

HEINONLINE

Citation: 4 Inter-Am. & Eur. Hum. Rts. J. 85 2011



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue Nov 11 12:15:52 2014

-- Your use of this HeinOnline PDF indicates your acceptance
of HeinOnline's Terms and Conditions of the license
agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope
of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=2030-7942](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=2030-7942)

BLOCKING ASYLUM: THE STATUS OF ACCESS TO INTERNATIONAL PROTECTION IN GREECE

MARIANA GKLIATI*

“Our Sustainer, lead us forth to freedom out of this land
whose people are oppressors”
The Quran 4:75

1. INTRODUCTION

Increasingly, many western states adopt restrictive asylum policies and practices in order to deter potential asylum seekers from seeking refuge in their land. They are often successful, but at the expense of violating fundamental human rights. The restrictions reach the extent of blocking the access to the asylum procedure, not giving individuals the chance to seek international protection.

This article examines whether law and practice in Greece with respect to access to the asylum procedure are in violation of EU law and the European Convention on Human Rights (ECHR). When the situation of asylum in Greece is examined, the discussion always focuses on low recognition rates and detention conditions. Although it can mean the nullification of the right in practice, the problem of access to the asylum procedure rarely makes headlines.

The present research aspires to shed light on the worrying situation of access, not from an international refugee law perspective but from a regional human rights one. International refugee law has been placed within the human rights paradigm and its standards are incorporated in EU law and the ECHR. However, the primary reason for taking this perspective is the search for effective results, namely changing abusive policies. Greece can potentially be held accountable before regional instruments, while there is in practice no such mechanism under the Geneva Convention Relating to the Status of Refugees (Geneva Convention 1951). There is no individual complaints

* Mariana Gkliati, Legal Research Master student, University of Utrecht, <marianagkl@yahoo.gr>. The author expresses her gratitude to Prof. Leo Zwaak for the supervision of the research and his insightful comments on this article.

procedure, while the Office of the United Nations High Commissioner for Refugees (UNHCR) has failed to activate its supervisory role.¹ Given that human rights law is the only effective device available to strengthen and enhance existing standards, law and practice in Greece will be examined in the light of EU law and the ECHR. However, the legacy and knowledge of international law cannot be omitted in the examination of the origin and the content of the right to asylum.

It needs to be made clear that this paper does not deal with the European Union border control policies or the role of Frontex with respect to access to asylum. Although many writers² would agree that access to the asylum procedure is being obstructed by the European Union immigration policies and the instruments implementing them, it is dealt with in this paper as a separate issue that could be the subject of further research.

Finally, for the purpose of the present article, data have been collected by both desk and empirical research. Namely, international, regional and national legislation and case law have been examined, while data concerning the situation in Greece have been gathered as part of the qualitative research conducted in the country. A number of NGOs and independent national institutions have been interviewed and their reports have been studied. The interviewees are actors with significant experience in the field of refugee law who conduct field research in Greece or deal with individual cases.

2. ASYLUM: THE RIGHT AND THE OBLIGATION

Every discussion on asylum should start by unravelling the basic aspects of the debate on the definition of the right itself. Although, we tend to connect the right to asylum with refugees, it is, in fact, a customary right of the recipient state.³ It springs from the principles of state sovereignty and is translated as the right of the country of refuge to grant a foreign national asylum, without this being conceived by the state of the person's nationality as a hostile act. A right "to be granted asylum" was mentioned in draft proposals but was never included in the final document of the Geneva Convention 1951,⁴ with explicit reference to a desire not to impose on the states a correlative obligation to

¹ The UNHCR has supervisory responsibility over the Geneva Convention 1951 by virtue of Article 35 of that Convention, and the 1950 Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res. 428(V), 14 Dec. 1950; N. Mole, *Asylum and the European Convention on Human Rights*, (Strasbourg, Council of Europe Publishing 2007, 4th ed.), p. 17.

² See for instance: B. Vandvik, "Extraterritorial Border Controls and Responsibility to Protect: A View from ECRE", 1 *Amsterdam law forum* (2008), p. 27; R. Byrne (ed.), E. Aukot, B. Chimni and others, *The Refugee Law Reader* (Budapest, Hungarian Helsinki Committee, 2008 5th ed.), p. 124.

³ A. Vibeke Egli, *Mass Refugee Influx and the limits of Public International Law* (London, Martinus Nijhoff Publishers 2002), p. 13.

⁴ R. Plender and N. Mole, "Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments", in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge, Cambridge University Press 1999), p. 81.

grant asylum.⁵ Thus, for international law, it remained a right of the sovereign state with no strings attached⁶ other than the prohibition of refoulement in Article 33.⁷ This view is reaffirmed in the 1967 Declaration on Territorial Asylum⁸ – product of a series of attempts that failed to result in a binding treaty – where it is made clear that the right to asylum is an “exercise of [state] sovereignty”,⁹ reduced only to the extent of Article 3(1) (prohibition of expulsion or compulsory return), as well as in Article 1(23) of the Declaration to the UN World Conference on Human Rights in 1993.¹⁰

In the rather idealistic words of Reinhard Marx, one of Germany’s leading asylum lawyers, “(the recipient) state is in effect acting on behalf of the International Community, which by developing refugee instruments and customary rules, has determined that lack of national protection for the refugee should be substituted by adequate international protection.”¹¹ However, this scenario does not always reflect reality, as noted by Ann Vibeke Egli.¹²

A quite different approach is taken by Maria-Teresa Gil-Bazo, who talks about the right to be granted asylum and refers to it as the “invisible right.”¹³ She argues that the Geneva Convention 1951 is not clear as to who is entitled to the right: the states or the individuals. Equally dubious is, according to her,¹⁴ EU legislation, the EU Charter of Fundamental Rights (henceforth the Charter) and the Qualification Directive.¹⁵ She nevertheless accepts that, although the right to asylum was traditionally a right of the state, since the twentieth century, when the language of human rights was introduced into international law, it has acquired a dual character. Thus, despite the absence of an

⁵ T. Gammeltoft-Hansen and H. Gammeltoft-Hansen, “The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU”, 10 *European Journal of Migration and Law* (2008), p. 446.

⁶ C. Harvey, “Taking Human Rights Seriously in the Asylum Context? A Perspective on the Development of Law and Policy”, in F. Nicholson and P. Twomey (eds.), *Current Issues in UK Asylum Law and Policy* (Dartmouth, Ashgate 1998), p. 213–221; A. Edwards, “Human Rights, Refugees, and The Right ‘To Enjoy’ Asylum”, 17 *International Journal of Refugee Law* (2005), p. 296.

⁷ “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

⁸ UNGA Res. 2312 (XXIX), 14 December 1967.

⁹ Article 1(1) 1967 Declaration on Territorial Asylum.

¹⁰ Article 1(23) Vienna Declaration and Program of Action of 25 June 1993, UN doc. A/CONF.157/23.

¹¹ R. Marx, “Non-refoulement, Access to Procedures and the Responsibility for Determining Refugee Claim”, 7 *International Journal of Refugee Law* (1995) p. 388.

¹² Vibeke Egli, *supra* n. 3, p. 13.

¹³ M.T. Gil-Bazo, “The Charter of Fundamental Rights of the European Union and the Right to Be Granted Asylum in the Union’s Law”, 27 *Refugee Survey Quarterly* (2008) p. 37.

¹⁴ M.T. Gil-Bazo, “Refugee status and subsidiary protection under EC law: the qualification directive and the right to be granted asylum”, in A. Baldaccini, E. Guild, and H. Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Oxford, Hart 2007), p. 236–239.

¹⁵ Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 29 April 2004.

explicit reference in the international treaties and the long lasting tradition of state sovereignty, we should accept that the right has evolved into an implicit subjective right of the individual, which correlates with the already well-established discretionary power of the state.¹⁶

Other commentators take a more moderate position, arguing that although there is no right to be “granted” asylum *de jure*, such a right may exist *de facto*,¹⁷ explained as a restriction to the discretion of the states by treaty law and other rules.¹⁸

In any case, the substantive right to be granted or to obtain asylum is recognised in neither the Geneva Convention 1951 and the New York Protocol 1967, nor any other international treaty or court. As it is enshrined in Article 14(1)¹⁹ of the Universal Declaration of Human Rights, it includes the right to seek and to enjoy asylum from persecution. Its wording intends to grant a procedural right: the right to an asylum process,²⁰ whereas the reference to enjoying asylum relates to an implicit right to “benefit from asylum”,²¹ a concept requiring host states to adhere to particular practices, especially of a welfare nature. The Geneva Convention 1951, in several articles, grants refugees the same legal rights and access to employment, education, housing and social security as nationals, while the right to family reunification is implicit in the non-discrimination provisions and the preamble.²²

A necessary precondition for the asylum enterprise, resulting from Articles 1 and 33 read together, is, apparently, the existence of an accessible procedure in order for the recipient state to determine whether or not an individual qualifies for international protection.²³ The procedure must be open to anyone who wishes to apply for asylum, and the validity of each claim must be considered individually on its merits. Neither the Geneva Convention 1951, nor the New York Protocol 1967 provides a specific procedure for the determination of the status of refugees, yet it is reasonably argued that there is an implied right,²⁴ while it is generally recognized that the Convention cannot be applied without a fair and efficient procedure.²⁵ The need for access to the procedure

¹⁶ Gil-Bazo, 2008, *supra* n. 13, p. 38–41.

¹⁷ T. Einarsen, “The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum”, 2 *International Journal of Refugee Law* (1990), p. 361; Plender and Mole, *supra* n. 4, 1999, p. 364.

¹⁸ G. Goodwin-Gill, *The Refugee in International Law* (Oxford, Oxford University Press 1996, 2nd ed.), p. 202–203; D. Joly, *Heaven or Hell? Asylum Policies and Refugees in Europe* (USA, St. Martin’s Press Inc. 1996), p. 1.

¹⁹ For the legislative history of the Article, see Gammeltoft-Hansen and Gammeltoft-Hansen, *supra* n. 5.

²⁰ Gammeltoft-Hansen and Gammeltoft-Hansen, *supra* n. 5, p. 439.

²¹ Edwards, *supra* n. 6, p. 296–302.

²² T.J. Hatton, *Seeking Asylum: Trends and Policies in the OECD* (London, Centre for Economic Policy Research 2011), p. 9, <www.cepr.org/pubs/books/cepr/Seeking_Asylum.pdf>.

²³ *Ibid.*

²⁴ Edwards, *supra* n. 6, p. 301.

²⁵ UNHCR comments on the European Commission’s Proposal for a recast of the Dublin II Regulation, 18 March 2009, p. 1–2.

has been recognised by states on several occasions,²⁶ while procedural guarantees, such as access to information, legal aid, and interpretation are also deemed necessary.

The substance of the right is reflected in Articles 31 and 33 that regulate the prohibition of penalisation and refoulement respectively. As stated in an UN report of June 1988,²⁷ asylum consists of several elements: admitting a person to the territory of a State, allowing the person to remain there, refusing to expel or extradite and not prosecuting, or punishing a person, or otherwise restricting the person's liberty. Thus, illegal entry or illegal presence in the country cannot be the sole reason for imposing penalties to asylum seekers, and cannot prejudice admission into the asylum procedure or the outcome of that procedure.²⁸

The second substantive element of the right, i.e. the principle of non-refoulement, is a core element of international protection and the first concern of the asylum seeker. It is a principle of customary international law²⁹ that has acquired the status of *jus cogens*, a peremptory norm from which no derogation is permitted.³⁰ It is a higher norm that states cannot violate or derogate from, irrespective of its inclusion in an international instrument. Non-refoulement is usually connected to the prohibition of torture and cruel or degrading treatment or punishment, and covers any act of the state, "including interception, rejection at the frontier, or indirect *refoulement*",³¹ which could result in returning the refugee or asylum seeker to the territories of a state, where his or her life, rights and freedoms are threatened. A non-refoulement component is directly or indirectly included in several other key international and regional instruments, such as the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Charter on Human and Peoples' Rights (African Charter), and the American Convention on Human Rights.

