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Governance of irregular migration along the Greek- Turkish border: discrepancies between law and reality.

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Abstract

This research looks at the legal framework concerning the governance of irregular migration in the European Union and specifically in Greece, and investigates how the practice concerning the governance of irregular migration involves human rights violations along the Greek-Turkish border. The main stance of the research is to have a clear picture of the human rights violations in accordance with the obligations to respect human rights which are set out in different legal acts.

The Evros border that constitutes a part of the external EU border (the border between Greece and Turkey) has been subject to hundreds of irregular crossings since 2010. This alarming development has led to a request for help by Greece. This has been answered by Frontex through the deployment of the Rapid Border Intervention Teams (RABITs) to the Greek-Turkish border. Three different operations have been conducted in Greece: Operation RABIT 2010, Operation Poseidon and Operation Attica. Frontex has been assisting the Greek police in the field and states that the practice still is the responsibility of the specific member state.

There have been raised concerns on human rights compliance in Greece by several organizations such as the Fundamental Rights Agency, the UNHCR and Human Rights Watch. Regardless of their efforts to improve the situation, it seems that human rights violations still occur at the Evros border. This study therefore looks at the legal framework concerning the governance of irregular migration whereby different EU legislation is discussed: the Asylum Procedures Directive, the Asylum Qualifications Directive, the Schengen Borders Code, the Dublin II Regulation and the Return Directive. The conclusion that is drawn on the basis of the analysis of this legislation is that the doctrine of securitization seems to be apparent in EU legislation, meaning that immigrants are criminalized and the Union does not provide enough legal safeguards against the principle of non-refoulement. The ambiguous role of Frontex is discussed whereby the lack of responsibility is criticized and its criminalization of irregular immigrants. After having provided for the theoretical framework, practice comes into play. By assessing different reports from organizations such as Human Rights Watch, the UNHCR, Pro Asyl and others, transparency is provided on how irregular migration is managed in Greece. These reports picture a very harsh situation for asylum-seekers in Greece where they are subject to inhuman or degrading treatment or punishment and they are subject to a highly dysfunctional system.

Eventually, the legal framework and the practice will be taken together in order to examine how it can be that human rights in practice are still violated when a legal framework provides obligations to respect human rights. Recommendations will be given on how to cope with this problem. A critical look will be taken at Frontex, without denying the responsibility of Greece. It is argued that the fear of scholars concerning the lack of legal safeguards has become reality and that not only Frontex officials should be responsible during operations but Frontex as an agency should be responsible for its actions.

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1. Introduction

The European Union has been under pressure in the last years because of revolutions in North Africa and the economic crisis. These problems reach further than only the Union itself but have major impact on the Unions' external border and therefore also on the Schengen area (Collett, 2011).

Migration has put pressure on the external borders of the territory with lots of migrants trying to reach the Union by crossing the sea to the small Italian island Lampedusa (Collett, 2011). What does this imply for the European Union? It means that if the migrants successfully cross, they will be entering a territory without internal borders. This illustrates the issue of trust, since states that do not constitute parts of the external border have to trust states that do (Collett, 2011). States holding the external border are a lot of times not the destination country of migrants, migrants crossing the border will travel further to other EU member states and will try to get a residence permit there. This means that the inflow of migrants to states depends on the border controls of states holding the external border. The external border is, as described by Collett (2011), as strong as its weakest link which is sought for by the migrants. Strict border control means that migrants are putting themselves more at risk in order to reach European territory. This phenomenon is called a 'waterbed effect' or 'squeezed balloon syndrome' (Dijstelbloem, Meijer & Besters, n.d.; Besters & Brom, 2010). Parts of the external border that are seen as the weakest will be subject to border crossings from migrants.

Another issue being raised is the solidarity issue; everyone should be responsible for the protection of the external border even though not all member states are holding an external border (Carrera & Guild, 2010). Solidarity and responsibility, as Raspotnik, Jacob & Ventura (2012) are at the heart of EU's actions in the field of asylum and border controls since states need to cooperate on financial issues, practical issues and also redistribution issues in the light of the burden on certain member states that have to cope with large amounts of irregular migrants. Different initiatives on EU level have been taken: the FRONTEX agency which aims to support member states with border controls and return and the European Asylum Support Office (EASO) which is set up with the aim to assist with providing information on best practice methods in order to avoid dysfunctional national asylum systems and fostering information exchange to help with processing claims in EU (Raspotnik, Jacob & Ventura, 2012). On the other hand, the Dublin II Regulation has received criticisms for the fact that it puts a heavier burden on member states holding the external border since it states that migrants need to lodge an asylum claim in the country whose borders they crossed (Carrera & Guild, 2010).

In the light of recent developments such as the Arab Spring or the problems in Syria, one can imagine that the European Union is more attractive to live in than other (non- EU) states. Italy was the first to address the problem in the European Union; it raised concerns about this development and requested European assistance in order to cope with the inflow. Assistance would incorporate both technical and financial support and furthermore Italy wanted relocation of migrants in other EU member states; this is an appeal to European solidarity. However, trust

became an issue since the Northern member states did or do not trust the border protection of their southern partners (Collett, 2011). European countries have re- introduced border controls for over 70 times since the abolition of internal borders checks in the EU (Brady, 2012). It therefore seems that there is a lack of solidarity and consent on how to address the problems of immigration with one common external border. It has become an important issue in the light of the economic crisis ('we have already a hard time ourselves') and the rise of political movements against immigration in several countries (Fekete, 2005).

States whose borders constitute a part of the external border seem to get less support and this raises concerns (Carrera & Guild, 2010). Numerous alarms have been given from various organizations because of human rights violations that have occurred at these borders, especially in Greece (Human Rights Watch, 2008; 2008a; 2009; 2011; the UNHCR, 2007; 2008; 2009; the Fundamental Rights Agency, 2011; the Committee on Migration, Refugees and Displaced Persons, 2011; CPT, 2009; Pro Asyl, Greek Council for Refugees and Infomobile, 2012).

Greece has been facing important irregular immigrant crossings since the collapse of the Communist regimes in the 1990s. Until 2001 there was a law in force that would make expulsion of irregular migrants easy and quick. In 1998 it started with Border Guards along the border with Albania, Bulgaria, the Former Yugoslav Republic of Macedonia (FYROM) and Turkey. Since the last years, the border with Turkey is the most used by irregular migrants to cross (Triandafyllidou & Ambrosini, 2011). Greece is located at the front line of the EU's external border controls (Carrera & Guild, 2010). The most common place for persons to cross the border is along the Evros border: the river Evros is situated in the northeast of Greece. The total length of the border between Greece and Turkey here is 206 kilometers of which 190 kilometers are constituted by the river. The part of land will be characterized by a fence to try to discourage immigrants from crossing the border (Pro Asyl, Greek Council for Refugees and Infomobile, 2012). In Appendix 1, a map of Greece is provided to see where the place exactly is located.

The Frontex Risk Analysis Network (FRAN) Quarterly in 2010 stated that the Greek land border was responsible for 90% of the detections of illegal border crossings (FRAN Quarterly Second Quarter, 2010). The last FRAN Report dating from the third quartile of 2012 considers that the Greek border is the main route for crossing the border, even though the detections have been reduced by 44% in one year (FRAN Quarterly Third Quarter, 2012).

Since Greece could not handle the amount of people crossing the border, it called upon the European Union to help. It was a problem for the Union as a whole because these immigrants would eventually end up in all EU countries (Tryfon, 2012). The Greek made an urgent call to Brussels and this led to the first deployment of the Frontex RABIT intervention teams (Carrera & Guild, 2010; Tryfon, 2012). This led to the mobilization of 175 border control specialists to the Greek region of Evros (Carrera & Guild, 2010). There were already activities taking place at the Evros border: JO Poseidon Land which took place since 2008 and Project Attica since 2009. These projects were halted when the RABIT 2010 Operation came into force in November 2010 (Frontex, 2011).

What complicates the case of Greece is that it has the lowest recognition of refugees in the European Union (Carrera & Guild, 2010; Committee on Migration, Refugees and Displaced

Persons, 2013; Human Rights Watch, 2009). When persons are not recognized as being a refugee, return can occur in several ways: (1) refusal of entry at the land border, (2) 'push-backs' at sea, and (3) deportation after arrest in the country (UNHCR, 2009). The point about this is that individuals do not get a chance to present their case and there appears to be a big chance of *refoulement* to their country of origin. According to the official data of the ministry that adjudicates asylum claims; in 2009 only 36 out of 15.928 applications have been recognized. In 2010 this was 95 out of 10.273 (Cabot, 2012). The Greek government has ascertained improvement on asylum law; however this has not been realized (Carrera & Guild, 2010). The 'push-backs' at sea involve Greek guards pushing back migrants into their boats and escorting them to the Turkish side (The Guardian, 2012). Deportation after arrest in the country takes place without access to the procedures (for asylum) or any other formality. Cases were documented about 550 people (UNHCR, 2009).

While the European Union has its own Charter of Fundamental Rights which is binding upon all member states and EU agencies since the Treaty of Lisbon, it still seems that there is a way out of the obligations to respect human rights regarding border governance. This problem will be taken up in this research, guided by the following research question: 'To what extent does the legal framework on governance of irregular migration protect migrants from possible human rights violations in practice by Greek and Frontex officials along the Greek Turkish border?'

