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# **After M.S.S.: the contemporary asylum and migration situation in Greece**



# Preface

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This thesis was written for my Master degree in International and European Law at the University of Groningen. It is the result of a research carried out for the Embassy of the Kingdom of the Netherlands in Greece about the asylum situation in the country. I would like to take this opportunity to express my gratitude to the Embassy for a very rewarding and thought-provoking internship. A special thanks to Robert-Jan Sieben for his encouragement to ‘go outside’ and Natasha Apostolidi for her expertise and sharing of her contacts. Furthermore, I would like to thank all the people that I have interviewed for this research, thank you very much for your contribution, time and insights. Lastly, I would like to thank my supervisor H.B. Winter for his support and constructive (and quick!) feedback.

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# Table of contents

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## Abbreviations

1. Introduction	1.
2. The Greek asylum crisis, background and broader context	3.
2.1 Background	3.
2.2 Factors contributing to the asylum crisis	4.
2.2.1 The Dublin II Regulation	4.
2.2.2 Migration management in Greece	4.
2.2.3 The financial situation of Greece	5.
2.2.4 Migration trends	7.
2.3 International and European response	8.
2.3.1 Worries from NGO's	8.
2.3.2 Suspension of the Dublin II Regulation	9.
2.4 The Greek action plan	10.
3. Theoretical background on asylum law	11.
3.1 Definition of asylum and refugees	11.
3.2 The principle of <i>non-refoulement</i>	12.
3.2.1 Scope	12.
3.3 The Common European Asylum System	14.
3.4 Secondary asylum legislation adopted	15.
3.4.1 Legislative asylum measures	15.
3.4.2 The Dublin Regulation	17.
4. The M.S.S. v. Belgium and Greece case	21.
4.1 Outline	21.
4.2 Areas of violation	22.
4.2.1 Detention conditions	23.
4.2.2 General living conditions	24.
4.2.3 Inadequacy of the asylum determination system	26.
4.2.4 Violation of Belgium	28.
4.3 Significance of the case	29.
4.3.1 Implications on the CEAS	30.
4.3.2 Implications on Greece	30.
4.4 The European Court of Justice: the case of NS and ME	31.
5. The Greek and European response: which measures have been taken?	34.
5.1 The Greek action plan	34.
5.1.1. Progress report	35.
5.2 Fence at the Greek Turkish border	37.
5.3 Operation Xenios Zeus	38.
5.4 Voluntary repatriation program	41.
5.5 General reaction to criticism	42.

5.6	Help from the European Union and NGO's	44.
5.6.1	Financial solidarity	44.
5.6.2	Operational support	46.
5.6.2.1	Frontex	46.
5.6.2.2.	EASO	50.
5.6.3.	Voluntary relocation measures	51.
6.	Analyses of the current state of the three violations found by the Court in M.S.S.	52.
6.1	Detention conditions	52.
6.2	General living conditions	55.
6.3	Inadequacy of the asylum determination system	58.
7.	Conclusion	61.
8.	Bibliography	64.

## Abbreviations

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CEAS	Common European Asylum System
EASO	European Asylum Support Office
ECHR	European Convention of Human Rights
ECRE	European Council on Refugees and Exiles
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ERF	European Refugee Fund
EU Dublin Regulation	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
EU Procedures Directive	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
EU Qualification Directive	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
EU Reception Directive	Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers
Eurodac	European Dactyloscopy, fingerprint database for identifying asylum seekers
Eurostat	The Statistical Office of the European Union
Frontex	The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
IOM	International Organization for Migration

NGO

Non-governmental organisation

UNHCR

Office of the United Nations High Commissioner for Refugees

UDHR

Universal Declaration of Human Rights

# 1. Introduction

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The challenges regarding the asylum situation in Greece are widely known. The country had a huge increase of asylum seekers in recent years and has been the main entry point for irregular migratory flows into the European Union. In 2010 it saw a massive shift of migration flows to the Evros region, the land border between Greece and Turkey. According to FRONTEX, by the end of 2010, Greece was responsible for around 90 per cent of all detections of irregular crossings at external European land, sea and air borders.<sup>1</sup> The European Union's administrative and physical external border control regimes have become more stringent, causing many former routes into the European Union inaccessible.<sup>2</sup> It is estimated that most of those who cross Greece's borders irregularly see the country as a transit country from which they attempt to reach other European Union member states.<sup>3</sup> However, Greece bears the responsibility for securing the rights and providing for the needs of nearly all these people as the European Union has adopted the Dublin II Regulation, which determines that the state through which an asylum seeker first entered the European Union is the one responsible for examining the refugee claim.

Since 2007 a stream of reports from NGO's, European and international bodies documented serious human rights violations during almost every stage of the asylum procedure; relating to access to the territory, significant barriers to requesting asylum, low quality asylum procedures producing extremely low refugee recognition rates, severe shortcomings in social support, and appalling migrant detention conditions.<sup>4</sup> The failure of the Greek government to adopt coherent migration policies, enduring mismanagement of the asylum system and the economic crisis and resulting austerity aggravated what UNHCR described as a 'humanitarian crisis'.<sup>5</sup> The Fundamental Rights Agency has criticised Greece for the ill-treatment migrants receive at its borders, reporting specifically on extreme violations of human rights at the Evros region. It also noted that the situation at borders in Greece is not conducive to identifying persons in international protection. Of the 30.000 first asylum applications Greece considered in 2010, just 11 were approved, compared to the average rate of positive decisions across the 27 EU countries of 28 percent.<sup>6</sup>

In January 2011 the European Court of Human Rights (hereinafter: ECtHR) held in its M.S.S. case that removal to Greece would expose an asylum seeker to degrading detention and living

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<sup>1</sup> European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, FRAN Quarterly, Issue 2, June 2011, available at: < [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/FRAN\\_Q2\\_2011.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q2_2011.pdf)> (accessed 13 September 2013).

<sup>2</sup> McDonough, P., Tsourdi, E., Putting solidarity to the test: assessing Europe's response to the asylum crisis in Greece, Research Paper number 231, policy development and evaluation service of UNHCR, 2012, available at <<http://www.unhcr.org/4f269d5f9.html>> (accessed 13 September 2013).

<sup>3</sup> International Catholic Migration Commission (ICMC), *Mayday! Strengthening responses of assistance and protection to boat people and other migrants arriving in Southern Europe*, September 2011, available at: <<http://www.refworld.org/docid/4f02ebd12.html>> (accessed 12 September 2013).

<sup>4</sup> McDonough, P., Tsourdi, E., Putting solidarity to the test: assessing Europe's response to the asylum crisis in Greece, Research Paper number 231, policy development and evaluation service of UNHCR, 2012, available at <<http://www.unhcr.org/4f269d5f9.html>> (accessed 13 September 2013);

<sup>5</sup> Ibid.

<sup>6</sup> Eurostat, Asylum decisions in the EU27: EU Member States granted protection to more than 100 000 asylum seekers in 2012, 96/2013, 18 June 2013.



conditions and would put him or her at risk of indirect *refoulement*.<sup>7</sup> The European Court of Justice endorsed the Strasbourg's ruling, stating that there was a 'systemic deficiency' in the Greek asylum system.<sup>8</sup> Following the judgment of the ECtHR the Netherlands and almost all the other European countries suspended transfers of asylum seekers to Greece pursuant to the Dublin II Regulation, until improvements have been made. This thesis describes the current Greek asylum and migration situation, using the three violations of Greece identified by the ECtHR in the M.S.S. case: conditions in detention, general living conditions and the inadequacy of the asylum determination system. For this reason, the thesis will evolve around the following main research question:

*'Did the asylum situation in Greece improve after the M.S.S. judgment of the ECtHR?'*

The goal of my research is to gain more insight into the asylum crisis of Greece, primarily from the moment of the judgement of the ECtHR (11 January 2011) until June 2014. In particular the way the Greek government has handled the situation and which effect this has had so far, but also to which extend programmes enacted by European and other international actors have improved conditions. The European Asylum system will serve as the legal framework to which the Greek asylum procedure will be assessed. The thesis seeks to build on research undertaken by various non-governmental organisations, independent researchers and European and international institutions by evaluating progress made by Greece since the judgement of the ECtHR and investigating remaining obstacles to the effective application of European and International support. Furthermore, interviews have been carried out for this research with UNHCR Greece, the Greek Ombudsman, the Asylum Service, the First Reception Service, EASO, the Greek Council for Refugees and NGO Praksis. These interviews have been carried out in November and December 2013 in Greece, and with the Asylum Service and the Greek ombudsman I have spoken a second time in May 2014 from the Netherlands through email and Skype.

In order to answer my research question, I will start with the background and broader context of the asylum crisis in Greece. The third chapter will give an outline of asylum and refugee law insofar useful for this research, and comprises the principle of non-*refoulement* and the Common European Asylum System, with special emphasis on the challenges of the Dublin Regulation. In chapter four the M.S.S. judgment of the ECtHR will be analysed in-depth, with both the three violations of Greece identified by the Court and the significance of the case and its implications on the Common European Asylum System extensively discussed, followed by the similar ruling of the European Court of Justice in the N.S and M.E. case. Chapter five and six form the analysis of the actual measures that have been taken by the Greek government and the current situation regarding asylum and migration management in Greece. Firstly the Greek Action Plan on Asylum and Migration Management will be discussed, as well as the solidarity efforts undertaken so far to support Greece in its crisis. The sixth and final chapter will provide the contemporary situation regarding the three violations found by the ECtHR, conditions in detention, general living conditions and the inadequacy of the asylum determination system, and will demonstrate that Greece still has a long way to go.

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<sup>7</sup> M.S.S. v. Belgium and Greece, case number 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <<http://www.refworld.org/docid/4d39bc7f2.html>> (accessed 13 September 2013).

<sup>8</sup> European Court of Justice, Joined Cases C-411/10 and C-493/10 N.S. and M.E., 21 December 2011, § 86 and 94.

## 2. The Greek asylum crisis

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### 2.1 Background

Long before the current financial crisis in Greece, the Greek asylum procedure was recognized as an area of crisis for the European Union.<sup>9</sup> In the last two decades Greece has emerged as one of the Union's most porous external borders and the main entry point for irregular migratory flows into the European Union.<sup>10</sup> Greece has been facing a drastic spike in migration since the collapse of the Communist regimes in Eastern Europe in the 1990s. In the past ten years increasing numbers of people from the Middle East, Africa, and South Asia have entered the European Union via Greek territory.

Immigration, however, is a relatively new concept for Greece. From the late nineteenth century until the 1970's Greeks emigrated to all parts of the world on a large scale.<sup>11</sup> Traditionally it has been one of the most important emigration countries following the Second World War, with its peak in the 1950's and 1960's.<sup>12</sup> It is estimated that more than 2 million Greek nationals have emigrated until now.<sup>13</sup> In the last two decades, this trend towards emigration has diminished considerably, even though the accession to the European Economic Community, since 1981, has offered new opportunities for Greek nationals to leave the country.<sup>14</sup> The fact that most of the emigrants in the past were unskilled resulted in a shortage of unskilled labour when Greece faced a period of rapid economic development around the 1970's. This, in combination with the existence of a large 'black' economy and the collapse of communism in Eastern Europe, was one of the reasons that Greece became a major host country for almost exclusively unskilled migrants from South East Europe in the 1990's.<sup>15</sup> In a rather short period of time, Greece has become a country with one of the largest percentage of alien population in Europe.<sup>16</sup>

In 2010 Greece saw a massive shift of migration flows to the Evros region, the land border with Turkey. According to FRONTEX, by the end of 2010, Greece was responsible for around 90 per cent of all detections of irregular crossings at external EU land, sea and air borders.<sup>17</sup> Greece's location positions the country at the gates of the Schengen territory and the common European Union's external territorial border. The European Union's administrative and physical external

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<sup>9</sup> Cabot, H., The Governance of Things: Documenting Limbo in the Greek Asylum Procedure, *Political and Legal Anthropology Review*, volume 35, number 1, 2012.

<sup>10</sup> Ibid.

<sup>11</sup> Magliveras, K., Greece, in: *International Encyclopedia of Laws: Migration Law*, by Vaheule, D. ed., Kluwer Law International, Alphen aan den Rijn, 2010.

<sup>12</sup> International Organization for Migration, Greece Overview, available at: <<http://www.iom.int/cms/en/sites-/iom/home/where-we-work/europa/european-economic-area/greece.html>> (accessed at 14 November 2013).

<sup>13</sup> Supra note 3, p. 14.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid., p. 15.

<sup>16</sup> Ibid.

<sup>17</sup> European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *FRAN Quarterly*, Issue 2, June 2011, available at: <[http://frontex.europa.eu/assets/-Publications/Risk\\_Analysis/FRAN\\_Q2\\_2011.pdf](http://frontex.europa.eu/assets/-Publications/Risk_Analysis/FRAN_Q2_2011.pdf)> (accessed 13 September 2013).

border control regimes have become more stringent, causing many former routes into the European Union inaccessible.<sup>18</sup>

The large increase of migrants in recent time, has not only posed an enormous challenge for the population of Greece, but also for the economy and society. The failure of successive Greek governments to adopt coherent migration policies, chronic mismanagement of the asylum system, and, most recently, the deep economic crisis and resulting austerity have exacerbated what the United Nations High Commissioner for Refugees (hereinafter: UNHCR) described in late 2010 as a “humanitarian crisis.”<sup>19</sup> Countless undocumented migrants and asylum seekers live in deep destitution, occupying abandoned buildings, town squares, parks, and even forests. The ultimate goal for many, whether they are economic migrants or asylum seekers, is to transit through Greece to other countries in the European Union.

## **2.2 Factors contributing to the asylum crisis**

### **2.2.1 The Dublin II Regulation**

The Dublin II regulation was adopted ‘to lay down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.’<sup>20</sup> The most applied criteria is that of the country where the asylum seeker has irregularly entered the European Union.<sup>21</sup> If it appears that an individual has passed through the territory of another member state, the individual will be returned to the state of first entry.<sup>22</sup> As such, the Dublin II Regulation effectively imposes a disproportionate burden on the southern European Border States.<sup>23</sup> As stated before, in 2010 90 percent of all irregular migration into the European Union entered through Greece. According to some, no country, regardless the effectiveness and organization of their asylum system, would be able to handle such an influx of migrants. Although most migrants arriving in Greece see the country as a transit country, they are stuck in Greece, since they can’t travel on to other European states and are mostly not able to go back where they came from. The Dublin II Regulation will be discussed in more detail in chapter 3.4.2.

### **2.2.2 Migration management in Greece**

One of the reasons for the contemporary asylum crisis in Greece is the fact that there never was an efficient and workable migration or asylum system. The migratory influx in Greece grew rapidly and rather unexpectedly. Greece did not have a legislative framework to control and

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<sup>18</sup> McDonough, P., Tsourdi, E., *Putting solidarity to the test: assessing Europe’s response to the asylum crisis in Greece*, Research Paper number 231, policy development and evaluation service of UNHCR, 2012, available at <<http://www.unhcr.org/4f269d5f9.html>> (accessed 13 September 2013).

<sup>19</sup> Ibid.

<sup>20</sup> Supra note Dublin II.

<sup>21</sup> Lavrysen, L, *M.S.S. v. Belgium and Greece (2): The impact on EU Asylum Law*, Strasbourg Observers, February 2011, available at: <<http://strasbourgobservers.com/2011/02/24/m-s-s-v-belgium-and-greece-2-the-impact-on-eu-asylum-law/>> (accessed 31 October 2013).

<sup>22</sup> Ibid.

<sup>23</sup> Mallia, P., Introductory note to the European Court of Human Rights: *M.S.S. v. Belgium and Greece*, *International Legal Materials*, volume 50, number 3, 2011.

manage these migratory inflows until the beginning of the 1990s.<sup>24</sup> The first law attempting to regulate such matters was implemented in 1991, but focused solely on restricting migration: it included stricter border controls while making the legal entrance and settlement of foreigners who aimed to work in Greece nearly impossible.<sup>25</sup> Despite the strictness of the Greek migration law, which for instance prohibited any contact between undocumented migrants and public services, hundreds of thousands of immigrants without documents or permits came to Greece in the following years.<sup>26</sup> After five years the Greek government seemed to realize that the incoming immigrants were not of a temporary nature, and could no longer and only be managed by stricter border controls and large-scale removal operations.<sup>27</sup> As a consequence, Greece implemented three regularisation programmes between 1997 and 2005, with nearly a million applicants in total.<sup>28</sup> The regularisation programmes were needed not only because of the continuing illegal immigration, but also because of the frequent shifts between legal and illegal status that many immigrants encountered because the procedures to issue or renew a residence permit were highly complicated and especially cumbersome.<sup>29</sup>

The overall system is characterised by fragmentation of responsibilities and lack of systematic coordination.<sup>30</sup> At a national level, four different Ministries are responsible for border control, migration and asylum issues, while an efficient form of coordination between the relevant Ministries does not exist.<sup>31</sup> Furthermore, the law regulating immigration in Greece is inconsistent and depends on legislation that often changes and that is dictated through presidential decrees that sometimes build on one another or, at other times, exclude each other.<sup>32</sup>

“The Greek authorities for many years did not have a coherent strategy on what to do with irregular migrants and failed asylum seekers who could not be, or who were not returned to their country of origin. They were simply left in a legal limbo.”

- Committee on Migration, Refugees and Displaced Persons of the Council of Europe

<sup>24</sup> Triandafyllidou, A., *Migration and Migration Policy in Greece. Critical Review and Policy Recommendations*, ELIAMEP, Athens, 2008; UNHCR examined asylum claims in Greece until 1999, referring those identified as refugees for resettlement.

<sup>25</sup> Law 1975/1991 Entry-exit, sojourn, employment, deportation of aliens, procedure for the recognition of alien refugees and other provisions. NGO's and scholars strongly criticized law 1975/1991 for being out of touch with reality: it ignored the presence of tens of thousands of foreigners in Greece.

<sup>26</sup> Supra note Triandafyllidou, A., *Migration and Migration Policy in Greece*; According to The Continuous Reporting System on Migration SOPEMI, in 1997 there were 74.500 legal migrants in Greece, however several researchers estimated that there were approximately 400,000 undocumented immigrants living and working in Greece.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> It is nearly impossible for most of the immigrants to comply with the conditions set out in the law for the issuing or renewal of their permits. For instance, work and stay permits were issued for one-year periods only, therefore immigrants often received their permit after it already expired. This situation actually contributes to irregular migration.

<sup>30</sup> European Union Agency for Fundamental Rights, *Coping with a fundamental rights emergency: The situation of persons crossing the Greek land border in an irregular manner*, thematic situation report, 2011.

<sup>31</sup> Ibid. The Ministry of Citizen Protection, the Ministry of Interior, Decentralisation and E-government, The Ministry of Health and Social Solidarity and the Ministry of Labour and Social Protection are all responsible for a different part of migration and asylum policy.

<sup>32</sup> Cabot, H., *The Governance of Things: Documenting Limbo in the Greek Asylum Procedure*, *Political and Legal Anthropology Review*, volume 35, number 1, 2012, p. 25.

### 2.2.3 The financial situation of Greece

Any analysis of the Greek asylum crisis must also consider the economic crisis, which aggravates the situation and reduces the ability for the Greek Government to adequately respond to the large arrival numbers of migrants.<sup>33</sup> Although Greece had a weak fiscal position, with a debt level close to 100 percent of its gross domestic product (hereinafter GDP), Greece adopted the Euro in 2001 and saw dynamic economic growth rates between 2001 and 2008.<sup>34</sup> The sudden deterioration of their economic position started between August and October 2009.<sup>35</sup> Greece went into recession after 15 years of growth and its budget deficit went up to 15.4 per cent of GDP after revisions by the new government revealed that the country's true deficit was much higher than it had previously admitted.<sup>36</sup> On April 23, 2010, the Greek government requested financial assistance, which it received through two rescue packages with funds from the European Union and the International Monetary Fund; the first one in 2010 worth a 110 billion euro and the second package followed in 2012 and amounted to 130 billion euros.<sup>37</sup> As a condition for the granting of the packages, the Greek government was obliged to adopt stringent austerity measures to bring the public sector deficit under control and severe cuts had to be made in social services and public sector employment.<sup>38</sup> Consequently, the Greek economy has shrunk by 25 percent in the last few years and faced six following years of recession. Unemployment stood at 28 percent in November 2013 with youth unemployment at 61.4 percent.<sup>39</sup>

The financial crisis, and the resulting austerity measures, also affect Greece's 'other crisis': the asylum situation.<sup>40</sup> The needed transformation of asylum and migration policy's costs money, but, obviously, the available national budget is small. Although there are European funds available, the procedures to disburse funds are complex, the available staff is limited and so is the capacity to absorb funding from the European Union.<sup>41</sup> The cuts in public expenditure and the ban on recruitment in the public sector affect the whole asylum system, since those processing asylum applications are public employees. The financial crisis also distracts policymakers.<sup>42</sup> Any significant reform requires several acts of the government, ideally in combination with careful study before implementation and monitoring afterwards.<sup>43</sup> That is hard

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<sup>33</sup> Committee on Migration, Refugees and Displaced Persons of the Council of Europe, *Migration and asylum: mounting tensions in the Eastern Mediterranean*, Report, 23 January 2013, available at:

<<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19349&Language=en>> (accessed 23 January 2013).

<sup>34</sup> Visvizi, A., The Crisis in Greece and the EU-IMF Rescue Package: Determinants and Pitfalls, *Acta Oeconomica*, volume 62, number 1, 2012, p. 23.

<sup>35</sup> Ibid., p. 20.

<sup>36</sup> Greece's sovereign-debt crunch: A very European crisis, *The Economist*, news report, 4 February 2010, available via: <<http://www.economist.com/node/15452594>> (accessed 13 February 2014).

<sup>37</sup> Ibid.

<sup>38</sup> Supra note Committee on Migration, Refugees and Displaced Persons of the Council of Europe.

<sup>39</sup> Kathimerini, Greek unemployment rises to 28 percent, a record high, 13 February 2014, news report, available at: <[http://www.ekathimerini.com/4dcgi/w\\_articles\\_wsite1\\_1\\_13/02/2014\\_537346](http://www.ekathimerini.com/4dcgi/w_articles_wsite1_1_13/02/2014_537346)> (accessed 21 February 2014.)

<sup>40</sup> McDonough, P., Tsourdi, E., The "Other" Greek Crisis: Asylum and Eu Solidarity, *Refugee Survey Quarterly*, volume 31, number 4, 2012, p. 67-100.

<sup>41</sup> Supra note European Union Agency for Fundamental Rights, *Coping with a fundamental rights emergency*.

<sup>42</sup> McDonough, P., Tsourdi, E., Putting solidarity to the test: assessing Europe's response to the asylum crisis in Greece, Research Paper number 231, Evaluation and Policy Development Unit of UNHCR, 2012, available at: <<http://www.unhcr.org/4f269d5f9.html>> (accessed 13 September 2013).

<sup>43</sup> Ibid.



to comply with when the government is actually preoccupied by efforts to bring its finances in line with the demands of the European Union and the IMF.<sup>44</sup>

The spill over effects of the economic crisis has not only affected administrative action, but also society as a whole, with social tension and anti-immigration sentiments becoming increasingly more widespread. The Greek ombudsman stated in her annual report of 2012 that: “there is a very real danger that this economic crisis will evolve into a crisis of shared democratic values and social cohesion for the country.”<sup>45</sup>

#### **2.2.4 Migration trends**

Over the past eight years, migration routes at the Southern European border underwent several important shifts.<sup>46</sup> The Mediterranean Sea is one of the busiest seaways in the world, as well as a very dangerous route for migrants and asylum seekers who are on their way to Europe.<sup>47</sup> In 2006, southern Spain, the Canary Islands, Sicily, the Italian island Lampedusa and the sea border between Greece and Turkey were affected the most by arrivals.<sup>48</sup> A year later, detections at the sea border of Spain decreased with 70 percent as a result of joint operations between Spain and transit countries in West Africa.<sup>49</sup> Consequently, irregular movements moved to the Italian and the Greek Sea borders, which continued to happen through 2008.<sup>50</sup> As it was the case for 2007, detections at the Greek sea and land borders with Turkey and the land border with Albania accounted for almost 50 percent of the EU total in 2008.<sup>51</sup> Following the return/deportation of almost 1000 persons to Libya by the Italian authorities in 2009, arrivals in Italy and Malta almost entirely ceased: Italy faced a 96 percent drop in arrivals in the first quarter of 2010, in comparison with 2009.<sup>52</sup> As a consequence the number of detection of illegal border crossings in Greece amounted to 75 percent of the European total in 2009.<sup>53</sup> At the end of 2010 the increase in detections of illegal border crossing was almost exclusively the result of increased migration in Greece: nearly 90 percent of all detections at external European land, sea and air borders came from Greece.<sup>54</sup> This peak was a result of a shift from the sea to the land border with Turkey, where in November 2010 around 350 detections a day were recorded near the city of Orestiada (the most north-eastern town in Greece, situated six km from the Evros River, which forms a natural border with Turkey).<sup>55</sup> The European Agency for the Management of Operational

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<sup>44</sup> Ibid.