The right to seek asylum is naturally connected to the right to leave one's country. But, if there is a right to departure, does this mean that there is also a right to arrival?

²⁶ Conclusion of ECHR No. 81 (XLVIII) 1997, para. (h) (A/AC.96/895, para. 18); Conclusion No. 82 (XLVIII) 1997 para.(d)(iii) (A/AC.96/895, para.19); Conclusion No. 85 (XLIX), 1998, para. (q) (A/AC.96/911, para. 21.3).

²⁷ C.L.C. Mubanga-Chipoya., *Final Report, The Right of Everyone to Leave any Country, including His Own, and to Return to His Country*, UN doc. E/C.4/Sub.2/1988/35, June 1988, p. 103–106.

²⁸ Hatton, *supra* n. 22, p. 9.

²⁹ Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol, above n.14, Preambular paragraph 4, UNHCR, *Summary Conclusions on Non-Refoulement*, Global Consultations on International Protection, Lisbon Expert Roundtable 3–4 May 2001, Washington D.C.; E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement: Opinion", in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, Cambridge University Press 2003), p. 87–177.

³⁰ J. Allain, "The *jus cogens* nature of non-refoulement", 13 *International Journal of Refugee Law* (2001), p. 538–542.

³¹ UNHCR Summary Conclusions: "The Principle of Non-Refoulement", June 2003, <www.unhcr.org/refworld/docid/470a33b00.html>.

On this issue, there is a great chasm between developing countries that claim even a right to immigration and the developed ones that aim mostly at state sovereignty and the right of the state to control the entry of aliens.³² The formulation of Article 12 of the ICCPR and Article 2 of Protocol No. 4 to the ECHR does not imply a right to arrival. On the other hand, the African Charter recognizes the right of individuals when persecuted not only to seek, but also to obtain asylum in other countries.³³ Equally progressive is the American Convention on Human Rights that enshrines in Article 22(9) the right “to seek and be granted asylum in a foreign territory.”

Islam also takes a quite liberal approach towards both migrants and refugees and considers the granting of asylum and protection as a moral and legal obligation.³⁴ The seeking and the granting of asylum are connected to human dignity, which according to the Quran, has been conferred by God “on the children of Adam”,³⁵ and are embedded in the Muslim tradition that goes back to the relocation of the Prophet Muhammad and other immigrants in Medina from Mecca in 622 C.E.³⁶ “Guided and inspired by the above indicated teachings and principles”,³⁷ Muslim states have always opened their doors to huge waves of immigrants, Muslim or non-Muslim, either from neighbouring countries or from the heart of Europe.

The broadest interpretation of the right to asylum by an international or regional supervisory body was given by the Inter-American Commission of Human Rights in the case of *The Haitian Center for Human Rights et al. v. United States*.³⁸ The case concerned a boat carrying asylum seekers leaving Haiti and heading towards the Americas. The United States responded immediately by sending their ships to the international waters and turning the Haitian boat back with a winch. The Haitian Center for Human Rights initiated proceedings before the Inter-American Commission, where for the first time arguments referring to the right to asylum were heard. The Commission chose to avoid a direct confrontation with the basic question, reasoning on the basis that the state had no way of knowing that the boat’s destination was the USA:

“Even if it is true ... that the President possesses inherent constitutional authority to turn back from the United States Government’s gates any alien, such a power does not authorize the interdiction and summary return of refugees who are far

³² H. Hannum, *The right to leave and return in international law and practice*, *International Studies in Human Rights* (Dordrecht, Martinus Nijhoff Publishers 1987).

³³ Article 12(3) of the African Charter.

³⁴ M. Abd al-Rahim, “Asylum: a Moral and Legal Right in Islam”, 27 *Refugee Survey Quarterly* (2008), p. 15.

³⁵ The Quran 17:70. For English translations from the Quran see M. Asad, *The Message of the Quran* (Gibraltar, Dar al-Andalus 1980).

³⁶ Abd al-Rahim, *supra* n. 34, p. 16–22.

³⁷ *Ibid.*, p. 22.

³⁸ IACHR (Report) Case 10.675, Report No. 51/96, 13 March 1997, *The Haitian Center for Human Rights et al. v. United States*.

from, and by no means necessarily heading to the United States. The United States Government's interdiction program had the effect of prohibiting the Haitians from gaining entry into The Bahamas, Jamaica, Cuba, Mexico, the Cayman Islands, or any other country in which they might seek safe haven.”

However, the Commission indirectly mentioned, for the first time, the right to “seek and receive asylum”. In any case, it did not recognise a right to immigration or freedom of movement.

3. THE RIGHT THROUGHOUT THE AGES

Contrary to popular belief, the history of asylum does not start with the Geneva Convention 1951 and the international regime for the protection of refugees. Its origins³⁹ can be tracked back to ancient Greece, imperial Rome, early Christianity, and, as mentioned above, the birth of Islam.

Religious persecution was usually the trigger for exile and seeking sanctuary in foreign lands.⁴⁰ The persecution of Christians by the Roman emperors between 64 and 313 B.C., the flights of the Huguenots (French Protestants) in the 16th and 17th centuries, and the pogroms against the Russian and Eastern European Jews in the late 19th century are only some of the most striking examples in Western history. A political element started emerging more actively in the 19th century, especially with the Spring of Nations of 1848.⁴¹ Nevertheless, persecutions had not been of a large scale.

It was the mass exodus of the 20th century that set the ground for the development of the international regime for the protection of human rights, and the protection of refugees in particular.⁴² Huge flows of people were being displaced from their homelands, because of the efforts of the newly created or reorganised states to create more homogenous populations.⁴³ This phenomenon became apparent mostly in the old territories of the disintegrated Ottoman Empire with the exchange of populations between Greece, Serbia, Bulgaria and Turkey. But it was the successive waves of people fleeing the two World Wars and the Communist regimes, that sealed the history of refuge. In 1945, it became apparent that over 30 million people had been forced by the nazi and fascist regimes to leave their homes in Europe and another 13 million ethnic Germans had been expelled mainly from Czechoslovakia, Poland and the Soviet Union.⁴⁴

³⁹ Edwards, *supra* n. 6, p. 299.

⁴⁰ Hatton, *supra* n. 22, p. 5.

⁴¹ *Ibid.*

⁴² Gil-Bazo, 2008, *supra* n. 13, p. 38.

⁴³ Hatton, *supra* n. 22, p. 5.

⁴⁴ Hatton, *supra* n. 22, p. 6.

Refugee protection has its origins in general principles of human rights⁴⁵ and there was no explicit reference to it until the Geneva Convention 1951, which defines, in Article 1, a refugee as a person who:

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

The definition above and the traditional distinction between refugees and migrants are based on the assumption that refugees, as opposed to migrants, do not have an element of choice and planning in their movements. Many writers view this distinction with a critical eye and contest it. On the basis of this critique lies the acknowledgement of the huge inequalities between the South and the West that goes together with the realization that “the issue of what is and what is not voluntary is inherently open to dispute.”⁴⁶ As noted by Fourlanos, the difference between a migrant and a refugee may be a question of degree rather than type.⁴⁷

The Geneva Convention 1951 was the first international agreement to make this distinction and regulate the most important issues concerning refugees. It conferred upon them specific rights and bound the signatory states to apply international human rights standards towards them.⁴⁸

However, the UN was hesitantly moving towards a rights-based approach to asylum law, already since the Universal Declaration of Human Rights (UDHR) and the ICCPR. Article 13(2) of the UDHR, as reaffirmed in Article 12(2) of the ICCPR, provides that “Everyone has the right to leave any country, including his own, and to return to his country.” Despite the states’ intentions for a right to asylum not to be found in the UDHR and the ICCPR, it is widely argued that it is implicit because of the very existence of the Geneva Convention 1951.⁴⁹ The right “to enter any country” may not be mentioned, but it “would make a nonsense of the 1951 Convention if this was not intended, at least for the purposes of status determination.”⁵⁰ After all, “the right to leave any country and the right to seek asylum are two sides of the same coin.”⁵¹

⁴⁵ Feller, Türk, and Nicholson, *supra* n. 29, p. 582.

⁴⁶ Vibeke Egli, *supra* n. 3, p. 18.

⁴⁷ G. Fourlanos, *Sovereignty and the Ingress of Aliens, With Special Focus on Family Unity and Refugee Law* (Stockholm, Almqvist and Wiksell International 1986).

⁴⁸ M. Elewa Badar, “Asylum Seekers and the European Union: Past, Present and Future”, 8 *International Journal of Human Rights* (2004), p. 159.

⁴⁹ K. Goldman Robert and M. Martin Scott, “International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law”, 5 *Human Rights Quarterly* (1983), p. 302, 309–310.

⁵⁰ Edwards, *supra* n. 6, p. 298.

⁵¹ *Ibid.*

The right was also secured by the Convention relating to the Status of Stateless Persons of 1954⁵² and the Convention on the Reduction of Statelessness of 1961.⁵³ The latest progressive development in international refugee law was the Protocol⁵⁴ to the Refugee Convention that was adopted in a UN conference in New York in 1967. The Protocol abolished the clauses of the Geneva Convention 1951 that restricted international protection to persons who were displaced due to events occurring in Europe before January 1951, thus, radically extending its scope.

Many would argue that the Geneva Convention 1951 is outdated and in need of a revision. However, this seems rather unlikely, since today's circumstances would not allow for such a liberal approach.⁵⁵ World War II and the Cold War generated refugees who were viewed with sympathy in Europe and North America.⁵⁶ People fleeing fascist, nazi, quisling, and communist regimes: this was the image of refugees that the drafters of the international documents had in mind and this can be proven by the geographic limitation of the Geneva Convention 1951 that restricts the protection only to people coming from Europe. The openness of western democratic states towards this kind of political refugees symbolized their superiority towards the regimes from where these people were fleeing. This is exactly where the Geneva Convention 1951 owes its "generosity."⁵⁷ As a further result, in the first years of the application of the Geneva Convention 1951, acquisition of refugee status was rather easily achievable.⁵⁸

Today, however, the conditions have changed and states are more reluctant to provide sanctuary to people in need of international protection.⁵⁹ This already started with the increasing flows of asylum seekers following the fall of the Berlin Wall and the disintegration of the Soviet Union and the former Yugoslavia.⁶⁰ But, even then, as *The Economist* observed: "rightly or wrongly the community is less in a panic over immigrants from the east. They are, after all, fellow Europeans, often with useful skills to offer and many of them anyway likely to return home when economic circumstances permit."⁶¹

Today's unemployment, the large flows of asylum seekers and the image of modern refugees have made states, especially in Europe, reconsider their asylum

⁵² Convention relating to the Status of Stateless Persons of 1954.

⁵³ Convention on the Reduction of Statelessness of 1961.

⁵⁴ Protocol relating to the Status of Refugees of 1967.

⁵⁵ G. Papageorgiou, Seminar on European Asylum law held, Athens, May 2011.

⁵⁶ Hatton, *supra* n. 22, p. 4.

⁵⁷ *Ibid.*

⁵⁸ Mole, 2005, *supra* n. 1, p. 10.

⁵⁹ *Ibid.*

⁶⁰ Badar, *supra* n. 48, p. 160.