2. Methodology

This research aims to look at the legal framework concerning governance of irregular migration in the European Union in combination with the practice to see whether fundamental rights are enforced in practice. Therefore, the (in) discrepancy between the theory and practice will be described. It will be a case study on the Greek- Turkish border since attention has been raised by organizations that are concerned with the situation in Greece (see introduction).

This descriptive research will consist of two different parts: the legal framework regarding the compliance with fundamental rights in governance of irregular migration activities and the practice concerning the compliance with fundamental rights during governance of irregular migration activities. The first study is guided by a question that will address the legal framework that underpins governance of irregular migration in Greece. The sub question is descriptive and is formulated as follows: 'How does the legal framework assure compliance with fundamental rights during governance of irregular migration?' The second question relates to the practice, thus what is actually happening along the Greek- Turkish border. The second question is: 'What are the practices concerning governance of irregular migration in Greece with regard to the protection of fundamental rights?'

The unit of analysis within this study will be the legal framework guiding respect to fundamental rights during governance of irregular migration and practice concerning fundamental rights compliance during governance of irregular migration in Greece, since this will be the matter where conclusions will be drawn upon. Frontex is involved in these operations mainly by its assistance to the Greek police. In order to logically describe the research which will be conducted, a division of both descriptive studies is practical. These studies will form the basis for explaining governance of irregular migration along the Greek-Turkish border.

The time frame for this study will be based on the dates of the reports found. At least I have to consider that the Return Directive only came into force in 2008, therefore reports after its implementation need to be considered because of the fact that this Directive could be important to both the legal framework and the practice. The reports found on the issue date from 2008 until now (one report found from Human Rights Watch dates from 2008). This will also be the time frame for this study as long as the reports date from after the implementation of the Directive.

2.1. The legal framework concerning governance of irregular migration along the Greek-Turkish border

This study is guided by the sub question: 'Which legal framework constitutes the governance of irregular migration in Greece?' Sources for this study will be legal, both primary and secondary EU legal sources; involving the Return Directive, Fundamental Rights, the Directive on qualifications for becoming a refugee or a beneficiary of subsidiary protection status (2011) and the Directive on Asylum Procedures (2005). Also Greek legislation and measures will be outlined since EU Directive provides for a standard and subsidiary measured can be taken nationally. As explained earlier, returns need to be assessed by investigating why a person cannot acquire

legality and therefore has to be sent back. Therefore the ways to acquire legal stay will be assessed, directed at how individuals will be assessed for not being eligible for this way into legality.

2.2. The experience concerning compliance with fundamental rights during governance of irregular migration along the Greek- Turkish border

This study will, like the first one, be qualitative in nature and will be a case study with Greece taken as subject. It is guided by the sub question: 'What are the practices concerning the governance of irregular migration in Greece with regard to the protection of fundamental rights?' Since no personal experience will be acquired on the situation at the border, reports from, amongst others, Human Rights Watch, UNHCR, the Fundamental Rights Agency, the CPT and the Committee on Migration, Refugees and Displaced Persons will function as the basis for this analysis. These reports are detailed qualitative reports. Using more reports from different organizations will contribute to the validity of the study, since case studies (especially involving field reports) are not as superficial as surveys or experimental measurements are (ibid.). Another argument for using different field reports is that reliability will increase; field research can be very personal and by assessing different reports, reliability can be increased (Babbie, 2010). The more field research is existent which underlines the same practice, the higher the reliability is.

Concluding this research will be done by assessing the previous studies and defining discrepancies and in discrepancies between EU law and practice. This means that there will be taken a close look towards the 'ideal' legal framework which summons all participants to respect human rights and the implementation of these legal documents in the field. The purpose is to find the gaps between law and practice and describe these. The conclusion will involve an thorough assessment of the legal framework and the practice and will be followed by some recommendations on this issue.

3. Governance of irregular migration in Greece

This chapter will devote attention to the background of the governance of irregular migration in Greece in an EU context within the time frame from 2008 until now. After Greece's call for help in 2010, Frontex agreed on assisting Greece with its governance of the external border by sending Rapid Border Intervention Teams (RABITs). Before its deployment, there were other Union activities taking place. It is important to know what the context of these operations has been in order to have a good insight of what has been done on the EU level with regard to border governance.

In the second half of 2010, the Greek authorities noticed a substantial rise in irregular crossings of migrants in the Evros, more specifically near the town of Orestiada which is located 6 kilometers away from the Evros river. The whole Greek- Turkish land border is approximately 200 kilometers long and is drawn by the river Evros. Only 10.5 kilometers of the border is constituted by land; in 2012 a fence on this piece of land was finalized (Human Rights Council, 2013). This probably was a result of demining of the area close to the border and because of cheaper smuggling prices at this entry point (Human Rights, Council, 2013). Many people crossing the border are in fact refugees, and if they flee for another reason, they come from countries such as Afghanistan, Iran or Iraq, which makes return to these countries difficult (McDonough & Tsourdi, 2012). When the authorities calculated that an amount of 47,706 people crossed the border irregularly, Greece believed this to be an urgent matter of irregular border crossing and therefore officially requested for the deployment of the first RABIT border intervention team on the 24th of October 2010 (Burridge, 2012). A lot of people crossing irregularly are requesting asylum, this caused a backlog of 47,000 cases at the end of 2010 (McDonough & Tsourdi, 2012).

In 2010, Frontex started with a RABIT 2010 Operation, whereby 175 border control specialists were sent to the Greek region of Orestiada (Carrera & Guild, 2010). The main objectives of this border operation were (1) overall assistance to Greece's border control with significantly improved border surveillance and reception conditions; (2) providing support for strengthened border control in order to reduce irregular migration flows and acquiring intelligence on facilitators and hidden persons; and (3) helping Greece with providing a mapped process in order to establish a more effective governance of irregular migration to be implemented by Greece (Frontex, 2010). Participating member states provided in August 2011 about 70 to 80 guest officers as experts and two to three interpreters per month (McDonough & Tsourdi, 2012). These officers are under the command of the Greek authorities and Frontex has argued that only Greece remains responsible for the treatment of persons in need of international protection (Frontex, 2010).

The ability of Frontex to deploy these border teams goes back to July 2007, when Regulation 863/2007 was adopted. This outlined the task and powers of border guards in a requesting EU member state, (Regulation No. 863/2007). The Regulation has been incorporated in the Frontex Regulation (2011). The 2011 Frontex Regulation, together with the Schengen Borders Code, provides for the main instruments through which Frontex gets the mandate to act

(Marin, forthcoming). The Schengen Borders Code, Article 12, contains border surveillance provisions for border surveillance on which RABIT Operations are built. These border surveillance provisions have the aim to 'prevent unauthorized border crossings, to counter cross- border criminality and to take measures against persons who have crossed the border illegally (Schengen Borders Code, Article 12 (1)). It is part of the Common European Asylum System (CEAS) which added an extra layer of EU law to international asylum obligations such as the 1951 Geneva Convention relating to the status of refugees (McDonough & Tsourdi, 2012).

The main objective of the Greek authorities, as told to the Special Rapporteur, is to detect migrants before they cross the Turkish side of the border. Thermal cameras and use of helicopters create a difficulty of successfully crossing this border. When migrants try to cross, the authorities inform the Turkish authorities who apprehend the individuals. If the Turkish authorities are unable to proceed, Greek border guards will show their presence on the river to prevent them from crossing the border (Human Rights Council, 2013). There were already activities taking place at the Evros border: JO Poseidon Land which took place since 2008 and Project Attica since 2009. These projects were halted when the RABIT 2010 Operation came into force in November 2010 and were reintroduced after the end of the RABIT operation (Frontex, 2011).

JO Poseidon Land was reintroduced in March 2011 with the objective of increasing the level of border surveillance and border checks, and to provide assistance on screening and debriefing activities (nationality determination) (Frontex, 2012). Assistance of Frontex is given at the Greek- Turkish border, the Bulgarian- Turkish border and the Greek- Albanian border (Burridge, 2012). The objectives do not differ that much from the RABIT deployment; this is however a long- term deployment of border guards and the RABIT operation was a short- term operation of four months (Frontex, 2010). Project Attica is a Joint Return Operation which is now synergized with JO Poseidon Land. It stretches over the Greek land but Frontex is also active at the Turkish border (Burridge, 2012). When it was initiated in 2009, it was a 'pilot' project aimed to help the Greek with identifying and screening irregular migrants, acquisition of travel documents and returning irregular migrants to their home countries. Subsequently, Frontex assisted in carrying out identifications and screening of irregular migrants, acquisition of their travel documents and return of people to their home countries (Amnesty International & ECRE, 2010).

4. The legal framework concerning governance of irregular migration along the Greek- Turkish border

This section will outline the legal framework concerning governance of irregular migration; this includes relevant international law, EU law, case law or Greek national law in order to have a solid background understanding on governance of irregular migration in the European Union. The first section of this chapter elaborates on the persons that are affected by the compliance of human rights with governance of irregular migration in the Union; these are asylum seekers, refugees or illegal immigrants. Afterwards, the legal framework is explained which will be divided in three sections: legal safeguards against human rights violations and EU law concerning governance of irregular migration. At last, actors in the field such as Frontex will get attention to see how their role in the field is described.

4.1. Individuals subject to governance of irregular migration

It is important to have an understanding of the persons that are involved in the action and practices that this research investigates. These persons can be named as refugees, asylum-seekers or illegal immigrants.