<sup>45</sup> The Greek Ombudsman, Annual Report 2012, available at: <<http://www.synigoros.gr/resources/annualreport-2012--3.pdf>> (accessed 14 February 2014).

<sup>46</sup> Supra note European Union Agency for Fundamental Rights, *Coping*

<sup>47</sup> UNHCR, Mediterranean crossings to Italy and Malta exceed 8000 in first six months of 2013, briefing notes, 5 July 2013, available at: <<http://www.unhcr.org/51d6a0859.html>> (accessed 16 February 2014).

<sup>48</sup> Frontex, Annual Report 2006, available at: <[http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_-\\_documents/Annual\\_report/2006/annual\\_report\\_20061.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_-_documents/Annual_report/2006/annual_report_20061.pdf)> (accessed 16 February 2014).

<sup>49</sup> Frontex, Annual Report 2007, available at: <[http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_-\\_documents/Annual\\_report/2007/frontex\\_general\\_report\\_2007\\_final.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_-_documents/Annual_report/2007/frontex_general_report_2007_final.pdf)> (accessed 16 February 2014).

<sup>50</sup> Frontex, Annual Report 2008, available at: <<http://www.eipa.eu/files/File/Migration/Frontex%20Annual%20Report%202008.pdf>> (accessed 16 February 2014).

<sup>51</sup> Ibid.

<sup>52</sup> Frontex, Annual Report 2010, available at: <[http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_-\\_documents/Annual\\_report/2010/frontex\\_general\\_report\\_2010.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_-_documents/Annual_report/2010/frontex_general_report_2010.pdf)> (accessed 16 February 2014).

<sup>53</sup> Frontex, Annual Report 2009, available at: <<http://www.europarl.europa.eu/document/activities/cont-/201008/20100805ATT79751/20100805ATT79751EN.pdf>> (accessed 16 February 2014).

<sup>54</sup> Supra note Frontex 2010.

<sup>55</sup> Ibid.

Cooperation at the External Borders of the Member States of the European Union (hereinafter Frontex), called the land border between Greece and Turkey ‘the unquestionable current hot spot for illegal border-crossing into the European Union’.<sup>56</sup>

## 2.3 International and European response

### 2.3.1 Worries from NGO’s

Since 2007 a wealth of reports with severe criticism from NGO’s drew attention to the asylum situation in Greece. For example, ProAsyl, a German NGO, documented serious human rights abuses against refugees that were trying to reach Greece via the Aegean Sea, in its report with the applicable name: ‘The truth may be bitter, but it must be told’.<sup>57</sup> The report describes the excessive use of force of the Greek coast guard and border authorities, in some cases amounting to torture, alongside the repeated push backs from Greek territory without considering possible protection needs.<sup>58</sup> A study of UNHCR documented an asylum system which failed to grant asylum at all, rejecting applications with standardised language identifying applicants as economic migrants without protection needs.<sup>59</sup> In 2008, a Human Rights Watch report reported abusive treatment, systematic push backs and expulsions without allowing asylum applications,

“The asylum procedure has collapsed and refugees are denied access to any meaningful refugee determination procedure. This puts them at a serious risk of *refoulement*.”

- UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (October 2010)

asylum procedures without legal representation or adequate interpretation, blocking access to asylum proceedings, and inhumane detention conditions.<sup>60</sup>

Another report of UNHCR of 2009 described in detail the difficulties of registering an asylum claim: ‘applications are received on only one day per week [by the police]. At present, around 20 claims are registered in one day, although up to 2,000 persons may be queuing to apply for asylum’.<sup>61</sup> Another frequently reported component of the Greek asylum procedure, were the shockingly and enduring low recognition rates.<sup>62</sup> According to Eurostat,

<sup>56</sup> Ibid.

<sup>57</sup> ProAsyl, *The truth may be bitter but it must be told: The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard*, October 2007, available at: <[http://www.proasyl.de/fileadmin/proasyl/fm\\_redakteure-/Englisch/Griechenlandbericht\\_Engl.pdf](http://www.proasyl.de/fileadmin/proasyl/fm_redakteure-/Englisch/Griechenlandbericht_Engl.pdf)> (accessed 22 October 2013).

<sup>58</sup> Ibid.

<sup>59</sup> United Nations High Commissioner for Refugees, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007, available at: <<http://www.refworld.org/docid/473050632.html>> (accessed 30 September 2013). According to UNHCR “A review of second instance decisions by the Ministry of Public Order found that the summary of the facts normally did not exceed two lines, and the negative decision was stated in a few lines in standardized format. As a result, it was not only impossible to deduce the interpretation of the law applied by the Ministry of Public Order, but it was not possible to deduce, from the decisions alone, whether the law was applied at all.”

<sup>60</sup> Human Rights Watch, *Stuck in a Revolving Door, Iraqis and other Asylum seekers and migrants at the Greece/Turkey Entrance to the European Union*, Human Rights Watch, 2008.

<sup>61</sup> United Nations High Commissioner for Refugees, *Observations on Greece as a country of asylum, December 2009*, available at: <<http://www.unhcr.gr/fileadmin/Greece/General/Greece/Observations2009EN.pdf>> (accessed 13 September 2013).

<sup>62</sup> Supra note UNHCR *Observations on Greece as a country of asylum*; Supra note McDonough, P., Tsourdi, E., *Putting solidarity to the test*; supra note Human Rights Watch.

the statistical office of the European Union, the recognition rate, the share of positive decisions in the total number of decisions, of Greece in 2009 was one percent, as to the 27 percent average rate in the European Union.<sup>63</sup> Many reports of NGO's affirmed the above and similar findings.

### 2.3.3 Suspension of the Dublin II Regulation

In its report of 2009, UNHCR stated that: 'until the reform of the Greek asylum system is put in place, UNHCR has no choice but to continue to recommend against transfers to Greece under the Dublin II Regulation or otherwise'.<sup>64</sup> The recommendation of UNHCR and the other reports described above, had led to several European Union member states to stop 'Dublin returns' to Greece by 2010-2011.<sup>65</sup> However, for the most part member states continued to apply the Dublin regulation to transfer asylum seekers to Greece.<sup>66</sup> The European Commission proposed a European mechanism to suspend transfers to a member state whose asylum system is under 'particular pressure' in 2008.<sup>67</sup> However, the proposal proved to be too controversial and was not adopted.<sup>68</sup>

In January 2011 the ECtHR held in its M.S.S. case that removal to Greece would expose an asylum seeker to degrading treatment and would put him or her at risk of indirect *refoulement*.<sup>69</sup> The Court also ruled that Belgium had violated these standards as well in returning the asylum seeker to Greece.<sup>70</sup> Hundreds other individuals had already appealed to the court and to national courts for orders stopping transfers to Greece.<sup>71</sup> Those Member States that had not yet stopped transfers did so directly after the judgment.<sup>72</sup> In December 2011 the ECJ endorsed this ruling and stated that member states may not transfer asylum-seekers in the face of 'substantial grounds' for believing there is a serious risk to their fundamental rights, and must either find another responsible State or process the applications themselves.<sup>73</sup> Although the Dublin system for now

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<sup>63</sup> Eurostat, *Asylum decisions in the EU27, EU Member States granted protection to 78 800 asylum seekers in 2009, news report*, 18 June 2010, available at: <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/3-18062010-AP/EN/3-18062010-AP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-18062010-AP/EN/3-18062010-AP-EN.PDF)> (accessed 17 February 2014).

<sup>64</sup> Supra note UNHCR Observations on Greece as a country of asylum, p. 1.

<sup>65</sup> Supra note McDonough, P., Tsourdi, E., The "Other" Greek Crisis, p. 68; For instance France, Spain and Hungary had blocked some transfers to Greece.

<sup>66</sup> Supra note McDonough, P., Tsourdi, E., Putting solidarity to the test, p. 5; until the judgment of the ECtHR the practice of Belgium, Finland, the Netherlands, Norway and Sweden has tended not to oppose Dublin transfers to Greece or has recently permitted transfers to resume. The practice of the Council for Aliens' Law Litigation (CALL) in Belgium had varied, but since March 2010 has found that such 'transfer decisions should be based on a rebuttable presumption that Greece will abide by its obligations.' In both Finland and Norway, courts ruled in February 2010 that transfers to Greece could resume, except for vulnerable groups. In the Netherlands, the Council of State has regularly ruled in favour of transfers to Greece, although transfers of Somalis were halted in June 2010 until further notice after reasoned Rule 39 interim measures were issued by the European Court of Human Rights in a case involving Somalis. (Source: UNHCR)

<sup>67</sup> European Union: European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, 3 December 2008, available at: <<http://www.refworld.org/docid/493e8e3a2.html>> (accessed 17 February 2014).

<sup>68</sup> Supra note McDonough, P., Tsourdi, E., Putting solidarity to the test, p. 5.

<sup>69</sup> Supra note M.S.S v. Greece and Belgium.

<sup>70</sup> Ibid.

<sup>71</sup> Supra note McDonough, P., Tsourdi, E., Putting solidarity to the test, p. 1.

<sup>72</sup> Supra note McDonough, P., Tsourdi, E., The "Other" Greek Crisis, p. 68.

<sup>73</sup> Supra note European Court of Justice, Joined Cases C-411/10 and C-493/10 N.S. and M.E.



essentially ceased to operate with respect to Greece, a few member states did not adopt a general policy prohibiting Dublin transfers to Greece.<sup>74</sup> For example, in Austria an individual assessment of each case continues to be made, but there have been relatively few transfers in practice to Greece since January 2011.<sup>75</sup> Also in Italy, there has been no official halt of Dublin transfers to Greece: an individual review is made in each case.<sup>76</sup> The Italian authorities have sent 210 requests to Greece to take responsibility for asylum claims in 2011. However, only two transfers were officially realised in the context of the Dublin Regulation.<sup>77</sup> Human Rights Watch came with a different story, when it accused Italy of summarily returning asylum seekers to Greece.<sup>78</sup> In its report, it is stated that ‘officials in several ports along Italy’s Adriatic coast routinely return stowaways on ferries from Greece within hours, without adequately considering requests for asylum’.<sup>79</sup>

## 2.4 The Action Plan

Responding to the national and international criticism and to pressure from the European Commission over the gaps between its laws and CEAS standards, Greece presented an “action plan on migration management” in August 2010.<sup>80</sup> The intention of the action plan is to manage ‘the mixed migration flows at the entry points of the Greek territory, in a way that both secures the need for enhanced border controls to prevent illegal immigration, and ensures the provision of international protection and adequate living conditions to the persons concerned, in accordance with Greece’s international and European obligations’.<sup>81</sup> The Revised Action Plan led to the adoption of Law 3907/2011, whereby the First Reception Service, the Asylum Service and the Appeals Authority was established.<sup>82</sup> A significant increase in mixed migration flows entering Greece in 2010 in combination with the national financial crisis vastly complicated these efforts.<sup>83</sup> The action plan will be further discussed in chapter 5.1.

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<sup>74</sup> European Council on Refugees and Exiles, *Dublin II Regulation: Lives on hold, European Comparative Report*, February 2013, available at: <<http://www.refworld.org/docid/513ef9632-.html>> (accessed 13 September 2013). These countries are Austria, Italy and Slovakia.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Human Rights Watch, *TURNED AWAY Summary Returns of Unaccompanied Migrant Children and Adult Asylum Seekers from Italy to Greece*, January 2013, available at: <[http://www.hrw.org/sites/default/files/reports-italy0113ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports-italy0113ForUpload_0.pdf)> (accessed 17 February 2014).

<sup>79</sup> Ibid.

<sup>80</sup> Hellenic Republic, Ministry of Citizen Protection, *Greece sends its National Action Plan for Migration Management to the European Commission*, press release, 25 August 2012, available at: <[http://www.minocp.gov.gr/index.php?option=ozo\\_content&perform=view&id=3246&Itemid=443&lang=EN](http://www.minocp.gov.gr/index.php?option=ozo_content&perform=view&id=3246&Itemid=443&lang=EN)> (accessed 18 September 2013).

<sup>81</sup> United Nations Committee on the Elimination of Racial Discrimination (CERD), *Reports submitted by States parties under article 9 of the Convention*, Information received from the Government of Greece on the implementation of the concluding observations of the committee, addendum, 17 December 2010, CERD/C/GRC/CO/16-19, available at: <<http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.GRC.CO.16-19.Add.1.pdf>> (accessed on 22 October 2013).

<sup>82</sup> Ministry of public order and citizen protection, *Greek Action Plan on Asylum and Migration Management*, executive summary, available at <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/p4\\_exec\\_summary/\\_p4\\_exec\\_summary\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/p4_exec_summary/_p4_exec_summary_en.pdf)> (accessed on 13 September 2013).

<sup>83</sup> Supra note 1.

### 3. Legal framework on asylum law

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#### 3.1 Definition of asylum and refugees

The right of asylum, derived from the Greek ἄσυλον, is an ancient legal concept, under which a person persecuted by his or her own country may be protected by another sovereign authority or a foreign country. Asylum as it stands today was stated in article 14 of the Universal Declaration of Human Rights (hereinafter: UDHR) in 1948: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.'<sup>84</sup> The word 'asylum' is not defined in international law, but it has become a collective term for the overall protection provided by a country to refugees on its territory.<sup>85</sup> Asylum in the European Union's Member States was formed by the application of the Geneva Convention of 1951 on the Status of Refugees (hereinafter: Refugee Convention), which had article 14 UDHR as a legal basis.<sup>86</sup> The Convention, together with its Protocol from 1976, is the primary legal source of refugee rights and laid down a definition of a 'refugee' for the first time.<sup>87</sup> According to Article 1, read in conjunction with the Protocol, a 'refugee' is 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.'<sup>88</sup> This definition also serves as a basis for the legal instruments of the EU in the field of asylum.<sup>89</sup> Furthermore, the Convention determines the rights and duties of both the refugee and the host-State.<sup>90</sup> Next to the general obligations, the Contracting Parties need to oblige to the principle of non-discrimination as to race, religion or country of origin, non-penalization of the refugee who entered the territory of the State unlawfully, and non-expulsion or return of the refugee to the frontiers or 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, the so-called principle of *non-refoulement* (see chapter 3.2)<sup>91</sup>. In addition, the Convention defines the minimum standards of protection and welfare that a State should provide to refugees. Among others, these rights feature judicial protection of the refugees, self-employment, access to elementary education, to social security, administrative assistance and

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<sup>84</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Available at: <<http://www.un.org/en/documents/udhr/index.shtml>> (accessed 4 February 2014).

<sup>85</sup> Achiron, M., Jastram, K., *Refugee Protection, a Guide to International Refugee Law*, Handbook for parliamentarians, Office of the United Nations High Commissioner for Refugees, Geneva, 2001.

<sup>86</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, Treaty Series, volume 189, p. 137, available at: <<http://www.refworld.org/docid/3be01b964.html>> (accessed 4 February 2014)).

<sup>87</sup> Lenart, J., 'Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Merkourios – Utrecht Journal of International and European Law*, volume 28, number 75, 2012.

<sup>88</sup> Supra note UN General Assembly, *Convention Relating to the Status of Refugees* (twoe hierboven).

<sup>89</sup> Dublin II Regulation, art 2(g): 'refugee' means a third-country national qualifying for the status defined by the Geneva Convention and authorised to reside as such on the territory of a Member State.'

<sup>90</sup> Supra note UN General Assembly, *Convention Relating to the Status of Refugees*.

<sup>91</sup> Ibid., art. 2, 3, 31(1), and 33.

freedom of movement.<sup>92</sup> Finally, the preamble of the 1951 Convention underlines the need for international cooperation as ‘the grant of asylum may place unduly heavy burdens on certain countries’.<sup>93</sup>

### 3.2 The principle of *non-refoulement*

The prohibition of *refoulement* is the cornerstone of international refugee and asylum law.<sup>94</sup> Broadly, the prohibition of *refoulement* prescribes that no refugee should be expelled or returned (‘refouler’) to any country where he or she runs a risk of being subjected to human rights violations, such as persecution, other ill-treatment or torture.<sup>95</sup> In international law the prohibition of *refoulement* has been developed in several legal instruments, both on a global and a regional level. As stated above, the principle is set out in the Refugee Convention according to which no State party to the Convention: ‘shall expel or return 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’.<sup>96</sup> *Refoulement* is also prohibited by Article 3(1) of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in Article 7 of the International Covenant on Civil and Political Rights. The principle of *non-refoulement* is not explicitly prohibited under the ECHR. However, the ECtHR has interpreted the obligation from article 3 to provide protection from *refoulement*.<sup>97</sup> Article 3 prohibits removal to torture, or cruel, inhuman or degrading treatment or punishment, and the ECtHR held that extradition or expulsion of a person will breach article 3 where there are substantial grounds for believing that he or she faces a real risk of being subjected to these violations in the receiving state.<sup>98</sup> Moreover, within the European Union the Qualification Directive prohibits member states from returning individuals to the death penalty or execution; to torture or inhuman or degrading treatment or punishment in the applicant’s country of origin; or to a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’.<sup>99</sup>

#### 3.2.1 Scope

The principle of *non-refoulement* applies, as stated in article 33 of the Refugee Convention explicitly to refugees in the meaning of article 1. However, it also applies to asylum seekers irrespective of their formal recognition. In other words, it also applies to asylum seekers whose status has not yet been determined, up to the point where their status is officially and finally

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<sup>92</sup> Ibid., art. 16, 18, 22, 24, 25 26.

<sup>93</sup> Ibid., preamble.

<sup>94</sup> Wouters, C., W., *International Legal Standards for the Protection from Refoulement*, Proefschrift, Intersentia Publishers, Mortsel, 2009.

<sup>95</sup> Goodwin-gill, G.S., McAdam, J., *The Refugee in International Law*, third edition, Oxford University Press, New York, 2007.

<sup>96</sup> Supra note refugee convention.

<sup>97</sup> Hurwitz, A., *The Collective Responsibility of States to Protect Refugees*, Oxford University Press, New York, 2009.

<sup>98</sup> Supra note Goodwin-gill, G.S., McAdam, J, p. 210.

<sup>99</sup> European Union, Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004, OJL 304/12, available at: <<http://www.refworld.org/docid/4157e75e4.html>> (accessed 6 February 2014).

determined in a fair procedure.<sup>100</sup> Irrelevant as well is the legal or migration status of the asylum seeker, it does not matter how the asylum seekers arrives at the territory of a state.<sup>101</sup> Allowance for this is contained in article 31 of the Refugee Convention, which prohibits states to impose penalties on refugees on account of their illegal entry or presence.<sup>102</sup> Furthermore, the principle comprehends any measure attributable to a state which could have the effect of returning a person to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This has two aspects: it encompasses actions of states wherever undertaken: at land borders or in maritime zones, including the high seas.<sup>103</sup> In addition it includes refusal of entry at the border, but also interception and indirect *refoulement*.<sup>104</sup> Indirect *refoulement* comprises the removal to a third country where no risk exists, but where there is a chance of the person being removed from that third country to his country of origin or another country, where he or she does face a risk of subjection to harm.<sup>105</sup> Finally, the principle also applies in situations of a mass influx.<sup>106</sup> A situation of mass influx refers to a ‘significant number of arrivals in the host country, over a short period of time, of people from the same country of origin who have been displaced under circumstances indicating that members of the group would qualify for international protection’.<sup>107</sup> As a principle of international law, *refoulement* is not allowed for no matter how grave the consequences of a sudden influx of refugees might be on the resources, economy or political situation of a state.<sup>108</sup> In the European Union a Council Directive has been adopted which establishes minimum standards for giving temporary protection in the event of a mass influx.<sup>109</sup> The council directive is in accordance with the principle of *non-refoulement*, however, it is a short-term solution and has not been activated yet.<sup>110</sup>

Abiding to the principle of *non-refoulement* implies two possibilities: sending the refugee to a country where there is no threat of persecution, a safe third country, or admitting the refugee within the territory of the State Party to the Geneva Convention.<sup>111</sup> Although the principle of *non-refoulement* does not create an obligation on a state to admit an individual, it is however a first step towards the granting of asylum.<sup>112</sup> Eventually states have the responsibility to provide

<sup>100</sup> UNHCR, “Summary Conclusions: The Principle of *Non-Refoulement*”, July 2001, available at: <<http://www.unhcr.org/refworld/docid/470a33b00.html>> (accessed 8 February 2014).

<sup>101</sup> Supra note Goodwin-gill, G.S., McAdam, p. 233.

<sup>102</sup> Ibid., p. 264.

<sup>103</sup> Goodwin-gill, G.S., The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement, *International Journal of Refugee Law*, volume 23, number 3, 2011, p. 443-457.

<sup>104</sup> Supra note UNHCR, “Summary Conclusions: The Principle of Non-Refoulement.

<sup>105</sup> Supra note Wouters, p. 121.

<sup>106</sup> Supra note UNHCR, “Summary Conclusions: The Principle of Non-Refoulement; Supra note Goodwin-gill, G.S., McAdam, p. 335.

<sup>107</sup> Supra note Wouters.

<sup>108</sup> Supra note Goodwin-gill, G.S., McAdam, p. 335.

<sup>109</sup> EU Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal L212/12, 7 August 2001.

<sup>110</sup> Supra note Wouters, p. 158.

<sup>111</sup> Chetail, V., International Legal Protection of Migrants and Refugees: Ghetto or Incremental Protection? Some Preliminary Comments, in: Padmaja, K., ed., *Law of Refugees: Global Perspectives*, ICFAI University Press, 2008, pp. 33-45.

<sup>112</sup> Ibid.

refugees with a lasting solution.<sup>113</sup> Article 34 of the Refugee Convention obliges states to ‘facilitate the assimilation and naturalization of refugees’.<sup>114</sup> The European Union has, with the adoption of the Qualification Directive (see chapter 3.5) obliged its member states to provide refugees with a residence permit.<sup>115</sup>

### 3.3 The Common European Asylum System

From the 1990s onwards the member states of the European Union have made an effort to harmonise asylum policies across the Union. Common policies emerged in the 90’s in connection with the Schengen Agreement, which abolished the internal borders and generated the need for enhanced and strengthened control of external borders and stricter policies regarding asylum and immigration.<sup>116</sup> The common policies started with the Dublin Convention in 1990, which was signed in 1997 and is the predecessor of the Dublin II Regulation (see chapter 3.5.1?).<sup>117</sup> In Dublin it was agreed upon that in order to prevent ‘asylum shopping’, an asylum claim would be dealt with by only one responsible state, specifically the state of first arrival.<sup>118</sup> In 1999, the European Council of Ministers came together during the Tampere Summit, where they committed themselves to the establishment of a Common European Asylum System (hereinafter: CEAS).<sup>119</sup> According to the Presidency Conclusions the CEAS would be ‘based on the full and inclusive application of the Geneva Convention’, whereby the principle of *non-refoulement* would be maintained.<sup>120</sup> Two phases were distinguished in the construction of the system. The first phase would include ‘a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status.’<sup>121</sup> For the second phase the Presidency conclusions stated that the ‘Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.’<sup>122</sup> Today, the CEAS has gone through both phases: the first phase took place from 1999 to 2004 and the second phase happened between 2005 and 2014. The commitment of Tampere was reaffirmed in the 2009 Stockholm Programme, which should be completed this year, calling for a CEAS that is based on high standards of protection and where

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<sup>113</sup> Supra note Wouters, p. 569.

<sup>114</sup> Supra note UN General Assembly, Convention Relating to the Status of Refugees

<sup>115</sup> European Union Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, Official Journal L 304/12, 30 September 2004.

<sup>116</sup> European Council on Refugees and Exiles, From Schengen to Stockholm, the history of the CEAS, online source, available at: <<http://www.ecre.org/topics/areas-of-work/introduction/194.html>> (accessed 9 February 2014).

<sup>117</sup> European Union, Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ("Dublin Convention"), 15 June 1990, Official Journal C 254, 1997.

<sup>118</sup> Hatton, T.J., European Asylum Policy, *National Institute Economic Review*, volume 194, number 1, 2005, p. 106-119; Asylum shopping is the intentional making of multiple refugee claims in order to ultimately choose the state which offers the most favorable conditions of asylum.

<sup>119</sup> European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council*, 16 October 1999, available at: <http://www.refworld.org/docid/3ef2d2264.html> (accessed 9 February 2014).

<sup>120</sup> Ibid., art. 13.

<sup>121</sup> Ibid., art. 14.