⁶¹ "The other fortress Europe: European Community is a magnet for millions of would-be immigrants from the poor east and south; the Community is trying, for better or worse, to devise ways of keeping them out. It's not going to be easy.", *The Economist*, 1 June 1991, <www.highbeam.com/doc/1G1-10822271.html>.

policies. Now, claimants, primarily from Africa and the Middle East, come to Europe in hordes because of the international political situation and the proximity to the areas of instability. As a result of this, each European country “is trying to be stricter than its neighbour”⁶² in an effort to become less attractive to asylum seekers.

At the same time, the poor, developing states of the global South continue to receive the vast majority of the world’s refugees.⁶³ Only 15% of refugees reach Europe,⁶⁴ while most of them do not make it very far from their homeland and seek refuge in neighbouring countries.⁶⁵ It is striking that around three-quarters of the world’s refugees are located in Asia and Africa.⁶⁶ UNHCR’s report *Global Trends 2010* reveals that Pakistan, Iran and Syria are hosting the largest refugee population, 1.9 million, 1.1 million and 1 million people respectively, while Germany, the developed country that hosts the largest number of refugees, is refuge for 594,000 people.⁶⁷

It is impressive that Sudan, a country that has been afflicted by poverty, prolonged instability and civil war, has been home to a large number of refugees from Chad, Uganda, Congo and Ethiopia,⁶⁸ which by the mid-1980s exceeded 1.5 million people.⁶⁹ Its refugee policy has often been described as one of the most liberal in the world⁷⁰ and its 1974 legislation was described by Peter Nobel, a distinguished Swedish lawyer and a descendent of Alfred Nobel, “as a model for other countries.”⁷¹

Finally, it was no other than the UN High Commissioner for Refugees who in his World Refugee Day message, in 2005, stated that “[w]hile developing countries, least able to afford it, host most of the world’s refugees, many industrialised nations continue to impose ever stricter controls on asylum.”

4. THE RESPONSE OF THE EUROPEAN UNION

The toughening of asylum legislation among European Union countries was based on the assumption that asylum seekers act as law consumers responding to push and pull

⁶² Badar, *supra* n. 48, p. 160.

⁶³ Gammeltoft-Hansen and Gammeltoft-Hansen, *supra* n. 5, p. 455.

⁶⁴ E. Nazarski, “Protection of, or Protection from, Refugees? Reflections on Border Controls and Movement of Persons at the European Borders”, 1 *Amsterdam Law Forum* (2008), p. 41.

⁶⁵ Hatton, *supra* n. 22, p. 21, Nazarski, *supra* n. 64, p. 41.

⁶⁶ Hatton, *supra* n. 22, p. 21.

⁶⁷ UNHCR, *Global Trends 2010*, <www.unhcr.org/4dfa11499.html?>, “UNHCR 2011 refugee statistics: full data”, *The Guardian*, 20 June 2011, <www.guardian.co.uk/news/datablog/2011/jun/20/refugee-statistics-unhcr-data>.

⁶⁸ Abd al-Rahim, *supra* n. 34, p. 23.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ P. Nobel, *Refugee Law in the Sudan* (Uppsala, Scandinavian Institute of African Studies 1982), p. 1.

factors of the various policies,⁷² namely people would choose to lodge their application in countries offering the highest level of protection.⁷³ States, in order to avoid being chosen as asylum destinations, are competing with each other in a race to the bottom.⁷⁴

Aiming to fight off “asylum shopping” and the inequality it caused, European states chose to coordinate their actions. Some saw the solution in burden sharing in the sense of redistributing the claimants more equitably. However, the relevant German proposal to the European Council in 1994 was rejected, notably by the UK.⁷⁵

The next suggestion that was believed to be more prosperous was to harmonize national asylum legislation at a European level.⁷⁶ The commitment to harmonization of policies across the EU was declared in the Treaty of Amsterdam,⁷⁷ when asylum policy was transferred from the third pillar to the first, thus giving the “Schengen Acquis” a supranational character.⁷⁸ The decision-making process became centralized and the Commission had the right to propose legislation as from 2002. Nevertheless, the Commission did not manage to take full control over these issues, since it met with resistance from the states that wanted to maintain a certain sovereign control.⁷⁹

The second step towards harmonization was taken in the Finnish town of Tampere in 1999, where the European Council articulated the vision of a Common European Asylum System (CEAS) in an area of freedom, security and justice, whilst reaffirming the absolute respect of the member states to human rights and their commitment to the full and inclusive application of the Geneva Convention 1951 and its Protocol, especially the principle of non-refoulement.⁸⁰ In the conclusions of the meeting, it was provided that the CEAS “should include common standards for fair and efficient asylum procedures in the member states.”

The Tampere multi-annual Programme did manage to create some convergence in policy and practice, but it was not until 2004 that CEAS moved to its second phase with the Hague Programme that focused on deeper harmonization in several areas.

⁷² C. Costello, “The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?”, 7 *European Journal of Migration and Law* (2005), p. 37–38.

⁷³ S. Barbou des Places, “Evolution of Asylum Legislation in the EU: Insights from Regulatory Competition Theory” (EU Working Paper RSC 2003/16), p. 3.

⁷⁴ G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection, and the Common Market of Deflection* (The Hague, Martinus Nijhoff Publishers 2000).

⁷⁵ Hatton, *supra* n. 22, p. 45–46.

⁷⁶ Costello, *supra* n. 72, p. 37–38.

⁷⁷ Treaty of Amsterdam of 1992, entered into force on 1 May 1999.

⁷⁸ Hatton, *supra* n. 22, p. 45–46; S. Juzz, “The Decline and Decay of European Refugee Policy”, 25 *Oxford journal of legal studies* (2005) p. 773–774.

⁷⁹ Juzz, *supra* n. 78, p. 774.

⁸⁰ E. Guild, “The Europeanisation of Europe’s Asylum Policy”, 18 *International Journal of Refugee Law* (2006), p. 642–645; Hatton, *supra* n. 22, p. 45–46, Juzz, *supra* n. 78, p. 775–776, Nazarski, *supra* n. 64, p. 39.

There, the EU set the target to have a uniform asylum procedure by 2010,⁸¹ with the main areas of harmonization being border control and surveillance. This resulted in the establishment of the Eurodac fingerprint database in 2003 and the Frontex border control agency in 2005. As put more clearly by Guild: “The emphasis of the Hague Programme is to stop or move the asylum seeker beyond the common external border to the territory of third states.”⁸²

The Hague Programme has not been completed, but a European Asylum Support Office has been created in Malta to take over the task of the harmonization of asylum procedures.⁸³ Furthermore, the Hague Programme was replaced by the Stockholm Programme that was agreed in 2009 and has set 2012 as a deadline for completion.

The six most important instruments that constitute the CEAS are the Asylum Procedures Directive, the Qualification Directive, the Reception Conditions Directive, the Dublin II Regulation, the Eurodac Regulation and the Frontex Regulation.

The Procedures Directive⁸⁴, introducing a minimum framework of procedures for granting or withdrawing refugee status, is the first measure of the CEAS. It sets down the rights of refugees and asylum seekers, and the guarantees for a common fair and efficient procedure with the objective to limit the secondary movements of claimants between Member States.⁸⁵

The Qualification Directive⁸⁶ establishes a set of minimum criteria to be used in the refugee status determination procedure, and it is the first instrument binding on EU Member States to extend international protection to people that fall outside the scope of the Geneva Convention 1951 and the New York Protocol 1967 (subsidiary protection).⁸⁷ Other regional treaties had preceded the Qualification Directive in this respect: the OAU Convention governing the Specific Aspects of Refugee Problems in Africa of 1969 and, in the Americas, the non-binding Cartagena Declaration on Refugees of 1984.⁸⁸ Its main objective is to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and to ensure that a minimum level of benefits is available to these persons in all Member States.⁸⁹

⁸¹ Nazarski, *supra* n. 64, p. 39.

⁸² Guild, *supra* n. 80, p. 645–647.

⁸³ Hatton, *supra* n. 22, p. 47.

⁸⁴ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

⁸⁵ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, preambular paragraph 6.

⁸⁶ Council Directive 2004/83/EC of 29 April 2004 on qualification.

⁸⁷ H. Storey, “EU Refugee Qualification Directive: a Brave New World?”, 20 *International Journal of Refugee Law* (2008), p. 5–7.

⁸⁸ *Ibid.*, footnote 12.

⁸⁹ Council Directive 2004/83/EC on qualification, preambular paragraph 6.

The Reception Conditions Directive,⁹⁰ once more with the purpose of limiting the secondary movements of applicants,⁹¹ lays down minimum norms concerning, among others, residence, freedom of movement, employment, family unity, education and health care for asylum seekers while their claims are being assessed.

The Dublin II Regulation⁹² establishes a new mechanism for determining the state responsible for examining an asylum claim with the objective to prevent abuse of asylum procedures in the form of multiple applications. This mechanism is backed up with a common database for fingerprints set up with the Eurodac Regulation.⁹³ In conclusion, the Frontex Regulation⁹⁴ sets up an autonomous EU agency to enhance the control of the external borders of the EU.

The new Lisbon Treaty has a dual function in the field of asylum: it repeats in Article 78 TFEU the commitments of the multiannual programmes, and it gives the Charter legally binding status and treaty rank.⁹⁵ Two provisions of the Charter are particularly relevant for the purposes of asylum. Article 18 regulates the right to asylum and provides that it shall be guaranteed with due respect to the rules of the Geneva Convention 1951 and the New York Protocol 1967, and in accordance with the Treaty establishing the European Community. According to the official explanations relating to the Charter, this last mention refers to Article 78 TFEU.⁹⁶ This article has given rise to a rich debate concerning the content of the “right to asylum” and whether it is only a right to seek⁹⁷ or also to be granted asylum.⁹⁸ It does, in any case, include at least a right to protection against refoulement,⁹⁹ that is also regulated in Article 19 of the Charter, which provides that no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to death penalty, torture or other inhuman or degrading treatment or punishment. This article shall be interpreted in accordance with the

⁹⁰ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

⁹¹ Council Directive 2003/9/EC of 27 January 2003 on reception conditions, preambular paragraph 8.

⁹² Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

⁹³ Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention.

⁹⁴ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

⁹⁵ Article 6 Lisbon Treaty.

⁹⁶ Explanations Relating to the Charter of Fundamental Rights, (2007) OJ C 303/17, p. 24.

⁹⁷ C. Harvey, “The Right to Seek Asylum in the European Union”, 1 *European Human Rights Law Review* (2004), p. 17–36.

⁹⁸ Gil-Bazo, 2008, *supra* n. 13, p. 33–52.

⁹⁹ V. Moreno-Lax, “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States: Obligations Accruing at Sea”, 23 *International Journal of Refugee Law* (2011), p. 208–209.

Strasbourg case law.¹⁰⁰ The content of the two articles has not yet been determined by the Court of Justice of the European Union (ECJ) and it remains to be seen how they will operate in practice.