An asylum seeker is being defined as someone who says that he or she is a refugee, but this claim has not yet been evaluated as such (UNHCR*, n.d.). National asylum systems have to qualify if this claim is grounded and if they are granted a refugee status and get international protection. A refugee is described by the UNHCR as 'someone who has been forced to flee his or her country because of persecution, war, or violence. A refugee has a well- founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. Most likely, they cannot return home or are afraid to do so' (UNHCR, n.d.). These refugees can get a legal status in a host country if they apply for asylum. They have to demonstrate that the fear they feel for returning is well- founded and if this is recognized as well- founded, they will get a legal status and material support (ibid.).

The last concept of 'illegal immigrant' is however more important to this research since illegal immigrants are subject to return operations. An 'illegal immigrant' is, as stated by the European Migration Network (2007), as: 'any person who does not, or who no longer, fulfills the conditions for entry into, presence in, or residence on the territory of the Member States of the European Union' (European Migration Network, 2007, p. 4). Askola defines this person as 'migrants who are not EU citizens' (Askola, 2010, p. 160). This definition is an introduction to a bigger discussion which is going on among scholars. This article argues that the EU regards immigration as 'unwanted input', this related to the discussion from scholars whether immigration has been 'securitized' as a reaction to 9/11 (Boswell, 2007; Neal, 2009; Kaunert, 2009; Guild, 2006; Huysmans, 2000). Several authors argue that securitization had a negative impact on the status of asylum seekers and migrants, including human rights protection (Brouwer & Catz, 2003; Baldaccini & Guild, 2007; Chebel d'Appollonia & Reich, 2008; Guild 2009). Guild argues that the term 'immigrant' or 'migrant' is a normative concept in Europe,

mostly related to a security aspect. Whether a person is legal or 'irregular' depends upon the knowledge of the state, this means: the individual has completed a process of the state and the state recognizes the individual as allowed to be on its territory (Guild, 2009). An important argument is moreover that the state can change the status of an individual away from irregularity through the change of its rules, international agreements or in other ways. Thus, the state can transform the status of a migrant easily. While the first two names are universally applied, an illegal immigrant is contested. As the discussion mirrors, this concept does have a political load.

4.2. Legislation

In the first place, it is important for this research to explain all relevant law that exists in this discipline in order to establish a legal framework. Directives and Regulations from the European Union interfere but also Greek national law plays a role. At first, EU and Greek laws are explained where after the actors in this field are identified.

4.2.1. Legal safeguards against human rights violations

In the Treaty on European Union (TEU), Article 2 establishes the values that need to be respected by the member states of the European Union, such as: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These are not further specified: Article 6 mentions the different Articles the Union recognizes (TEU, Article 6). These are: the recognition of the Charter of Fundamental Rights, compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ibid.).

The 1951 Convention relating to the status of Refugees and its 1967 Protocol

The 1951 Convention relating to the status of Refugees (here after: 1951 Geneva Convention) is an international treaty on the status of the refugee which is ratified by almost 150 states (Duffy, 2008). Together with its 1967 Protocol, they can be called the 'cornerstone of international legal regime for the protection of refugees' (Qualifications Directive, 2004, Preamble 3). All EU member states are bound to this treaty, which The Geneva Convention is important to consider since it cannot be overridden by regional treaties such as Union law- making (Storey, 2008). The 1951 Geneva Convention establishes the definition of a 'refugee', this is a person who

'as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it' (The 1951 Convention relating to the status of Refugees, Article 1 (b)).

The Convention determines that a refugee has access to courts on territories of all contracting members (Article 16) and the obligations in the treaty will be applied without discrimination of race, religion, or country of origin (Article 3). Important in this treaty is Article 33, relating to non- refoulement; 'No Contracting State shall expel or return ("refouler") a refugee in any

manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion' (The 1951 Convention relating to the status of Refugees, Article 33(1)). However, the provision that follows states: 'the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country' (The 1951 Convention relating to the status of Refugees, Article 33(2)). This means that there is an exception to the principle of non- refoulement in the 1951 Convention because the principle of non- refoulement cannot be guaranteed to everyone (Duffy, 2008).

European Convention for the Protection of Human Rights and Fundamental Freedoms

This Convention was signed in 1950 by the member of the Council of Europe and entered into force on the 3rd of September, 1953. This Convention formed the basis for the Charter of Fundamental Rights (explained below) (Chalmers, Davies & Monti, 2010). The European Union has agreed on joining the Convention, means that the ECHR would provide as a safeguard to the interpretation of fundamental rights in the Union (Fundamental Rights Agency, 2012). The judicial mechanism of this Convention is the European Court of Human Rights (Duffy, 2008). The Convention is consisting of two sections: Convention for the protection of human rights and fundamental freedoms, and a section containing the protocols to the Convention for the protection of human rights and fundamental freedoms. The first section is divided in different obligations: (1) Rights and freedoms; (2) European Court of Human Rights; (3) Miscellaneous provisions (European Convention on Human Rights, 1950). The second section ensures collective enforcement of other rights than mentioned in the previous section of the Convention (ibid.). Important provisions in this Convention are Article 3, Article 6 and Article 14. Article 3 states that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Article 6 determines that everyone has the right to a fair trial; Article 14 ensures a prohibition of discrimination on grounds such as sex, religion, race, color, political or other opinion (European Convention on Human Rights, 1950). Article 3 protects from non-refoulement in an unconditional way;

The Charter of Fundamental Rights

The European Charter of Fundamental Rights which was agreed upon in 2000 establishes human rights in the European Union (European charter of Fundamental Rights, 2000). This Charter is binding upon all agencies and institutions that are EU related since the Lisbon treaty of 2009 (Lisbon Treaty, 2007). This Charter contains several chapters: dignity, freedoms, equality, solidarity, citizen's rights, justice and general provisions. Especially the chapter on freedoms is important in this case since it involves freedoms which are relevant for the Greek case. Article 11, Article 18 and Article 19 are especially important to consider here. These articles refer to the right to asylum, the freedom of expression and information and protection in the event of removal, expulsion or extradition (European Charter of Fundamental Rights, 2000).

4.2.2. EU legislation concerning governance of irregular migration

Schengen Borders Code

The Schengen Borders Code is agreed upon in order to modify 'existing legislation on border checks carried out on people. It is intended to improve the legislative part of the integrated governance of irregular migration policy by setting out the rules on crossing external borders and on reintroducing checks at internal borders' (Europa, 2010). The Regulation established common rules applicable to the movement of persons across borders, establishing common rules for crossing of external borders by third- country nationals. Rules on crossings of external borders are laid down such as times when and places where the border can be crossed, and entry conditions are defined for third- country nationals. Furthermore the rules on control of external borders and refusal of entry are defined (Schengen Borders Code, 2006).

When a person enters a border in an irregular manner, the first Regulation this person will come across is the Schengen Borders Code. The Code is agreed upon in order to modify 'existing legislation on border checks carried out on people. It is intended to improve the legislative part of the integrated governance of irregular migration policy by setting out the rules on crossing external borders and on reintroducing checks at internal borders' (Europa, 2010). It falls under the Area of Freedom, Security and Justice (AFSJ) and therefore authorities must respect certain humanitarian obligations such as the obligation to *non- refoulement*. This principle has been conceptualized by the Geneva Convention on Refugees in 1951, as one could have read in section 4.2.1. Regarding the EU, Article 78 (1) on the Treaty of the Functioning of the EU (TFEU) states that asylum and refugee policy implemented by the EU must respect this principle. Article 3 (b) of the Schengen Borders Code explicitly states the rights concerning refugees or people seeking international protection concerning non- refoulement: 'This Regulation shall apply to any person crossing the internal or external borders of Member States, without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non- refoulement' (Schengen Borders Code, Article 3 (b)). It is clear that the obligation to respect the rights of the persons is unconditional in the Schengen Borders Code.

A problem with the Borders Code is that it does state the obligation towards this principle, but does not regulate the way in which it has to be respected in terms of their actions in the field (Weinzierl, 2007). This leaves discretion to member states on how to guarantee this principle. Besides the legal obligation to respect non- refoulement, it has been argued that the Schengen Borders Code is prejudiced towards exclusion and provides brief guidance on who should be admitted (Guild, 2006). The Borders Code provides guidance in the first place by ruling out people that are in the Schengen Information System (SIS); the people subjected to this have shown behavior that justifies exclusion from the EU territory and every person may be checked in the SIS system (Schengen Borders Code, Article 7 (3) (c) (iii)). People are screened to check whether they constitute a potential risk as a second measure and when they are not, it is decided at *prima facie* whether they will get a visa (Guild, 2006). The refusal of a visa shall, as stated in the Borders Code, be 'without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long stay visas' (Schengen Borders Code, Article 13 (1)). The right to appeal is stated in the Code, but is weakened by the provision that 'Lodging such an appeal shall not have suspensive effect on a decision to refuse entry' (idem, Article 13 (3)).

Even though the Schengen Borders Code does not establish a clear procedural safeguard concerning the protection against refoulement, Article 18 of the Charter of Fundamental Rights does establish that a person has the right to asylum and article 19 states that collective expulsions or expulsions of people who will seriously risk a death penalty, torture or other inhuman or degrading treatment shall be prohibited (Charter of Fundamental Rights, Article 18 & 19). The right to asylum is assumed to have three elements, which are: (1) when someone claims to have a well- founded fear that he or she will be subject to persecution in his or her country of origin, member states are not permitted to turn these persons away from their territory without examination the truthfulness of this claim; (2) member states must assess this claim with an individual examination of the claim; and (3) the person may not be transferred to unsafe territories nor a state which may return the person to the territory where the person may be at risk (Chalmers, Davies & Monti, 2010). This means that a person has protection when he or she claims to have a well- founded fear and this protection will enable the individual to enter the asylum procedure in any EU member state.