<sup>122</sup> Ibid., art. 15.



similar asylum applications are treated alike and result in the same outcome regardless of the Member State in which they are lodged.<sup>123</sup>

The judgment of the ECtHR in *M.S.S v Belgium and Greece*, together with the NS and ME case of the ECJ, made clear that the EU asylum system, as it now stands, has not realized the agreements made in Tampere and Stockholm. There are still significant differences between EU Members States across the Union and the system is not always able to effectively protect asylum seekers. In order to explain some of the reasons for this, the legislative measures that have been adopted in accordance with the CEAS in order to harmonise the Member States' differing asylum systems will be discussed shortly in the next paragraph. The most controversial measure, the Dublin regulation, will be looked at in more detail.

### **3.4 Secondary asylum legislation adopted**

#### **3.4.1 Legislative asylum measures**

Following the Tampere Summit the European Union has adopted a number of important legislative measures that harmonise common minimum standards for asylum and gave body to the Tampere Presidency Conclusions. Together with the Dublin Regulation, these interconnected Directives are closely related to the MSS judgment, where the ECtHR looks whether Greece meets the criteria set up in the European asylum legislation. The most prominent ones will be discussed below in order of adoption

The first Directive that was adopted after the Tampere Summit is the Temporary Protection Directive.<sup>124</sup> As stated above, this Directive's purpose is 'to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries'.<sup>125</sup> However, since there is no mass influx of refugees in the case of Greece, this Directive will not be further discussed. Secondly, the Reception Conditions Directive was adopted, which laid down 'minimum standards for the reception of asylum seekers in Member States'.<sup>126</sup> The Directive applies 'to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum seekers'.<sup>127</sup> The rights that are protected under the Directive are amongst others: their right to information, to documentation, to residence and freedom of movement, to schooling and education of minors, to employment, health care, and member states are obliged to provide minimum standards on material reception conditions (accommodation, food and clothing).<sup>128</sup> Quickly after this came the Dublin II Regulation, that established a revised mechanism for determining the member state responsible for processing an asylum application. The Regulation is supported by EURODAC, a fingerprint database for identifying asylum seekers. The Dublin II Regulation will be further elaborated in the next paragraph. The third Directive adopted relevant for the implementation of the CEAS, the

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<sup>123</sup> European Commission, *The Stockholm Programme – An open and secure Europe serving and protecting citizens* 2009, Official Journal C 115/8, 2010.

<sup>124</sup> Supra note Temporary Protection Directive.

<sup>125</sup> Ibid., art. 1.

<sup>126</sup> European Union: Council of the EU, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Official Journal L 31/18, February 2003.

<sup>127</sup> Ibid., art. 3.

<sup>128</sup> Ibid., art. 5, 6, 7, 10, 11, 15 and 13.

Qualification Directive, covers the definition of a refugee and creates a common set of criteria to be used in the status determination process.<sup>129</sup> Lastly, the Asylum Procedures Directive established minimum standards on the procedures under which asylum claims are processed.<sup>130</sup> Furthermore, it includes rules about access to the procedures of asylum and detention (Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum), the definition of safe third countries, the rights and the obligations of asylum seekers, the right to interviews with the authorities, to legal assistance and to appeal.<sup>131</sup>

In December 2008 a legislative harmonisation process started when the Commission presented its first recast proposals in the area of asylum.<sup>132</sup> After five years of negotiations, the European Parliament voted in June 2013 on the remaining legislative pieces of the ‘asylum package’, which comprised the recast Asylum Procedures and Reception directives, and the Dublin and Eurodac Regulations, as well as the recast Qualification Directive already adopted in 2011.<sup>133</sup> The revision of the asylum *acquis* aimed to pursue two main objectives: enhance the level of harmonisation of asylum law in the European member states by reducing the possibilities for member states to derogate from standards set in European Union law and increase the level of protection for asylum seekers and refugees in asylum legislation.<sup>134</sup> In addition, the revision of the legislation had to be in line with the evolving jurisprudence of the ECtHR and the jurisprudence of the ECJ.<sup>135</sup>

Improvements introduced through the asylum package include among others a new right to information for asylum applicants, a mandatory personal interview for all asylum seekers, an obligation on the European Commission to produce a common information leaflet and access to an effective remedy is now more strongly guaranteed.<sup>136</sup>

Other aspects of the package constitute less progress as initially envisaged or even a status quo with regard to the first generation of asylum legislation. There is only limited progress with regard to the second objective of the recast process, which was to increase the level of harmonisation of national asylum procedures and their procedural tools. Furthermore, there is no significant progress regarding access to free legal assistance and representation at the first instance of the asylum procedure and torture survivors and unaccompanied children will not be

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<sup>129</sup> European Union: Council of the EU, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, Official Journal L 304, September 2004.

<sup>130</sup> European Union: Council of the EU, Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal L 326, December 2005.

<sup>131</sup> Ibid., art. 6, 10-16, 18, 27 and 39.

<sup>132</sup> Asylum Information Database, *Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System*, Annual Report 2012/2013, 6 September 2013, available at: <[http://www.asylumineurope.org/files/shadow-reports/not\\_there\\_yet\\_02102013.pdf](http://www.asylumineurope.org/files/shadow-reports/not_there_yet_02102013.pdf)> (accessed 14 February 2014).

<sup>133</sup> European Council on Refugees and Exiles, *EU adopts ‘Asylum Package’: All eyes turned on implementation*, ECRE Weekly Bulletin, 14 June 2013, available at: <<http://www.ecre.org/component/downloads/downloads/755.-html>> (accessed 5 June 2014).

<sup>134</sup> Supra note Asylum Information Database, *Not There Yet*.

<sup>135</sup> Ibid.

<sup>136</sup> Supra note ECRE, *EU adopts ‘Asylum Package’*.

exempted from accelerated and border procedures making it more difficult for them to access asylum procedures and substantiate their application for international protection.<sup>137</sup>

However, before a real judgment can be made about the effects of the recast measures it has to be awaited how the member states will transpose the European asylum legislation into national law. Member States now have entered the phase of transposition of the newly adopted standards into national legislation and implementation of the revised Directives and Regulations in practice, which should be done by the second half of 2015.<sup>138</sup>

Greece transposed the asylum directives discussed through Presidential Decrees 220/2007, 90/2008 and 96/2008, and 81/2009.<sup>139</sup> However, this did not run very smoothly: the European Commission has taken formal action against Greece at least once for not transposing or incorrect implementation of each of the five main CEAS measures.<sup>140</sup> In each case, Greece adjusted the laws before the infringement procedure led to a judgment of the European Court of Justice.<sup>141</sup>

### 3.4.2 The Dublin Regulation

As it was mentioned before, the Dublin system is the most controversial part of the CEAS. It has been widely criticised from the moment of its adoption, which has only grown stronger in the last years and particularly after the M.S.S. judgment.<sup>142</sup> The Dublin II regulation, which replaced the Dublin Convention of 1997, was adopted ‘to lay down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.’<sup>143</sup> The most applied criteria is that of the country where the asylum seeker has irregularly entered the European Union.<sup>144</sup> If it appears that an individual has passed through the territory of another Member State, the individual will be returned to the initial state of entry.<sup>145</sup> The Regulation was designed to prevent two ‘undesirable phenomena’ in the area of refugee law.<sup>146</sup> Firstly, ‘refugees in orbit’: refugees circulating between member states or within a member state, not being allowed to stay within the territory,

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<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Presidential Decree 220/2007 on the Amendment of Greek Legislation in Order to Comply with Directive 2003/9/EC, Official Gazette of the Hellenic Republic, volume 1, number 251, 13 November 2007, available at: <<http://www.et.gr/index.php>> (accessed 14 February 2014); Presidential Decree 90/2008 on the Amendment of Greek Legislation in Order to Comply with Directive 2005/85/EC, Official Gazette of the Hellenic Republic, volume 1, number 138, 11 July 2008, available at: <<http://www.et.gr/index.php>> (accessed 14 February 2014); Presidential Decree 81/2009 Amending Presidential Decree 90/2008, Official Gazette of the Hellenic Republic, volume 1, number 99, 30 June 2009, available at: <<http://www.et.gr/index.php>> (accessed 14 February 2014).

<sup>140</sup> European Commission, Home affairs: Browse infringements of EU Home Affairs law, available at: <[http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements\\_by\\_policy\\_asylum\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_policy_asylum_en.htm)> (accessed 14 February 2014).

<sup>141</sup> Ibid.

<sup>142</sup> Lenart, J., ‘Fortress Europe’: Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms, Merkourios – Utrecht Journal of International and European Law, volume 28, number 75, 2012.

<sup>143</sup> Supra note Dublin II.

<sup>144</sup> Lavrysen, L, M.S.S. v. Belgium and Greece (2): The impact on EU Asylum Law, Strasbourg Observers, February 2011, available at: <<http://strasbourgobservers.com/2011/02/24/m-s-s-v-belgium-and-greece-2-the-impact-on-eu-asylum-law/>> (accessed 31 October 2013).

<sup>145</sup> Ibid.

<sup>146</sup> Supra note Lenart, p. 11.



or being able to leave it, and with no State being willing to take responsibility for examining the claim.<sup>147</sup> Secondly, ‘asylum shopping’: intentionally lodging multiple applications in several Member States in order to ultimately choose the state which offers the most favourable conditions of asylum.<sup>148</sup> Regarding the first phenomenon it can be said that the Dublin II Regulation is successful in preventing this, at least within the European Union, since the Regulation provides for the responsible state within the union, and because article 3(3) of the Regulation states that every member state ‘shall retain the right to send an asylum seeker to a third country, in compliance with the provisions of the Refugee Convention.’ Two problems arise however. For the system of returns and readmissions to be reliable, it must be based on “a workable system of readmission agreements” (which facilitates the expulsion of third-country nationals) with ‘safe third countries’.<sup>149</sup> However, the Dublin II Regulation does not define which or when third countries would be considered ‘safe’. Secondly, as became apparent through the MSS case, member states cannot longer presume that all member states are *a priori* safe countries. Which is a problem because that is exactly where the system is based on: the fact that all the member states have acceded to the Refugee Convention and to the ECHR, that they affirm themselves to establish a CEAS comprising harmonized protection standards, and that they, as members of the Union, are obliged to respect and protect fundamental rights, is supposed to make them ‘safe’.<sup>150</sup> As laid down in the preamble of the Dublin II Regulation: ‘Member States, all respecting the principle of *non-refoulement*, are considered as safe countries for third-country nationals’.<sup>151</sup>

As regards to the second phenomenon, the Dublin system laying down a hierarchy of criteria and mechanisms to define which member state is responsible to examine an asylum application helps to eliminate ‘asylum shopping’. With help from the Eurodac system, the European fingerprint database for identifying asylum seekers, which identifies asylum seekers that have lodged multiple asylum applications.<sup>152</sup> However, the Regulation was supposed to work as a deterrent of asylum claims motivated by differences in the reception conditions or procedural standards, targeting those member states perceived to offer the most favourable conditions of asylum.<sup>153</sup> Consequently, this was supposed to create a level playing field of protection across the Union. However, although the legislative measures have been harmonised to a large extent, in practice there are still huge disparities between the member states.<sup>154</sup> For example in 2012 recognition rates differed immensely between member states: from very low in Greece (0.9%), Luxembourg (2.5%), and Cyprus (7.9%), to very high in Italy (61.7%) and Malta (90.1%).<sup>155</sup>

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<sup>147</sup> Ibid.

<sup>148</sup> Supra note Hatton, p. 5.

<sup>149</sup> Ferguson Sidorenko, O., *The Common European Asylum System, Background, Current State of Affairs, Future Direction*. TMC Asser Press, The Hague, 2007.

<sup>150</sup> Moreno-Lax, V., Dismantling the Dublin System: M.S.S. v. Belgium and Greece, *European Journal of Migration and Law*, volume 14, number 1, 2012, p. 5.

<sup>151</sup> Supra note Dublin II Regulation, recital 2.

<sup>152</sup> European Union: Council of the EU, Council Regulation 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, Official Journal L 316, December 2000.

<sup>153</sup> Supra note Moreno-lax, Dismanteling the Dublin System, p. 2.

<sup>154</sup> Ippolito, F., Velluti, S., *The Recast of the EU Asylum System: A Balancing Act Between Efficiency and Fairness*, *Refugee Survey Quarterly*, volume 30, number 3, 2011, p.24-62.

<sup>155</sup> Eurostat, Asylum decisions in the EU27: EU Member States granted protection to more than 100 000 asylum seekers in 2012, 96/2013, 18 June 2013; According to this data of Eurostat, the overall protection rate at first

In its attempt to succeed in the two aforementioned objectives, ‘refugees in orbit’ and ‘asylum shopping’, other issues concerning the Dublin II Regulation arose. The most important and controversial among them is the failure ‘to strike a balance between responsibility criteria in a spirit of solidarity’, as it is stated in the preamble.<sup>156</sup> The distribution of the responsibility-sharing, or burden-sharing, among member states to examine asylum applications proves not to be in balance, as the system poses a disproportionate burden on the external border states of the Union.<sup>157</sup> This obviously has negative consequences on the efficacy of protection and status determination but it also shifts the burden of asylum from the wealthier northern member states to the member states that, due to their geographical positions, already experience serious challenges in hosting asylum seekers.<sup>158</sup> UNHCR pointed this aspect out two years after its adoption: ‘The Dublin II Regulation does not contain any mechanism to ensure that responsibilities are shared in a balanced or equitable manner. (...) In particular the criterion of illegal border crossing might place a disproportionate responsibility on States at the external borders of the Union’.<sup>159</sup>

This, together with the judgement of the ECtHR in *M.S.S.* and later the ruling of the ECJ in the *N.S.* and *M.E.* case, started discussions at European level that have led to the adoption of a new set of rules. On 29 June 2013 Dublin II was recast. The new regulation, Dublin III, was jointly adopted by the European Parliament and the European Council.<sup>160</sup> It entered into force 19 July 2013 and applies to applications lodged six months after its entry into force.<sup>161</sup> The Commission proposed a mechanism for dealing with the inefficiency of the previous system that had resulted in overburdening ‘certain Member States with limited reception and absorption capacities’ as well as a lack of ‘adequate standards of protection in the responsible Member State, in particular in terms of reception conditions and access to the asylum procedure’.<sup>162</sup> During the Dublin III proposal, a new kind of procedure was introduced which would have allowed for a temporary

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instance in the EU 27 was at 28.2%. Belgium, Bulgaria, Cyprus, Czech Republic, France Greece, Ireland, Latvia, Lithuania, Luxembourg, Poland, Romania, Slovenia, and Spain had an overall recognition rate lower than the EU average in 2012. Furthermore, 11 EU Member states have a recognition rate between 30 and 60% (Czech Republic, Estonia, Denmark, Finland, Germany, Italy, the Netherlands, Portugal, Slovakia, Sweden, UK).

<sup>156</sup> Supra note Dublin II Regulation, recital 8; See also: supra note Lenart; supra note Moreno-Lax; supra note Ippolito.

<sup>157</sup> Ibid.; For example, Greece has fewer than 1,000 reception places available, yet received over 10,000 new asylum applications in 2010, while in Malta in 2012 4.9 asylum requests per 1000 inhabitants were submitted, whilst the average in the EU for the same year was 0.6.

<sup>158</sup> Kneebone, S., McDowel, C., Morrell, G., A Mediterranean Solution? Chances of Success, *International Journal of Refugee Law*, volume 18, number 3-4, p. 503.

<sup>159</sup> UN High Commissioner for Refugees, *The Dublin II Regulation. A UNHCR Discussion Paper*, April 2006, available at: <<http://www.refworld.org/docid/4445fe344.html>> (accessed 12 September 2013).

<sup>160</sup> European Union, Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Official Journal L 180/31, 29 June 2013.

<sup>161</sup> Ibid.

<sup>162</sup> European Union: European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 3 December 2008.

‘suspension of Dublin transfers towards the responsible Member State’ under these circumstances, but the Council abolished this idea.<sup>163</sup>

As a consequence, the recast Regulation has no significant changes in the underlying principles of the Dublin II Regulation, as there was no political will for a fundamentally different approach to determining the member state responsible for examining an asylum application.<sup>164</sup> Therefore the aim was to increase the system’s efficiency while ensuring higher protection standards within a Dublin procedure.<sup>165</sup> Article 33, does outlines a ‘mechanism for early warning, preparedness and crisis management’.<sup>166</sup> However, the responsibility lies with the member state facing the crisis, although it can ‘at its own discretion and initiative, draw up a preventive action plan and subsequent revisions thereof. When drawing up a preventive action plan, the Member State may call for the assistance of the Commission, other Member States, EASO and other relevant Union agencies.’<sup>167</sup>

However, there are some positive changes in the recast Regulation as well. The new right to information, a personal interview and the European Commission’s obligation to produce a common information leaflet may leave asylum seekers better informed of what is happening to them.<sup>168</sup> Furthermore, the new provision on judicial remedies, in the form of an appeal or a review, may better enable asylum seekers to challenge Dublin decisions where transfers would not be in compliance with their fundamental rights.<sup>169</sup> But as it goes for recasts of the European asylum Directives, all of this depends on how the Dublin III Regulation will be applied at a national level.

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<sup>163</sup> Ibid.

<sup>164</sup> Supra note Asylum Information Database, Not There Yet.

<sup>165</sup> Ibid.

<sup>166</sup> Supra note Dublin III, art. 33.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid., art. 4 and 5.

<sup>169</sup> Ibid., art. 27.

## 4. The M.S.S. v. Belgium and Greece case<sup>170</sup>

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### 4.1 Outline

The applicant, MSS (whose name remained undisclosed, as per Rule 47(3) of the Rules of Court, fled Afghanistan in early 2008 after, as he claimed, he escaped from a murder attempt by the Taliban in reprisal for having worked as an interpreter for the international air force troops stationed in Kabul.<sup>171</sup> He entered the European Union through Greece, where his fingerprints were taken, but he did not apply for asylum there.<sup>172</sup> He arrived in Belgium where he applied for asylum in February 2009, where his fingerprints showed that he had been registered in Greece.<sup>173</sup> Conformant to the Dublin Regulation, an order was made in Belgium to return him to Greece.<sup>174</sup> MSS lodged several appeals for the order to leave the country to be set aside, but the applications were rejected on procedural grounds and their merits were not considered.<sup>175</sup> At the same time he applied to the European Court of Human Rights to have his transfer to Greece suspended under rule 39, which enables the court to make an interim measure order.<sup>176</sup> The Court refused to apply Rule 39 but informed the Greek government that its decision was based on its confidence that Greece would honour its obligations under the European Convention on Human Rights and comply with European Union legislation on asylum, including the Dublin Regulation, the Procedures Directive and the Reception directive.<sup>177</sup> In June 2009 MSS was transferred to Greece.<sup>178</sup> Immediately upon arrival he was placed in detention in a building next to the Airport, held in a small place with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor.<sup>179</sup> When he was released he was given an asylum seeker's card, the so called 'pink card', and he was notified that he was required to report within two days to the Attica police station to declare his home address in Greece so that he could be informed of the progress of his asylum application.<sup>180</sup> He had not done so because he had no address to register and he thought that having an address was a condition for the procedure to be set in motion.<sup>181</sup> In August 2009 MSS was arrested as he was attempting to leave Greece with a false identity card.<sup>182</sup> He was placed in detention for seven days in the same building next to the airport, and claimed that he had been beaten by the police officers in charge of the centre.<sup>183</sup> He

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<sup>170</sup> European Court of Human Rights, *M.S.S. v. Belgium and Greece*, number 30696/09, 21 January 2011.

<sup>171</sup> *Ibid.*, para. 9 and 31; Having worked or being suspected of having worked for the international forces in Afghanistan entails a serious risk of persecution, see: United Nations High Commissioner for Refugees, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 17 December 2010, available at: <<http://www.refworld.org/docid/4d0b55c92.html>> (accessed 13 September 2013).

<sup>172</sup> *Ibid.*, para. 9 and 10.

<sup>173</sup> *Ibid.*, para. 11 and 12.

<sup>174</sup> *Ibid.*, para. 15.

<sup>175</sup> *Ibid.*, para 21-30.

<sup>176</sup> *Ibid.*, para. 31.

<sup>177</sup> *Ibid.*, para. 32.

<sup>178</sup> *Ibid.*, para. 33.

<sup>179</sup> *Ibid.*, para. 34.

<sup>180</sup> *Ibid.*, para. 35.

<sup>181</sup> *Ibid.*, para. 269.

<sup>182</sup> *Ibid.*, para. 43.

<sup>183</sup> *Ibid.*, para. 44.

was sentenced by the Athens Criminal Court to two months' imprisonment, suspended for three years, for attempting to leave the country with false papers.<sup>184</sup> In the next year MSS renewed his pink card twice for six months.<sup>185</sup> During the first time, in December 2009, he informed the police he had nowhere to live, and asked the Ministry of Health and Social Solidarity to help find him a home.<sup>186</sup> At the end of January 2010 the Ministry informed the State Legal Council that, because of strong demand, the search for accommodation for the applicant had been delayed, but that something had been found; in the absence of an address where he could be contacted, however, it had not been possible to inform the applicant.<sup>187</sup> The second time he renewed his pink card MSS received a notice in Greek, which he signed in the presence of an interpreter, inviting him to an interview at the Attica police headquarters on 2 July 2010.<sup>188</sup> MSS did not attend the interview; according to him the notice had been handed to him in Greek and the interpreter had made no mention of any date for an interview.<sup>189</sup> In a text message to his counsel in September 2010 MSS informed him that he had once again attempted to leave Greece for Italy, where he had heard reception conditions were more decent and he would not have to live on the street.<sup>190</sup> He was stopped by the police and taken to the Turkish border for expulsion there. At the last moment, the Greek police decided not to expel him, according to the MSS because of the presence of the Turkish police.<sup>191</sup>

MSS complained to the ECtHR about his treatment by both Greece and Belgium. Against Greece he alleged breaches of Article 3 of the ECHR by reason of his conditions in detention and his conditions of living, and a breach of Article 13 of the ECHR because of the shortcomings in the asylum procedure and the risk of *refoulement* to Afghanistan without any real examination of the merits of his asylum application or access to an effective remedy.<sup>192</sup> Against Belgium he alleged that Belgium authorities had breached Articles 3 and 13 by sending him to Greece and exposing him to these risks.<sup>193</sup> The court ruled in favour of the applicant and held that both Greece and Belgium were in violation of their obligations under Articles 3 and 13.<sup>194</sup>

## 4.2 Areas of violation

Before the Court starts with its assessment of the complaints against Greece, it notes that the states which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers.<sup>195</sup> Moreover, the court states that it does not underestimate the burden and pressure the situation places on the states concerned; in particular the difficulties involved in the reception of migrants and asylum seekers.<sup>196</sup> However, the court concludes by saying that given the absolute character of Article 3 this cannot absolve a state of its obligations under that provision, and therefore it

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<sup>184</sup> Ibid., para. 45.

<sup>185</sup> Ibid., para. 47 and 50.

<sup>186</sup> Ibid., para. 47.

<sup>187</sup> Ibid., para. 49.

<sup>188</sup> Ibid., para. 51.

<sup>189</sup> Ibid., para. 52.

<sup>190</sup> Ibid., para. 53.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid., para. 3, 205, 235 and 266.

<sup>193</sup> Ibid., para. 3, 326 and 369.

<sup>194</sup> Ibid., para. 234, 264, 321, 360, 368 and 396. The Greek government had to pay the applicant €5,725, The Belgium government was to pay €32,250.

<sup>195</sup> Ibid., 223.

<sup>196</sup> Ibid.

does not accept the argument of the Greek government that it should take these difficult circumstances into account.<sup>197</sup>

#### 4.2.1 Detention conditions

MSS claimed that the conditions of his detention at Athens international airport amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention, which reads:

‘No one shall be subjected to torture or to inhumane or degrading treatment or punishment.’<sup>198</sup>

MSS described his conditions of detention as follows: he had been locked in a small room with twenty other people, had had access to the toilets only at the discretion of the guards, had not been allowed out into the open air, had been given very little to eat and had had to sleep on a dirty mattress or on the bare floor.<sup>199</sup> Furthermore he complained that during his second period of detention he had been beaten by the guards.<sup>200</sup> The Greek Government described the holding centre as a suitably equipped short-stay accommodation centre specially designed for asylum seekers, where they were adequately fed.<sup>201</sup> In a written observation of the UNCHR, intervening as a third party to the case, it stated that it found ‘the conditions of detention there [in the centre next to the airport] unacceptable, with no fresh air, no possibility of taking a walk in the open air and no toilets in the cell’.<sup>202</sup>

In this part of the judgment the Court follows its earlier jurisprudence in which shortcomings in material detention conditions, such as overcrowding and a lack of clean water, sanitation and beds or mattresses, in Greece have been found to breach Article 3.<sup>203</sup> The court states that it is important that the applicant’s allegations are supported by similar findings by the CPT, the UNHCR, Amnesty International and Médecins sans Frontières – Greece and are not explicitly disputed by the Government.<sup>204</sup> The court saw no reason to depart from its earlier conclusion on the basis of the Greek Government’s argument that the periods when the applicant was kept in

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<sup>197</sup> Ibid., para. 223 and 224.