5. THE RESPONSE OF THE COUNCIL OF EUROPE

At first sight, the European Convention on Human Rights seems to be of no relevance to refugees, since there is no express mention of asylum or the rights of refugees. The European Court of Human Rights has repeatedly stated that there is no such right enshrined in the ECHR.¹⁰¹ The reason for this seems to be that, when the ECHR was drafted, it was thought that the Geneva Convention 1951, which would be opened for signature the following year, would constitute a *lex specialis*, which would fully cover the need for international protection and the ECHR would be of a complementary nature.¹⁰²

In spite of the lack of a specific reference, the substantial body of jurisprudence that the European Court of Human Rights has generated since 1989 “sets the standards for the rights of asylum seekers all across Europe.”¹⁰³ The Court starts from the premise that a key attribute of national sovereignty is the right of states to admit or exclude aliens from their territory.¹⁰⁴ But, if exclusion causes a breach of some other provision of international law, states are bound to admit aliens. After all, it would be incompatible with the ECHR itself and the “common heritage of political traditions, ideas, freedom and rule of law”,¹⁰⁵ were the signatory states knowingly to surrender a person to another state, where there were substantial grounds for believing that he or she would be in danger of being subjected to torture or inhuman or degrading treatment or punishment.¹⁰⁶

The question of applicability of the ECHR in such cases was first considered in substance in the case of *Soering v. the UK*,¹⁰⁷ where the Court held that the long period on death row imposed on persons charged with a capital crime, amounts to torture, inhumane or degrading punishment and, thus, the expulsion of the German national concerned to the USA violated Article 3.

¹⁰⁰ Explanations Relating to the Charter of Fundamental Rights (2007), p. 24.

¹⁰¹ ECtHR (Judgment) 30 October 1991, Case Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, *Vilvarajah and Others v. the United Kingdom*; ECtHR (Judgment) 13 January 2007, Case No. 1948/04, *Salah Sheekh v. the Netherlands*. The decisions and judgments of the ECtHR are available on <www.echr.coe.it>.

¹⁰² Mole, 2007, *supra* n. 1, p. 10.

¹⁰³ *Ibid.*, p. 19.

¹⁰⁴ Among others, ECtHR (Judgment) 13 January 2007, Case No. 1948/04, *Salah Sheekh v. the Netherlands*, para. 135.

¹⁰⁵ Preamble of the ECHR.

¹⁰⁶ ECtHR (Judgment) 7 July 1989, Case No. 14038/88, *Soering v the United Kingdom*.

¹⁰⁷ *Ibid.*

The first cases, which actually dealt with refused asylum seekers, were *Cruz Varas v. Sweden*¹⁰⁸ and *Vilvarajah and others v. the UK*.¹⁰⁹ In the first case, the Court found no violation of Article 3 in the expulsion of a Chilean national denied asylum in Sweden, reasoning that the government, at the time of expulsion, did not and could not have been aware of the facts that would allow it to assess the danger that the applicant would face upon return. It was, however, the first time that it recognized the extra-territorial effect of Article 3 applied to asylum seekers. In the second case, there was also no breach of Article 3, although the applicants, citizens of Sri Lanka, had been subjected to ill-treatment upon return to their country, following the refusal of their asylum claim in the UK. Once more, the reason the Court gave was that the UK government could not have been expected to have foreseen the consequences of the applicants' removal and return to Sri Lanka. These two judgements may not have been positive for the particular applicants, but they set the foundations for the application of the ECHR rights to asylum seekers.

In a sense, the ECHR offers even broader protection than the Geneva Convention 1951, since it applies not only to refugees, according to the restrictive definition of Article 1 of the Geneva Convention 1951, but to everyone. Its scope extends to asylum seekers, rejected asylum seekers and persons denied subsidiary international protection. The only condition set by Article 1 of the ECHR, is that they were within the jurisdiction of a Contracting Party, when their right that is protected under the ECHR was arguably violated.¹¹⁰

The basic rights that are relevant to refugees and asylum seekers can be divided into two categories. First, there are the rights that are connected to the principle of non-refoulement and protect the applicants against expulsion. Second, there are the rights that are necessary to safeguard the basic needs of refugees and asylum seekers in the territory of the host state.¹¹¹

Thus, the ECHR may not provide a right to asylum, but it indirectly prohibits the removal of a refused asylum seeker,¹¹² especially in cases where the applicant has or is about to face treatment that meets the threshold of severity of Article 3.¹¹³ Asylum issues may also arise¹¹⁴ with respect to Article 2 (right to life),¹¹⁵ Article 4 (prohibition of slavery), Article 5 (right to liberty and security of the person),¹¹⁶ Article 6 (right to

¹⁰⁸ ECtHR (Judgment) 20 March 1991, Case No. 15576/89, *Cruz Varas v. Sweden*.

¹⁰⁹ ECtHR (Judgment) 30 October 1991, Case Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, *Vilvarajah and Others v. the United Kingdom*.

¹¹⁰ H. Lambert, "The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities", *24 Refugee Survey Quarterly* (2005), p. 39; Storey, *supra* n. 87, p. 29–32.

¹¹¹ Lambert, *supra* n. 110, p. 39.

¹¹² Badar, *supra* n. 48, p. 162.

¹¹³ ECtHR (Judgment) 7 July 1989, Case No. 14038/88, *Soering v the United Kingdom*.

¹¹⁴ Mole, 2007, *supra* n. 1, p. 23.

¹¹⁵ ECtHR (Judgment) 8 November 2005, Case No. 13284/04, *Bader and Others v. Sweden*.

¹¹⁶ ECtHR (Judgment) 11 July 2006, Case No. 13229/03, *Saadi v. the United Kingdom*.

a fair trial),¹¹⁷ Article 7 (prohibition of retroactive criminal punishment),¹¹⁸ Article 8 (right to respect for private and family life),¹¹⁹ Article 9 (freedom of thought, conscience and religion),¹²⁰ Article 10 (freedom of expression), Article 11 (freedom of assembly and association), Article 12 (right to marry),¹²¹ Article 13 (right to an effective remedy),¹²² Article 14 (prohibition of discrimination),¹²³ Article 3 of Protocol No. 4 (prohibition of expulsion of own nationals), Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens),¹²⁴ Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens),¹²⁵ Article 4 of Protocol No. 7 (prohibition of double jeopardy), and Article 1 of Protocol No. 12 (general prohibition of discrimination).

The case law of the Court is constantly evolving, taking into account the personal circumstances of the applicants, but also the condition of the relevant country. A particularly vivid example of the evolution of case law in relation to the situation in the country of origin is a series of cases dating from 1991 to 2011. In the first case, *Vilvarajah v. the UK*,¹²⁶ as mentioned above, the Court held that the applicants had to show that they faced a personal risk upon return to Sri Lanka. Later, in *Salah Sheekh v. the Netherlands*,¹²⁷ the Court held that it sufficed for the applicant to show that he belonged to a particular group of people, where all of its members were at risk in Somalia. When the situation in Sri Lanka further deteriorated, the Court held in *N.A. v. the UK*¹²⁸ that the civil disorder and the lack of order in Sri Lanka were so bad that no one of Tamil ethnic origin should be returned. The judges said that the situation in the country was not so bad that no one should be returned, but it could be so in the future. The final judgment was *Sufi and Elmi v. the UK*,¹²⁹ where the Court held that it is not safe for anyone to be sent back to Somalia. The latter case has also a background element that if it were not disturbing, it could have been amusing. The UK government contested the argument that the situation in the country justified such a strict application of Article 3 by arguing that a Committee of experts had been sent to Africa and they came down to the conclusion that Somalia was not as dangerous as the applicants

¹¹⁷ ECtHR (Judgment) 26 June 1992, Case No. 12747/8, *Drozd and Janousek v. France and Spain*.

¹¹⁸ HRC (View) 10 November 2006, *Mohammed Alzery v. Sweden*, Case No. CCPR/C/88/D/1416/2005.

¹¹⁹ ECtHR (Judgment) 12 October 2006, Case No. 13178/03, *Mayeka and Mitunga v. Belgium*.

¹²⁰ ECtHR (Decision) 28 February 2006, Case No. 60148/00, *Z. and T. v. the United Kingdom*.

¹²¹ ECtHR (Decision) 3 September 2002, Case No. 60148/00, *Singh and Others v. United Kingdom*.

¹²² ECtHR (Judgment) 11 July 2000, Case No. 40035/98, *Jabari v. Turkey*.

¹²³ ECtHR (Judgment) 28 May 1985, Case Nos. 9214/80, 9473/81, 9474/81, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*.

¹²⁴ ECtHR (Judgment) 5 February 2002, Case No. 51564/99, *Conka v. Belgium*.

¹²⁵ ECtHR (Judgment) 5 October 2006, Case No. 14139/03, *Bolat v. Russia*.

¹²⁶ ECtHR (Judgment) 30 October 1991, Case Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, *Vilvarajah and Others v. the United Kingdom*; ECtHR (Judgment) 13 January 2007, Case No. 1948/04, *Salah Sheekh v. the Netherlands*.

¹²⁷ ECtHR (Judgment) 13 January 2007, Case No. 1948/04, *Salah Sheekh v. the Netherlands*.

¹²⁸ ECtHR (Judgment) 17 July 2008, Case No. 25904/07, *NA. v. the United Kingdom*.

¹²⁹ ECtHR (Judgment) 28 June 2011, Case Nos. 8319/07 and 11449/07, *Sufi and Elmi v. United Kingdom*.

presented it. However, the Committee did not carry out its inquiry in Somalia, but in Kenya with the explanation that it was too dangerous for them to be in Somalia.¹³⁰

6. PRESENT SITUATION IN GREECE

As mentioned above, the right to asylum is translated, although not exclusively, as a right to the asylum procedure; a procedure that needs not only be fair and efficient, but also accessible. The latter feature of the right is particularly problematic in Greece, one of the two (along with Italy) main entrances to Europe. In 2010, 90% of all irregular crossings into the EU took place in Greece,¹³¹ while the number of people entering the country irregularly almost quadrupled from 9,000 in 2009 to 34,000 in 2010.¹³²

6.1. STEPS TAKEN AFTER *M.S.S. V. BELGIUM AND GREECE*

Greece was transformed from a sending into a receiving country only in the late 1980s¹³³ and has not yet managed to build up a system which deals with asylum seekers in an effective way that corresponds to European and international human rights standards. The case of Greece became “popular” especially due to Dublin II Regulation, according to which people seeking asylum in a European Union country but have entered the Union through Greece, were to be sent back to Greece, which was responsible to examine their application. However, the low recognition rates, the almost impossible access to the asylum procedure,¹³⁴ the lack of an effective remedy at second instance, as well as the dreadful reception, living and detention conditions in Greece were held by the European Court of Human Rights in its recent groundbreaking *M.S.S. v. Belgium and Greece* judgment to violate Article 3 ECHR, and Article 13 ECHR in conjunction with Article 3 ECHR, and have caused the suspension of implementation in practice of the Dublin II Regulation with respect to Greece. Namely, at the time of drafting the article, only a handful of asylum seekers had been returned to Greece from other EU Member States since January 2011, when the judgement of *M.S.S.* was published.¹³⁵

¹³⁰ Nuala Mole, Seminar on European Asylum law held in Athens, May 2011.

¹³¹ EU Fundamental Rights Agency (FRA), Annual Report 2011, <<http://fra.europa.eu/fraWebsite/attachments/annual-report-2011-chapter1.pdf>>.

¹³² I. Traynor and H. Smith, “Armed EU guards to patrol Greece-Turkey border”, *The Guardian*, 25 October 2010, <www.guardian.co.uk/world/2010/oct/25/armed-eu-guards-greece-turkey>.

¹³³ N. Sitaropoulos, “Modern Greek Asylum Policy and Practice in the Context of the Relevant European Developments”, 13 *Journal of Refugee Studies* (2000), p. 105.

¹³⁴ ECtHR (Judgment) 21 January 2011, Case No. 30696/09, *M.S.S. v. Belgium and Greece*, para. 301.

¹³⁵ Today, more than 960 similar cases challenging the return of asylum seekers to Greece are pending before the ECtHR, S. Troller, “On the Borders of Legality”, Human Rights Watch, 8 February 2011, <www.hrw.org/en/news/2011/02/08/borders-legality>.