The Directive on Return

The Directive is adopted with the aim to 'set out common standards and procedures to be applied in all Member States for returning illegally staying third country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations' (Return Directive, 2008, p. 1). Thus, the Directive applies to individuals who stay illegally in the country, which means that an individual does not (any longer) fulfill the criteria to entry from the Schengen Borders Code which will be discussed below (Baldaccini, 2010). The Directive states rules concerning voluntary and forced return, detention, banning re- entry and the protection of individuals (Return Directive, 2008).

The objective behind the Directive was that member states needed to stop granting amnesties to large groups of irregular migrants; the Union wanted to avoid situations such as the one in Spain in 2005. In this year, Spain granted amnesties to about 700,000 to 800,000 irregular migrants (Chalmers, Davies & Monti, 2010). This is, according to Fekete (2005), part of a broader problem. She argues that security for the West involves security from refugees; this indicates that the West is influenced by xeno- racism. This xeno- racism means that countries adopt a target- driven deportation program which legitimize force and this is most apparent in countries that also inhibit a xenophobic political Right in their government or in the opposition (Fekete, 2005).

Since the implementation of this Directive, scholars have had different criticisms on the Return Directive. In the first place, Baldaccini (2010) has argued that the Directive is focused too much on the return and less on protection for human rights since the obligation to respect human rights moved to the recitals of the Directive. This argument implies that there is too much discretion left to the member states, especially with the obligation to respect human rights (Baldaccini, 2010). The biggest criticism concerns forced removal. Formally, member states should at first hand issue voluntary removal of an individual between seven and thirty days for people who are issued with a return decision (Chalmers, Davies & Monti, 2010). When the individual does not return within this period, forced return comes into play. Forced return

comes also into play when there is a risk of absconding, the person poses a risk to public policy or national security, or the application done is proven manifestly unfounded or fraudulent (Return Directive, Article 7 (4)). Baldaccini (2009) has argued that these provisions are too broad, especially the clause about the risk of absconding. It is rather flexible and therefore it can be used in such a way that forced return will not be used the way it is stipulated in the Directive (Baldaccini, 2009). If member states decide for forced return, there are two sanctions that can be issued: re- entry bans and detention. Re- entry bans moreover can also be issued in the case of voluntary removal, which makes that an individual will become even more creative once he or she wants to seek for a better future since regular movement will not be allowed (Chalmers, Davies & Monti, 2010). Detention is more severe; member states are allowed to detain someone up to eighteen months. This is a very harsh measure for persons who did not commit a crime. It moreover illustrates arguments that have been made concerning the fact that the EU criminalises migrants (Chalmers, Davies & Monti, 2010; Baldaccini, 2010). Safeguards against detention for the individual is that it must be a matter of last resort and must only be used in preparation for the return. The flexibility especially of the provision on the risk of absconding can mean in practice that only forced return will be issued (Baldaccini, 2010).

The Dublin II Regulation

The Dublin Regulation establishes the state responsible for the asylum application of an individual. The objective is to avoid transferring asylum seekers from one member state to another and to avoid abuse of the system by the asylum seeker with applying for asylum in several member states (Dublin II Regulation, 2003). There are several criteria taken into account which are (1) unaccompanied minor will be subject to the responsibility of a member state where a member of his or her family is legally present; (2) an asylum seeker holding a valid visa or residence document is subject to the responsibility of the member state who issued this; (3) where the asylum seekers has irregularly crossed the border of a member state, that member state will be responsible for the asylum application; (4) where a person applies for asylum in a member state where a visa is not required, this member state shall bear the responsibility and (5) if a person applies for asylum in an international transit area of a member state, this member state has the responsibility of handling the asylum application (ibid.).

EU law which governs asylum constitutes of different legal documents. The Dublin Regulation in the first place establishes where the asylum application of an individual needs to be examined. Since the countries at the external border such as Greece will have more inflow or attempts to enter their country, this Dublin II Regulation has raised considerable doubts concerning EU solidarity. It means that member states where persons irregularly enter the border will also be the member states responsible for the asylum application. This puts a heavy burden on the member states that constitute the external border of the EU (Carrera & Guild, 2010). A lot of times, this is not the country of destination for the people crossing the border irregularly (Lazaroaia, 2012). However, they are subject to the asylum procedures in this country and therefore the countries holding the external border will be the countries where they have to apply for asylum.

Asylum Procedures Directive

The main objective of this Directive is to introduce a minimum framework in the European Union for granting or withdrawing refugee status (hereafter the Asylum Procedures Directive). The aim of this harmonization was to stop movement of third- country nationals between member states seeking the country where the chance of getting asylum was highest (Asylum Procedures Directive, preamble (6)). Since this research is interested in the application for asylum since it determines who will be subject to returns, the part of this Directive to be highlighted is the one who establishes the rules for granting or withdrawing refugee status.

The Asylum Procedures Directive applies when a person has requested asylum at in the territory, but also at the border and in transit zones of the member states (Weinzierl, 2007). Every request for international protection is interpreted as a request for asylum unless explicitly informed upon by the person under consideration. With this statement, the EU refers explicitly to the obligation of the principle of non- refoulement in both the territory and at the border. The Asylum Procedures Directive further builds on this for the fact that it grants the person in question with the right to stay in the member states' territory during the examination of the application (Asylum Procedures Directive, Article 7). However, there is a problem that can be encountered in this article, which is that this is quite abstract because of the fact that there is no residence permit issued here nor can provide any contribution to an asylum- seekers claiming for long- term residence.

There is an exception to the right to stay in the member states' territory: it is not granted to individuals coming from a 'safe country of origin' (Chalmers, Davies & Monti, 2010). This is doubttable for the fact that an asylum application from a safe third country is considered inadmissible. Moreover, the qualifications for a third country in order to be safe are very strict and Weinzierl has argued that there is no country outside the EU fulfilling the criteria and is not a member of the Dublin system (Weinzierl, 2007). Another type of country stated in the Directive is a 'safe third countries', these are states where it would be reasonable for a person to go to. It is up to the discretion of the member state itself to determine this; the Union intended to draw a list of minimum safe countries but this has been annulled by the European Court of Justice (European Court of Justice, 2008). The Court ruled that any future measures concerning asylum procedures, including any proposal to re-insert provisions for the adoption of common lists on safe countries, needed to be adopted through co-decision process, including qualified majority voting in the Council. It can at least be considered doubttable whether the EU wants to leave this important clause to the discretion of member states since an asylum application can be annulled by the member state if the member state determines that the country of origin or the third country from the person under consideration can be regarded as safe. Connect the previous statement with the fact that member states have to examine the nationality of a person who is apprehended and has thrown away his or her identification papers and there arises a very ambiguous discretion that threatens the position of people seeking international protection. For example, Senegal has been regarded as safe in 13 out of 17 responses while it had, in 2001, about 10.000 refugees living in other countries (Chalmers, Davies & Monti, 2010). This clearly shows the ambiguity of the safe third country concept, especially when individuals in need of international protection claim to have a well- founded fear irrespective of the safe third country concept but are not examined individually.

Asylum Qualifications Directive

The objective of this Directive which is fully called 'Directive 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' (here after the Asylum Qualification Directive) is to ensure that common standards are applied for the identification of persons in need of international protection and to make sure that a certain standard is upheld with regard to the benefits for these persons (Asylum Qualification Directive, preamble (12)). This Directive inhibits more practicalities for the examination of asylum applications or application for international protection.

The Asylum Qualification Directive has been described as a well- established piece of legislation in terms of its coverage for people in need of international protection who fall outside the 1951 Geneva Convention and its subsequent 1967 Protocol (Storey, 2008). The Directive ensures protection for two types of people: refugees and people in need of subsidiary protection. It aims to regulate examination procedures for international protection whereby the proof for legitimization of this protection is burdened on the individual lodging the application; the individual must prove his or her case with relevant documentation (Asylum Qualification Directive, 2004, Article 4(5)). The proof for 'subsidiary international protection' must be based on 'substantial grounds' where the Union encapsulated two different threats: a threat on the basis of the situation of the particular state and an individual or personal threat (Asylum Qualification Directive, 2004). This means that the Union examines applications on the basis of two standards rather than connecting them and look at the individuality of the particular risk (McAdam, 2005). As a consequence one can foresee that this broadens the scope for people who wish to get international protection. These persons will only need to demonstrate the situation in their country of origin without a clear link to their personal situation.

The Directive was initiated to provide more guidance on the broad Geneva Convention definitions. However, as Storey (2008) argues, the Directive sets a new standard that does not build on previous standards and therefore provides no interpretation but sets a new standard besides others (Storey, 2008). Building on this, it is not surprising that the main criticism of this Directive is the fact that the Union tried to establish a new standard other than complementing international law (ibid.). An example for this statement is the definition in the Directive concerning persons that are eligible for international protection. Persons eligible for protection are 'third- country nationals'; individuals residing in the Union are therefore excluded (Storey, 2008, p. 8). The UNHCR has criticized this definition for the fact that it is too narrow because the definition of 'refugee' is more restricted than the Geneva Convention which does not restrict to 'third- country nationals' (McAdam, 2005). It means that the Convention is undermined in terms of its definition of the term 'refugee' because this definition is not restricted in such a way (ibid.). As Storey (2008) argues, the Directive is more limited than the 1951 Geneva Convention for the fact that it does not apply to EU nationals but also because it does not cover all the rights set out in the Geneva Convention (ibid.).