<sup>198</sup> European Convention on Human Rights and Fundamental Freedoms, ETS number 5, 1950.

<sup>199</sup> Supra note (MSS), para. 206.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid., para. 208.

<sup>202</sup> Ibid., para. 213.

<sup>203</sup> See European Court of Human Rights, *S.D. v Greece*, number 53541/07, 11 June 2009; European Court of Human Rights, *A.A. v Greece*, number 12186/08, 22 July 2010; European Court of Human Rights, *Bygylashvili v. Greece*, number 58164/10, 25 September 2012. Discussed in more detail in paragraph 4.3.

<sup>204</sup> Supra note (MSS), para. 229; para. 230: ‘According to the findings made by organisations that visited the holding centre next to the airport, the sector for asylum seekers was rarely unlocked and the detainees had no access to the water fountain outside and were obliged to drink water from the toilets. In the sector for arrested persons, there were 145 detainees in a 110 square meter space. In a number of cells there was only one bed for fourteen to seventeen people. There were not enough mattresses and a number of detainees were sleeping on the bare floor. There was insufficient room for all the detainees to lie down and sleep at the same time. Because of the overcrowding, there was a lack of sufficient ventilation and the cells were unbearably hot. Detainees’ access to the toilets was severely restricted and they complained that the police would not let them out into the corridors. The police admitted that the detainees had to urinate in plastic bottles which they emptied when they were allowed to use the toilets. It was observed in all sectors that there was no soap or toilet paper, that sanitary and other facilities were dirty, that the sanitary facilities had no doors and the detainees were deprived of outdoor exercise.’



detention were brief, the Court simply found four days in addition to a week not to be regarded as an ‘insignificant’ duration.<sup>205</sup>

In *MSS*, the Court for the first time recognised asylum seekers as a vulnerable group, who States may have heightened positive obligations to protect, including against detention or living conditions in breach of Article 3.<sup>206</sup> The court considered that the feeling of arbitrariness, inferiority and anxiety, as well as the profound effect such conditions of detention indubitably have on a person’s dignity constitutes degrading treatment, especially since *MSS*’s vulnerability is inherent in his situation as an asylum seeker.<sup>207</sup> This means that under ECHR law, detention conditions should be adjusted to the specific situation of asylum seekers as being vulnerable, and this enhanced responsibility for states may not necessarily apply to other regular migrants.<sup>208</sup>

#### 4.2.2 General living conditions

It is partially this part of the judgment that makes the *MSS* case a landmark ruling. The court breaks new ground in ruling that the general living conditions in Greece for *MSS*, and with him thousands of other asylum seekers in Greece that lived in the same conditions, amounted to inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights.<sup>209</sup>

*MSS* complained that the state of extreme poverty in which he had lived since he arrived in Greece amounted to inhuman and degrading treatment within the meaning of article 3, as the authorities had given him no information about possible accommodation and had done nothing to provide him with any means of subsistence even though they were aware of the precarious situation of asylum seekers in general and of his case in particular.<sup>210</sup> He, like many other Afghan asylum seekers, had lived in a park in the middle of Athens for many months, spending his days looking for food with no access to any sanitary facilities.<sup>211</sup> At night he lived in permanent fear of being attacked and robbed. According to him, the resulting situation of vulnerability and material and psychological deprivation amounted to treatment contrary to Article 3.<sup>212</sup> The Greek government claimed that the situation in which *MSS* had found himself after he had been released was the result of his own choices and omissions.<sup>213</sup>

The standard of living conditions of asylum seekers is a controversial topic within Europe, just as the application of social and economic conditions by the Court.<sup>214</sup> The Convention does not expressly protect or require a certain level of economic well-being, nor does it in principle

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<sup>205</sup> *Ibid.*, para. 232.

<sup>206</sup> International Commission of Jurists, workshop on migration and human rights in Europe, *Non-refoulement in Europe after M.S.S. v. Belgium and Greece*, summary and conclusions, July 2011, available at: <<http://www.icj.org/wp-content/uploads/2012/06/Non-refoulement-Europe-summary-of-the-workshop-event-2011-.pdf>> (accessed on 30 September 2013).

<sup>207</sup> *Supra* note *MSS*, para. 233.

<sup>208</sup> Lambert, H., ‘Safe third country’ in the European Union: An evolving concept in international law and implications for the UK, *Journal of Immigration, Asylum and Nationality Law*, volume 26, number 4, 2012, p. 12.

<sup>209</sup> Clayton, G., Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*, *Human Rights Law Review*, volume 11, number 4, 2011.

<sup>210</sup> *Supra* note *MSS*, para. 236.

<sup>211</sup> *Ibid.*, para. 238.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*, para 240.

<sup>214</sup> *Supra* note Clayton, p.765.

protect more general economic and social rights<sup>215</sup> To be accepted as a violation of the Convention it must be established that the shortcoming of social and economic rights either threatens psychological integrity, protected by the right to respect for private life under Article 8, or amounts to inhuman and degrading treatment under Article 3. There has been an accretion under these articles towards a principled jurisprudence of positive obligations to provide for the basic human needs of vulnerable individuals in several areas.<sup>216</sup> As the court stated in its famous Airey case: ‘..the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.’<sup>217</sup>

In MSS the court firstly made clear that article 3 of the convention cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home, nor does it entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living.<sup>218</sup> However, it continues by stating that what is at issue in the MSS case cannot be considered in these terms, as the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into positive law, since the Reception Conditions Directive has been transposed into Greek law.<sup>219</sup> By giving decisive power to the obligations under this Directive, the Court strengthens its impact.<sup>220</sup> According to Judge Rozakis, Greece's international obligations, to treat asylum seekers in accordance with these requirements ‘weighted heavily in the Court's decision to find a violation of art 3’ against Greece.<sup>221</sup> He adds that the court further explained what it meant by ‘positive law’ when it referred to the ‘existence of a broad consensus at the international and European level concerning the need for special protection of asylum seekers as a particularly underprivileged and vulnerable population group, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive.’<sup>222</sup>

After having regarded the Reception Conditions Directive and the vulnerability of asylum seekers as a group, the Court starts its examination whether a situation of extreme material poverty can raise an issue under article 3, by stating that it has not excluded ‘the possibility that the responsibility of the State may be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity’.<sup>223</sup> It

<sup>215</sup> European Court of Human Rights, *Implementing the European Convention on Human Rights in times of economic crisis*, seminar background paper, 25 January 2013, available at: < [http://www.echr.coe.int/Documents/Seminar\\_background\\_paper\\_2013\\_ENG.pdf](http://www.echr.coe.int/Documents/Seminar_background_paper_2013_ENG.pdf) > (accessed 31 October 2013).

<sup>216</sup> Palmer, E., Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights, *Erasmus Law Review*, volume 2, number 4, 2009, p. 397.

<sup>217</sup> European Court of Human Rights, *Airey v. Ireland*, Series A, number 32, 16 May 1978.

<sup>218</sup> Supra note MSS, para. 249; European Court of Human Rights, *Chapman v. UK*, number 27238/95, 18 January 2001.; European Court of Human Rights, *Muslim v. Turkey*, number 53566/99, 26 April 2005.

<sup>219</sup> Supra note MSS, para. 250.

<sup>220</sup> Lavrysen, L, *M.S.S. v. Belgium and Greece (2): The impact on EU Asylum Law*, Strasbourg Observers, February 2011, available at: < <http://strasbourgobservers.com/2011/02/24/m-s-s-v-belgium-and-greece-2-the-impact-on-eu-asylum-law/> > (accessed on 31 October 2013).

<sup>221</sup> European Court of Human Rights, *M.S.S. v. Belgium and Greece*, concurring opinion of judge Rozakis, number 30696/0921, 21 January 2011.

<sup>222</sup> Ibid.; supra note MSS, para. 251.

<sup>223</sup> Quoted from European Court of Human Rights, *Budina v. Russia*, number 45603/05, 18 June 2009.



describes the situation of MSS as particularly serious; living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live, with on top of this the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving.<sup>224</sup> Reacting to the argument of the Greek government that MSS was responsible for his situation, that the authorities acted with due diligence and that he should have done more to improve his situation, the court stated that it didn't see how the authorities could have failed to notice or to assume that the applicant was homeless in Greece.<sup>225</sup> It reiterated the acknowledgement of the government that there were less than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers.<sup>226</sup> Therefore, as the court states, given the particular state of insecurity and vulnerability in which asylum seekers are known to live in Greece, the Court considers that the Greek authorities should not simply have waited for the applicant to take the initiative of turning to the police headquarters to provide for his essential needs.<sup>227</sup> Concluding, the court regarded that the Greek authorities did not have due regard for the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.<sup>228</sup>

#### **4.2.3 Inadequacy of the asylum determination system/shortcomings in the asylum procedure**

MSS complained that he had no effective remedy in Greek law in respect of his complaints under articles 2 and 3, in violation of article 13 of the Convention: 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'<sup>229</sup> Furthermore, he alleged that the shortcomings in the asylum procedure in Greece were such that he faced the risk of *refoulement* to his country of origin without any real examination of the merits of his asylum application, in violation of article 3 (see above) and article 2 of the Convention, which reads as follows: 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'<sup>230</sup>

The Greek government submitted that MSS 'had not suffered the consequences of the alleged shortcomings, and could therefore not be considered as a victim within the meaning of the Convention'.<sup>231</sup> Furthermore the government asked the court to take MSS's attitude into account,

<sup>224</sup> Supra note MSS, para. 254.

<sup>225</sup> Ibid., para. 256 and 258.

<sup>226</sup> Ibid., para. 258.

<sup>227</sup> Ibid., para. 259.

<sup>228</sup> Ibid., para 263.

<sup>229</sup> Supra note ECHR.

<sup>230</sup> Ibid.

<sup>231</sup> Supra note MSS, para. 271.

for his failure to cooperate with the authorities.<sup>232</sup> They considered that the authorities had followed the statutory procedure and maintained that Greek legislation was in conformity with Community and international law on asylum, including the non-*refoulement* principle.<sup>233</sup> In addition the government argued that MSS had not given the authorities a chance to examine the merits of his allegations, and therefore had not exhausted the domestic remedies.<sup>234</sup>

The court starts this part of the judgment by stating that ‘its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled.’<sup>235</sup> In finding its judgment, the court observes ‘that for a number of years the UNHCR and the European Commissioner for Human Rights as well as many international NGO’s have revealed repeatedly and consistently that Greece’s legislation is not being applied in practice and that the asylum procedure is marked by such major structural deficiencies that asylum seekers have very little chance of having their applications and their complaints under the convention seriously examined by the Greek authorities, and that in the absence of an effective remedy, at the end of the day they are not protected against arbitrary removal back to their countries of origin.’<sup>236</sup>

The Court concludes that MSS was at risk of *refoulement* from Greece in violation of Article 3 ECHR and did not have access to an effective remedy under Article 13 ECHR, in particular on the basis of a lack of effective legal remedy, inadequacies in the asylum application procedure and low recognition rates for asylum or subsidiary protection.<sup>237</sup> The Court based this on the fact that an application to the Supreme Administrative Court for judicial review of a possible rejection of the applicant’s request for asylum could not be considered as a safety net protecting him against arbitrary *refoulement*.<sup>238</sup> The inadequacies in the asylum application procedure consist of: problems of access to the asylum procedure due to the short three-day time limit for application; insufficient information about asylum procedures; difficulties in obtaining access to the Attica Police Headquarters; no reliable system of communication between the authorities and asylum seekers; shortage of interpreters; lack of training of relevant officials; lack of legal aid; excessive, lengthy delays in receiving a decision; stereotyped and unreasoned replies.<sup>239</sup> Moreover, the court calls the recognition rates for asylum and subsidiary protection extremely low.<sup>240</sup> The Court used numbers from UNHCR the showed that in 2008 Greece had a recognition rate at first instance of 0.04% for refugee status under the Geneva Convention (eleven people in total), and 0.06% for humanitarian or subsidiary protection (eighteen people).<sup>241</sup>

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<sup>232</sup> Ibid., para 272. The government states that: ‘By failing to report to the Attica police headquarters in June 2009 he had failed to comply with the formalities for initiating the procedure and had not taken the opportunity to inform the police that he had no address, so that they could not notify him of any progress through another channel. Furthermore, he had assumed different identities and attempted to leave Greece while hiding from the authorities the fact that he had applied for asylum there.’

<sup>233</sup> Ibid., para. 274.

<sup>234</sup> Ibid., para. 280.

<sup>235</sup> Supra note MSS, para. 286.

<sup>236</sup> Ibid., para. 300.

<sup>237</sup> Ibid., para 301-311, 313, 321.

<sup>238</sup> Ibid., para 316.

<sup>239</sup> Ibid., para. 301, 302.

<sup>240</sup> Ibid., para. 313;

<sup>241</sup> Ibid., para. 126; ‘12,095 appeals were lodged against unfavourable decisions. They led to 25 people being granted refugee status by virtue of the Geneva Convention and 11 for humanitarian reasons or subsidiary protection.

#### 4.2.4 Violation of Belgium

MSS alleged against Belgium that by sending him to Greece under the Dublin Regulation when they were aware of the deficiencies in the asylum procedure in Greece and had not assessed the risk he faced, the Belgium authorities had failed in their obligations under articles 2 and 3 of the Convention.<sup>242</sup> The Court agreed and Belgium was condemned for the violation of article 3 due to not only the risk of ‘indirect’ *refoulement* through Greece, but also because of the risk of ‘direct’ *refoulement* to Greece run by MSS. In finding this conclusion, the court starts its analysis with a reference to the *Bosphorus* doctrine, establishing that: ‘...the Convention did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity. The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations. State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. However, a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion.’<sup>243</sup> It further states that the Belgium authorities ‘could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention.’<sup>244</sup> Therefore the ‘presumption of equivalent protection [does] not apply in this case’.<sup>245</sup> The Court continues by stating ‘that the general situation [in Greece] was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception.’<sup>246</sup> Because, at ‘the time of the applicant’s expulsion the Belgian authorities *knew or ought to have known* that he had no guarantee that his asylum application would be seriously examined by the Greek authorities’, and because Belgium ‘also had the means of refusing to transfer him’, Belgium had violated article 3 ECHR.<sup>247</sup> In addition the Court found that Belgium had also violated the convention for exposing the applicant to conditions of detention and living conditions contrary to article 3: the relevant facts were ‘freely ascertainable from a wide number of sources’, and as the situation was ‘well known’ to the Belgian authorities, it could only be inferred that they ‘knowingly’ exposed the applicant to reception conditions contrary to Article 3 ECHR.<sup>248</sup> The Court also explained how the burden of proof should have been distributed. It rejected the Belgian approach that it was entirely for the applicant to present evidence of a direct or indirect risk of *refoulement* to reverse the presumption that Greece would abide by its obligations.<sup>249</sup> That would incorrectly increase the burden of proof ‘to such an extent as to hinder the examination on

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Where appeals were concerned, the respective success rates were 2.87% and 1.26%. By comparison, in 2008 the average success rate at first instance was 36.2% in five of the six countries which, along with Greece, receive the largest number of applications.’

<sup>242</sup> Supra note MSS, 323.

<sup>243</sup> Ibid., para. 338.

<sup>244</sup> Ibid., para. 340.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid., para. 352.

<sup>247</sup> Ibid., para. 358.

<sup>248</sup> Ibid., para. 366 and 367.

<sup>249</sup> Ibid., para. 389.

the merits of the alleged risk of a violation'.<sup>250</sup> To the contrary, the Court established that, on account of the serious doubts disclosed by the information on the Greek asylum system in the public domain, which were 'freely ascertainable from a wide number of sources', the authorities could not simply assume that the applicant would be treated in conformity with the Convention.<sup>251</sup> Belgium had 'to first verify how the Greek authorities applied their legislation on asylum in practice.'<sup>252</sup>

### 4.3 Significance of the case

The main importance of the judgment lies in the impact on the CEAS, and especially the Dublin II regulation. Furthermore, the standard set for living conditions of asylum seekers and the designation of asylum seekers as a vulnerable group are interesting and important aspects of the judgment. The latter two implications will firstly be discussed.

The Court's findings against Greece have an impact on the standard of treatment of asylum seekers in the Council of Europe area. As already mentioned above, the ECtHR breaks new ground in ruling that the general living conditions in Greece for MSS amounted to inhuman and degrading treatment contrary to Article 3 of the ECHR. It is common practice that a 'minimum level of severity' is required for an alleged ill-treatment, torture, inhuman or degrading treatment or punishment, to fall within the scope of article 3 of the convention.<sup>253</sup> However, before this judgment, degrading treatment did not include being homeless or the denial of socio-economic rights.<sup>254</sup> The Court considered that Greece had to abide by the Reception Directive, which Greece had transposed into Greek legislation. The court then describes MSS's situation as 'particularly serious'.<sup>255</sup> The implication of this could be, that even when the Reception Directive does not apply, for instance for those Council of Europe members outside of the European Union, or if it is breached, article 3 is to be found in violation in cases of 'a situation of extreme material poverty' when:

1. the applicant is faced with official indifference in a situation of 'serious deprivation or want incompatible with human dignity'
2. the applicant is 'wholly dependent on State support'
3. the applicant has a vulnerability that is 'inherent in his situation as an asylum seeker'

It is this third condition, the designation of asylum seekers as vulnerable, which forms another interesting aspect of the judgment.<sup>256</sup> The court states that in the present case it 'must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely

"Today's ruling by the ECtHR clearly shows the EU's need to urgently establish a Common European Asylum System and to support Member States in meeting their obligations to provide adequate international protection."

- Cecilia Malmström, European Commissioner for Home Affairs

<sup>250</sup> Ibid.

<sup>251</sup> Ibid., para. 352.

<sup>252</sup> Ibid., para. 359.

<sup>253</sup> Supra note Lambert, safe third country

<sup>254</sup> Ibid.

<sup>255</sup> Supra note MSS, para. 254.

<sup>256</sup> Supra note Clayton.

to have endured previously.<sup>257</sup> It is the first time that the ECtHR recognised asylum seekers themselves as a vulnerable group, regarding which States may have heightened positive obligations to protect, including protection against detention or living conditions in breach of article 3 ECHR.<sup>258</sup>

#### **4.3.1 Implications on the Common European Asylum System**

The Courts findings against Belgium have the implication that Belgium should have verified how the Greek authorities applied their legislation in practice, not just assume that MSS would be treated in conformity with European Union law. This means that it can no longer automatically be presumed that the member state to which an asylum seeker is returned will necessarily respect the individual's rights and determine the asylum application in compliance with International and European law. The Court states that: "the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill- treatment...where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention".<sup>259</sup> Therefore the judgment created a positive duty on all European member states to verify the safety of other member states prior to the application of the Dublin II Regulation. This brings an end, at least for now, to the 'principle of mutual trust', which was being applied by the member states under the Dublin II Regulation. The presumption that all member states can be seen as safe countries cannot outweigh the reality which is released in information provided by reliable actors, such as certain NGOs.<sup>260</sup> Since the Court did not provide an exhaustive list with refutability conditions, it is up to the national authorities of the member states to examine every asylum application in a close and rigorous manner.<sup>261</sup>

Consequently, Belgium and Greece, by simply applying the Dublin II Regulation, violated the rights provided for in the Convention. Accordingly, the judgment exposed the shortcomings on the Dublin system. Judge Rozakis, who wrote a concurring opinion, stated: 'It is clear that the European Union immigration policy – including Dublin II – does not reflect the present realities, or do justice to the disproportionate burden that falls to the Greek immigration authorities. There is clearly an urgent need for a comprehensive reconsideration of the existing European legal regime'.<sup>262</sup>

#### **4.3.2 Implications on Greece**

As stated before, Dublin transfers to Greece are suspended since the judgment of the Court. This will continue to be the case until Greece is accepted to have improved its reception and detention

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<sup>257</sup> Supra note MSS, para. 232.

<sup>258</sup> International Commission of Jurists, workshop on migration and human rights in Europe, Non-refoulement in Europe after M.S.S. v. Belgium and Greece, summary and conclusions, July 2011, available at: <http://www.icj.org/wp-content/uploads/2012/06/Non-refoulement-Europe-summary-of-the-workshop-event-2011-.pdf> (accessed on 30 September 2013).

<sup>259</sup> Supra note MSS, para. 353.

<sup>260</sup> Supra note Moreno-Lax, Dismantling the Dublin System, p.28.

<sup>261</sup> Ibid.

<sup>262</sup> European Court of Human Rights, M.S.S. v. Belgium and Greece, Concurring Opinion Judge Rozakis, number 30696/09, 21 January 2011.

conditions, and brings its asylum procedure up to date with European standards. Greece is communicating its efforts to improve its asylum system in the progress reports of its action plan, which will be further discussed in chapter 5.1.

#### **4.4 The European Court of Justice: the case of NS and ME<sup>263</sup>**

After the judgment of the ECtHR, a judgment of the European Court of Justice (hereinafter: ECJ) about the same subject was long awaited. In December 2011 the time was there, and the ECJ handed down a judgment in the N.S and M.E. case. The N.S. case concerned an asylum seeker from Afghanistan who lodged an asylum application in the United Kingdom, after he had travelled through, among other countries Greece.<sup>264</sup> Here, so he claimed, he was arrested and detained for four days, but did not make an asylum application.<sup>265</sup> Following his release, the Greek authorities gave him the order to leave the country within 30 days.<sup>266</sup> According to N.S., when he tried to leave Greece, he was arrested by the Greek police once again and expelled to Turkey, where he was detained and held in appalling conditions for two months.<sup>267</sup> After he escaped from detention in Turkey, he travelled to the UK, where he lodged an asylum claim on 12 January 2009.<sup>268</sup> In accordance with the Dublin II Regulation, the UK made a request to Greece to take charge of the appellant in the main proceedings in order to examine his asylum application.<sup>269</sup> Subsequently, the UK notified N.S. that directions had been given for his removal to Greece: ‘his claim that his removal to Greece would violate his rights under the ECHR was clearly unfounded, since Greece is on the ‘list of safe countries’’ in Part 2 of Schedule 3 to the 2004 Asylum Act’.<sup>270</sup> Later on, proceedings concerning a transfer of N.S. were annulled and the ECJ was asked for a preliminary reference.<sup>271</sup>

Thereafter the ECJ decided to join the proceedings in the case N.S. with the case of M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, which dealt with a proposed transfer of five asylum seekers to Greece from the Republic of Ireland.<sup>272</sup> The five unconnected appellants from Afghanistan, Algeria and Iran, travelled via Greece, where they were arrested for the illegal entry of the country. When they filed their asylum application in Ireland, it became clear that they were registered in the Eurodac system, which recorded that they had entered the European Union via Greece without claiming asylum there.<sup>273</sup> The five argued ‘the procedures and conditions for asylum seekers in Greece are inadequate and that Ireland is therefore required to exercise its power under Article 3(2) [the ‘sovereignty clause’] of the Dublin Regulation to accept responsibility for examining and

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<sup>263</sup> European Court of Justice, Joined Cases C-411/10 NS v Secretary of State for the Home Department and C-493/10 ME and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, 21 December 2011.

<sup>264</sup> Ibid., para. 34.

<sup>265</sup> Ibid., para. 35 and 35.

<sup>266</sup> Ibid., para. 35.

<sup>267</sup> Ibid.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid., para. 36; Greece failed to respond to that request within the time limit stipulated by Article 18(7) of the Regulation and was accordingly deemed, on 18 June 2009, pursuant to that provision, to have accepted responsibility for examining the appellant’s claim.

<sup>270</sup> Ibid., para. 38.

<sup>271</sup> Ibid., para. 50.

<sup>272</sup> Ibid., para. 51.

<sup>273</sup> Ibid.



deciding on their asylum claims'.<sup>274</sup> The High Court of Ireland therefore decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling.<sup>275</sup>

The ECJ stresses the fact that the CEAS is based on the assumption that all member states 'observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard'.<sup>276</sup> The Court states that this principle of mutual confidence that is underlying the Dublin Regulation is there to speed up the handling of asylum claims on the one hand and to avoid asylum shopping on the other hand.<sup>277</sup> This leads to the presumption that 'the treatment of asylum seekers in all Member States complies with the requirement of the Charter, the Geneva Convention and the ECHR'.<sup>278</sup> The Court therefore held that not every infringement of fundamental rights would affect the obligations under the Dublin Regulation: 'it would not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 [Respectively the Reception Directive, the Qualification Directive and the Procedures Directive] to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible'.<sup>279</sup> The threshold the Court establishes is that a member state may not transfer asylum seekers to another member state: 'if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State'.<sup>280</sup> The court later specifies this when it states that 'the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter'.<sup>281</sup>

The Court continues by quoting the ECtHR in its MSS case: 'the extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers'.<sup>282</sup> As a reaction to the submissions of several member states, according to which the member states lack the instruments necessary to assess compliance with fundamental rights by the member state responsible, the Court cites to the 'regular and unanimous reports' of NGO's, the input of UNHCR, and Commission Reports on the Dublin Regulation as well as the proposals for a recast of it, that the ECtHR took into account, stating that such information 'enables members states to assess the functioning of the asylum system in the member state responsible, making it possible to evaluate those risks'.<sup>283</sup> The ECJ added that,

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<sup>274</sup> Ibid., para. 52.