Applying Article 46 of the ECHR, the Court, requested Greece to adopt “general measures required to prevent similar violations in the future.”¹³⁶ However, it left considerable discretion to the state to determine the appropriate measures. The government committed to reform the asylum system, and it, indeed, passed a new law (N 3907/2011) that came into effect in January 2012. In the meantime, a new Presidential Decree (PD 114/2010) was adopted to cover the necessary transitional period. Among the objectives of the new law are the creation of a new Asylum Service and the establishment of Screening Centres at the borders. These developments caused general optimism outside the borders and many hoped that things either have changed or will change.¹³⁷

Unfortunately, this is far from being true, since in the eyes of national experts the new law looks abortive due to the economic deadlock of the country.¹³⁸ “If it is implemented it will indeed help a lot with the access, but we are not sure at all that it will be”, say the representatives of the Greek Ombudsman.¹³⁹ “The law provides for 13 Asylum Offices, but Greece will start with only 5, which will make things even worse. The new Asylum Service will also have many problems. The main issue will be staffing, since there is no possibility of hiring new staff, because of the economic situation”, explains the spokesperson of the National Commission for Human Rights (NCHR).¹⁴⁰ For now, only the director of the Asylum Service has been appointed.

While the Asylum Service and the Screening Centres seem to be only words on paper and a shoestring budget, no steps have been taken for the improvement of the reception,¹⁴¹ living¹⁴² and detention conditions.¹⁴³ The only real improvement concerns the effective remedy. The second instance refugee advisory committees that had been abolished in 2009¹⁴⁴ are restituted with N 3907/2011. Now there is an effective remedy at second instance that is accessible and effective. The decisions of these Appeal Committees have met the European quality standards, and for this reason, recognition rates have risen and are near the European average.¹⁴⁵ Nonetheless,

¹³⁶ ECtHR (Judgment) 21 January 2011, Case No. 30696/09, *M.S.S. v. Belgium and Greece*, para. 400.

¹³⁷ G. Papageorgiou, Seminar 2011: “The duty to inform applicants about asylum procedures: The asylum-seeker perspective”, European Union Agency for Fundamental Rights (FRA), Thematic Report September 2010, <<http://fra.europa.eu/fraWebsite/attachments/annual-report-2011-chapter1.pdf>>.

¹³⁸ AITIMA interview, V. Papadopoulos interview, NCHR interview.

¹³⁹ Greek Ombudsman, interview.

¹⁴⁰ The National Commission for Human Rights is a statutory National Human Rights Institution having a consultative status with the Greek state on issues pertaining to human rights protection and promotion.

¹⁴¹ ECtHR (Judgment) 21 January 2011, Case No. 30696/09, *M.S.S. v. Belgium and Greece*, paras. 159–160.

¹⁴² *Ibid.*, paras. 167–172.

¹⁴³ *Ibid.*, paras. 161–166.

¹⁴⁴ Article 5 of PD 81/2009.

¹⁴⁵ UNHCR interview.

this is an improvement only in quality, not in quantity, since there are just a few Committees and there is a backlog of almost 45,000 cases.¹⁴⁶

Although the new legislation looks promising, it has not brought any significant changes concerning access to the procedure. Several serious problems remain in practice, and national experts are all but optimistic about the implementation of the legislation. After all, as the UN Refugee Agency (UNHCR),¹⁴⁷ the Greek Ombudsman (Ombudsman)¹⁴⁸ and Amnesty International¹⁴⁹ note, legislation has been generally satisfactory but it is not implemented. There are organizational and systemic problems in practice at multiple levels.

6.2. THE ODYSSEY OF ACCESS TO ASYLUM

The basis of all problems in the Greek asylum system is the lack of access to the procedure.¹⁵⁰ Amnesty International has repeatedly expressed concerns about obstacles that people face in their effort to access their rights¹⁵¹ and ranks this problem as one of the main problems of asylum in Greece.¹⁵² The picture of access is described by the national experts participating in the empirical research as problematic, dramatic or even tragic. However, some of them see an effort to improve the situation. Mr Vassilis Papadopoulos¹⁵³ detected, following the change of government in 2009, some “good intentions”, which were, unfortunately, not translated into changes in practice. The Hellenic League for Human Rights (HLHR), the oldest human rights NGO in Greece, sees some small improvement in the last semester, but explains that this has to do with the fact that the situation had been extremely bad and talks about baby steps. A huge “but” overshadows the optimism of the Greek Council for Refugees and Exiles (GCR)¹⁵⁴ that notes that the situation is deterrent to people in real need of international protection and gives the example of a great number of Somalis and Afghans that do not even try to lodge an application in Greece and would rather risk travelling to another European Union state. On the other hand, the same situation

¹⁴⁶ According to the information provided by the Greek Ministry of Civil Protection to the Commissioner for Human Rights of the Council of Europe, 44,650 applications were pending in February 2010.

¹⁴⁷ UNHCR interview.

¹⁴⁸ Ombudsman interview.

¹⁴⁹ “The trap Dublin II: Returns of asylum seekers to Greece” (in Greek) Amnesty International 2010, <www.amnesty.org.gr/the-trap-dublin-ii-returns-asylum-seekers-to-greece>.

¹⁵⁰ Ombudsman interview.

¹⁵¹ “The trap Dublin II: Returns of asylum seekers to Greece” (in Greek) Amnesty International, <www.amnesty.org/en/library/asset/.../001/.../eur250012010en.pdf>.

¹⁵² Amnesty International, <www.amnesty.org.gr/refugeesfaq#greece>.

¹⁵³ Representative of the applicant in *S.D. v Greece*.

¹⁵⁴ GCR is part of the European network of NGOs, ECRE (European Council on Refugees and Exiles), GCR interview.

makes the system attractive to abusive claims, due to the complete absence of immigration policy, both at a national and a European level.¹⁵⁵

Problems concerning the access start with the entrance of asylum seekers at the borders, mainly the Evros River in the North and the islands of Lesbos, Chios and Samos. Due to several reasons that mainly have to do with their detention and lack of information, asylum seekers are prohibited from lodging an application there and are sent to Athens. As a result, the huge numbers of asylum seekers in Athens cannot be absorbed by the system and access is blocked at the only responsible Alien Directorate at Attica Police headquarters on Petrou Ralli Avenue (hereafter Petrou Ralli). Several other problems set the complete scene of lack of access to asylum in Greece.

“At the borders they are trying to prevent the lodging of applications in every way they can”, says Mr Papadopoulos.¹⁵⁶ There is an established practice to immediately detain almost everyone that enters the country irregularly. “People do not even have the opportunity to express that they seek asylum.”¹⁵⁷ Out of the beneficiaries that are detained, very few lodge their application at the borders and perhaps the main reason for this is that, as a general practice, people that apply for asylum are detained for a longer period than their fellow countrymen.¹⁵⁸ They are detained at least until the first interview, which takes place after 3 months, but they are more often than not detained after that as well until exhaustion of the maximum 6 months period of detention.¹⁵⁹ Several complaints have been filed with the UNHCR that police officers themselves urge the detainees not to make an asylum claim so that they are set free sooner.¹⁶⁰

If next to the longer detention, one adds the crude detention conditions, one realizes how pressing the issue becomes for the asylum seeker. The detention conditions in Evros have been described by the UNHCR as a humanitarian crisis. The same picture comes from the European Committee for the Prevention of Torture (CPT) that made a relevant public statement for the first time concerning a European country.¹⁶¹ In fact, there is only one holding camp, Fylakeio, in Evros. The rest of the people, among whom unaccompanied minors, are held in police stations, in cells that are built for the detention of people for 2 or 3 days. The detention conditions in Greece have been described in detail in the judgments of *Tabesh v. Greece*¹⁶², *S.D. v. Greece*,¹⁶³ *M.S.S. v. Belgium and Greece*, *R.U. v. Greece*,¹⁶⁴ and the reports of the European

¹⁵⁵ Ibid.

¹⁵⁶ G. Papadopoulos interview.

¹⁵⁷ Ombudsman interview.

¹⁵⁸ HLHR interview.

¹⁵⁹ Ombudsman interview, NCHR interview.

¹⁶⁰ UNCHR interview.

¹⁶¹ “Public Statement concerning Greece” (in Greek), European Committee for the Prevention of Torture, Strasburg, 15 March 2011, <www.cpt.coe.int/documents/grc/2011-10-inf-grc.pdf>.

¹⁶² ECtHR (Judgment) 26 November 2009, Case No. 8256/07, *Tabesh v. Greece*.

¹⁶³ ECtHR (Judgment) 11 June 2009, Case No. 53541/07, *S.D. v. Greece*.

¹⁶⁴ ECtHR (Judgment) 7 June 2011, Case No. 2237/08, *R.U. v. Greece*.

Commissioner for Human Rights, the UNHCR and several national and international NGOs.¹⁶⁵ All these constitute a rather serious deterrent factor and as a result only a few people choose to lodge an application at the borders.¹⁶⁶ The rest are released and get a note by the police that allows them to travel to Athens.

However, even from those that are not discouraged by the detention, very few eventually manage to make a claim.¹⁶⁷ The more obvious reason for this is the lack of information about their right to make an asylum claim or the relevant procedure.¹⁶⁸ In the relevant report of the Fundamental Rights Agency of the European Union (FRA), Greece was indicated as one of the countries where asylum seekers received little or no information on the procedure: “In Greece, most interviewees stayed in the country in an irregular manner for months without knowing where to apply.”¹⁶⁹ According to the law, people should be informed in a language they understand. The UNHCR in cooperation with the Greek government has issued a leaflet with all relevant information in only 6 languages,¹⁷⁰ although those that applied for asylum in Greece in 2009 were of more than 60 different nationalities.¹⁷¹ Despite this, serious doubts have been expressed on whether this leaflet is even being distributed.¹⁷² Even if it is, though, it cannot be sufficient because many people cannot even read in their own language.¹⁷³ In some police stations leaflets have been put up on the wall, but there the problem is that “the leaflets are in the corridor and the detainees in their cells!”¹⁷⁴ “There is no information at all”, stresses the representative of GCR. “Our experience has proven that there are people who do not know why they are being held, or for how long, or about their right to seek asylum and their other rights.”¹⁷⁵ This lack

¹⁶⁵ See among others “Greece: Unsafe and Unwelcoming Shores”, Human Rights Watch 2009, <www.hrw.org/en/node/86025>; “Annual Report”, National Commission for Human Rights, 2009, <www.nchr.gr>; “Annual Report” Doctors Without Borders, 2010, <www.msf.gr>.

¹⁶⁶ NLHR interview; AITIMA interview; Ombudsman interview; G. Papadopoulos interview; HCHR interview; GCR interview.

¹⁶⁷ “Out the back door: The Dublin II Regulation and illegal deportations from Greece”, AITIMA, NOAS and Norwegian Helsinki Committee, 2009, <www.nhc.no/filestore/Publikasjoner/Rapporter/2009/44836_Rapport_out_the_backdoor.pdf>.

¹⁶⁸ Ombudsman interview; “Away from the flashlights”, Amnesty International, 2005, <[www.amnesty.org.gr/wp-content/uploads/files/2005-10-05%20Greece%20Report%20\(Greek\).pdf](http://www.amnesty.org.gr/wp-content/uploads/files/2005-10-05%20Greece%20Report%20(Greek).pdf)>; “The trap Dublin II: Returns of asylum seekers to Greece” (in Greek) Amnesty International, <www.amnesty.org/en/library/asset/.../001/.../eur250012010en.pdf>; UNHCR interview.

¹⁶⁹ “The duty to inform applicants about asylum procedures: The asylum-seeker perspective”, European Union Agency for Fundamental Rights (FRA), Thematic Report September 2010, <<http://fra.europa.eu/fraWebsite/attachments/annual-report-2011-chapter1.pdf>>.