It differentiates from the Convention and other international treaties in the principle of non- refoulement because it does not refer to any of the international obligations; it only describes the principle (McAdam, 2005). This means that there is no legal source which backs the obligation to respect non- refoulement and this weakens the obligation (ibid.). With regard

to the restrictions of the principle of non- refoulement, Article 14 aims at a legal boundary to the principle. There has been international criticism on this, since it would not grant persons a refugee status. However, the Commission argued that it does grant persons a refugee status, but while they have this status, member states can strip them of their rights they would normally obtain. This differs from the obligations in the Geneva Convention because this Convention only ends the refugee status when an individual is subject to cessation or exclusion clauses. Member states therefore seem to have a certain flexible clause in the Directive, especially when persons can be deprived of their rights before a decision has been taken (Storey, 2008). More important, it does not grant the individuals the same rights universally.

4.3. Actors involved in the situation at the Greek- Turkish border

Frontex

Frontex was created in 2004 and was first pillar agency of the EU with the task of coordinating and assisting member states' actions in management and control of the EU's external borders (Guild, Carrera, Den Hertog & Parkin, 2011). Its formal legal basis can be found in Article 74, stating that 'The Council shall adopt measure to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission', and in 77 (b) and (d) of the TFEU relating to monitoring the border and an integrated management for the external border. As Léonard (2009) explains more explicitly, 'the establishment of Frontex came as a response to the perceived need for an increase in cooperation amongst EU Member States with regard to external border controls' (Leonard, 2009, p. 375). According to the latest amendments in the Frontex Regulation in 2011, its tasks have extended: (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; and (5) to support member states by organizing joint return operations (Frontex Regulation, 2011, article 2). Frontex has been increasing in both resources and capabilities. Besides the fact that it has retrieved more powers over the years; the budget for this Agency has been increased over the years too. For example, the budget for Joint Return Operations has been increased from €0.5 million in 2005 to €7 million in 2010 (Keller, Lunacek, Lochbihler & Flautre, 2010).

In 2007 an amendment was passed, establishing the Rapid Border Intervention Teams (RABITs) that could help the Member States combating massive flows of irregular migrants (Guild, Carrera, Den Hertog & Parkin, 2011). These operations differ because Frontex does not only have an advisory function there but it has a more extensive law enforcement function. Furthermore these actions are based on 'compulsory solidarity', which means that Member States have to provide for human and technical resources unless they prove not to be able to do this because of special circumstances. The last operational power it got by enacting the Regulation was assisting the Member States with Joint Return Operations of irregular migrants (ibid.). In 2011 the Regulation had gone through its second recast, adding more responsibilities by stating its responsibility for implementing operations and furthermore it added a guarantee to respect fundamental rights focused on unaccompanied children and vulnerable persons (Frontex Regulation, 2011). The extra responsibilities would enable the Agency to 'co- lead

border patrol operations with EU member states, deploy liaison officers in third countries, coordinate joint return operations, launch and finance pilot projects' (Human Rights Watch, 2011, p. 14).

It is important to look at the role of Frontex in governance of irregular migration. In the first place, there seems to be a one- sidedness to the role of Frontex which is criticized: its role as border protector without any reference to the humanitarian aspect of the governance of irregular migration activities (Rijpma, 2010). This relates to the argument made in the section concerning the Directive on Return, where it has been stated that the EU seems to criminalize migrants. This can be proven by the language Frontex uses in its FRAN reports, where it states that it 'fights against the trafficking of human beings and irregular migration' (FRAN Quarterly Fourth Quartile, 2012, p. 21). This is a term indicating that Frontex criminalizes people who cross the border, since it provides the public a picture that migration is something to defend one from. Another term to be highlighted is that Frontex has a common terminology for describing irregular border crossings: Frontex calls it 'illegal border crossings' (FRAN Quarterly Fourth Quartile, 2012). In section 3.1., it has been argued that the connotation of the word 'illegal' has raised a lot of discussion among scholars.

Not surprisingly, there have been heavy critics since the first operation of Frontex in 2005. There are blogs from human rights activists and demonstrations were held at the Frontex headquarters in Warsaw (Léonard, 2010). The most criticism on Frontex regards point (5) from the first paragraph in this section which is the support to member states by organizing Joint Return Operations (Jorry, 2007). These Joint Operations can be called a camouflage for joint expulsions according to Keller et al. (2010) and are constantly increasing in amount and budget. In Article 8 of the Return Directive, member states are required to have an 'effective forced return monitoring system' for removal; meaning that an effective system covers all phases of the removal of a person. This means that an effective system for returning persons is containing a pre- departure phase, arrival phase and reception services in the third country (Fundamental Rights Agency, 2012). The problem with this requirement is that member states who participate in Frontex- coordinated Joint Return Operations have the obligation to have an effective forced return monitoring system. However, practice tells that Finland, Italy, Spain and Sweden do not have an effective forced return monitoring system but were participating in 14 out of 38 joint return operations (ibid.). Article 3 of its Regulation states that the Agency may itself initiate joint return operations, as long as there is carried a thorough risk analysis prior to the return operation (Frontex Regulation, 2011, Article 3 (1)). Léonard (2010) has argued that the practices of Frontex are subject to the doctrine of securitization, this means that the EU is extremely politicising migration and its presentation as a security threat. Not surprisingly, the author is not trusting that principle of non- refoulement is unlikely to be upheld during these practices. Everyone who is apprehended by Frontex is treated as an 'illegal immigrant' and there is no provision made for potential asylum- seekers among them (Léonard, 2010). It is easy for Frontex to state that it only assists and potential violations of the principle of non- refoulement are under the responsibility of member states. However, the operations Frontex cooperates in must not violate this principle and there at least is some responsibility for Frontex there to uphold the principle (ibid.). It can even be taken up further by the ruling of the ECtHR; in the case of *Hirsi Jamaa and Others v. Italy*, the Court ruled that all state authorities must respect the

principle of non- refoulement and any activity by a member state which is aimed to prevent unauthorized border crossing of the external borders of the EU (even in when it is labeled a 'rescue operation') must be in conformity with the principle of non- refoulement (European Court of Human Rights, 2012). This means that Frontex' actions do need to be in conformity with the principle of non- refoulement and Frontex is cannot escape from this obligation.

Another important legal discussion by scholars to develop is the liability of Frontex during its operations. This has not been clear since its establishment; however the previous Regulation, Regulation No. 2007/2004, stated in Article 19 a clause for non- contractual and contractual liability. As Brooks (2012) argues, possible human rights violations could be governed by Article 19 (3) which states that Frontex shall make good any damage caused by its departments or by its servants in the performance of its duties. Article 19(4) gave the European Court of Justice (ECJ) the jurisdiction to rule on the compensation of these damages (Brooks, 2012). However, this Article is not included in the amended Regulation which makes clear that there still is a gap for Frontex' liability in operations. Currently, the Commission argues that officers can be held liable personally in severe situations, but as Keller et al. argue, this is legally impossible to bear (Keller et al., 2010). The only current safeguard comes from the ECJ for the fact that it is able to review the legality of the acts of Frontex, actions of failure to act (Article 265) and preliminary rulings on the validity of acts (Article 267). This means that the Agency could be requested justification of its actions but no relief can be sought in terms of damage.

The Code of Conduct, a document that was adopted in 2011 does make a step forward in terms of fundamental rights obligations and sanctions that are defined in the document. For example, the Code of Conduct does state that officers have to 'promote in full compliance with the principle of non refoulement, that persons seeking international protection are recognized, receive adequate assistance, are informed in an appropriate way about their rights and relevant procedures and are referred to national authorities responsible for receiving their asylum requests' (Frontex Code of Conduct, Article 5(a)). Problem however is that there is no 'monitoring procedure'; individuals, human rights groups, or international organizations can report a breach of the Code. The Fundamental Rights Strategy which has also been adopted by Frontex, does give the possibility to third parties to report on human rights violations (Slominski, 2013). This gives hope for more accountability for Frontex.

Greek authorities

On national basis, there are lots of different ministries involved in the Greek asylum procedures; each has its own task in the process. In the overview presented by the Commission (2012) the task division is described. The Ministry of Interior is responsible for migration policy and the integration of third- country nationals; The Ministry of Public Order and Citizen Protection has the responsibility to tackle illegal immigration, border controls and asylum procedures. The Foreign Affairs Ministry who has the task of keeping Schengen and national visas up to date; the Ministry of Labour and Social Security who has, together with the Ministry of Interior the task of watching labour market demands and setting the requirements for granting or withdrawing residence permits. The ministry who is responsible for guarding the rights of third- country nationals and unaccompanied minors is the Ministry of Justice, Transparency and Human Rights.

