified guardian or representative for an unaccompanied or separated minor, who acts in the child's best interest. This provision addresses concerns highlighted previously in the 2007 Odysseus report, which pointed out that "the practical implementation of the legal provisions [relating to the legal representation of unaccompanied minors] creates a problem in several Member States, resulting either from the absence of a legal guardian or from the role that is assigned to him."<sup>79</sup> In light of the decisive role guardians or representatives can play in ensuring the protection of unaccompanied and separated children, UNHCR would support the development of further tools at practical level, such as guidelines defining the appropriate qualifications and roles for a guardian or representative,<sup>80</sup> who should be independent and distinct from the legal adviser in order to avoid a conflict of interest.<sup>81</sup> This could be a possible task or area of work for the EASO in future, and could potentially be of significant benefit to Member States which

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<sup>77</sup> See footnote 74 above.

<sup>78</sup> See footnote 24 above.

<sup>79</sup> See footnote 8 above, at page 82. Specific problems relating to the appointment and/or role of guardians are reported in the United Kingdom, Hungary, and the Czech Republic.

<sup>80</sup> Such guidance has been suggested also by some observers for inclusion in the Directive: see Save the Children, *Save the Children comments on the revision of the reception directive*, 4 November 2008, available at: [http://www.savethechildren.net/alliance/europegroup/SC\\_Submissions\\_on\\_the\\_Revision\\_of\\_the\\_EC\\_Reception\\_Directive.pdf](http://www.savethechildren.net/alliance/europegroup/SC_Submissions_on_the_Revision_of_the_EC_Reception_Directive.pdf). The proposed definition and role is based on: *CRC General Comment No. 6 (2005)* see footnote 61 above; and Separated Children in Europe Programme, *SCEP Statement of Good Practice*, Fourth edition, March 2010, available at: <http://www.unhcr.org/refworld/docid/415450694.html>.

<sup>81</sup> See CRC General Comment No. 6, footnote 61 above, at para. 36: "In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation."

do not have such guidance in place at present nationally.<sup>82</sup>

**Recommendation:** UNHCR would suggest adding the following wording at the end of amended recast article 24(1): “Institutions or individuals whose interests could potentially be in conflict with those of the child should not be eligible for guardianship.”<sup>83</sup>

### 19. Victims of Torture and Trauma (article 25)

UNHCR welcomes amended recast article 25 (1), providing that victims of torture, rape or other serious acts of violence should have access to rehabilitation services that will enable them to obtain medical and psychological treatment. It also supports the obligation in article 25(2) for Member States to ensure the continued training of those working with such victims and EASO’s role in this<sup>84</sup>, as well as respect for confidentiality.

### 20. Appeals (article 26)

Amended recast article 26(1) strengthens the grounds on which asylum-seekers may challenge decisions relating to reception conditions, by extending their appeal rights to include all decisions relating to “withdrawal or reduction” of reception conditions. In addition, recast article 26(2) provides for legal assistance free of charge where the asylum-seeker cannot afford the costs and “in so far as it is necessary to ensure their effective access to justice.” This last provision reflects a similar guarantee for detained asylum-seekers in amended recast article 9(6). UNHCR welcomes the inclusion of this important further safeguard. In line with the case law<sup>85</sup> of the ECtHR and the EU Charter<sup>86</sup>, these measures improve the likelihood of access to an effective remedy, which is essential to ensure consistent adherence to the entitlements set out in the Directive.

### 21. Guidance, monitoring and control (article 28)

The continuing disparities in Member States’ implementation of the RCD highlight the need to strengthen reporting and monitoring. Various reports, including from delegations of the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) following their visits to reception and detention centres in several Member States,<sup>87</sup> have documented problems and divergences that are widely acknowledged as needing urgent rectification.

Amended recast article 28 proposes to strengthen existing monitoring provisions through the insertion of a national monitoring mechanism and a specific obligation to report to the European Commission. UNHCR considers that such a requirement for systematic reporting

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<sup>82</sup> Defence for Children International recently published *Core Standards for guardians of separated children in Europe: Goals for guardians and authorities*, 2011, ISBN: 978-90-74270-28-1, available at: <http://www.unhcr.org/refworld/docid/4ee998592.html>.

<sup>83</sup> See footnote 74 above, The European Parliament had adopted the same wording in its position on the Recast proposal, see footnote 3 above. General Comment No. 6 CRC acknowledges this possible difficulty when it states that: “Agencies or individuals whose interests could potentially be in conflict with those of the child’s should not be eligible for guardianship”.

<sup>84</sup> See article 6(4) EASO Regulation of 19 May 2010, footnote 11 above.

<sup>85</sup> See para. 301 in *M.S.S. v. Belgium and Greece*, see footnote 16 above, in which the ECtHR noted a lack of legal aid effectively depriving the asylum seekers of legal counsel.

<sup>86</sup> Article 47 of the EU Charter, see footnote 10 above, contains the right to an effective remedy and to a fair trial and sets forth that: “Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

<sup>87</sup> The reports are available via <http://www.europarl.europa.eu>.

would enable the European Commission more effectively to carry out its responsibility to ensure compliance with EU law in this field.

Practical cooperation initiatives – including in situations of particular pressure, as defined in the Regulation establishing the European Asylum Support Office<sup>88</sup> - would also be a potentially important way to help Member States maintain and improve the quality of reception in line with their *acquis* obligations. Current efforts under the EASO's leadership, including in Greece through the deployment of Asylum Support Teams, have demonstrated concretely the positive potential that expert advice and support on reception issues – including, in Greece's case, design and operation of reception facilities – can achieve. In addition to Member States' seconded experts, other stakeholders – including UNHCR and civil society organizations – have experience and knowledge that could contribute significantly to this work.

## Conclusion

UNHCR acknowledges that many current challenges with respect to reception of asylum-seekers relate to failure effectively to implement existing provisions of the RCD. However, there are also areas where the current provisions merit clarification or strengthening. Many of the proposed amendments would reduce scope for divergent interpretation of the existing standards, or improve certain standards where needed to ensure conditions that facilitate effective presentation and pursuit of asylum claims. The expressed aim of the proposed amendments, to “ensure higher standards of treatment for asylum-seekers with regard to reception conditions that would guarantee a dignified standard of living in line with international law”,<sup>89</sup> underlines this ambition and the pressing needs identified across the EU at present.

UNHCR encourages Member States and the Parliament to seek ways to achieve agreement in a spirit of compromise. This is particularly important for key elements of the Directive relating to detention – including in particular detention of children – safeguards for vulnerable persons; and material reception conditions. UNHCR hopes that negotiations on the proposed amendments, as well as efforts to promote practical cooperation in the field of reception of asylum-seekers, remain focused on the Directive's protection objective. Given the critical importance of adequate reception conditions to the process of presenting a claim comprehensively and accurately – and, in turn, to the reaching of a correct and high quality asylum determination – this is in the interest of Member States, asylum-seekers, and the Common European Asylum System as a whole.

UNHCR  
Bureau for Europe  
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<sup>88</sup> See footnote 11 above.

<sup>89</sup> *Ibid.*, footnote 1, Explanatory Memorandum.