¹⁷⁰ Arabic, English, French, Greek, Persian, and Turkish.

¹⁷¹ “The duty to inform applicants about asylum procedures: The asylum-seeker perspective”, European Union Agency for Fundamental Rights (FRA), Thematic Report September 2010, <<http://fra.europa.eu/fraWebsite/attachments/annual-report-2011-chapter1.pdf>>.

¹⁷² Ombudsman interview; G. Papadopoulos interview; AITIMA interview; HLHR interview.

¹⁷³ Ombudsman interview.

¹⁷⁴ NCHR interview.

¹⁷⁵ GCR interview.

of information has been reported by many actors during their field research¹⁷⁶ and in its 2010 report the FRA noted that this lack of adequate or timely information in a language understood by the asylum applicant could undermine the practical application of their rights.¹⁷⁷ The police on the other hand, claims that detainees receive the necessary information. However, a reasonable question can be raised: How can this be since there are no interpreters?

There is no organized body of accredited interpreters and the state mechanism is one of outsourcing to NGOs. There are only a few interpreters in areas where they happen to operate programs of interpretation and legal aid under a government agreement.¹⁷⁸ The inefficiencies of the system will worsen when these programs come to an end. Often, the police depends on other detainees or residents of the area to do the translation. The latter are, of course not getting paid; they do a favour to the police to get a favour back later.¹⁷⁹ This system can obviously not be reliable and objective.¹⁸⁰ The lack of sufficient interpretation was also noted by the Commissioner for Human Rights during his visits to Greece in December 2008 and February 2010. He describes it as a chronic problem that causes grave concern.¹⁸¹ Already in 2001, the NCHR stressed that these deficiencies in interpretation violate the elementary procedural principles of the rule of law and fundamental principles of international human rights law.¹⁸²

The problems concerning legal aid are added to the above picture and make things even harder for those who wish to enter the asylum process. Programs of legal aid co-financed by the EU and the Greek state, run in a few areas, and, even there they cannot cover all the needs.¹⁸³ The number of lawyers is very limited compared to the number of asylum seekers, thus NGOs and private practice lawyers need to focus on the most pressing cases.¹⁸⁴ However, the problems do not stop there, since even when there are lawyers available, they are often hindered by the police through several different

¹⁷⁶ "Greece: Unsafe and Unwelcoming Shores", Human Rights Watch 2009, <www.hrw.org/en/node/86025>; Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2009, <<https://wcd.coe.int/wcd/ViewDoc.jsp?id=1401927&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>>.

¹⁷⁷ Thematic Report September 2010, Fundamental Rights Agency, 2010, <<http://fra.europa.eu/fraWebsite/attachments/annual-report-2011-chapter1.pdf>>.

¹⁷⁸ UNHCR interview; G. Papadopoulos interview.

¹⁷⁹ Ombudsman interview, "Stuck in a Revolving Door", Human Rights Watch, 2008, <www.hrw.org/fr/node/76211/section/4>; G. Papadopoulos interview; Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2010, <<https://wcd.coe.int/wcd/ViewDoc.jsp?id=1661397>>.

¹⁸⁰ Ombudsman interview.

¹⁸¹ Commissioner for Human Rights, report 2009.

¹⁸² "Proposals for the promotion of a modern, efficient framework of refugee protection in Greece" (in Greek), Greek National Commission for Human Rights, 2001, <www.nchr.gr>.

¹⁸³ UNHCR interview.

¹⁸⁴ "The trap Dublin II: Returns of asylum seekers to Greece" (in Greek) Amnesty International 2010, <www.amnesty.org.gr/the-trap-dublin-ii-returns-asylum-seekers-to-greece>.

tricks from getting in touch with the detainees.¹⁸⁵ Since 2008 things have improved, but there are still problems.¹⁸⁶ Access to NGOs is now open, but private legal practitioners still face lack of cooperation by the authorities.¹⁸⁷ These lawyers do not get access to the detainees, while in many cases the lawyers are the detainees' only chance to get informed about their situation. The lack of access to information, the absence of interpretation and the barriers of communication for asylum seekers and advocates have a particularly negative impact on the beneficiaries' access to the asylum procedure itself.

Nevertheless, even in the case that the detainees are already informed and speak a language the police officers can understand, they may encounter with indifference from the authorities. According to the law,¹⁸⁸ international protection can be requested either in writing or orally. In practice, though, the latter method is not taken into account.¹⁸⁹ Police officers fail to register the oral claims and even refuse to provide the applicants with the relevant form they should fill in.¹⁹⁰ Applicants are being ignored until a lawyer intervenes.¹⁹¹ This practice is quite widespread and while some Police Directorates are better than others, only 50% of the applications are being received and registered.¹⁹² However, these numbers show an improvement compared to previous years.¹⁹³ Greek legislation¹⁹⁴ provides that persons who wished to lodge an asylum application, but could not do so due to a fault of the authorities, should be considered to be asylum seekers. However, this is not being applied, because of the difficulty to provide evidence to support these complaints.¹⁹⁵

Not being able to make an asylum claim, the detainees are in constant danger of being refouled. The main fear of all the experts concerns the readmission agreement between Greece and Turkey, that was signed in 2001 and recently entered into force. According to this agreement, Greece may send back to Turkey nationals of the latter's neighbouring countries Iraq, Syria and Iran which irregularly entered Greece from Turkey. Turkey is under the obligation to accept them and send them back to their

¹⁸⁵ "Greece: Unsafe and Unwelcoming Shores", Human Rights Watch 2009, <www.hrw.org/en/node/86025>; Commissioner for Human Rights, report 2009.

¹⁸⁶ Ombudsman interview; NCHR interview.

¹⁸⁷ HLHR interview; AITIMA interview; G. Papadopoulos interview.

¹⁸⁸ Article 2 of PD 114/2010.

¹⁸⁹ "Away from the flashlights", Amnesty International, 2005, <[www.amnesty.org.gr/wp-content/uploads/files/2005-10-05%20Greece%20Report%20\(Greek\).pdf](http://www.amnesty.org.gr/wp-content/uploads/files/2005-10-05%20Greece%20Report%20(Greek).pdf)>.

¹⁹⁰ Human Rights Commissioner's third party intervention at the ECtHR in cases of returnees from the NL to Greece, 2010, <<https://wcd.coe.int/wcd/ViewDoc.jsp?id=1595689&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>>; Human Rights Commissioner's third party intervention at the ECtHR in the case of *M.S.S. v. Belgium and Greece*, <<https://wcd.coe.int/wcd/ViewDoc.jsp?id=1661397>>; GCR interview; UNHCR interview.

¹⁹¹ AITIMA interview.

¹⁹² HLHR interview.

¹⁹³ HLHR interview; NCHR interview.

¹⁹⁴ Article 2 of PD 114/2010.

¹⁹⁵ Ombudsman interview.

countries of nationality. The fact that worries experts the most is that these people cannot have their asylum claims examined there either, because Turkey is one of the four states that have not waived the geographic restriction of the Geneva Convention 1951 and, thus, accepts asylum seekers only from Europe. Due to the structural deficits of the Greek asylum system, many asylum seekers that did not manage to lodge an application, for the reasons mentioned above, are in danger of being deported to Turkey and later on back to the place from where they were fleeing.¹⁹⁶ This danger has been officially acknowledged by the European Court in the judgment of *Abdolkhani and Karimnia v. Turkey*.¹⁹⁷ This way, Greece is not only accountable for blocking access to asylum, but also for chain-refoulement.¹⁹⁸ The acquisition of evidence is particularly difficult in such cases, because these people are usually not registered by the authorities and are returned to Turkey before anyone knows of their existence.¹⁹⁹ However, there are several recorded cases,²⁰⁰ while the GCR reveals²⁰¹ that in Evros the authorities even register people as having a different nationality, so that the Readmission Protocol can be activated.

These are not the only cases where refoulement is at stake at the frontiers. Organizations like Pro Asyl,²⁰² Human Rights Watch²⁰³ and UNCHR²⁰⁴ have mentioned incidents in their reports where the Greek coastguard pushed boats with asylum seekers back to Turkey, or where they were turned back at the borders. Many NGOs²⁰⁵ have also listed several incidents in their reports, where people were being

¹⁹⁶ “Out the back door: The Dublin II Regulation and illegal deportations from Greece”, AITIMA, NOAS and Norwegian Helsinki Committee, 2009, <www.nhc.no/filestore/Publikasjoner/Rapporter/2009/44836_Rapport_out_the_backdoor.pdf>; UNHCR interview; G. Papadopoulos interview.

¹⁹⁷ ECtHR (Judgment) 22 September 2009, Case No. 30471/08, *Abdolkhani and Karimnia v. Turkey*.

¹⁹⁸ “Out the back door: The Dublin II Regulation and illegal deportations from Greece”, AITIMA, NOAS and Norwegian Helsinki Committee, 2009, <www.nhc.no/filestore/Publikasjoner/Rapporter/2009/44836_Rapport_out_the_backdoor.pdf>; “Turkey: Stranded: Refugees in Turkey denied protection”, Amnesty International, 2009, <www.amnesty.org/en/library/info/EUR44/001/2009/en>.

¹⁹⁹ UNHCR interview.

²⁰⁰ See among others “Greece: Unsafe and Unwelcoming Shores”, Human Rights Watch 2009, <www.hrw.org/en/node/86025>.

²⁰¹ GCR interview.

²⁰² “The truth may be bitter but it must be told”, Pro Asyl and Group of Lawyers for the Rights of Refugees and Migrants, Athens 2007, <www.proasyl.de/fileadmin/proasyl/fm_redakteure/Englisch/Griechenlandbericht_Engl.pdf>.

²⁰³ “Greece: Unsafe and Unwelcoming Shores”, Human Rights Watch 2009, <www.hrw.org/en/node/86025>; Simone Troller, “With a Migrant Crisis Looming, the EU Should Learn from its Past Mistakes”, Human Rights Watch 2011, <www.hrw.org/en/news/2011/04/06/migrant-crisis-looming-eu-should-learn-its-past-mistakes>.

²⁰⁴ “Position on the return of asylum seekers in Greece in compliance with Dublin Regulation”, UNHCR 2008, <www.unhcr.gr>; “Notes on Greece as an asylum country”, (in Greek), UNHCR, 2009, <www.unhcr.gr>.