The Ministry of Development, Competitiveness, Infrastructure, Transport and Networks is being involved in residence permits aiming at independent financial activity or investment and the Ministry of Shipping, Maritime Affairs and the Aegean is responsible together with the police, for sea and governance of irregular migration and the 'fight against illegal migration' (European Migration Network, 2012). It seems that task division is a very complex matter in this issue since numerous departments are involved. As the Special Rapporteur François Crépeau successfully argues, it would be better to give one ministry the overall responsibility since spreading tasks over different ministries means also spreading responsibility (Human Rights Council, 2013).

On the field, the Hellenic Police has the main responsibility together with the Ministry of Citizen Protection on the surveillance of land borders, detention of migrants (including the management of detention centers), deportation and the asylum system. The Hellenic Coast Guard bears the main responsibility for border management at sea borders.

The Greek Constitution and non- EU legal acts are important to discuss for a comprehensive understanding of the matter. The Constitution gives ratified international treaties the status of integrated Greek national law; this means that international law can be considered Greek law and moreover will prevail when Greek law tells something contrary to international law (Human Rights Council, 2013). The Greek Constitution furthermore guarantees different rights, such as the respect and protection of the value of the human being and full protection of life, honour and liberty which is irrespective of nationality, race or language, religious or political beliefs for all people living on Greek territory (The Constitution of Greece, Article 2 and Article 5 (2)). Considering the topic of this research, it is important to state the right that 'no person shall be arrested or imprisoned without a reasoned judicial warrant which must be served at the moment of arrest or detention pending trial, except when caught in the act of committing a crime' (Idem, Article 6 (1)). Another important provision in the Greek Constitution is that 'torture, any bodily maltreatment, impairment of health or the use of psychological violence, as well as any other offence against human dignity are prohibited and punished as provided by law' (Idem, Article 7(2)). Every person shall be entitled to get legal protection by the courts and may plead to the courts on his interests and rights (Idem, Article 20 (1)).

It has become clear that the Greek government is unable to cope with the massive inflow of irregular migrants. There have been criticisms on its asylum system for years; the main criticism was that it is dysfunctional as a whole (Pro Asyl, Greek Council for Refugees and Infomobile, 2012). Greece has promised to improve the situation and undertook measures with an agreement on Presidential Decree 114/2010 establishing an Appeals Board, and Law 3907/2011 which establishes an Asylum Service and a Service of First Reception. Regrettably, these services have not been in function. As the Special rapporteur informs, he has been reassured that the services must be operationalized by June 2013 (Human Right Council, 2013). The National Commission of Human Rights and the Greek Ombudsman have been established, this is a positive turn towards protection of human rights in Greece. Due to financial problems, these institutions do not have the opportunity to be fully operationalized (ibid.). This means that for several years, Greece has been violating its international obligations to respect human rights and this falls completely under Greek responsibility. The situation has been described by the

ECtHR as violating Article 3 of the ECHR stating that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’ (European Convention on Human Rights, n.d., Article 3). Also, the Court of Justice of the European Union rules in 2011 that member states may not transfer irregular immigrants to Greece because of ‘substantial grounds’ for believing that there is a serious that fundamental rights of migrants will be violated in Greece (McDonough & Tsourdi, 2012). Therefore, international awareness of the situation in Greece is there, but Greece resides in a deep economic and social crisis and is unable to cope with the inflow of irregular migrants in a respectful way (ibid.).

International organizations

Numerous international organizations are involved in the field of refugee law. The most important organization who has also legal right to be admitted into the field is the United Nations High Commissioner for Refugees (UNHCR). Under Article 21 (1) of the Asylum Procedures Directive, member states have to allow the UNHCR (1) access to applicants for asylum; (2) to get information on individual asylum cases; and (3) to present its views to the member state concerned (Asylum Procedures Directive, 2005, Article 21 (1)). Another important actor on the behalf of the Union is the European Agency for Fundamental Rights (FRA) that has been established by Regulation No 168/2007 with the main aim to ‘to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate’ (Regulation No 168/2007, Article 2). This Agency does not have the mandate like the UNHCR enjoys on the field but does have the responsibility to publish several reports relating to the developments on the issue (Regulation No 168/2007, Article 4 (1)). The FRA thus has no legislative or regulatory power and does not have a quasi- judicial competence (Milanova, 2011).

4.4. Conclusion

This section will answer the sub question: ‘By which legal framework are returns operations enabled in Greece?’ As one could have read in this chapter, the legal framework depicted can be described as a framework defined by the European Union with the Union’s aim to provide for minimum standards on irregular migration governance. However, there is an interplay with both the EU Charter on Fundamental Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and The 1951 Convention relating to the status of Refugees and its 1967 Protocol since for example the principle of non- refoulement has been defined before the Union established the legislation that defined minimum rules on the governance of irregular migration in the EU. Other interplay happens at the national level; Greece translated the relevant EU Directives into national law and remains the main responsible actor for the actions that happen on its territory.

As arguments have made clear, there are a lot of sensitive issues regarding the way the European Union has designed and implemented law concerning immigration and on the role of the actors involved. In the first place, there seems to be a problem of solidarity since the Dublin II Regulation puts heavy burden on member states holding the external border; states such as Greece. Secondly and more importantly, it seems that the EU has adopted the doctrine of

securitization in its legal instruments and its main governance of irregular migration actor Frontex is criminalizing immigrants. Legal instruments sometimes provide flexibility regarding the obedience of the principle of non- refoulement while this principle can be seen as pivotal to international refugee law and provide protection to people seeking international protection. This has been illustrated in the case of the Schengen Borders Code, which does state the obligation to comply with the principle of non- refoulement but does not give any procedures concerning the obligation. The Asylum Qualifications Directive is encountered by the same problem; the description of the principle of non- refoulement is described but there is no referral to an international treaty. This weakens the obligation to respect the principle. It therefore is not uncommon that the EU has been criticized on its incorporation of the principle of non- refoulement. Another argument for the doctrine of securitization is the procedure in terms of forced removal in the Return Directive. It enables member states to detain migrants up to eighteen months; this is inadmissible when someone considers an individual in search of a better future. It is important to be aware of the basis for this detention when an EU state is normally only allowed to detain a person when a judgment has been given. The measure of detention gives the impression that someone has committed a crime as severe as a crime one can be detained for in EU member states; but this is without the interference of a judge to decide the legality of immigrants' detention.

5. The experience concerning compliance with fundamental rights during governance of irregular migration along the Greek- Turkish border

After the establishment and critical analysis of the legal framework in the first chapter, this chapter will devote attention to the practice along the Greek- Turkish external border.

In this analysis, various reports will be assessed from organizations that have gained field practice. Human Rights Watch (2008; 2009; 2011), the UNHCR (2008; 2009), the Fundamental Rights Agency (2011), the Committee on Migration, Refugees and Displaced Persons (2011), Statewatch (2012), the Human Rights Council (2011), the CPT (2009) and a report by Pro Asyl, Greek Council for Refugees and Infomobile (2012) have discussed the situation from different viewpoints.

Asylum procedures in Greece will be assessed according to the common way third-country nationals are treated. This means that there will be started with a section on asylum applications which will be followed with a section on detention, a section on Petrou Ralli and at last a section will be devoted to returns.

5.1. Observations on Asylum applications

There have been reported several cases where migrants have been ‘pushed back’ by the authorities in order to prevent them from entering Greek territory (Pro Asyl, Greek Council for Refugees and Infomobile, 2012). The ones who enter the territory are entering a country with a dysfunctional asylum system: the UNHCR paper from 2011 states that there is no information for the asylum- seekers on the asylum procedure and therefore they do not know how to apply or re- register (UNHCR, 2011).

At first, persons are apprehended by Greek authorities or Frontex where after they have to fill in a registration form in the presence of the authorities following systematic detention unless immediate hospitalization is needed. No one counts as exception: pregnant women or babies are detained too (Fundamental Rights Agency, 2011). Their personal data is not kept confidential and there is no other systematic screening procedure besides defining nationality. Nationality screening is done by Frontex and they state that it is done in cooperation with the Greek authorities. Practice tells that Frontex suggests a nationality and this is unanimously taken over by the Greek authorities since there is a lack of interpreters (Human Rights Watch, 2011). This is not the only procedure: there are also cases where Greek authorities establish nationality or they cooperate. Interpreters are present in some occasions, in other occasions they are not.

The material that is used for identifying someone’s country of origin is not suitable for people who are illiterate or people who have lived for long periods as a refugee in other countries than their country of origin. Overall, the procedure of identification of someone’s nationality takes 5 to 10 minutes whereas in Germany it would take up to a whole working day. The Human Rights Council states that nationality is wrongly identified, people are not informed

on the procedures and people cannot make their protection claim heard because of the insufficiency in interpreters (National Commission for Human Rights, 2011). The law does not provide any legal remedy against false registration of the country of origin; however it is of big importance that nationality is identified in a right manner since otherwise there is a risk for detainees to be returned to the wrong country of origin (Pro Asyl, Greek Council for Refugees and Infomobile, 2012). Furthermore it is unknown how to challenge nationality identification; the fact that a person can prove identity by providing the authorities with identification papers from his or her country of origin is not known by the individuals (ibid.). Instead, the authorities (Frontex and Greek officials) determine nationality and this means that an individual is made powerless in terms of nationality identification since all ways to challenge it are kept unknown.