<sup>275</sup> Ibid., para 53.

<sup>276</sup> Ibid., para. 78.

<sup>277</sup> Ibid., para. 79.

<sup>278</sup> Ibid., para. 80.

<sup>279</sup> Ibid., para. 82 and 84;

<sup>280</sup> Ibid., para. 86.

<sup>281</sup> Ibid., para. 94.

<sup>282</sup> Ibid., para. 89.

<sup>283</sup> Ibid., para. 90 and 91.

subject to the right to examine the asylum application, the member state which should transfer the applicant to the responsible member state under the Dublin Regulation and which finds it is impossible to do so, must examine the other criteria set out in that regulation in order to establish whether they enable another Member State to be identified as responsible for the examination of the asylum application.<sup>284</sup> In that regard, it must ensure that it does not worsen a situation (...) by using an unreasonably lengthy procedure for determining the responsible member state. If necessary, 'that member state must itself examine the application'.<sup>285</sup> In addition, the Court states that 'European Union law precludes the application of a conclusive presumption that the Member State [indicated by the Dublin Regulation] as responsible [for the asylum application] observes the fundamental rights of the European Union'.<sup>286</sup> If the Dublin Regulation would require a conclusive presumption of compliance with fundamental rights 'it could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States'.<sup>287</sup> Hence the Court stipulates that this would be the case 'with regard to a provision which laid down that certain States are 'safe countries' with regard to compliance with fundamental rights', because 'the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions'.<sup>288</sup> Consequently, the conclusive presumption that all member states can be seen as safe countries for asylum applications is incompatible with European Union law, since this only permits 'rebuttable' presumptions.

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<sup>284</sup> Ibid., para. 96.

<sup>285</sup> Ibid., para. 98.

<sup>286</sup> Ibid., para. 105.

<sup>287</sup> Ibid., para. 100.

<sup>288</sup> Ibid., para 102 and 103.



## 5. The Greek and European response: which measures have been taken?

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### 5.1 The Greek action plan

As stated before, after pressure from European and international actors, the Greek government decided to reform its asylum legislation. Following the parliamentary elections held in Greece in October 2009, the newly established government set up an expert committee to give an opinion on the reform of the asylum system.<sup>289</sup> In November 2009, the Minister of Citizen Protection established the Committee of Experts on asylum, which included key stakeholders involved in migration and asylum issues in Greece: representatives of relevant Ministries and agencies, academics, NGO's and UNHCR. Its task was to present a proposal regarding the amendments to the existing law and practice, and to make suggestions concerning the establishment of a new civil authority to deal with asylum application, composed of civil servants instead of the police officers that were in charge at the time.<sup>290</sup> The proposals of the committee were submitted to the Greek government on 22 December 2009. The then Prime Minister Papandreou, stated at a press conference that: 'the aim pursued is to reform the legislative framework to bring it into line with the 1951 Convention on Refugees and with European Law'.<sup>291</sup> As a result, after 'intensive consultation' the Greek Action Plan on Migration Management was drafted, and presented to the European Commission in September 2010. The Greek government stated: 'The Greek authorities recognize that existing procedures and facilities have exhausted their limits and, as a result, fall short of actual needs and have therefore decided to intervene on several fronts'.<sup>292</sup> The implementation of the action plan would take 3 three years and the intention was 'the management of mixed migration flows at the entry points of the Greek territory, in a way that both secures the need for enhanced border controls to prevent illegal immigration, and ensures the provision of international protection and adequate living conditions to the persons concerned, in accordance with Greece's international and European obligations'.<sup>293</sup> The plan involved:

- (a) The creation of Screening Centres and the adoption of a modern procedure for screening, registering and managing aliens;
- (b) The restructuring of the asylum procedure and the creation of a new Asylum Department, independent from the Police;
- (c) The increase of the number of centres for receiving vulnerable groups and minors;
- (d) The modernization of aliens' detention centres, the creation of new centres and the improvement of the return procedure.<sup>294</sup>

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<sup>289</sup> Supra note MSS, para 123.

<sup>290</sup> Ibid.

<sup>291</sup> Ibid., para 124.

<sup>292</sup> <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.GRC.CO.16-19.Add.1.pdf>

<sup>293</sup> Ibid.

<sup>294</sup> Ibid.

### 5.1.1 Progress report

Since then the most important law that was passed is Law 3907/2011, which came into force in January 2011 and aimed at achieving three goals within one year.<sup>295</sup> The first was the creation of an Asylum Service, functioning within the Ministry of Citizen Protection for the examination of asylum applications on first instance and the establishment of Appeals Committees, within the same Service, but with an independent character, to examine the applications on second instance.<sup>296</sup> The second goal was to create a 'first reception' Service, also under the authority of the Ministry of Citizen Protection. This Service would have a Central Service in Athens, with several First Reception Centres and temporary or mobile First Reception Units across the country.<sup>297</sup> The third and final part of the law includes the transposition of the European Returns Directive into Greek legislation.<sup>298</sup> It can be read in the Law that the Asylum Service and the Appeals Authority 'shall become operational (...) within 12 months after the entry into force of the present law.'<sup>299</sup>

As stated before, the implementation of the Action Plan, and thereby the establishment of both services has been considerably delayed. Due to the delay in the establishment of the new Asylum Service, the asylum procedure has been in a transitional phase between the adoption of the Action plan and the opening of the Asylum Service. The Asylum Service became operational on 7 June 2013, and with the adoption of Presidential Decree 113/2013 on the 13<sup>th</sup> of June 2013, the transitional phase officially ended.<sup>300</sup> Since then Greece has a twofold system for asylum applications whereby applications that are lodged after 7 June 2013 fall under the new procedure, in contrast to the applications that are lodged before that date which still fall within the scope of the old procedure, and therefore remain under the jurisdiction of the police.<sup>301</sup> And this is the core change brought about by the new procedure and the establishment of the Asylum Service: the registration, examination and ruling at first instance of asylum claims are now under the jurisdiction of an independent and civil service and no longer under the responsibility of the police.

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<sup>295</sup> National Authorities, Greece: Law Number 3907 of 2011 on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC "on common standards and procedures in Member States for returning illegally staying third country nationals" and other provisions, 26 January 2011, available at: <http://www.refworld.org/docid/4da6ee7e2.html> (accessed 24 April 2014).

<sup>296</sup> Ibid., art 1 and 3.

<sup>297</sup> Ibid., art 8.

<sup>298</sup> Ibid., art 16.

<sup>299</sup> Supra note Law Number 3907 of 2011.

<sup>300</sup> National Authorities, Greece: Presidential Decree No. 113/2013 Establishment of a single procedure for granting the status of refugee or of subsidiary protection beneficiary to aliens or to stateless individuals in conformity with Council Directive 2005/85/EC "on minimum standards on procedures in Member States for granting and withdrawing refugee status" (L 326/13.12.2005) and other provisions, 14 June 2013, available at: <http://www.refworld.org/docid/525e84ae4.html> > (accessed 24 April 2014).

<sup>301</sup> Before the Asylum Service became active, the authorities competent to receive and register asylum applications under the Old Procedure were the Asylum Departments of the Aliens' Directorates of Attica (Athens) and of Thessaloniki, the Security Departments of the National Airports, and the Sub-directorates and Security Departments belonging to the Police Directorates across the country (there are 53 Directorates). Although in theory applicants could lodge an application to local authorities, those authorities reportedly refused to register applications and directed applicants to attempt to submit their applications at the Attica Aliens Directorate in Athens, which only registered claims once a week for a few hours.

Furthermore, Law 3907/2011 has created the First Reception Service, which has been operational since July 2013.<sup>302</sup> The Service provides for closed reception centres where migrants will be kept for 15 days, which can be prolonged to a maximum of 25 days.<sup>303</sup> At the centres the migrants will have at least 5 m<sup>2</sup> per person, there are separate residential areas for men, woman and families, everyone can walk freely on the terrain, however no one is allowed to leave the Centre.<sup>304</sup> Here they will go through screening procedures in order to establish their identity and nationality, to register them, to provide, if needed, medical and psychological support and to inform them on their obligations and rights.<sup>305</sup> And the centres offer the possibility to screen and identify individuals in need of international protection and those belonging to vulnerable groups. After the 15 (or 25) days, they will either be referred to reception centres for asylum seekers, facilities for other vulnerable groups, detention/pre-removal centres, or returned to their countries of origin.<sup>306</sup>

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<sup>302</sup> Council of the European Union, Greece's Revised National Action Plan on Asylum Reform and Migration Management, Information by Greece, 14347/13, 3 October 2013.

<sup>303</sup> Interview with the First Reception Service of 13 December 2013.

<sup>304</sup> Ibid.

<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

## 5.2 Fence at the Greek-Turkish border

After Greece faced a shift of migration flows to the Evros region, at the border with Turkey, the then Citizens' Protection Minister announced that authorities planned to build a fence along Greece's land border with Turkey in order to curb illegal migration.<sup>307</sup> The Minister further elaborated the plan by stating that: 'Cooperation with other EU states is not going well. Greek society has reached its limits in taking in illegal immigrants, Greece can't take it anymore.'<sup>308</sup> The plan, which was inspired by the frontier of the United States and Mexico, drew criticism from opposition parties and NGO's.<sup>309</sup> The main conservative opposition party New Democracy called the fence 'a half measure (...) which cannot solve a major problem' and the Communist Party said it was 'inhumane'.<sup>310</sup> Amnesty International too stated that the plan would constitute a violation of human rights.<sup>311</sup>

The border between Greece and Turkey is made up of a 203 kilometer land border and a sea border in the Aegean Sea. Until 2010, most migrants tried to reach Greece by crossing the Aegean Sea in small boats to one of the Greek islands in the Aegean, such as Mytilini, Samos or Chios.<sup>312</sup> During that year the main 'route' shifted to the land border with Turkey, which runs along the Evros River for the biggest part, due to the increased surveillance of the by Frontex supported Greek coastguard.<sup>313</sup> Especially the 12.5 kilometer part of the land border with Turkey that does not run along the Evros River became a popular entry point for smugglers and migrants into the country.<sup>314</sup> And at this part of the border the 10.5 kilometer fence was built a little less than three years after the Government announced the plan. The request to the European Union to fund the more than three million euro project was rejected: 'the Commission has decided not to follow up the Greek request because it considers it pointless. Fences and walls are short-term measures that do not solve migration management issues in a structural way.'<sup>315</sup> As a reaction, the Minister accused the European Union of hypocrisy on the issue of illegal immigration: 'on one hand they refuse to review Dublin II and pressure Greece, threatening it with penalties for failing to guard its borders, on the other hand, when measures are taken, they keep their distance and mock.'<sup>316</sup> In December 2012 the four-meter-tall, barbed-wire fence was completed, and Greece decided to deploy an additional 1800 police officers to the border region under operation 'Aspida' (Shield).<sup>317</sup>

<sup>307</sup> Kathimerini, Minister wants Evros border fence, 2 January 2011, news report, available at: [http://www.ekathimerini.com/4dcgi/\\_w\\_articles\\_wsitel\\_1\\_02/01/2011\\_371436](http://www.ekathimerini.com/4dcgi/_w_articles_wsitel_1_02/01/2011_371436) (accessed 30 October 2013).

<sup>308</sup> Ibid.

<sup>309</sup> Kathimerini, Mixed response to Evros fence idea, 3 January 2011, news report, available at: [http://www.ekathimerini.com/4dcgi/\\_w\\_articles\\_wsitel\\_1\\_03/01/2011\\_371613](http://www.ekathimerini.com/4dcgi/_w_articles_wsitel_1_03/01/2011_371613) (accessed 30 October 2013).

<sup>310</sup> Ibid.

<sup>311</sup> Ibid.

<sup>312</sup> Amnesty International, *Frontier Europe, Human Right Abuses on Greece's Border With turkey*, Amnesty International Ltd, July 2013, available at: <http://www.amnesty.org/en/library/asset/EUR25/008/2013/en-/d93b63ac-6c5d-4d0d-bd9f-ce2774c84ce7/eur250082013en.pdf> (accessed 13 October 2013).

<sup>313</sup> Ibid.

<sup>314</sup> Ambrosini, M., Triandafyllidou, A., Irregular Immigration Control in Italy and Greece: Strong Fencing and Weak Gate-keeping serving the Labour Market, *European Journal of Migration and Law*, volume 13, issue 3, 2011.

<sup>315</sup> Kathimerini, Minister in EU row over fence, 7 February 2012, news report, available at: [http://www.ekathimerini.com/4dcgi/\\_w\\_articles\\_wsitel\\_1\\_07/02/2012\\_426615](http://www.ekathimerini.com/4dcgi/_w_articles_wsitel_1_07/02/2012_426615) (accessed at 19 February 2014).

<sup>316</sup> Ibid.

<sup>317</sup> Supra note Amnesty International, *Frontier Europe*; Joint Operation Poseidon Land began in March 2011 as a continuation of the deployment of Rapid Border Intervention Teams from Frontex. The objectives of the operation

The main concern regarding the fence is the possible incompatibility with the principle of *non-refoulement*. UNHCR stated that ‘of course the Greek state has the right to protect its borders. However, the state also has obligations to ensure the safe access of asylum seekers in the country. How to do that in practice with this policy is a question that not has been answered by anyone. Our view and what we always advocate to the Greek authorities is that in every border control practice that they undertake or plan they have to make sure that somehow access is ensured.’<sup>318</sup> Likewise Amnesty International ‘acknowledges the prerogative of states to control the entry into and stay of non-nationals in their territory and of the EU to support member states in carrying out legitimate border control. However, the manner in which Greece’s border with Turkey is being controlled is leading to serious human rights violations.’<sup>319</sup>

A few months after the fence had been built, Frontex reported that ‘the situation changed dramatically’ after the mobilization of ‘unprecedented resources’.<sup>320</sup> Detections dropped ‘to almost negligible levels’, from about 2000 a week to below 10 per week from the end of 2012.<sup>321</sup> However, detections in the Aegean Sea increased by 912 percent in the same period, starting immediately following the enhanced surveillance at the land border.<sup>322</sup> This caused severe problems: firstly because the route is dangerous and many people do not survive the journey, and secondly because the islands are not able to handle the renewed influx of migrants.<sup>323</sup> Because of this, the fence does not seem to be a solution, but more a way to move the problem. Or as Frontex put it in their report: ‘despite the clear impact of the Greek operational activities on the number of detections of illegal border-crossing, there is little evidence to suggest that the absolute flow of irregular migrants arriving in the region has decreased in any way.’<sup>324</sup>

### 5.3 Operation Xenios Zeus

The Greek government launched operation Xenios Zeus on August the second of 2012. The operation, which was controversially called after the ancient Greek god of hospitality and guests, is aimed at cracking down illegal immigration.<sup>325</sup> The operation objectives, as described by responsible Minister of Public Order and Citizens' Protection Nikos Dendias, are: ‘1: Pushing back illegal immigrants from Evros and sealing of the borders. 2: Sending illegal immigrants back to their countries of origin. At a first stage, the operations are focused on the centre of Athens. An extension of their scope to the periphery of Greece has been also planned. 3: Ensuring the rule of law and protecting quality of life in Athens, to the benefit of both inhabitants and visitors of the country’s capital. In this context, the aim of the operations is to suppress

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are to increase the level of border surveillance, to increase the level of border checks and assistance with screening and de-briefing activities. (Source: Frontex) the Frontex operations will be further discussed in chapter 5.4.2 (?).

<sup>318</sup> Interview with UNHCR Greece of 15 November 2013.

<sup>319</sup> Supra note Amnesty International, Frontier Europe.

<sup>320</sup> Frontex, Annual Risk Analysis 2013, April 2013, available at: <[http://frontex.europa.eu/assets/Publications-Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2013.pdf](http://frontex.europa.eu/assets/Publications-Risk_Analysis/Annual_Risk_Analysis_2013.pdf)> (accessed 20 February 2014).

<sup>321</sup> Ibid.

<sup>322</sup> Ibid.

<sup>323</sup> Kathimerini, Greek islands faced with fresh wave of illegal migrants, 7 January 2013, news report, available at: <[http://www.ekathimerini.com/4dcgi/w\\_articles\\_wsite6\\_1\\_07/01/2013\\_477171](http://www.ekathimerini.com/4dcgi/w_articles_wsite6_1_07/01/2013_477171)> (accessed 20 February 2014).

<sup>324</sup> Frontex, FRAN Quarterly, issue three: July- September 2012, July 2013, available at: <[http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Fran\\_Q3\\_2012.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Fran_Q3_2012.pdf)> (accessed 20 February).

<sup>325</sup> Human Rights Watch, Unwelcome Guests, Greek Police Abuses of Migrants in Athens, Human Rights Watch, June 2013, available at: <[http://www.hrw.org/sites/default/files/reports/greece0613\\_ForUpload\\_.pdf](http://www.hrw.org/sites/default/files/reports/greece0613_ForUpload_.pdf)> (accessed 30 September 2013).

“We will not allow our towns, or our country, to be occupied and become a migrant ghetto”

- Nikos Dendias, Minister of Public Order and Citizens' Protection

illegal activities, including illegal trade, prostitution, drug trafficking, and organized mendicancy.’<sup>326</sup> The operation was extended to Patras in early October 2012.<sup>327</sup>

The operation was one of the first actions of the conservative-led government that is still in power today. Immigration and crime in especially Athens were very popular themes during the lead-up to the national elections of 2012. As a candidate, now Prime Minister Antonis Samaras’ campaign focused on reclaiming Greek cities from immigrants: ‘Greece today has become a centre for illegal immigrants. We must take back our

cities, where the illegal trade in drugs, prostitution, and counterfeit goods is booming. There are many diseases and I am not only speaking about Athens, but elsewhere too.’<sup>328</sup> Greece’s far right nationalist party Golden Dawn, described by media and scholars as neo-Nazi and fascist, received nearly seven percent of the votes in these elections and entered 18 seats in Parliament.<sup>329</sup>

Operation Xenios Zeus is realised by the use of existing general police powers to conduct identity checks to verify the legal status of individuals presumed to be irregular migrants.<sup>330</sup> While such stops by the police were frequent before the start of the operation, official statistics demonstrate a significant intensification since the launch of the operation.<sup>331</sup> Six months after the beginning of the operation, in February 2013, 84,792 people had been brought to police stations to verify their legal status in Athens alone.<sup>332</sup> Of these people, 1,811 were arrested for illegal entry and unlawful residence in Greece, a criminal offence in Greece, and detained pending deportation.<sup>333</sup> The Ministry of Public Order and Citizen Protection stopped publishing statistics on the number of people brought to police stations on 23 February 2013, possibly as a reaction to criticism at the percentage of people actually being arrested and those who have been brought to police stations.<sup>334</sup> It is therefore impossible to find out how many people have been subjected to immigration stops in the streets (these numbers have never been published) and how many people have been brought to police stations. The number of people arrested, however, is still being published: since the launch of the operation 5,602 individuals have been arrested for the reason that ‘they did not meet the legal requirements in the country of residence, and for other

<sup>326</sup> Dendias, N., Dealing with illegal immigration/Operation “XENIOS ZEUS”, 11 February 2013, Blog, available at: <<http://dendias.gr/en/read/1169>> (accessed 21 February 2014).

<sup>327</sup> Kathimerini, More than 150 migrants detained in Patra raids, 1 October 2012, news report, available at: <[http://www.ekathimerini.com/4dcgi/\\_w\\_articles\\_wsitel\\_1\\_01/10/2012\\_463859](http://www.ekathimerini.com/4dcgi/_w_articles_wsitel_1_01/10/2012_463859)> (accessed 21 February 2014).

<sup>328</sup> Official YouTube channel of New Democracy, “A. Samaras: The law will return in the cities,” video, 19 April 2012, available at: <<http://www.youtube.com/watch?v=fXUXRwk7U6Q&feature=youtu.be>> (accessed 27 February 2014).

<sup>329</sup> Supra note Human Rights Watch, Unwelcome Guests.

<sup>330</sup> Human Rights Watch, Unwelcome Guests, Greek Police Abuses of Migrants in Athens, Human Rights Watch, June 2013, available at: <[http://www.hrw.org/sites/default/files/reports/greece0613\\_ForUpload-.pdf](http://www.hrw.org/sites/default/files/reports/greece0613_ForUpload-.pdf)> (accessed 30 September 2013).

<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.



violations of the Aliens Act.<sup>335</sup> The operation does not involve specialised police teams, but it mobilises police officers in different parts of the city, especially in the city centre, on a daily basis.<sup>336</sup> The by the Greek government so-called ‘sweeps’ for the most part are carried out by a particular category of low ranked and less trained police staff called the police guards.<sup>337</sup> The police that are conducting the stops, except for the officers of the border guard, do not receive specialised training in immigration and asylum issues, for instance on how to establish if an individual has a legal basis to stay in Greece and how to recognise fake documents.<sup>338</sup>

Operation Xenios Zeus has impelled widespread criticism, in particular about the scale of the operation. A few days after the launch of the operation Amnesty International urged the Greek government to halt the police crackdown.<sup>339</sup> The organisation stated that ‘the scale of the police operation in Athens at the weekend raises serious concerns about discrimination on the basis of perceived ethnicity’.<sup>340</sup> Likewise, Human Rights Watch stipulated that: ‘the fact that over 94 percent of those taken to police stations to verify their legal status in Greece were found to be in the country lawfully suggests that the police are casting an extraordinarily wide net’.<sup>341</sup> It further stated that ‘ethnic profiling is discriminatory and unlawful when groups are systematically targeted solely or mainly on the basis of race or ethnicity. Depriving people of liberty is also unlawful and arbitrary when based on discriminatory grounds such as in Xenios Zeus’.<sup>342</sup> The report Human Rights Watch wrote about the operation describes frequent police checks of individuals with a foreign-looking appearance, unjustified searches of personal belongings, derogatory verbal language, arbitrarily detainment and occasional physical abuse.<sup>343</sup> Furthermore, the Greek Ombudsman called the operation problematic in view of two fundamental constitutional principles: the principle of proportionality and the prohibition of ethnic racial discrimination.<sup>344</sup>

The practise of ethnic profiling seems to be confirmed by the complaints of several tourists that they were taken to police stations in spite of showing their papers to the police. For instance, in 2012 an African American tourist was arrested despite showing his United States passport and

<sup>335</sup> Hellenic Police, Ministry of Public Order and Citizen Protection, Results police checks from 02/15/2014 to 02/21/2014 in the center of Athens, within the operation ‘Xenios Zeus’, available at: <[http://www.astynomia.gr/index.php?option=ozo\\_content&lang=..&perform=view&id=38022&Itemid=1240&lang=>](http://www.astynomia.gr/index.php?option=ozo_content&lang=..&perform=view&id=38022&Itemid=1240&lang=>) (accessed 27 February 2014).

<sup>336</sup> Supra note Human Rights Watch, Unwelcome Guests.

<sup>337</sup> Ibid. In order to become a police guards you have to be a high school graduates who has fulfilled their military obligations, and is not older than 28 years. The police guards do not receive the two-year training that police officers receive, but take a three-month training which includes possession of a weapon.

<sup>338</sup> Supra note Human Rights Watch, Unwelcome Guests.

<sup>339</sup> Amnesty International, Greece must halt mass police crackdown on ‘irregular migrants’, news report, 8 August 2012, available at: <<http://www.amnesty.org/en/news/greece-must-halt-mass-police-crackdown-on-irregular-migrants-2012-08-08>> (accessed 4 March 2014).

<sup>340</sup> Ibid.

<sup>341</sup> Supra note Human Rights Watch, Unwelcome Guests.

<sup>342</sup> Human Rights Watch, Xenios Zeus and the True Meaning of Greek Hospitality, news report, 9 July 2013, available at: <<http://www.hrw.org/news/2013/07/09/xenios-zeus-and-true-meaning-greek-hospitality>> (accessed 4 March 2014).

<sup>343</sup> Supra note Human Rights Watch, Unwelcome Guests, The report is based on interviews with 49 persons about their experiences during police stop and search operations, conducted in Athens in February and April 2013.