²⁰⁵ See among others “The truth may be bitter but it must be told”, Pro Asyl and Group of Lawyers for the Rights of Refugees and Migrants, Athens 2007, <www.proasyl.de/fileadmin/proasyl/fm_redakteure/Englisch/Griechenlandbericht_Engl.pdf>; “Away from the flashlights”, Amnesty

held and then refouled to Turkey, either because they had not managed to make an application or despite the fact that they had made one. While this practice was systematic in the past, it seems that this does not occur anymore at such a large scale.²⁰⁶ Since November 2010, when Frontex started its operations, the HLHR has not managed to confirm such a complaint, but they suspect that there are still isolated incidents.²⁰⁷ Several such complaints have reached the Office of the Greek Ombudsman, but they have not been confirmed due to the lack of official registrations and cooperation by the Turkish authorities.²⁰⁸

Besides this, the only plan of the government that has started materializing is the fence that will be raised at the eastern land borders with Turkey to manage “mixed flows” of migrants. This is a wall of 10.3 km and will cost 19 million Euros. Its aim is to block irregular access of immigrants to the territory.²⁰⁹ However, such a wall will not discriminate in favour of asylum seekers, but will exclude them de facto from international protection. UNHCR has suggested the creation of open points for the lodging and examination of asylum applications, but this proposal was turned down by the Greek government. Hence, people prohibited from entering Greece will be trapped in Turkey that will not examine their asylum claim and will send them back to territories where their life or freedom is being threatened. “People will keep coming from the natural border of Evros River”, explains the spokesperson of HLHR. “If they do not drown, but manage to get across, the police border guard will be there waiting to arrest them”, he continues. Based on the description of the findings of researchers, these people will face a closed door to the asylum process and will be in great danger of being refouled through the Readmission Agreement. The fence in combination with the shortcomings of the system, are without doubt a very successful mechanism of refoulement. Many national migration experts, human rights and immigration rights groups, labour unions and politicians have spoken out against the erection of the fence²¹⁰ that will be the first one on EU territory. However, the government continues to move forward. The construction of the fence began in April 2012 and is expected to be completed in September 2012.²¹¹

International, 2005, <[www.amnesty.org.gr/wp-content/uploads/files/2005-10-05%20Greece%20Report%20\(Greek\).pdf](http://www.amnesty.org.gr/wp-content/uploads/files/2005-10-05%20Greece%20Report%20(Greek).pdf)>; “Annual Report 2010” Amnesty International, 2010, <www.amnesty.org.gr/>; “Out the back door: The Dublin II Regulation and illegal deportations from Greece”, AITIMA, NOAS and Norwegian Helsinki Committee, 2009, <www.nhc.no/filestore/Publikasjoner/Rapporter/2009/44836_Rapport_out_the_backdoor.pdf>.

²⁰⁶ G. Papadopoulos interview.

²⁰⁷ HLHR interview.

²⁰⁸ Ombudsman interview.

²⁰⁹ Published in the Official Greek Government Gazette (FEK) in 2 September 2011.

²¹⁰ See indicatively, “Raise your Voice against the Wall of Shame in Evros”, Group of Lawyers for the Rights of Migrants and Refugees, 2011, <www.ipetitions.com/petition/against-the-wall-evros/>, J. Kakkissis, “Greek Border Fence to Keep Out Illegal Immigrants?”, *Time Magazine*, 7 January 2011, <www.time.com/time/world/article/0,8599,2040821,00.html#ixzz1ay0LnGPI>.

²¹¹ “Construction of Evros fence begins”, *Skai.gr news portal*, 26 April 2012, <www.skai.gr/news/greece/article/201341/elegho-ton-sunoron-kai-prosfugiko-suzitoun-sto-louxemvourgo-oi-upourgoi-tis-ee-/>; “Construction of fence in Evros begins”, *To Pontiki newspaper*, 26 April 2012, <<http://topontiki.gr/article/34376>>.

Facing all these difficulties, 90% of people that also managed to avoid refoulement, goes to Athens to seek asylum.²¹² Only very few of these people will eventually manage to lodge an application for asylum at the Police Directorate of Petrou Ralli. The reason for this is that for years this police station opens its doors only once per week to receive only 20–30 applications. Huge queues are created every Saturday morning, often of 2,000 or 3,000 people that are waiting in vain for a ‘ticket’ to an interview.²¹³ The position of the GCR and the NCHR on this issue is that in Athens there is in fact no access. In his visit to Greece, the Commissioner for Human Rights witnessed serious public disorder that was created in front of the premises of Petrou Ralli, where approximately 3,000 aliens were queuing in order to submit their application. The event led to police intervention, the death of one asylum seeker and the injury of a number of other asylum seekers.²¹⁴ Many people, after having tried multiple times to submit an application, are in the end completely discouraged and simply stop trying.²¹⁵

Similar problems exist in other cities as well, namely in Thessaloniki, where the police station accepts only 8 applications for asylum per week.²¹⁶ Apart from Thessaloniki, though, it can be said that the system is more easily accessible outside the capital. However, a recent event makes us doubt even that. In May 2011 an asylum seeker was detained in Igoumenitsa after he voluntarily went to the police station to submit an application accompanied by a lawyer of the NGO AITIMA. The police officer in charge based his detention on the new Presidential Decree²¹⁷ and he stated that from that point on, he will detain everyone who comes to seek asylum.²¹⁸ This threat managed to stop applications for a while in the area, but due to the interventions of the UNHCR and AITIMA the practice was not established. However, this constitutes a serious deterrent factor for the asylum seekers and in fact it nullifies the right in practice.²¹⁹ There are opposing views as to who is at fault,

²¹² UN High Commissioner for Refugees, Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Sharifi and Others v. Italy and Greece*, 2009, <www.unhcr.org/refworld/docid/4afd25c32.html>.

²¹³ “The trap Dublin II: Returns of asylum seekers to Greece”, (in Greek) Amnesty International 2010, <www.amnesty.org.gr/the-trap-dublin-ii-returns-asylum-seekers-to-greece>; “Greece: Unsafe and Unwelcoming Shores”, Human Rights Watch, 2009, <www.hrw.org/en/node/86025>; statement of Ecumenical Refugee Program, 2009, <www.proasyl.de/fileadmin/proasyl/fm_redakteure/STARTSEITE/Griechenland/Ecumenical_Refugee_Programme.pdf>; Ombudsman interview; AITIMA interview; UNHCR interview; HLHR interview; NCHR interview; G. Papadopoulos interview.

²¹⁴ Human Rights Commissioner’s third party intervention at the ECtHR in cases of returnees from the NL to Greece.

²¹⁵ UNHCR interview.

²¹⁶ HLHR interview; GCR interview.

²¹⁷ Article 13 of PD 114/2010.

²¹⁸ C. Zervas, “In prison instead of political asylum” (in Greek), *Eleftherotypia newspaper*, 8 May 2011, <www.enet.gr/?i=news.el.article&id=273540>; press release, (in Greek), AITIMA, 2011, <www.aitima.gr/aitima_files/Aneptihimitoi_anthropoi.pdf>.

²¹⁹ UNHCR interview; AITIMA interview; HLHR interview.

with some commentators²²⁰ arguing that this issue was caused due to a false interpretation of the Presidential Decree by the police, and others²²¹ blaming the law itself. The former keep reminding that PD 114/2010 allows for detention as an ultimate resort, when alternative measures cannot be applied, and only under certain exceptional conditions. However, the reality is that there are no alternative measures in the Greek asylum system and one of the conditions is so wide that it covers almost every asylum seeker, namely: a person can be detained in case he/she does not bear or has destroyed his/her travel documents. Thus, perhaps due to vagueness of the law, the exception becomes the rule and detention is allowed for everyone who willingly goes to a police station to seek asylum. This interpretation is also supported by case law, though of a lower court without much authority.²²² This development was the latest strike that threatens to block the access to the asylum procedure even further.

Last but not least, two other, well-known, deficiencies complete the picture of the failed asylum system in Greece: the determination procedure is long-lasting and ineffective. Firstly, there are many people that are waiting for up to 12 years for the determination of their status, while having to cope with several obstacles and huge discomfort.²²³ This situation holds back people in real need of international protection that would rather face the insecurity and fear of everyday life of the irregular immigrant, and risk even their lives trying to get to another EU country. Fortunately, the situation seems to be improving, since the new Presidential Decree sets a five months limit as a maximum for the determination of status. However, it is too soon to tell whether this promise is kept. What really seems hopeful are the newly created Appeal Committees, mentioned above, that have the task to review applications that have been piling up for years. Secondly, the recognition rates of asylum requests in Greece are extremely low and especially at the first instance come down to 0.04%.²²⁴ This deters people from seeking asylum in Greece, since they know that their application will be unsuccessful and that they will not receive any welfare support.²²⁵ In his interesting quantitative research,²²⁶ Hatton brings forward the underestimated effect of the recognition rate and estimates that a fall in the recognition rate of 10 percentage points reduces applications by 16%.

²²⁰ UNHCR interview; NCHR interview.

²²¹ AITIMA interview; HLHR interview; GCR interview; G. Papadopoulos interview.

²²² Decision on claims challenging the detention of the detained asylum seeker in Igoumenitsa: Administrative Court of first instance of Kerkira, no. 7/2011.

²²³ Ombudsman report, 2011 (in Greek), <www.synigoros.gr/allodapoi/pdfs_01/8957_1_ParemvasiStP.pdf>; AITIMA interview; UNHCR interview; G. Papadopoulos interview.

²²⁴ "Greece: Systematic detention of irregular immigrants and asylum seekers under minimal condition" (in Greek), Amnesty International 2010, <www.amnesty.org.gr/>; ECtHR (Judgment) 21 January 2011, Case No. 30696/09, *M.S.S. v. Belgium and Greece*, para. 126.

²²⁵ HLHR interview; G. Papadopoulos interview.

²²⁶ Hatton, *supra* n. 22, p. 72–74.

The latest positive developments could help asylum seekers regain their trust in the Greek system, but this can only happen if the other changes of the new legislation take effect as well.

7. CONSEQUENCES UNDER EU LAW

The situation regarding access to asylum can lead to holding Greece accountable internationally, since it does not fulfil its obligations under EU primary or secondary law. EU legislation does not lay down a specific applicable procedure, and it is for the domestic legal system of each state to do so,²²⁷ following the general principle of effectiveness. This general principle of EU law has as an effect that, for the purpose of effective enforcement of EU law, “procedural hurdles should be removed or procedural guarantees should be put in place.”²²⁸ The European Court of Justice has specified this principle, ruling in *Rewe*²²⁹ and in *Peterbroeck*²³⁰ that domestic rules should not make the exercise of rights conferred by EU law “practically impossible or excessively difficult”. Furthermore, rights guaranteed by EU law require a procedural system which is “easily accessible”.²³¹

Blocking access to the asylum procedure, or in other words the right to seek asylum, is in violation of the EU Charter itself, which guarantees the right in Article 18. The Charter is binding on EU organs and institutions, as well as member states when they implement EU legislation.

The EU secondary legislation on asylum is one of minimum standards, from which states cannot deviate at least downwards.²³² Although the Procedures Directive lays down “rather minimal standards”,²³³ the Greek practice violates it gravely. All the issues described above that block access to the right to asylum constitute a serious infringement of the general provision of Article 6(2) which states that member states shall ensure that everyone has the right to make an application for asylum on his/her own behalf.

Besides, a number of the aforementioned issues violate separate articles of the Directive. Namely, the lack of information of the asylum seekers about rights and procedures breaches the duty of the state to inform, a duty which has officially been

²²⁷ ECJ (Judgment) 20 September 2001, C-453/99, *Courage and Crehan*, para. 29; ECJ (Judgment) 11 September 2003, C-13/01 *Safalero*, para. 49.

²²⁸ M. Reneman, “Access to an Effective Remedy in European Asylum Procedures”, 1 *Amsterdam Law Forum* (2008), p. 69.

²²⁹ ECJ (Judgment) 7 July 1981, C-158/80, *Rewe*, para. 5.

²³⁰ ECJ (Judgment) 14 December 1995, C-312/93, *Peterbroeck*, para. 12.

²³¹ ECJ (Judgment) 16 November 2004, C-327/02, *Panayotova and Others v. Minister voor Vreemdelingenzaken en Integratie*.

²³² Storey, *supra* n. 87, p. 16–22.

²³³ Juss, *supra* n. 78, p. 778.

described as an “important element of procedural fairness”²³⁴ and an “essential condition to ensure effective access to the asylum procedure”,²³⁵ and is included in Articles 6(5) and 10(1)(a). Moreover, the almost total lack of interpreters at the first stage of the procedure completely disregards the guarantees that applicants should enjoy in accordance with Article 10(1)(b). Furthermore, the right to free legal assistance may be rather restrictive, but Article 15(1) enshrines a basic entitlement to consult a lawyer at the applicant’s own cost. As mentioned in Chapter 5, access to legal assistance is being hindered in violation of this article. Also, the law and practice in Greece allow for the holding of a person “in detention for the sole reason that he/she is an applicant for asylum”, which is prohibited under Article 18.