When persons are detained, their cases are brought before the public prosecutor. Here, their cases are not heard individually but instead their immediate return is issued without assessing whether it is a violation of the principle of non- refoulement. When they apply for asylum, these applications are often not forwarded by the authorities. Getting asylum in Greece is often a disillusion: recognition rates are close to 0% in first instance and there is a backlog of around 52,000 cases and also second instance protection rates are very low (2.87 in 2009) (Human Rights Council, 2011). Authorities tell that persons need to go to the main directorates (Petrou Ralli) which means that migrants have to wait six months in detention before they can apply for asylum (later more) (Human Rights Council, 2011). People are sometimes returned under the Readmission Protocol without having any possibility to present an asylum application or being able to access legal remedies against the deportation decision (ibid.). Vulnerable persons have been returned to Turkey since the police registered them as adults and they have no chance of challenging this decision. People in need of international protection applied for asylum with the consult of a lawyer but were sent back because the authorities did not register their claims.

In other cases, they get a first asylum interview which is done by the same authorities that issued their return. The quality of this interview is poor and the authority who decides whether or not to give asylum is not independent. Often, people want to prove their asylum claim with documents they brought. The difficulty is that these personal belongings are taken from them once they are detained and they never get them back. Other reported cases are that police refuses to accept evidence written in other languages. Police effectively make asylum-seekers withdraw their claims without knowing it. This can happen since authorities order detainees to sign a document under pressure which is in Greek and therefore not understandable. Authorities sometimes order an asylum seeker to withdraw his or her claim (Pro Asyl, Greek Council for Refugees and Infomobile, 2012).

Upon release after detention, asylum seekers get a Red- Card which is a temporary residence permit and has to inform people about where the asylum seeker lives. The police deny writing they are homeless; it is likely that the reason is that the asylum seeker cannot request housing or other reception conditions. It will be very hard to inform an asylum seeker about the process of his or her application when the authorities do not know where someone is residing (Pro Asyl, Greek Council for Refugees and Infomobile, 2012). Once the Red- Card has expired, they cannot renew it because it needs to be done at Petrou Ralli the next day after the card has expired. This is impossible, as will be seen in the section on Petrou Ralli which is handled below.

Once they fail to renew their cards, the authorities assume that the asylum seeker has withdrawn his or her asylum application (Pro Asyl, Greek Council for Refugees and Infomobile, 2012).

5.2. Asylum applications at Petrou Ralli

The General Police Directorate of Greece is located at the street called Petrou Ralli in Athens and for most people seeking international protection this is the place they are sent to upon their release after 6 months of detention. The documentaries as well as found reports on the situation in Petrou Ralli need special attention in this section since it has all to do with asylum applications and shows the severe conditions asylum-seekers have to stand in order to have a chance to get a red card. The Group of Lawyers for the Rights of Migrants and Refugees together with AITIMA, the Greek Council for Refugees, the Ecumenical Refugee Program and the Greek Section of Amnesty International have been carrying out protests on 17 February, 24 February, 2 March and 9 March 2012 in order to 'denounce the situation being faced by persons in need of international protection who try to seek asylum in Attica, as well those who have been referred to Attica from other Greek cities, after the illegal refusal of local authorities to register their asylum applications' (Dublin Transnational Project, 2012).

This situation being mentioned needs attention. Statewatch has reported about the protests and the situation asylum-seekers face at Petrou Ralli (Statewatch, 2012). The authorities that were present concluded several things. At first, getting access to the asylum procedure at Attica is almost always an illusion: it means you have to wait for two or three days and nights in a row under miserable circumstances and then the chance is still very small someone will eventually get a registered claim (ibid.). The conditions under which people have to wait to apply are degrading:

"The conditions under which they have to wait for days, exposed to any weather conditions and without access to toilet, water and food, the arbitrary manner in which asylum claims are then singled out and registered, the lack of any guidance and information by the authorities, in combination with the way the asylum seekers excluded from the selection are being chased by the police in order to go away, constitute a violation of their human dignity and highlights once again the treatment that the competent authorities have in store for 'foreigners'" (Statewatch, 2012, p. 6-7).

Subsequent to this there is the role of the authorities in this situation. This report is clear towards their role which is that they try to prevent asylum-seekers from entering the building and they take absolutely no measures to relieve people from the inhuman and degrading circumstances under which they have to wait (ibid.). They are intimidating the asylum-seekers and chasing them away. Furthermore they do not handle any of the information in the reports with confidentiality, at Petrou Ralli names of people are shouted to the audience without respecting their privacy (Smallman, & Mara, 2012).

A major problem which is seen nowadays is the rise of a neo-Nazi party called the Golden Dawn in Greece. Member of this organization are also policemen which results in attacks from the police on immigrants (Smallman, & Mara, 2012; Domoney, 2013; Why are they doing this to

us, n.d.). Immigrants are subject to racist attacks in Athens: police or advocates of the Golden Dawn are attacking immigrants on large scale (Smallman, & Mara, 2012; Domoney, 2013; Why are they doing this to us, n.d.). The immigrants are denied access into hospitals, which makes that they cannot access medical care.

There are cases of Greek people shouting at immigrants on Attica Square that they have to leave, where after they call the police and the Greek police then detains some of them and separates families without mentioning why (The Battle for Attica Square, n.d.). Therefore, avoiding access to the asylum procedure results in putting at risk the life and freedom of people seeking international protection, and it deprives them of their rights and devalues their dignity (Statewatch, 2012).

5.3. Detention along the Greek- Turkish border

Once individuals enter the country and are 'taken care of' by the Greek authorities, they are subject to what the National Commission of Human Rights calls 'administrative deportation and detention' (The National Commission of Human Rights, 2011). Persons are being held detained with the objective of deportation: either directly to their country of origin or indirectly through the readmission agreement with Turkey (Pro Asyl, Greek Council for Refugees and Infomobile, 2012). It has been reasoned that they are detained because of the risk of absconding: however there is often a lack of individual assessment on whether it is plausible that an individual will abscond. Even though Presidential Decree 114/2010 states clear rules concerning detention¹, people applying for asylum are more or less automatically detained for the reason that they have applied for asylum and detention is needed for a speedy completion of the application. It seems that people who apply for international protection are detained longer than people that do not request international protection (ibid.). The UNHCR issues that there is no individual assessment on the need of detention; instead they are 'systematically detained' (UNHCR, 2009, p. 8). This detention mostly takes the maximum amount of time (six months), where after they are being released with a document requesting their 'voluntary' departure from Greece within a specific period (most common is 30 days). In certain circumstances it detention can even last 18 months, but this is dependent on the nationality assessment (see the part of observations on asylum applications). However this seems arbitrary: detainees from the same nationality are held in detention for different periods (ibid.).

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has posed repeatedly recommendations upon Greece to improve its detention (CPT, 2011, p. 7). It visited the police detention facilities of Soufli, Tycherio and Feres and concluded on the following shortcomings: detained persons complained about the cold, the

¹ Presidential Decree 114/2010 states a person can be detained when: 1. The applicant does not possess or has destroyed his/her travel documents and it is necessary to determine identity, the circumstances of entry and real information on his/her country of origin, in particular in the case of mass illegal entries of applicants; 2. The applicant is a danger for national security or public order, the reason being detailed in the detention order; 3. Detention is considered necessary for the speedy and effective completion of the application. The detention shall be limited to the minimum duration required, and must in no case exceed 90 days. If the applicant has been detained earlier in view of an administrative deportation order, the total detention time must not exceed 180 days (Presidential Decree 114/2010, Article 13.4).

lack of both quality and quantity of the food, not being able to change clothes frequently (once per month), lack of heating or hot water and a lack of information about their situation (ibid.).

Human Rights Watch reported about the detention conditions too by interviewing the detainees and guards (Human Rights Watch, 2011). They visited the detention centers in Fylakio, Feres, Tycherio and Soufli where they experienced inhuman and degrading conditions for detainees. In Fylakio authorities had to enter the cells with a mask in order bear the smell of the sewage, cells are overcrowded, there is poor food quality, it is very hard to get medical care, no soap for washing and interviewees told that there is absolutely no information provided on their specific situation. Detainees moreover told that they are subject to police violence and disciplinary punishment (hitting with sticks) and there is a tense atmosphere in the cells (also riots). The cells of Tycherio (a former train station) inhibit more than 2.5 times more detainees than its capacity and since it is not designed as a detention center, it has no beds and no toilets. There is a problem with mice in the cells and one detainee told that there is no access to a doctor, no electricity and they drink from the urinal. Feres police station has a center that was not designed for detention either. The same characteristics are apparent here as were in the other two centers and here detainees tell about police violence and taking over medical care themselves as there is no medical care. In the case of the detention center in Soufli, there are the same conditions as in the other cells and Human Rights Watch heard there has been a rape in this detention center two days before they visited the center (Human Rights Watch, 2011).