<sup>344</sup> The Greek Ombudsman, Special report: The phenomenon of racist violence in Greece and how it is combated, September 2013, available at: <<http://www.synigoros.gr/resources/docs/sronracistviolencesummary2013.pdf>> (accessed 28 November 2013).

was beaten until he passed out when he tried to photograph his handcuffs with his phone, and woke up in the hospital.<sup>345</sup> Similarly, a Korean backpacker was arrested and beaten up by the police in January 2013.<sup>346</sup> The events have made the United States put a warning about the safety and security for U.S. nationals traveling to Greece on their Bureau of Consular Affairs website.<sup>347</sup> It states that ‘the U.S. Embassy has confirmed reports of U.S. African-American citizens detained by police authorities conducting sweeps for illegal immigrants in Athens. U.S. citizens are strongly urged to carry a copy of their passport or some form of photo identification with them at all times when traveling in Greece.’<sup>348</sup>

According to police officials, foreigners with valid documents proving lawful stay in Greece will be stopped only briefly.<sup>349</sup> The police will detain and transfer to a police station any individuals without papers or with papers the police decide need to be verified.<sup>350</sup> Minister Dendias called Xenios Zeus ‘a huge success’, arguing that the operation has made residents of the capital feel safer, reduced crime rates and improved Greece’s credibility with its European partners as an effective guardian of the union’s eastern border.<sup>351</sup> He further stated that ‘it’s not so much about the numbers of migrants that have gone, but the common understanding now that Athens is a safe and well-organised city’.<sup>352</sup>

#### 5.4 Voluntary repatriation program

Due to the economic crisis, the inefficient asylum system, continuously worsening labour demand, the diminished social welfare and the rise in racist violence many migrants are unable or unwilling to remain in Greece. There are several projects and measures that are supporting migrants to return to their country of origin. This process of returning a person to their country of origin is called repatriation. The assisted voluntary returns from Greece, that are run by the International Organization for Migration (hereinafter: IOM), applies for legal and/or illegal migrants who wish to return to their country of origin.<sup>353</sup> IOM has stated that 15.481 people have taken advantage of the program since it started in 2010.<sup>354</sup> The returns are funded by national resources (25 percent) and the European Return Fund (75 percent), one of the four financial

<sup>345</sup> Fisher, M., Greek police beat up another ‘illegal immigrant’ who’s actually a tourist, news report, available at: <<http://www.washingtonpost.com/blogs/worldviews/wp/2013/01/10/greek-police-beat-up-another-illegal-immigrant-whos-actually-a-tourist/>> (accessed 4 March 2014).

<sup>346</sup> Hadjimatheou, C., The tourists held by Greek police as illegal migrants, *BBC*, news report, available at: <<http://www.bbc.com/news/magazine-20958353>> (accessed 30 September 2013).

<sup>347</sup> Bureau of Consular Affairs, U.S. Department of State, Country Information Greece, available at: <<http://travel.state.gov/content/passports/english/country/greece.html>> (accessed 4 March 2014).

<sup>348</sup> Ibid. It also notes that ‘there has been a rise in unprovoked harassment and violent attacks against persons who, because of their complexion, are perceived to be foreign migrants. U.S. citizens most at risk are those of African, Asian, Hispanic, or Middle Eastern descent. Travelers are urged to exercise caution’.

<sup>349</sup> Supra note Human Rights Watch, Unwelcome Guests.

<sup>350</sup> Ibid.

<sup>351</sup> Hope, K., Athens crackdown shows no hospitality for illegal migrants, *Financial Times*, 14 February 2014, available at: <<http://www.ft.com/intl/cms/s/0/a18bc960-9560-11e3-9fd6-00144feab7de.html?siteedition=intl#axzz-2v0heteEa>> (accessed 19 February 2014).

<sup>352</sup> Ibid.

<sup>353</sup> International Organization for Migration, IOM assisted voluntary return programmes in Europe, January 2006, available at: <[http://www.bamf.de/SharedDocs/MILo-DB/DE/Rueckkehrfoerderung/Foerderprogramme/-ProgrammeEU/peu-grc-freiw-rueckkehr-download.pdf?\\_\\_blob=publicationFile](http://www.bamf.de/SharedDocs/MILo-DB/DE/Rueckkehrfoerderung/Foerderprogramme/-ProgrammeEU/peu-grc-freiw-rueckkehr-download.pdf?__blob=publicationFile)> (accessed 5 March 2014).

<sup>354</sup> Kathimerini, Immigrants’ interest in repatriations growing fast, 19 October 2013, news report, available at: <[http://www.ekathimerini.com/4dcgi/w\\_articles\\_wsitel\\_1\\_19/10/2013\\_523896](http://www.ekathimerini.com/4dcgi/w_articles_wsitel_1_19/10/2013_523896)> (accessed 5 March 2014).

instruments of the General Programme on ‘Solidarity and Management of Migration Flows’.<sup>355</sup> In 2012 another 800 were repatriated by a program funded by Norway.<sup>356</sup> Likewise, in February 2014 the British Embassy in Athens announced a program for helping the Greek authorities repatriate around 1500 migrants over the course of twelve months.<sup>357</sup> The British government has launched two million for the project, which will be run jointly with the Greek Ministry of Public order and Citizen Protection and the IOM.<sup>358</sup> The British ambassador stated that the ‘assessment is that the UK remains a primary final destination country for many of the irregular migrants in Greece. British funding for this program is ultimately about reducing illegal migration to the UK. That is why we are co-operating with the Greek government as it faces the continuing challenge of illegal migration’.<sup>359</sup> The scheme will repatriate immigrants to Pakistan, Afghanistan, Iraq, Iran, Bangladesh, Morocco, Egypt, India, Nigeria and Sudan.<sup>360</sup> Unaccompanied minors, mostly from Afghanistan, single-parent families and migrants with medical needs will also be among the repatriated, just as around 30 victims of human trafficking will be returned, mostly citizens from central and Eastern Europe.<sup>361</sup> Minister Dendias of Public Order and Citizen Protection has announced that: ‘the IOM will remain our strategic partner in the years to come so we can deal with a problem that cannot be solved overnight’.<sup>362</sup>

## 5.5 General reaction to criticism by Greece

As described above, Greece has been criticized by national and international media and organisations, condemning Greece for the unjust and harsh treatment immigrants receive in the country, as well as for the failure of the Greek authorities to change the situation significantly so far. However, it can be argued that this criticism has not succeeded in bringing substantive change in the way immigration policy is handled so far (there are significant differences between different parts of immigration policy however: for example, there have been significant steps made in the asylum policy, while the use of detention and detention conditions have not been improved, or even deteriorated).

Although the Greek government did recognise that the existing asylum procedures fell short and there was need for change, criticism is also often dealt with by the authorities through denial and

<sup>355</sup> European Union, Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007, establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme ‘Solidarity and Management of Migration Flows’, Official Journal of the European Union L 144/45, 6 June 2007; The other three Funds are: the European Fund for the Integration of Third Country Nationals, the External Borders Fund and the European Refugee Fund.

<sup>356</sup> Frontex, Annual Risk Analysis 2013, April 2013, available at: <[http://frontex.europa.eu/assets/Publications-/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2013.pdf](http://frontex.europa.eu/assets/Publications-/Risk_Analysis/Annual_Risk_Analysis_2013.pdf)> (accessed 22 October 2013).

<sup>357</sup> Kathimerini, British Embassy announces 2-million-pound migrant repatriation program in Greece, 20 February 2014, available at: <[http://www.ekathimerini.com/4dcgi/\\_w\\_articles\\_wsitel\\_1\\_20/02/2014\\_537536](http://www.ekathimerini.com/4dcgi/_w_articles_wsitel_1_20/02/2014_537536)> (accessed 25 February 2014).

<sup>358</sup> Ibid.

<sup>359</sup> Smith, M., UK launches £2m project in Greece to assist repatriation of migrants, The Guardian, 19 February 2014, news report, available at: <<http://www.theguardian.com/uk-news/2014/feb/19/uk-launches-project-greece-repatriation-migrants>> (accessed 25 February 2014).

<sup>360</sup> Ibid.

<sup>361</sup> Ibid.

<sup>362</sup> International Organization for Migration, New Voluntary Return Programme Will Help 7,000 Migrants Leave Greece, 2 July 2013, news report, available at: <<http://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2013/pbn-listing/new-voluntary-return-programme-w.html>> (accessed 5 March 2014).

several rhetorical defences, some of which are contradicting each other. These range from rationalizing the type of treatment immigrants experience in Greece by emphasising the criminal and other dangers their presence allegedly creates, to arguing away the failure to address the problem by mentioning the exceptional large number of irregular migrants in Greece and a lack of financial resources.<sup>363</sup> But also undermining the extent of the problem or simply denying the possibility that Greece would not uphold human rights or the possibility that racism can demonstrate itself amongst Greek people.<sup>364</sup> For example the Greek Prime Minister Antonis Samaras stated that Greeks have been against racism ‘from the depths of centuries’, because they are both culturally and biologically predisposed to oppose it; because ‘their tradition does not allow them [to do otherwise]’ and because ‘there are very powerful antibodies in our DNA, in our gene, which fight that “virus”’.<sup>365</sup> On the other hand, operation Xenios Zeus has been presented by the Minister of Public Order and Citizen Protection, Nikos Dendias, as an effort to restore the human rights of illegal immigrants, but also as part of a broader strategy of deterrence, aimed at turning Greece into an ‘unfriendly destination’ for those considering entering or staying in the country illegally.<sup>366</sup> Furthermore, the Greek government often denies accusations or findings in reports from NGO’s and European and International organisations. For example, in the official response of the government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter: CPT), Greece essentially denied the findings of the CPT by stating, in contrast to the findings, that unaccompanied children are systematically detained separately from adults (except when ‘no vacancies exist’); that ‘all detained aliens have access to douche and hot water’; that all detained people are provided with three meals a day and hygiene products (although these are provided for by NGO’s); and they are medically examined on a daily basis (again in part through NGO’s).<sup>367</sup> In the same report the government blames the poor conditions on the detainees themselves, by stating that: ‘The hygienic installations (...) are an issue that tantalizes and bothers the relevant Police authority on a daily basis. The detained in their effort to “blackmail” their immediate release, destroy the installations, break the fountains, stuff the drainages with towels, shoes, clothes etc, the result of which is the dirty water to flow in the toilets and the other spaces. A plumber is coming every day to stop up the toilets and repair the pipes, fountains etc, so that to be used by the detained aliens.’<sup>368</sup> However, a couple of months later the Greek Minister of Public Order and Citizen Protection, Nikos Dendias, said that conditions in Greek immigration detention centres stand at the ‘lowest acceptable civilised minimum’, as they may contribute to the goal of discouraging illegal immigration by sending a message that the country is ‘unfriendly’ to it.<sup>369</sup>

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<sup>363</sup> Cheliotis, L. K., Behind the veil of philoxenia: The politics of immigration detention in Greece, *European Journal of Criminology*, volume 10, number 6, November 2013, p. 728.

<sup>364</sup> Ibid.

<sup>365</sup> Prime Minister’s Press Office, Address by Prime Minister Mr. Antonis Samaras at the Commemorative Event for the Seventieth Anniversary of the Displacement of Greek Jews in Thessaloniki, 17 March 2013, in Greek available at: <<http://www.primeminister.gov.gr/2013/03/17/10133>> (accessed 10 April 2014).

<sup>366</sup> Supra note Cheliotis, L. K., Behind the veil of philoxenia.

<sup>367</sup> Council of Europe, Response of the Government of Greece to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Greece from 20 to 27 January 2011, 10 January 2012, p. 7, 8.

<sup>368</sup> Ibid., p. 9.

<sup>369</sup> Supra note Cheliotis, L. K., Behind the veil of philoxenia.

## 5.6 Help from the European Union and NGO's

This paragraph will discuss the solidarity efforts undertaken so far to support Greece in its asylum and migration crisis. Article 80 of the Treaty on the Functioning of the European Union (hereinafter TFEU) states that ‘the principle of solidarity and fair sharing of responsibility, including its financial implications’ shall govern all policies enacted under articles 77 through 97, which cover policies on border checks, asylum and immigration.<sup>370</sup> In the Action Plan Greece reiterates that the asylum situation it finds itself in is not merely a Greek problem, but a European problem instead, and it therefore states that ‘Greece has, in various occasions, appealed to the principle of solidarity among Member-States for an in depth cooperation on political and funding issues.’<sup>371</sup> The actual implementation of the Greek Action Plan would and will be impossible without (financial) support by the European Union.<sup>372</sup> Indeed, European Commissioner of Home Affairs Malmström declared that the European Commission would provide support to Greece to improve its situation.<sup>373</sup> The European solidarity measures, can essentially be grouped into three categories: financial solidarity; operational support (through Frontex and the EASO); and voluntary relocation measures.

### 5.6.1 Financial solidarity

The most concrete form of solidarity and responsibility-sharing between European member states existent in the field of asylum today is financial solidarity through the European Refugee Fund (hereinafter: ERF), to be replaced as of 2014 by the Asylum and Migration Fund.<sup>374</sup> In both cases, funds allocated to each member state consist of a fixed amount per country in addition to a variable amount in view of the proportion of persons seeking or benefiting from protection in each European member state.<sup>375</sup> And so far, the most significant support Greece received has been financial support. The earlier mentioned Framework programme on solidarity and management of migration flows’ covered financial solidarity mechanisms between 2007 and 2013 in the form of four funds: the ERF, the European External Borders Fund, the European Return Fund and the European Fund for the integration of third-country nationals. During the period 2011-2013 Greece received 97,9 million euros from the Return Fund, 129,7 million euros

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<sup>370</sup> European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047-0200:en:PDF>> (accessed 6 March 2014).

<sup>371</sup> Ministry of public order and citizen protection, Greek Action Plan on Asylum and Migration Management, executive summary, available at <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/p4\\_exec-summary/p4\\_exec\\_summary\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/p4_exec-summary/p4_exec_summary_en.pdf)> (accessed on 13 September 2013).

<sup>372</sup> European Union Agency for Fundamental Rights, *Coping with a fundamental rights emergency. The situation of persons crossing the Greek land border in an irregular manner*, thematic situation report, 2011.

<sup>373</sup> Joint statement by Mr Christos Papoutsis, Minister of Citizen Protection of Greece and Cecilia Malmström, European Commissioner in charge of Home Affairs: Greece and the Commission agree to enhance cooperation on reforming the Greek asylum system, 27 September 2010 available at: <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/450>> (accessed 6 March 2014).

<sup>374</sup> European Council on Refugees and Exiles, Enhancing intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System, January 2013, available at: <[http://www.emnbelgium.be/sites/default/files/publications/intra-eu\\_solidarity\\_-\\_full\\_paper1.pdf](http://www.emnbelgium.be/sites/default/files/publications/intra-eu_solidarity_-_full_paper1.pdf)> (accessed 6 March 2014).

<sup>375</sup> Ibid.



under the External Border Fund and 19.95 million under the ERF.<sup>376</sup> The fact that the focus of funding was thus on border control and detention measures instead of protection measures financed through the ERF initiated criticism from several actors.<sup>377</sup> Greece itself has been criticised many times for its failure to absorb European funds.<sup>378</sup> In recent years, recipients from the ERF included UNHCR Greece, NGO's and national institutions.<sup>379</sup> Nearly all of the NGO's in Greece suffer from the bureaucratic hurdles in the Greek government relation to the disbursement of funds, including the ERF. According to the Special Rapporteur of the UN these underutilization of these funds has created significant difficulties for NGO's which rely on them to implement their programs. All the NGO's that were interviewed for this research stated that the disbursement of funds could take up to several years.

With the start of the new funding period from 2014 until 2020, the structure of European Home Affairs funding has changed greatly. The number of funds will be reduced to two: the Asylum and Migration Fund and the Internal Security Fund.<sup>380</sup> The ERF, the Return Fund and the European Integration Fund will fall under the Asylum and Migration Fund, and the European Borders Fund will be, together with a fund against terrorism and one against crime, falling under the Internal Security Fund.

Besides funding from the European Union, solidarity measures have also been granted by the EEA states: Iceland, Liechtenstein and Norway. These countries have set aside, through the EEA Grants €63.4 million to Greece for the 2009-2014 funding period.<sup>381</sup> Almost one-third, which amounts to €20.9 million, is to be dedicated to asylum and migration issues, in cooperation with UNHCR and IOM.<sup>382</sup> The Grants will contribute to 'ensuring a smooth-functioning national migration management system in Greece that safeguards the right to seek asylum and gives special attention to unaccompanied asylum-seeking children.'<sup>383</sup>

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<sup>376</sup> European Commission, commission staff working document, Communication from the Commission to the European Parliament and the Council, 4th Annual Report on Immigration and Asylum, 2012.

<sup>377</sup> Parliamentary Assembly of the Council of Europe, Migration and asylum: mounting tensions in the Eastern Mediterranean, Doc. 13106, 23 January 2013, available at: <<http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=19349&lang=en>> (accessed 13 October 2013); European Council on Refugees and Exiles, Europe is turning its back on refugees from Syria, says Amnesty International, ECRE Weekly Bulletin, 13 December 2013, available at: <<http://www.asylumineurope.org/news/13-12-2013/europe-turning-its-back-refugees-syria-says-amnesty-international>> (accessed 10 March 2014).

<sup>378</sup> Kathimerini, Race against time to absorb all EU funds set aside for 2013, 27 November 2013, news report, available at: <[http://www.ekathimerini.com/4dcgi/\\_w\\_articles\\_wsite2\\_1\\_27/11/2013\\_529787](http://www.ekathimerini.com/4dcgi/_w_articles_wsite2_1_27/11/2013_529787)> (accessed 29 November 2013).

<sup>379</sup> Supra note Putting solidarity to the test.

<sup>380</sup> European Commission Home Affairs, Funding Home Affairs beyond 2013, available at: <[http://ec.europa.eu/dgs/home-affairs/financing/fundings/funding-home-affairs-beyond-2013/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/financing/fundings/funding-home-affairs-beyond-2013/index_en.htm)> (accessed 10 March 2014).

<sup>381</sup> EEA Grants, Supporting efforts in Greece on asylum and migration, 12 December 2011, news report, available at: <<http://eeagrants.org/News/2011/Supporting-efforts-in-Greece-on-asylum-and-migration>> (accessed 10 March 2014).

<sup>382</sup> Ibid.

<sup>383</sup> Ibid.



## 5.6.2 Operational support

### 5.6.2.1 Frontex

On 24 October 2010, the Greek government asked for assistance in controlling its external land border with Turkey due to an ‘exceptional mass inflow of irregular immigrants’.<sup>384</sup> The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, or Frontex, responded to this request by the deployment of a Rapid Border Intervention Team (hereinafter: RABIT), as well as ‘operational means to increase the control and surveillance levels at Greece’s external border with Turkey’.<sup>385</sup> This deployment of a RABIT, a group of specialised border guards made available by the 27 European member states to deal with emergency situations at the European external borders, was the first since the establishment of Frontex in 2005.<sup>386</sup> The RABIT deployment was provisionally planned for two months, but was extended until 3 March 2011. The end of the mission was immediately followed by a permanent Frontex mission, Joint Operation ‘Poseidon Land’, which was an extension of the already ongoing mission in the Aegean, Joint Operation ‘Poseidon Sea’.<sup>387</sup> While the RABIT is a mechanism that can only be implemented on a short-term basis, as in response to an ‘urgent and exceptional migratory pressure, Joint Operations are classified as ‘permanent’ operations by Frontex.’<sup>388</sup> However, Frontex stated that besides the duration, there would not be a lot of differences between the two missions: ‘the Poseidon Land 2011 joint operation being launched right after the end of the RABIT operation will ensure continuity in effectively controlling the Greek-Turkish border, as well as in preventing irregular immigration in the Eastern Mediterranean region.’<sup>389</sup> The states participating in Joint Operation ‘Poseidon Land’ provide 70-80 guest officers as experts, and about 2 to 3 interpreters per month.<sup>390</sup>

Frontex was established ‘with a view to improving the integrated management of the external borders of the Member States of the European Union.’<sup>391</sup> With the latest amendments of the Frontex Regulation of 2011 taken into account, its tasks are: (1) to coordinate operational cooperation between member states; (2) to assist member states in training national border guards; (3) to carry out risk analyses and management of external borders; (4) to provide member states increased technical and operational assistance at external borders when necessary;

<sup>384</sup> Burrige, A., The ‘Added Value’ of RABITs: Frontex, Emergency Measures and Integrated Border Management at the External Borders of the European Union, *Consortium for Comparative Research on Regional Integration and Social Cohesion*, Luxembourg, 2012.

<sup>385</sup> Frontex, Frontex deploys Rapid Border Intervention Teams to Greece, news report, 25 October 2010, available at: <<http://frontex.europa.eu/news/frontex-deploys-rapid-border-intervention-teams-to-greece-PWDQKZ>> (accessed 11 March).

<sup>386</sup> European Union: Council of the European Union, 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, Official Journal L 349/126, 25 November 2004.

<sup>387</sup> Frontex, RABIT Operation 2010 Ends, Replaced by JO Poseidon 2011, news report, 2 March 2011, available at: <<http://frontex.europa.eu/news/rabit-operation-2010-ends-replaced-by-jo-poseidon-2011-iA6Kaq>> (accessed 11 March 2014).

<sup>388</sup> Ibid.

<sup>389</sup> DOC-Europa, Frontex and the RABIT operation at the Greek-Turkish border, Memo, 2 March 2011, available at: <[europa.eu/rapid/press-release\\_MEMO-11-130\\_en.doc](http://europa.eu/rapid/press-release_MEMO-11-130_en.doc)> (accessed 11 March 2014).

<sup>390</sup> Interview with Frontex Operational Officer (Land Borders Sector) by UNHCR in Alexandroupolis on 22 August 2011, see <<http://www.unhcr.org/4f269d5f9.pdf>>.

<sup>391</sup> Supra note council regulation Frontex.

and (5) to support member states by organizing joint return operations.<sup>392</sup> Although Frontex is restricted to facilitating cooperation in the sphere of border control between member states, thus leaving primary responsibility for control and surveillance of external borders with the member states, its activities, and in particular its compliance with human rights, have attracted substantial attention in recent years.<sup>393</sup>

When Frontex began to operate, it became clear that there are many human rights implications involved with its activities and that it was ill-equipped to handle these.<sup>394</sup> This was especially the case when intercepting irregular migrants, asylum seekers and refugees at land and sea borders, and also during return operations involving irregular migrants and rejected asylum seekers.<sup>395</sup> International organisations and NGO's have criticised Frontex both at a structural and organisational level. At the organisational level, there were particular worries with regard to the principle of non-*refoulement*. In a NGO Statement on International Protection a broad coalition of NGO's expressed their concern about the fact that: 'much of the rescue work by Frontex is in fact incidental to a deterrence campaign so broad and, at times, so indiscriminating, that directly and through third countries – intentionally or not – asylum-seekers are being blocked from claiming protection under the 1951 Refugee Convention.'<sup>396</sup> According to Amnesty International and the European Council on Refugees and Exiles (hereinafter: ECRE), Frontex does not know whether any asylum claims were made during interception operations as it does not collect such data and does not receive such information from member states.<sup>397</sup> At a structural level, concerns have been raised about the human rights implications of Frontex's work in terms of a lack of transparency, unclear responsibility and accountability, and lack of democratic scrutiny.<sup>398</sup>

In response to these concerns Frontex endorsed a 'Fundamental Rights Strategy in 2011, which was a result of consultation between Frontex, IOM, UNHCR and the FRA.'<sup>399</sup> According to

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<sup>392</sup> Ibid.

<sup>393</sup> Den Heijer, M., Reflections on Refoulement and Collective Expulsion in the Hirsi Case, *International Journal of Refugee Law*, issue 25, number 2, July 2013, p. 265-290.

<sup>394</sup> Cederbratt, M., *Frontex: Human Rights Responsibilities*, Parliamentary Assembly, Council of Europe, Report, Doc 13161, 8 April 2013.

<sup>395</sup> Ibid.

<sup>396</sup> Executive Committee of the High Commissioner Programme, NGO Statement on International Protection: The High Commissioner's Dialogue on Protection Challenges, 4-6 March 2008; According to a report by the European Council on Refugees and Exiles (ECRE) and the British Refugee Council: 'Frontex fails to demonstrate adequate consideration of international and European asylum and human rights law including the 1951 Convention relating to the Status of Refugees and European Community (EC law) in respect of access to asylum and the prohibition of refoulement'.

<sup>397</sup> Amnesty International and ECRE, Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), September 2010.