Last but not least, the overall shortcomings make access to the asylum procedure almost impossible and this constitutes a violation of the Dublin II Regulation itself. One of the general principles underlying the Regulation is “effective access to the asylum procedure”, which is indicated in recital 4 of the Preamble and Article 3(1), which place an obligation to examine the asylum applications on the member states.

8. CONSEQUENCES UNDER THE ECHR

As already mentioned, the ECHR does not entail a specific right to asylum or other rights concerning the asylum procedure. However, as explained above, a state can still be held accountable when, due to deportation, a person’s substantive rights have been violated. The liability of the state, in this case Greece, may also occur when the deportation has not yet been completed but the applicant is prohibited from accessing the asylum procedure.

In this case, the liability of the state is based on the principle of effectiveness that has a different context than the homonymous general principle of EU law. It means that every right enshrined in the ECHR should not be theoretical and illusory, but practical and effective.²³⁶ In order for this goal to be reached, according to Article 13 ECHR, a person whose rights have been violated should have an effective domestic remedy in order to have his or her claim decided and, if appropriate, obtain redress. According to the consistent interpretation of the European Court of Human Rights, this article takes effect in respect of grievances, which can be regarded as arguable in terms of the ECHR. Thus, an individual does not need to prove beyond reasonable doubt that his or her right is at risk, but only needs to have an arguable claim. The

²³⁴ “The duty to inform applicants about asylum procedures: The asylum-seeker perspective”, European Union Agency for Fundamental Rights (FRA), Thematic Report September 2010, <<http://fra.europa.eu/fraWebsite/attachments/annual-report-2011-chapter1.pdf>>, p. 5.

²³⁵ “Determination of Refugee Status”, UNHCR, 12 October 1977, No. 8 (XXVIII) – 1977, par. (ii) <www.unhcr.org/refworld/docid/3ae68c6e4.html>, “Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), Conclusions, letter g”, UNHCR, 31 May 2001, EC/GC/01/12, <www.unhcr.org/refworld/pdfid/3b36f2fca.pdf>.

²³⁶ ECtHR (Judgement) 13 May 1980, Case No. 6694//74, *Artico v. Italy*.

Court has only given a negative definition of the term “arguable”, having held that a grievance could not be called unarguable even if it had been eventually adjudged by the ECHR organs to be “manifestly ill-founded.”²³⁷ The companion of Article 13 is Article 1 which entails the positive obligation of states to secure to everyone within their jurisdiction the rights and freedoms enshrined in the ECHR. It follows that an effective asylum and another international protection determination procedure which is practically accessible to everyone with an arguable claim, needs to be put in place.²³⁸ As shown above, the law and practice in Greece significantly hinder, while in some cases completely block the access to the remedy that is the asylum procedure.

There are only a few rulings on relevant issues. In *Gebremedhin v. France*, the European Court of Human Rights found a violation of Article 13 taken in conjunction with Article 3, because the applicant did not have access to a remedy for the determination of her refugee status in the “waiting zone” of the airport. In *Abdolkhani and Karimnia v. Turkey*²³⁹ the Court reaffirmed its previous conclusion in a case where the applicants were deported to Iraq without having been allowed to lodge an asylum claim. There are two more cases that were unsuccessful in ruling on the issue. In *Moghaddas v. Turkey*,²⁴⁰ the applicant argued that his deportation to Iraq, without an examination of his asylum claim, despite the real risk of being exposed to inhuman and degrading treatment there, could also lead to his refoulement to Iran, where he was likely to be tortured and executed, and complained of a violation of Articles 2, 3 and 13. This part of the application was rejected as manifestly ill-founded, as in the case of *S.E. v. France*.²⁴¹ However, in both cases, the question which fell to be examined under Article 13 concerned the lack of procedural safeguards in respect of asylum claims lodged at borders.

There has not yet been much case law on cases concerning push backs or refoulement at the borders, without providing access to asylum procedures, as several cases, among which *Sharifi and Others v. Italy and Greece*²⁴² are still pending at the time of writing of the article. However, it is argued that when restrictions on access to territory reach a certain threshold, they amount to a violation of the right to seek asylum. It is obvious that pushing back a boat or turning back asylum seekers at the land borders meets this threshold.²⁴³ Even the Readmission Protocol between Turkey and Greece could be put under the microscope, as prior to returning individuals to Turkey, Greece “should obtain guarantees (...) that (...) refugees will not face a risk of

²³⁷ ECtHR (Judgment) 27 April 1988, Case Nos. 9659/ 82, 9658/82, *Powell and Rayner v. the United Kingdom*.

²³⁸ ECtHR (Judgment) 5 February 2002, Case No. 51564/99, *Conka v. Belgium*; ECtHR (Judgment) 26 April 2007, Case No. 25389/05, *Gebremedhin v. France*.

²³⁹ ECtHR (Judgment) 22 September 2009, Case No. 30471/08, *Abdolkhani and Karimnia v. Turkey*.

²⁴⁰ ECtHR (Decision) 15 June 2009, Case No. 46134/ 08, *Moghaddas v. Turkey*.

²⁴¹ ECtHR (Decision) 15 December 2009, Case No. 10085/08, *S.E. v. France*.

²⁴² ECtHR (Judgment) communicated on 13 July 2009, Case No. 16643/07, *Sharifi and Others v. Italy*.

²⁴³ Vandvik, *supra* n. 2, p. 29–32.

chain refoulement.”²⁴⁴ This theoretical approach is confirmed by the Grand Chamber in its judgment in the case of *Hirsi and Others v. Italy*,²⁴⁵ which concerns 200 people who were intercepted on the high seas by Italian authorities and pushed back to Tripoli in 2009 under the Italian-Libyan Readmission Agreement. The European Court of Human Rights found Italy in violation of Article 3 for exposing the applicants to the risk of torture in Libya, but also to the risk of arbitrary repatriation to their countries of origin (Somalia and Eritrea), where they would face torture and inhumane conditions. As the Court noted, “indirect removal of an alien leaves the responsibility of the Contracting state intact.”²⁴⁶ A violation of Article 4 of Protocol No. 4 and of Article 13 taken together with Article 3 of the ECHR and Article 4 of Protocol 4 was also found.

9. CONCLUDING THOUGHTS

Looking back at the picture of asylum in Greece, one could see that those who have managed to find themselves before the deciding authorities are, in a very disturbed sense of the word, lucky, since the vast majority of asylum seekers are still waiting in a queue, are in a prison cell, or have simply given up. These images constitute several violations of the existing European human rights standards and could bring Greece before the European courts.

Greece has chosen a securitarian approach towards refugees and is taking it to the extreme. Of course, there are several other factors that play a role, such as the huge number of incoming asylum seekers, the lack of an efficient administrative infrastructure and the lack of the necessary financial resources.

It is true that “economic and social inability to protect refugees does not release the host country from its responsibilities towards the uprooted.”²⁴⁷ It does, however, bring to the fore the responsibility of the other EU member states that have failed to fulfil their obligation to international cooperation in hosting large numbers of refugees and finding durable solutions to the problem. This failure is more vividly depicted in the Dublin II Regulation that has misinterpreted burden-sharing for burden-shifting.

It has become obvious from the findings of the research that there is an urgent need for Greece to take measures towards compliance with EU and human rights standards. The state should apply the new legislation, but perhaps more importantly, it should take brave steps in changing the widespread and systemic administrative practices.

It is also necessary for the government to strive for the revision of the Dublin II Regulation which puts a disproportionate burden on the shoulders of the countries of

²⁴⁴ Ibid., p. 32.

²⁴⁵ ECtHR (Judgment) 23 February 2012, Case No. 27765/09, *Hirsi and Others v. Italy*.

²⁴⁶ Ibid., para. 146.

²⁴⁷ Vibeke Eggli, *supra* n. 3, p. 29–87.

the European South by applying the concept of “protection elsewhere.”²⁴⁸ The whole system is based on the assumption that all Member States provide a similar level of adequate protection. However, this presumption is – as has been described in this article – far from reality, and it leads to unfair results for the states and to violations of the human rights of the asylum seekers. Today, the need for a revision of this, among others, expensive²⁴⁹ and inefficient²⁵⁰ system is more pressing than ever. It must be replaced by a system that is based on solidarity among Member States, and that respects the human rights and free choice of the asylum seekers.

Discussions on recasting the Regulation have been ongoing since 2008, when the European Commission submitted its relevant proposal.²⁵¹ However, this proposal fails to question the fundamental flaws of the system.²⁵² As Cecilia Malmström, the European Commissioner for Home Affairs, stated in a meeting with NGOs in Athens in 2010, the states lack the political will to change the substance of the Regulation. The European Court of Justice recently had the opportunity to deal with these questions.²⁵³

It must be kept in mind that, today, European states, especially in their formation as a union, have the opportunity, the capability and the responsibility to find solutions that are viable for both the receiving states and the refugees.

ANNEX

This Annex hosts the questionnaire, on the basis of which the interviews were conducted.

Questionnaire

The current research deals with the problems that the access to the asylum procedure presents in Greece. Please, explain your answers and include factual information, wherever this is possible.

It should be noted that any reference to “asylum claim/procedure” will also cover the “claim/procedure for granting humanitarian status”.

²⁴⁸ R. Byrne, G. Noll, and J. Vedsted-Hansen (eds.), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (The Hague, Kluwer Law International 2002), p. 10.

²⁴⁹ “Asylum Processes (Fair and Efficient Asylum Procedures)”, Comments From The European Council On Refugees And Exiles on the European Commission Proposal to Recast the Dublin Regulation, April 2009 Global Consultations on International Protection, EC/GC/01/12, 31 May 2001.

²⁵⁰ Ibid.

²⁵¹ Commission Proposal for the recast of Dublin II Regulation, Brussels, 3.12.2008, COM(2008) 820 final, 2008/0243.

²⁵² “Asylum Processes (Fair and Efficient Asylum Procedures)”, Comments From The European Council On Refugees And Exiles on the European Commission Proposal to Recast the Dublin Regulation, April 2009 Global Consultations on International Protection, EC/GC/01/12, 31 May 2001.

²⁵³ ECJ (Judgment) 2012, C 411/10, *N. S. v. Secretary of State for the Home Department*.

Questions:

A) General Picture

1. Please, briefly describe the problems that the beneficiaries of international protection face with respect to the access to the procedures, and give your evaluation of the situation.

B) Practice

2. Are there cases of push backs or illegal deportations of beneficiaries, before they were given the chance to lodge a claim, or before their claim had been examined? If so, are these isolated incidents or general practice? What is the role of minefields on this?
3. Are there any cases of refusal by the authorities to accept asylum claims?
4. Are there problems concerning the information of imprisoned beneficiaries with respect to their rights, the provision of legal aid and translation?
5. How would you describe the asylum procedure in terms of complexity and duration?
6. Namely:
 - What is the average time needed for the receipt and for the examination of a claim?
 - How many asylum applications are submitted per week?
 - a) In Athens?
 - b) In border areas – entry points?
 - c) In other areas?How could you explain these numbers?
 - What is the situation at the police stations responsible for the asylum claims?
7. Please, give your views on whether and to what extent the aforementioned problems constitute a deterrent factor for the beneficiaries in making an asylum application.

C) Legislation

8. Which laws form the Greek legal framework on the provision of international protection?
9. What is your opinion about the new Presidential Decree (ΠΔ 114/2010) with respect to the access to the asylum procedure?