<sup>398</sup> Supra note Cederbratt, M., *Frontex: Human Rights Responsibilities*; According to the report by ECRE and the British Refugee Council: 'There is a worrying lack of clarity regarding Frontex accountability for ensuring compliance with international and EC legal obligations by Member States involved in Frontex coordinated operations. This is compounded by the lack of transparency, and the absence of independent monitoring and democratic accountability of the Agency.' Furthermore, a study by the European Parliament on the implementation of the EU Charter of Fundamental Rights points out that Frontex's "coercive policy linked with a culture of secrecy and lack of transparency exacerbates the vulnerable status of the individuals" who try to cross the European frontiers in order to get a better life in Europe.<sup>24</sup> This study clearly talks about a "profound knowledge gap" regarding the nature of the operations, their impact on the ground and their compatibility with the EU legal framework.

<sup>399</sup> Supra note Mayday.

Frontex the strategy's 'endorsement represents a further important step in Frontex's ongoing efforts to formalise an emphasis on fundamental rights at every level of its activities.' This is part of a gradual process rather than a sudden change of policy.<sup>400</sup> Furthermore, the revision of the Frontex Regulation of 2011 includes the protection of fundamental rights in the legal framework.<sup>401</sup> Amongst other things, the amended Regulation provides the nomination of a Fundamental Rights Officer, a Consultative Forum on Human Rights and a possibility to suspend or terminate a mission in the case of a breach of human rights.<sup>402</sup>

According to some, this has not filled all the gaps regarding especially the accountability of Frontex activities, since the responsibility of operations remains with the member states: 'Member States remain primarily responsible for the implementation of the relevant international, EU or national legislation and law enforcement actions undertaken in the context of Frontex coordinated joint operations and therefore also for the respect of fundamental rights during these activities. This does not relieve Frontex of its responsibilities as the coordinator and it remains fully accountable for all actions and decisions under its mandate. Frontex must particularly focus on creating the conditions for ensuring compliance with fundamental rights obligations in all its activities.'<sup>403</sup>

The modifications made by Frontex have not put an end to accusations of human rights violations by the organisation during Joint Operations 'Poseidon Land and Sea'. In September 2011 Human Rights Watch published a report accusing Frontex 'of turning a blind eye to the torture, beating, and systematic degradation of illegal migrants detained after crossing the border from Turkey.'<sup>404</sup> In July 2013, Amnesty International reported the systematic push-back operations in Greece along the border with Turkey.<sup>405</sup> European Commissioner Cecilia Malmstrom stated in response to a parliamentary question related to the allegations made by Amnesty International that: 'The Commission is aware and very concerned about allegations of push-back operations to Turkey by the Greek authorities. (...) Should serious violations of fundamental rights be proven and persist, the suspension or termination – in part or in whole – of Frontex operations in those areas is a possibility.'<sup>406</sup>

<sup>400</sup> Frontex, Management Board Endorses Frontex Fundamental Rights Strategy, 4 April 2011, news report, available at: <<http://frontex.europa.eu/news/management-board-endorses-frontex-fundamental-rights-strategy-KxtacI>> (accessed 12 March 2014).

<sup>401</sup> Supra note Cederbratt, M., Frontex: Human Rights Responsibilities.

<sup>402</sup> Supra note European Union, Regulation (EU) No 1168/2011 of the European parliament and of the council of 25 October 2011 amending Council Regulation (EC) No 2007/2004. Articles: 3(3), 3(1a), 26a(2)(3)(4).

<sup>403</sup> Frontex, Opinion on the European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations, 17 May 2012, available at: <<http://www.ombudsman.europa.eu/en/cases/-correspondence.faces/en/11758>> (accessed 14 March 2014).

<sup>404</sup> Human Rights Watch, *The EU's Dirty Hands*, 21 September 2011, available at: <<http://www.hrw.org/node/101671/section/3>> (accessed 6 February 2014).

<sup>405</sup> Amnesty International, *Frontier Europe, Human Right Abuses on Greece's Border With Turkey*, Amnesty International Ltd, July 2013, available at: <<http://www.amnesty.org/en/library/asset/EUR25/008/2013/en/d93b63ac-6c5d-4d0d-bd9f-ce2774c84ce7/eur250082013en.pdf>> (accessed 13 October 2013)

<sup>406</sup> European Union, European Parliament, Parliamentary questions, Answer given by Ms Malmström on behalf of the Commission, 3 September 2013. Full answer: 'The Commission is aware and very concerned about allegations of push back operations to Turkey by the Greek authorities. The Commission has met Amnesty International to discuss the findings of their report and will ensure an appropriate follow-up with the Greek authorities. The Commission launched infringement proceedings against Greece in 2009, inter alia noting concerns about practices hampering access to the territory and to asylum procedures for persons who may have been in need of international

In response to Amnesty International, Frontex wrote on 6 June 2013 that since 2012 they had received 18 reports of alleged violations of fundamental rights which included ‘unofficial returns (“push-backs”) involving groups of migrants (up to ten people) or single individuals that had allegedly been returned to Turkey by the Hellenic Police.’<sup>407</sup> Furthermore, Amnesty International stated that ‘Frontex informed Amnesty International that it had raised such allegations with the Greek authorities in writing on three separate occasions and received a response denying that such push-backs had taken place.’ However, the Greek Minister of Citizen Protection and Public Order stated in an answer to a parliamentary question relating to push-backs in July 2013 that: ‘With regards to the issue of interdiction (..) according to our information, we inform you that no incident of interdiction of a foreigner who tried to illegally cross the Greek-Turkish borders was ever reported either by a Greek police officer or by a Frontex officer.’<sup>408</sup>

In March 2012 the then European Ombudsman, P. Nikiforos Diamandouros, began an own initiative inquiry into ‘the implementation by Frontex of its fundamental rights obligations’.<sup>409</sup> The present Ombudsman continued the investigation and found that, in general, Frontex was making reasonable progress in addressing fundamental rights issues, recommending, however, that Frontex should establish a complaints mechanism for dealing with complaints about fundamental right infringements arising from its work.<sup>410</sup> Frontex rejected this recommendation with the argument that individual incidents are the responsibility of the respective Member State.<sup>411</sup> The European Ombudsman disagreed and accordingly submitted a Special Report to the

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protection. The Commission will not hesitate to take additional procedural steps, if needed, with a view to ensuring respect of EC law and fundamental rights. Frontex has put in place a system of reporting on serious incidents applied in all joint operations. It covers notably the possible violation of fundamental rights. Those reports are forwarded to the Greek authorities for investigation. The Fundamental Rights Officer of Frontex has also visited the operational area of Joint Operation Poseidon in Greece and reported her findings to the Agency's Management Board. Frontex has urged the Greek authorities to remedy shortcomings identified. Should serious violations of fundamental rights be proven and persist, the suspension or termination — in part or in whole — of Frontex operations in those areas is a possibility, according to Regulation (EU) No 1168/2011 (Frontex Regulation). The Commission also provides supports to Greece, in terms of expertise and financial assistance, with a view to reforming national practices in line with the *acquis*. For example, the Commission is co-financing measures aimed at providing information and interpretation by UNHCR and NGOs to migrants arriving in border areas.’

<sup>407</sup> Supra note Amnesty International, *Frontier Europe, Human Right Abuses on Greece's Border With Turkey*.

<sup>408</sup> ProAsyl, *PUSHED BACK: systematic human rights violations against refugees in the aegean sea and at the greek-turkish land border*, PRO ASYL Foundation and Friends of PRO ASYL, 7 November 2013, available at: <[http://www.proasyl.de/fileadmin/fm-dam/1\\_EU\\_Fluechtlingspolitik/proasyl\\_pushed\\_back\\_24.01.14\\_a4.pdf](http://www.proasyl.de/fileadmin/fm-dam/1_EU_Fluechtlingspolitik/proasyl_pushed_back_24.01.14_a4.pdf)> (accessed 10 November 2013); Answer (9-8-13) to a parliamentary question (18-7-13) given by the competent ministers of Shipping and of the Aegean and Citizens Protection and Public Order: Reported push-backs of illegal migrants and refugees who enter in the country. Accountability, human rights protection, funds for granting international protection. Available at: <[www.hellenicparliament.gr/UserFiles/67715b2c-ec81-4f0c-ad6a-476a34d732bd/-8174770.pdf](http://www.hellenicparliament.gr/UserFiles/67715b2c-ec81-4f0c-ad6a-476a34d732bd/-8174770.pdf)>

<sup>409</sup> Nikiforos Diamandouros, P. (European Ombudsman), Letter to Mr. Ilkka Laitinen Executive Director Frontex about the opening own-initiative inquiry OI/5/2012/BEH-MHZ concerning implementation by Frontex of its fundamental rights obligations, available at: <<http://www.ombudsman.europa.eu/en/cases/correspondence.faces-/en/11316/html.bookmark>> (accessed 14 March 2014).

<sup>410</sup> O'Reilly, E., European Ombudsman, Ombudsman calls on Frontex to deal with complaints about fundamental rights infringements, 14 November 2013, available at: <[http://europa.eu/rapid/press-release\\_EO-13-17\\_en.htm](http://europa.eu/rapid/press-release_EO-13-17_en.htm)> (accessed 14 March 2014).

<sup>411</sup> Ibid.

European Parliament in November 2013, asking for its support in persuading Frontex to review its approach.<sup>412</sup>

Frontex has recently strengthened its patrols in the coastal waters in the Eastern Aegean between Greece and Turkey within the framework of Joint Operation “Poseidon Sea”. The Operation was extended to also cover the west coast of Greece and is currently Frontex’s largest operational activity in the Mediterranean region.<sup>413</sup>

#### 5.6.2.2. EASO

Another (young) European organisation that has played an important role in the operational support measures to Greece is the European Asylum Support Office (hereinafter EASO). EASO is an independent regulatory agency of the European Union that was established in May 2010 to facilitate, coordinate and strengthen the practical cooperation on asylum between member states in order to help to improve the implementation of the CEAS.<sup>414</sup> It was established ‘in order to achieve greater harmonisation of the applicable standards and by strengthening support for practical cooperation between the member states’.<sup>415</sup> Furthermore, it provides support ‘to Member States subject to particular pressure on their asylum and reception systems’.<sup>416</sup> On 1 February 2011, EASO became operational as an European agency.<sup>417</sup> One month later, EASO and the Greek government signed the EASO Operating Plan for Greece, which was signed on 1 April 2011 and had a duration of two years.<sup>418</sup> The support of EASO to Greece consists mainly in the deployment of Asylum Support Teams (hereinafter AST’s). In this first phase of support, the AST’s were made up out of 70 experts from 14 member states, supporting Greece with the establishment of the new Asylum Service, the First Reception Service, Appeal Authority and the reduction of the backlog of asylum claims from the ‘old system’.<sup>419</sup> On 7 March 2013 EASO and Greece signed the EASO-Greece Operating plan Phase II, extending the support to Greece until December 2014.<sup>420</sup> Phase II builds on Phase I and continues to support a number of prioritized areas, such as: ‘training of the staff of the new services, support to the backlog committees, support to improvement of reception procedures and the management of EU funds related to asylum and reception’, through a scheduled number of 56 AST’s.<sup>421</sup>

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<sup>412</sup> Ibid.

<sup>413</sup> Supra note Committee on Migration, Refugees and Displaced Persons of the Council of Europe.

<sup>414</sup> European Union, Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, Official Journal L 132/11, 29 May 2010.

<sup>415</sup> Ibid.

<sup>416</sup> Ibid.

<sup>417</sup> EASO, Our Short History, EASO Brochure, available at: <[http://easo.europa.eu/wp-content/uploads/2012-easo\\_brochure\\_en1.pdf](http://easo.europa.eu/wp-content/uploads/2012-easo_brochure_en1.pdf)> (accessed 17 March 2014).

<sup>418</sup> EASO, Annual Report on the Situation of Asylum in the European Union 2012, Publications Office of the European Union, Luxembourg, 2013.

<sup>419</sup> EASO, Emergency support, EASO support to Greece, available at: <<http://easo.europa.eu/about-us/tasks-of-easo/emergency-support/>> (accessed 19 March 2014).

<sup>420</sup> EASO, EASO and the Greek government sign agreement to extend EASO support to Greece until December 2014, Press release, 7 March 2013, available at: <<http://easo.europa.eu/wp-content/uploads/EASO-press-release-Greece-Operating-Plan-Phase-II.pdf>> (accessed 19 March 2014).

<sup>421</sup> Ibid.



### 5.6.3. Voluntary relocation measures

A third possibility of solidarity that has recently been the subject of renewed discussion at the European level is the physical relocation of asylum seekers or those granted international protection.<sup>422</sup> Currently there is a relocation programme in place for Malta, European Relocation from Malta (EUREMA), which is running since 2010 and with member states volunteering to take asylum seekers from Malta.<sup>423</sup> Recently attempts have been made from the European Parliament to establish a more permanent relocation mechanism, however this has met opposition from several member states which fear that relocation might be a pull factor for migrants.<sup>424</sup> Following a so-called informal council meeting in Copenhagen where European ministers rejected proposals to establish such a system, Commissioner Malmström said that ‘Everyone supports solidarity in asylum matters between EU Member States in principle, but few are willing to create a coordinated system for actually helping Member States that are under great pressure’.<sup>425</sup> Although the Greek government has requested for relocation measures, no relocation of asylum seekers from Greece has taken place yet.

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<sup>422</sup> European Council on Refugees and Exiles, Enhancing intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System, January 2013, available at: <[http://www.emnbelgium.be/sites/default/files/publications/intra-eu\\_solidarity - full\\_paper1.pdf](http://www.emnbelgium.be/sites/default/files/publications/intra-eu_solidarity_-_full_paper1.pdf)> (accessed 6 March 2014).

<sup>423</sup> European Parliamentary Research Service, Support from the EU and solidarity between Member States, news report, 30 March 2014, available at: <http://epthinktank.eu/2014/03/30/asylum-and-irregular-immigration-in-the-eu-state-of-play/> (accessed 8 April 2014).

<sup>424</sup> Ibid.

<sup>425</sup> Cecilia Malmström, My Blog, Formal informal in Copenhagen, available at: <<http://blogs.ec.europa.eu/-malmstrom/tag/solidarity/>> (accessed 8 April 2014).



## 6. Analyses of the current state of the three violations found by the Court in M.S.S.

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In 2010 the ECtHR found that Greece was in violation of art 3 ECHR in three different areas: detention conditions, living conditions and the asylum procedure (see chapter 4). The court came to this conclusion by looking at different aspects of the asylum and migration system in Greece, using reports about the situation in Greece by national, international and non-governmental organisations. In this chapter these three areas will be looked at as they are today, by looking at the aspects the court based its judgment on. In doing this, reports have been used from organisations and NGO's that have been stated by the Court in the M.S.S. case as well, together with the interviews that have been carried out for this thesis.

### 6.1 Detention conditions

In M.S.S. the ECtHR found that detention conditions amounted to degrading treatment in violation of article 3 ECHR, taking into account the systematic placement of asylum seekers in detention, accounts of brutality and insults by the police and living conditions in detention centres.<sup>426</sup> Since then, conditions did not significantly improve. Detention is applied systematically without an individual assessment in each case, which includes unaccompanied children and families.<sup>427</sup> In practice, the authorities consider that being in an irregular situation automatically constitutes sufficient basis for detention.<sup>428</sup> Despite the fact that law 3907/2011 provides for the detention of migrants only when less coercive measures cannot be implemented, in reality, no less coercive measures exist. Furthermore, Law 4075/2012 amended Presidential Decree 114/2010 and Law 3386/2005, providing for migrants and asylum seekers to also be detained if they represent “a danger to public health,” when they “suffer from an infectious disease,” “belong to groups vulnerable to infectious diseases,” or are living in “conditions that do not meet minimum standards of hygiene”.<sup>429</sup> Also asylum seekers awaiting a decision on their application may be detained for up to 18 months, since the provisions governing the maximum length of detention for asylum seekers has been prolonged in October 2012.<sup>430</sup> The maximum detention duration for asylum seekers' used to be, in accordance with Article 13

“As detention is concerned, the situation even deteriorated after the M.S.S. case, since asylum seekers are now detained up to 18 months”

- senior investigator, Greek Ombudsman

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<sup>426</sup> Supra note 3, para. 205.

<sup>427</sup> UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Addendum: Mission to Greece*, 18 April 2013, A/HRC/23/46/Add.4, available at: < <http://www.refworld.org/docid/51b983ab4-.html> > (accessed 8 October 2013).

<sup>428</sup> Ibid.

<sup>429</sup> The Special Rapporteur on the human rights of migrants, François Crépeau, noted in his report that the majority of the medical problems migrants in detention suffer from are caused by, or directly linked to, their detention conditions in Greece. Access to medical care, however, is mostly insufficient.

<sup>430</sup> The maximum duration of asylum seekers' detention used to be, in accordance with Article 13 of [Presidential Decree 114/2010](#), up to 90 days and, “If the applicant has been detained earlier in view of an administrative deportation order, the total detention time cannot exceed 180 days”. According to the new amendment, Presidential Decree 116/2012, detention can be further prolonged by up to 12 months by a police administrative decision.

of Presidential Decree 114/2010, up to 90 days and, “If the applicant has been detained earlier in view of an administrative deportation order, the total detention time cannot exceed 180 days”.<sup>431</sup> According to the new amendment, Presidential Decree 116/2012, detention can be further prolonged by up to 12 months by a police administrative decision.<sup>432</sup> Decisions are issued with standardized justification and without taking into consideration other factors, such as the situation in the country of origin.<sup>433</sup>

As stated before, apart from the administrative detention of person arriving in Greece in an irregular manner, administrative detention is also extensively used in the context of Operation ‘Xenios Zeus’, the ‘sweep operations’ and subsequent detention aiming at cracking down on irregular immigration and crime in Athens, which was initiated in August 2012.<sup>434</sup> Since the start of the operation, tens of thousands of people presumed to be undocumented migrants have been subjected to stops and searches on the streets and detention at police stations.<sup>435</sup> This has resulted in widespread detention of irregular migrants in police or pre-removal detention facilities throughout the country, which are not suitable for long-term detention and have been criticised frequently by many institutions and all of the interviewees.<sup>436</sup>

Moreover, human rights violations towards migrants by law enforcement officials in Greece have been documented many times. The latest report comes from Amnesty International, that says racism is ‘entrenched’ in the Greek police in its report ‘A law unto themselves: A culture of abuse and impunity in the Greek police’, which describes the torture and other forms of ill-treatment of refugees and migrants in immigration detention, during collective expulsions back to Turkey by Greek coastguards and border guards and during sweep operations to crack irregular migration.<sup>437</sup> In addition, according to the Greek Ombudsman out of the 281 racially motivated crimes recorded between 1 January 2012 and 30 April 2013, one in six (47 incidents) were reported to have been committed by law enforcement officials.<sup>438</sup> At the same time, the Internal Affairs Directorate of the Greek Police launched a nationwide investigation, following an order by the Minister of Public Order and Citizens’ Protection, in relation to reports of police officers supporting, tolerating or covering up offences committed by members of the far right nationalist party Golden Dawn, described by media and scholars as neo-Nazi and fascist, or

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<sup>431</sup> Greece: Presidential Decree No. 114 of 2010 on the establishment of a single procedure for granting the status of refugee or of beneficiary of subsidiary protection to aliens or to stateless persons in conformity with Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, 16 November 2010, available at: < <http://www.refworld.org/docid/4cfdadf2.html> > (accessed 31 October 2013).

<sup>432</sup> Greece: Presidential Decree 116/2012 on the establishment of a single procedure for granting the status of refugee or of beneficiary of subsidiary protection to aliens or to stateless persons in conformity with Council Directive 2005/85/EC, published in the Greek Government Gazette on 19 October 2012.

<sup>433</sup> Interview with the Greek Council of Refugees of 20 November 2013.

<sup>434</sup> See also chapter 5.3.

<sup>435</sup> Cosse, E., Dispatches: Greece - One Year On, Abuses Continue Under Operation Xenios Zeus, Human Right Watch, 2 August 2013, available at: < <http://www.hrw.org/news/2013/08/02/dispatches-greece-one-year-abuses-continue-under-operation-xenios-zeus> > (accessed 10 October 2013).

<sup>436</sup> In practice, any police station that has a detention facility is being used as a detention center.

<sup>437</sup> Amnesty International, A law unto themselves: A culture of abuse and impunity in the Greek police, 3 April 2014, available at: <http://www.refworld.org/docid/533e67154.html> (accessed 8 April 2014).

<sup>438</sup> Greek Ombudsperson, Special report on racist Violence, The phenomenon of racist violence in Greece and how is being dealt with, September 2013, available at: < [www.synigoros.gr/resources/docs/eidikiekthesiratsistikivia.pdf](http://www.synigoros.gr/resources/docs/eidikiekthesiratsistikivia.pdf) > (accessed 9 April 2014).

participating in such offences.<sup>439</sup> In its findings, the Internal Affairs Directorate stated that ten police officers were found to have a direct or indirect link with the criminal activities attributed by prosecutors to members or members of Parliament of Golden Dawn, furthermore he stated that it had made a full record of 142 cases where victims alleged that they had been subjected to ‘extreme police conduct’, human rights violations such as ill-treatment with a hate motive by the police, between 2009 and October 2013.<sup>440</sup>

Despite recent efforts by the Government to improve detention conditions, by renovating facilities and building new centres, material conditions did not significantly improve. By way of example, in the detention centre in Fylakio (northern Evros) up to 72 irregular migrants, together with asylum seekers and unaccompanied minors were held in a 100m<sup>2</sup> cell without light, heating or warm water.<sup>441</sup> In addition, the Working Group on Arbitrary Detention of the United Nations often found administrative detainees, including irregular migrants and asylum seekers, together with criminal detainees in one cell.<sup>442</sup> The conditions of detention in one centre in Greece were found to be so bad that a local court in Igoumenista (north-western Greece) acquitted migrants who were charged with escaping from detention stating that the “wretched and highly dangerous” conditions were not in compliance with the migrants’ human rights.<sup>443</sup> According to the ruling more than 30 persons were put into a 15m<sup>2</sup> cell with no running water or bedding and just one chemical toilet, the space was never cleaned and the detainees were coping with lice, skin disease and typhoid.<sup>444</sup> The judge argued that both the duration and the conditions of their detention were in breach of the European Convention on Human Rights. “Therefore, the court judges that [the detainees] escaped to avoid a severe and otherwise inevitable threat which – through no fault of their own – endangered their health, and specifically to avoid infectious diseases given their particularly limited access to medical attention care, medicine and hospital treatment,” the ruling said.

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<sup>439</sup> Supra note Amnesty International, a law unto themselves; Publication of the Findings of the Greek Police Internal Affairs Directorate by the Head of the Directorate and the Press Officer for the investigation of the involvement of police officers in unlawful activities of members of the Golden Dawn Party as well as incidents of racist conduct and corruption, 30 October 2013, at <[http://www.astynomia.gr/index.php?option=ozo\\_content&lang=..&perform=view&id=33752&Itemid=1179&lang=](http://www.astynomia.gr/index.php?option=ozo_content&lang=..&perform=view&id=33752&Itemid=1179&lang=)> (accessed 8 April 2014); The Directorate was also ordered by the Prosecutors’ Office of Appeal Courts in Athens to conduct a preliminary criminal investigation into allegations of police officers tolerating or covering up hate crimes.

<sup>440</sup> Ibid.; It also found that in cases where the police were called to deal with racially motivated violence the inaction of particular police officers, and their involvement in violence, bribery and abuse of power, exacerbated the negative experience of the victims.

<sup>441</sup> Committee on Migration, Refugees and Displaced Persons of the Council of Europe, Migration and asylum: mounting tensions in the Eastern Mediterranean, Report, 23 January 2013, available at: <<http://assembly.coe.int-/ASP/Doc/XrefViewPDF.asp?FileID=19349&Language=en>> (accessed 23 January 2013).

<sup>442</sup> OHCHR - UN Office of the High Commissioner for Human Rights: Working Group on Arbitrary Detention statement upon the conclusion of its mission to Greece, 31 January 2013, available at: <[http://www.ecoi.net/local\\_link/238325/347421\\_en.html](http://www.ecoi.net/local_link/238325/347421_en.html)> (accessed 31 October 2013).

<sup>443</sup> See Ekathimerini.com, Court clears migrants of escaping custody, 12 January 2013, at: <[www.ekathimerini.com/4dcgi/\\_w\\_articles\\_wsitel\\_1\\_12/01/2013\\_478162](http://www.ekathimerini.com/4dcgi/_w_articles_wsitel_1_12/01/2013_478162)> (accessed 30 September 2013); see also: <<http://infomobile.w2eu.net/2013/01/12/not-guilty-decided-court-of-igoumenitsa-in-the-case-of-migrants-who-were-charged-escape-from-prison/#more-2278>> ; The migrants were detained for having illegally entered Greece.

<sup>444</sup> The lice, skin diseases and typhoid came as a result of the fact that they had not been able to shower or change clothes for months. The accused were limited to the tiny cell 24 hours per day, with no provision for exercise, or a breath of fresh air.

A new report from Médecins Sans Frontières (Doctors Without Borders), called ‘Invisible Suffering’, details the medical problems that detained migrants and asylum seekers suffer from, caused or aggravated by the substandard conditions, the length of detention and the lack of consistent or adequate medical assistance.<sup>445</sup> Conditions include respiratory, gastrointestinal, dermatological, and musculoskeletal diseases, as well as anxiety, depression, and extreme acts such as hunger strikes, self-harm, and suicide attempts.<sup>446</sup>

‘Despite our repeated calls for improvements to detention conditions and migrants access to health care, we have seen little change and the overall situation continues to deteriorate’ said Dr. Apostolos Veizis, Médecins Sans Frontières's head of mission in Greece.<sup>447</sup>

Furthermore, procedural safeguards including information given, legal remedies to challenge the decision to be detained, the presence of interpreters, the provision of legal aid, the provision of medical psychosocial services is limited or completely absent.<sup>448</sup> In practise, detainees have no information in a language they can understand about the reason for detention, the duration, rights in detention and possibilities to challenge their expulsion and deportation.<sup>449</sup>

Lastly, there are persistent reports of ill-treatment, including torture, committed by law enforcement officials against migrants and asylum seekers, both at the time of the arrest and while in detention.<sup>450</sup> UNHCR stated that the lack of trust the victims exhibit in the rule of law is directly related to the ineffectiveness of the mechanism protecting them, ‘detainees are afraid that if they submit formal complaints about their treatment they will face retaliation and there are actually cases where complaints were lodged there was retaliation’.<sup>451</sup>

In view of these considerations it can be concluded that the detention conditions did not significantly improve since the judgment and remain in violation of Article 3 of the Convention.

## 6.2 Living conditions

In M.S.S., the Court found that the living conditions of the applicant while he was an asylum seeker in Greece, constituted “humiliating treatment showing the lack of respect for [the applicant’s] dignity”, and noted that this situation, combined with prolonged uncertainty had attained the level of severity required to fall within the scope of Article 3.<sup>452</sup> The material

<sup>445</sup> Médecins Sans Frontières, *Invisible Suffering, Prolonged and systematic detention of migrants and asylum seekers in substandard conditions in Greece*, 1 April 2014, available at: <[http://www.doctorswithoutborders.org/sites/usa/files/attachments/invisible\\_suffering.pdf](http://www.doctorswithoutborders.org/sites/usa/files/attachments/invisible_suffering.pdf)> (accessed 8 April 2014).

<sup>446</sup> Ibid.

<sup>447</sup> Médecins Sans Frontières, The “Invisible Suffering” of Migrants Detained In Greece, news report, 1 April 2014, available at: <<http://www.doctorswithoutborders.org/article/invisible-suffering-migrants-detained-greece>> (accessed 8 April 2014).

<sup>448</sup> Interview with the Greek Council of Refugees of 20 November 2013; Interview with UNHCR Greece of 15 November 2013; Interview with the Greek Ombudsman of 5 December 2013.

<sup>449</sup> Interview with the Greek Council of Refugees of 20 November 2013.

<sup>450</sup> Supra note 10; Interview with UNHCR Greece of 15 November 2013; Interview with the Greek Ombudsman of 5 December 2013.

<sup>451</sup> Interview with UNHCR Greece of 15 November 2013.

<sup>452</sup> Supra note 3, para. 263; The Court therefore held that, given national law obligations of Greece to ensure adequate material reception conditions, pursuant to the Reception Directive, the situation of extreme poverty brought about by the inaction of the State was treatment contrary to Article 3 ECHR. The Court’s judgment was based in particular on the following aspects of the applicant’s situation: extreme poverty, no housing, inability to cater to basic needs such as food and personal hygiene; lack of possibility for the applicant to improve his situation such as by access to the jobs market; lack of information about accommodation for asylum seekers.

situation of asylum seekers remains extremely difficult; the majority of the interviewees regarded this as one of the major challenges for the Greek government.<sup>453</sup> An important step in this field is the establishment of the First Reception Service, which has been operational since July.<sup>454</sup> The Service provides for closed first reception centres where migrants will be kept for 15 days, which can be prolonged to a maximum of 25 days in exceptional circumstances, where they will go through screening procedures in order to establish their identity and nationality, to register them, to provide, if needed, medical and psychological support and to inform them on their obligations and rights.<sup>455</sup> Although the First Reception Service is operational, it faces considerable problems and delays. So far, only one First Reception Center has opened and is functioning in Fylakio, Evros, and two Mobile Units started operating in the islands of Chios and Samos in July, of which the one in Chios is transferred to Lesbos by October.<sup>456</sup> The main problem for the Service is staffing, because due to the austerity measures Greece's civil service cannot hire new servants.<sup>457</sup> According to the director of the Service, Mr. Panagiotis Nikas, staffing is a huge problem: because the civil service cannot hire, the First Reception Service needs to receive staff through transfers of other departments. Although there are many people interested, a transfer of one person can take up to one year because the signatures of four different ministers are needed. Accordingly the Service is having difficulties with the large number of people that have to go through the system.<sup>458</sup> The Greek Ombudsman stated that: 'the system is not normalized yet and the procedures are not running smooth'.<sup>459</sup>

“Asylum seekers do not receive protection at the moment; even when a refugee is recognized, he or she has to live in a park under very severe restraints and living conditions and has to be afraid to be beaten up by extremist groups every night.”

- UNHCR Greece

An amendment of law 3907/2011 that authorizes the First Reception Service to establish and operate open reception facilities for vulnerable groups and asylum seekers has been approved by parliament, whereby six establishments for the operation of open reception centres 'have been identified' so far with a total capacity of 1000 places.<sup>460</sup> Three of these centres will be opened in 2014, since their running costs have been secured for one year under EEA

Grants, after that it will be uncertain how the centers will be financed.<sup>461</sup> At the moment there is a maximum of 1000 bed spaces in reception in the country, which are all run by NGO's.<sup>462</sup> However, according to UNHCR Greece the quality differs immensely and for some of these

<sup>453</sup> Interview with UNHCR Greece of 15 November 2013; Interview with the Greek Ombudsman of 5 December 2013.

<sup>454</sup> Council of the European Union, Greece's Revised National Action Plan on Asylum Reform and Migration Management, Information by Greece, 14347/13, 3 October 2013.

<sup>455</sup> Interview with the First Reception Service of 13 December 2013.

<sup>456</sup> Since the start of operation of the First Reception Center in Fylakio and the two Mobile Units in Chios and Samos, until the 9<sup>th</sup> of December 3074 persons went through the first reception procedures. The mobile units comprise only of staff and some materials, the migrants are detained in the detention facilities that were already operative on these islands.

<sup>457</sup> Interview with the First Reception Service of 13 December 2013.

<sup>458</sup> Interview with the Greek Ombudsman of 9 April 2014.

<sup>459</sup> Ibid.

<sup>460</sup> Supra note 26; Interview with the First Reception Service of 13 December 2013; however, 1000 places will not be sufficient: in 2009 15,928 asylum applications were lodged, 10,273 during 2010, 9,311 in 2011 and 9,577 in 2012.

<sup>461</sup> Supra note 26.

<sup>462</sup> Interview with UNHCR Greece of 15 November 2013.



centres it is even arguable if they deserve to be called reception centres, since NGO's in Greece face many problems concerning funding.<sup>463</sup> There are numerous periods, reaching up to a few months where there is a gap in funding and some of the reception facilities have to close down or decrease the quality of the services, meaning that there is no staff or materials present.<sup>464</sup>

As a consequence, countless undocumented migrants and asylum seekers live in destitution, living in parks and town squares and occupying abandoned buildings.<sup>465</sup> In practice, they do not have access to health, nor do they have opportunities to improve their situation, which further deteriorated after M.S.S. since a law was implemented which prescribes that a person can only be hired if their asylum claim has been granted.<sup>466</sup>

In addition, life as a migrant in Greece is dangerous enough on its own. As stated before, practices of police violence against immigrants have been reported regularly, from the unwarranted use of force and the deliberate destruction of residence permits during routine identity checks to physical maltreatment in police stations.<sup>467</sup> On the other hand, police authorities have supported, tolerated or covering up cases where members of the far right nationalist party Golden Dawn have committed open attacks on immigrants and their property, and where they have issued threats against organisations that offer assistance to immigrants in need.<sup>468</sup> More generally, according to data provided by the Racist Violence Recording Network, a collection of 30 nongovernmental organisations including the UNHCR, racially motivated violence is a serious and rapidly growing issue in the country.<sup>469</sup>

On the Aegean islands, the situation is becoming more and more problematic. Migration has been diverted to the islands since the summer of 2012, when the Greek government significantly enhanced border controls at the Greek-Turkish land border under operation 'Aspida' ('Shield'), in combination with the construction of a fence and the Frontex operation 'Poseidon Land', pushing migrants to take the increasingly risky routes to the islands.<sup>470</sup> The local authorities are not prepared and fall short of providing reception and detention facilities; migrants and asylum

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<sup>463</sup> All NGO's in Greece suffer from the bureaucratic hurdles in the Greek government relation to the disbursement of funds, including the European Refugee Fund, which provides funding to civil society organizations that, among other things, operate shelters for asylum seekers. According to the Special Rapporteur of the UN these underutilization of these funds has created significant difficulties for NGO's which rely on them to implement their programs. All the NGO's that were interviewed for this research stated that the disbursement of funds could take up to several years.

<sup>464</sup> Interview UNHCR. Consequently reception centers for unaccompanied minors can be just a building with a few beds without anyone taking care of the minors.

<sup>465</sup> Human Rights Watch, *Unwelcome Guests, Greek Police Abuses of Migrants in Athens*, Human Rights Watch, June 2013, available at: < [http://www.hrw.org/sites/default/files/reports/greece0613\\_ForUpload.-pdf](http://www.hrw.org/sites/default/files/reports/greece0613_ForUpload.-pdf)> (accessed 30 September 2013).

<sup>466</sup> Interview with the Greek Council of Refugees of 20 November 2013; Interview with Praksis of 18 December 2013.

<sup>467</sup> Supra note Amnesty International.

<sup>468</sup> Ibid; For instance, 30 members of Golden Dawn gathered at the polyclinic of Médecins Sans Frontières in Perama on 12 April 2014 and chanted slogans against immigrants while there were dozens of patients there, including children of both immigrants and Greeks.

<sup>469</sup> Kathimerini, Racism is on the rise in Greece, NGO network finds, news report, 2 April 2014, available at: <[http://www.ekathimerini.com/4dcgi/\\_w\\_articles\\_wsitel\\_1\\_02/04/2014\\_538696](http://www.ekathimerini.com/4dcgi/_w_articles_wsitel_1_02/04/2014_538696)> (accessed 8 May 2014).

<sup>470</sup> Amnesty International reported that since August 2012, at least 130 refugees, mostly Syrian and Afghan, died in at least 11 known incidents while trying to reach Greece by boat from Turkey.



seekers, including pregnant women and families with small children have to face overcrowding or sleep on the streets.<sup>471</sup>

### 6.3 Shortcomings in the asylum procedure

The ECtHR found that M.S.S was at risk of *refoulement* from Greece in violation of Article 3 ECHR and did not have access to an effective remedy under Article 13 ECHR, in particular on the basis of a lack of effective legal remedy, inadequacies in the asylum application procedure and low recognition rates for asylum or subsidiary protection.<sup>472</sup> The reforms to the asylum system can be seen as the area where the most progress has been made. At the same time, however, the risk of *refoulement* remains highly alarming.

The newly established Asylum Service is a very important step forward. The autonomous Asylum service, functioning under the Ministry of Citizen Protection is competent for examining and ruling at first instance on all applications for international protection, replacing the role previously assumed by the police. Furthermore, the new Appeals Authority, responsible for the examination of applications at second instance, started operations on 7 June 2013, with the assistance and support of UNHCR and EASO. UNHCR has deployed ten lawyers who are experienced in asylum law and work as mentors, advisors and sponsors for the caseworkers.<sup>473</sup> According to the Greek Ombudsman: ‘the procedures for once are kept: the rights of the people are respected, proper interviews, translation takes place. This is the first time that the ombudsman can observe this, the new Service is keeping everything conform the legal framework.’<sup>474</sup> Since the opening of the Service 7262 applications have been submitted, consisting of 5610 men (77,3%) and 1652 women (22,7%), of which 316 unaccompanied minors (4.4%).<sup>475</sup> 4412 cases have been closed, with a recognition rate of 18.9% (refugee status 13,4% and subsidiary protection 5.5%).<sup>476</sup> Although this constitutes a significant improvement in comparison to the situation before June 2013, especially concerning the quality of the application procedure, the quality of human resources and the information available concerning asylum procedures, huge challenges still exists.<sup>477</sup>

Firstly, access to the asylum procedure is still worrying, and according to the acting head of the Asylum Service, still not much better than it was at the old system.<sup>478</sup> Of the 13 regional asylum

<sup>471</sup> Parliamentary Assembly of the Council of Europe, *Migration and asylum: mounting tensions in the Eastern Mediterranean*, Doc. 13106, 23 January 2013, available at: <<http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=19349&lang=en>> (accessed 13 October 2013).

<sup>472</sup> Supra note M.S.S., para. 299-322. The inadequacies in the asylum application procedure were based on the following findings: Inadequacies in the asylum application procedure: problems of access to the asylum procedure due to the short three- day time limit for application; insufficient information about asylum procedures; difficulties in obtaining access to the Attica Police Headquarters; shortage of interpreters; lack of training of relevant officials; lack of legal aid; excessive, lengthy delays in receiving a decision; stereotyped and unreasoned replies; lack of appeal to second instance committees (para.301-311). Recognition rates were shockingly low, of the 30,000 first asylum applications Greece considered in 2010, just 11 were approved (the European average is around 25 percent).

<sup>473</sup> Interview with the Asylum Service of 19 November 2013.

<sup>474</sup> Interview with the Greek Ombudsman of 9 April 2014.

<sup>475</sup> Ministry of Public Order and Citizen Protection, Statistics of the new Greek Asylum Service, 7-6-2013 until 31-3-2014, available at <[http://www.yptp.gr/images/stories//2014/prokhrukseis14/Greek%20Asylum%20Service-%20statistical%20data%207.6.13-31.3.14\\_en.pdf](http://www.yptp.gr/images/stories//2014/prokhrukseis14/Greek%20Asylum%20Service-%20statistical%20data%207.6.13-31.3.14_en.pdf)> (accessed 2 May 2014);

<sup>476</sup> Ibid.

<sup>477</sup> Interview with the Asylum Service of 19 November 2013;

<sup>478</sup> Ibid.

offices that were envisaged in the action plan, the Asylum Service so far only steadily operates in Athens.<sup>479</sup> The other problem concerning access is the understaffing of the Service: of the 80 caseworkers that are needed as a minimum in Athens, only 45 of the places have been filled due to the fact that the social service is not allowed to hire.<sup>480</sup> At the moment there are 62 active case workers throughout the whole Service, however this will only decrease in the near future, because some losses are expected for various reasons (e.g. maternity leave).<sup>481</sup> The acting head of the Service added: 'Owing to the continuing understaffing, access to the asylum procedure by the asylum seekers, especially in the Athens Regional Asylum Office, is not easy. Therefore, the queues remain, although perhaps not as long as they were at the beginning. The current average time from the registration of a claim for asylum to the issuing of a first instance decision is 68 calendar days. The current average time from the lodging of an appeal to the issuing of a second instance decision is 44 calendar days.'<sup>482</sup>

Secondly, a great concern exists regarding the backlog of pending asylum claims that fall under the old system, which according to the Asylum Service still comprised around 30.000-35.000 cases in November.<sup>483</sup> He added that 'until all backlog is cleared I don't think you can say a proper national system can be established in Greece'.<sup>484</sup> Consequently, if the problems concerning staffing and full functioning across the country will not be resolved in the near future, the new system will start to create a growing backlog of its own.

Besides the limited access to the asylum system, the risk of violation of the principle of *non-refoulement* also exists in the alleged systematic exercise of push-backs by the Greek authorities.<sup>485</sup> With the closing of the land border with Turkey by the construction of a fence, and the shift of migration towards the Aegean Sea, reports of illegal push-backs have increased in the

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<sup>479</sup> At the moment there are a few persons operating in the first reception center in Fylakio (northern Evros), the regional office in Alexandroupoli (southern Evros) has not found a building yet, however there are some persons operating in a temporary building, and there are two small regional offices at the Aegean Islands, one on the island of Lesbos, which has one person for registration and one caseworker. The other office on Rhodes has two caseworkers and administrators, but they have no building yet so they are not operational. The fifth and most important regional asylum office that is not yet established is the one in Thessaloniki, because it is the second largest city after Athens. According to the acting head of the asylum service, there are already around 15 caseworkers that are fully trained, the only problem is the building.

<sup>480</sup> Interview with the Asylum Service of 19 November 2013; He added that 'there is no immediate hope that there will be a radical solution in the foreseeable future, so I fear that we will remain to be grossly understaffed for the near future'.

<sup>481</sup> Interview with the Asylum Service of 2 May 2014.

<sup>482</sup> Ibid.

<sup>483</sup> Interview with the Asylum Service of 19 November 2013; According to UNHCR, Greece had a backlog of 48.201 cases in 2010. According to EASO, Greece still remains among the countries with the largest number of unprocessed asylum claims within the European Union.

<sup>484</sup> Interview with the Asylum Service of 19 November 2013.

<sup>485</sup> Most of the interviewees (UNHCR Greece, Greek Council of Refugees, the Greek Ombudsman, Praksis) stated that they received complaints and stories about push-backs carried out by the Greek authorities; Also see: Amnesty International, *Frontier Europe, Human Right Abuses on Greece's Border With turkey*, Amnesty International Ltd, July 2013, available at: <<http://www.amnesty.org/en/library/asset/EUR25/008/2013/en/d93b63ac-6c5d-4d0d-bd9f-ce2774c84ce7/eur250082013en.pdf>> (accessed 13 October 2013); Pro Asyl, *Pushed Back, systematic human rights violations against refugees in the aegean sea and at the greek-turkish land border*, PRO ASYL Foundation and Friends of PRO ASYL, November 2013, available at: <[http://www.proasyl.de/fileadmin/fm-dam/1\\_EU\\_Fluechtlingspolitik/pushed\\_back\\_web\\_01.pdf](http://www.proasyl.de/fileadmin/fm-dam/1_EU_Fluechtlingspolitik/pushed_back_web_01.pdf)> (accessed 10 November 2013).

same period.<sup>486</sup> The persons claiming to be pushed back stressed that they were not heard by the Greek authorities and that they were not afforded an opportunity to request international protection or to challenge their illegal removal, also many Syrian refugees alleged that their documents were taken away.<sup>487</sup> The push-backs, as described in the reports of Amnesty International and the German NGO Pro Asyl, are systematically carried out by the Greek authorities pushing migrants and refugees back to Turkey from the Greek territorial waters, the Greek islands, after a distress alert is launched from their boats or in the Evros area at the land border directly after their arrival on Greek territory via the Evros River. UNHCR Greece expressed their concern during the interview about a group of around 150 refugees from Syria that went missing after they crossed the Evros River earlier that day.<sup>488</sup>

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<sup>486</sup> Ibid.

<sup>487</sup> Ibid.

<sup>488</sup> UNHCR seeks clarifications on the fate of Syrian refugees in Evros, 13 November 2013, available at: <http://www.unhcr.gr/nea/artikel/2768a7a2ced20c6daca7326788699f09/unhcr-seeks-clarifications-on-the-fa.html> (accessed 14 November 2013).

## Conclusion

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After years without a functioning asylum and migration system and one of the highest rates of asylum applications in Europe, Greece had one of the lowest refugee recognition rates in Europe and an extraordinarily high number of asylum cases that remained pending. The absence of a functional asylum procedure with sufficient safeguards to ensure the respect of the right to seek asylum and the inhumane treatment migrants received in general provoked several European member states to stop returning asylum seekers to Greece under the Dublin II Regulation and subsequently a judgment of the European Court of Human Rights that held that removal to Greece would expose an asylum seeker to degrading treatment and would put him or her at risk of indirect *refoulement*, which suspended Dublin transfers altogether until improvements have been made.

With the judgments of the ECtHR in the M.S.S. case and of the European Court of Justice in the case N.S. and M.E. the compliance of the Dublin system with basic human rights and fundamental freedoms has been questioned and a positive duty on all European member states to verify the safety of other member states prior to the application of the Dublin Regulation has been created, which has brought an end, at least for now, to the ‘principle of mutual trust’.

After the judgment, the Greek government found the political will to act on the issue and some important legislation has been passed through the Greek parliament. European influence has been crucial in this respect for putting strong pressure on the country to reform its failing asylum system and improve its management of irregular migration. The reform of the asylum and migration management policies was largely due to external influences and mounting pressures from the European Union, and of course from the ECtHR on Greece to respect its international and European obligations in these areas. Greece, under the spotlight because of its continuing inability to provide effective protection for those in need, had to respond to the harsh criticisms concerning its failed asylum system.

This thesis describes the current Greek asylum and migration situation, using the three violations of Greece identified by the ECtHR in the M.S.S. case: conditions in detention, general living conditions and the inadequacy of the asylum determination system. The progress made in these three areas differs substantially.

Since the judgment of the Court, Greece has made considerable progress in adopting an Action Plan on Asylum and Migration Management to improve the situation of migrants in Greece. The new First Reception Service and Asylum Service are very important steps in this process. However, arrival numbers, cumbersome bureaucracy and the financial crisis vastly complicated these efforts and consequently reforms are still partially incomplete and have been hampered by a lack of resources. The problem does not lie in formal recognition of protection principles but in operationalising the rules: in making protection a reality at the point of enforcement.

Detention conditions still amount to degrading treatment in violation of article 3 ECHR, and asylum seekers are systematically detained for prolonged periods of time that can reach up to 18 months. Living conditions remain extremely difficult and give rise to situations comparable to

“The future will not be bright for asylum seekers in Greece for at least the coming four or five years”

- Director First Reception Service

that of the applicant in M.S.S. Although steps have been taken to increase reception places for asylum seekers, vulnerable groups and unaccompanied minors, it is unlikely that the situation will improve in the foreseeable future unless resources are granted to ensure the operation, staffing and maintenance of these facilities. Furthermore, the court stated in M.S.S. that the risk of *refoulement* was a constant concern. Unfortunately, no real improvements on this part can be found as well.

The greatest improvement has been made with regard to the changes in the asylum procedure. Before 2010 there was no efficient and workable asylum system. The relevant legislation did not meet international and European standards, but especially the enforcement lacked any systematic coordination and certainly was not in compliance with human rights norms. That has changed. With the implementation of the Action Plan and the entry into force of Law 3907/2011 the registration, examination and ruling of asylum claims are now under the jurisdiction of an independent and civil service, with help from UNHCR, and no longer under the responsibility of the police. The procedures are there and are being kept, and the rights of asylum seekers are respected. However, although the improvements made in the asylum procedure have ensured a significant increase in the fairness of the system, many problems remain regarding access to the asylum procedure. And also for this Service there is the need for practical assistance and cooperation from its European partners, since appropriate staffing of the services remains one of the main obstacles to the proper implementation of the Action Plan. However, as the ECtHR said in its M.S.S. case, the difficult situation Greece finds itself cannot absolve it of its obligations under Article 3, since the prohibitions on torture and other cruel, inhuman or degrading treatment or punishment are absolute.

The statement of the Court in 2010 about the need for special protection of asylum seekers as a particular underprivileged and vulnerable population group, as evidenced by the Geneva Convention, is mostly still not being acted upon by the Greece authorities. Also, the statement of the ECJ in its N.S. and M.E. case needs to be taken into consideration: Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter. Unfortunately such a risk still exists in Greece, and member states cannot presume that an asylum applicant would be treated in conformity with human rights obligations by Greece at this point.

Concluding can be said that the Greek government has not yet taken sufficient measures to ensure compliance with Article 3 ECHR and conditions for asylum seekers have not improved sufficiently since the M.S.S. judgment. In this regard can also be concluded that responsibility sharing on a European level has failed, and with Greece still being in the process of building an effective asylum system, so is the CEAS. Did the asylum situation in Greece improve after the M.S.S. judgment of the ECtHR?

The building of a fair asylum system has started. However, the system now has to start functioning properly and grow into an effective and all-round protection mechanism. However, even this area that has undergone considerable progress is not on the level to ensure full respect for human rights of migrants and asylum seekers in Greece. Other areas, such as reception

conditions and in particular detention conditions, revealed no progress and at some aspects even deteriorated, despite the investment of considerable European resources in the implementation of the Greek Action Plan. The first steps have been taken, but for Greece to become a 'safe state' with regard to compliance with fundamental rights, numerous more steps have to be taken. Therefore, Greece needs several more years before it meets the requirements and before European member states can even start thinking about returning asylum seekers back to Greece.



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