The report of Pro Asyl, Greek Council for Refugees and Infomobile (2012) even highlights that the four detention centers have a total capacity of 479 detainees but were hosting an average of 1000 detainees during the research. Since 2011 there has been a decrease in the amount of detainees in the four detention centers but there has been an increase of detainees held outside (Pro Asyl, Greek Council for Refugees and Infomobile, 2012). Besides lack of the primary needs such as clothing and food, an important shortage to note is one of access to the outside world, access to lawyers, access to legal aid, access to their own files, the lack of a proper place to meet with lawyers, the lack of safeguards against deportation or the lack of effective legal remedy against detention (ibid.). Access to the outside world is very hard to get: often detainees could not inform anyone about their situation or they could not get the evidence for the asylum application that was needed. The access to lawyers is restricted since the police arbitrarily denies access and does not tell why. The same happens with access to the files: police denies access and it even often happens that different files from the same detainee are kept in different police directorates. There was no access to legal aid provided for in Greek law until 2011, however there are problems on the implementation of this law and therefore detainees still do not have access to legal aid. Detainees are unable to meet with their attorney in a place where they could talk in private. Most of the times they have to meet their attorneys in corridors and this is always observed by the police within a distance of 2 meters. There is a safeguard against deportation but it is very hard to fulfill this. An appeal has to come to the Citizen Protection Minister within five days and it has to be written in Greek, otherwise there is no safeguard against deportation. The same difficulty counts for legal safeguards against detention; an appeal should be given in written or oral form but a lawyer is needed and there is no free legal aid. Therefore this appeal is theoretically possible but practically only a small number of detainees is able to lodge an appeal (ibid.).

Court rulings from the European Court of Human Rights already established violations on Article 3 of the European Charter on Human Rights in cases such as *A.A. v Greece* and *MSS v Greece and Belgium*. In the first case the Court ruled:

'The Court notes that according to various reports by international bodies and non-governmental organizations (see paragraph 160 above), the systematic placement of asylum seekers in detention without informing them of the reasons for their detention is a widespread practice of the Greek Authorities' (M.S.S. v. Belgium and Greece (Application no. 30696/09), 2011, p. 56).

In the other case, *MSS v Greece and Belgium*, the Court also ruled on that Article 3 was violated which might give a more serious note to the argument of human rights violations in Greece (European Court of Human Rights, 2011). This indicates that it is officially recognized that Greece is not regarded as a safe country for refugees (Pro Asyl, Greek Council for Refugees & Infomobile, 2012). The violence mainly points towards people asking for medical care or people that complain because of their living conditions. It is known and reported that women have to trade sexual favours in order to get soap, clothing or milk (Smallman & Depardon, n.d.; Pro Asyl, Greek Council for Refugees and Infomobile, 2012). There are several instances known where women agreed to be taken out of their cells for ten to twenty minutes by police officers and were compensated with Coca Cola or other products. Female detainees furthermore reported about police officers who came in the late night hours to the cells and sexually harassed the women. Sometimes they touched or kissed the women through the bars of the cell (ibid.).

5.4. Returns

As has been argued above, deportations are immediately issued once a person enters Greece. There are several observations on the way Greece deports persons who have been experienced by Pro Asyl, Greek Council for Refugees and Infomobile (2012). At first, there is the Readmission Protocol with Turkey which was signed in 2002. People who are subject to deportation to Turkey are most of the times people who originate from neighboring countries such as Iraqis, Iranians, Syrians and Georgians (ibid.). A request for readmission is sent to Turkey; mostly after a person has been transferred from a detention center in Evros to Venna detention center which is known among migrants as a deportation center. It is problematic that a request for deportation is being made without the automatic judicial review on this case. The combination of this and the fact that lawyers or interpreters are often restrained in their work or not admitted means a very serious risk of refoulement for the migrants. They do not have any possibility of defending their situation or proving their case. There have been observations in 2010 that show a trend group applications for readmission rather than individual applications. The Special Rapporteur François Crépeau has been concerned about this development, especially because the agreement mainly focuses on combatting 'illegal' migration and there are no safeguards for respecting human rights in the agreement (Human Rights Council, 2013).

Immigrants and asylum- seekers made clear that it would be better to return to their own countries since they are completely stuck in Greece (Smallman, & Mara, 2012). They are held for detention, cannot apply for asylum and do not have the papers to get out of the country. Besides waiting every Saturday morning at Petrou Ralli, the only thing they can do is wait and

try to survive in a country with increasing racist attacks (Smallman, & Mara, 2012; Domoney, 2013). Immigrants even tell that there is almost no difference between the situation in Greece and in a war zone (Smallman & Depardon, n.d.). Immigrants feel they are unwanted by the Greek but are also prohibited from going anywhere else.

5.5. Conclusion

This section will answer the sub question: ‘What are the practices concerning the returns in Greece with regard to the protection of fundamental rights?’ Practices described in this chapter picture a painful truth concerning governance of irregular migration along the Greek- Turkish border. Nationality screenings are not transparent since there is not one procedure but there are several. Information for the asylum- seekers is at least minor, most of the times asylum- seekers do not know how to challenge their nationality determination. There is a huge subjectivity to the registration of asylum applications; the Greek authorities can either register them, register them with delay or do not register them at all. One registration has been done, there is still a danger or being forced to sign a document in Greek which states that you withdraw your application. Detention conditions are very harsh; there is a lack of almost all basic human needs. When immigrants are released after 6 months of detention, they try to get asylum at the Attica Aliens Department. This is almost impossible too. A lot of immigrants have declared that they feel like they are in one big territory with a huge fence around it: Greece. There is no place to go and immigrants in Greece are not safe on the streets since an extreme right- wing party called the Golden Dawn has been attacking immigrants on the streets (Dabilis, 2013). For me, it is striking that these practices happen in the European Union. It is clear that these practices will not be backed by legal instruments, but the clear violations will be developed in the next section.

6. Conclusion & discussion

The research question stated in the introduction is ‘To what extent does the legal framework on governance of irregular migration protect migrants from possible human rights violations in practice by Greek and Frontex officials along the Greek Turkish border?’ This chapter will draw links between the legal framework concerning governance of irregular migration and the practice concerning the governance of irregular migration along the Greek- Turkish border and will though these links give an answer to the research question. It is divided into different sections: the risk of refoulement, asylum procedures, detention and the last part will discuss the role of the actors. It is followed by a part on the generalization of this research and eventually the recommendations are given.

6.1. Risk of refoulement

In the previous chapter, one could have read different ways in which an asylum- seeker is treated in Greece. The practices of push- backs, late registration of applications, no registration of applications or forcing the asylum- seeker to sign a document stating that the asylum- seekers wants to withdraw his or her application are practices that are astonishing.

There is a big risk of asylum seekers being refouled since there are cases of people being returned to other countries who did not have the possibility of applying for asylum. A brief nationality screening can result in people being transported to different countries than their country of origin. The right to asylum according to Article 18 of the Charter of Fundamental Rights is being violated in the first place, besides Article 19 concerning ‘protection in the event of removal, expulsion or extradition’ is being violated which means that no individual should be expelled to a country where he or she has a high risk of being subject to torture, death penalty or other inhuman or degrading punishment or treatment. Article 47 of the Charter of Fundamental Rights is being breached in this respect for the fact that people do not have any chance to an effective remedy or fair trial against the decision of deportation (Charter of Fundamental Rights, Articles 18, 19, 47). Furthermore the provisions made in the Directives discussed are breached such as Article (4) (4) (b) of the Return Directive and Article 5 (c) of the Return Directive. These establish the obligation to respect the principle of non- refoulement concerning people that can be refused entry on the basis of Article 13 of the Schengen Borders Code (basis on which refusal of entry is allowed) and the obligation to respect the principle when implementing the Directive (Return Directive, Article (4) (4) (b) & 5 (c)).

As has been seen in the legal framework, the anxiety of the scholars concerning the possible violation of the principle of non- refoulement has become the truth. It seems that there is not enough protection for irregular migrants against refoulement and this is a very serious problem for the Union.

6.2. Asylum Procedures

The fact that there is no confidentiality of data in Greece with respect to the applications made by asylum seekers means that Greece is in breach of several legal obligations. In the first place

Greece is in breach of Article 41 of the Asylum Procedures Directive which ensures full compliance with the principle of confidentiality (Asylum Procedures Directive, 2005, Article 41). Article 8 of the European Convention of Human Rights and Fundamental Freedoms (ECHR) is being violated, stating that 'everyone has the right to the protection of personal data concerning him or her' (ECHR, 2000, Article 8).

The fact that applicants cannot appeal the determination of nationality is serious for the fact that a wrong determination of nationality could lead to deportation to a wrong country or it could have influence on the asylum application if the determination of nationality is the one of a safe country of origin. The Asylum Procedures Directive has given minimum standards on appeals procedures, but there is no clause in the article precisely referring to this type of default. Article 39 1a (iii) states that appeal can be sought for the fact that an examination will not be done because the country of origin is considered to be a safe country of origin. However, this will not be sufficient when an applicant will come from a different country of origin. Article 8 (2) of the Charter of Fundamental Rights however does protect this: it states that everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified (Charter of Fundamental Rights, Article 8 (2)).

It is clear that the Union should find a way in order to protect individuals from wrong country of origin determination. This should be incorporated in future amendments concerning asylum law.

6.3. Asylum applications at Petrou Ralli

The practices concerning the Attica Aliens Department in Petrou Ralli are harsh: getting access to the asylum procedure at Attica is almost always an illusion, as one could have read in the previous chapter. The fact that only a few asylum applications are taken per week makes the chance of getting asylum close to zero. People wait every week to be able to deliver an asylum application for half a year or longer (Smallman, & Mara, 2012). In the first place, practice has shown that the principle of confidentiality is violated since the Greek authorities call names and do not consider any of the information in the application as qualified (see section 5.3.).

The practices at Petrou Ralli have implications for people's right to have access to asylum as it is stated in the Charter of Fundamental Rights in Article 18. As I see it, it does not constitute a real violation of Article 18 since there theoretically is access to asylum here but the inability of the Greek authorities to handle with the enormous amount of applications creates a dysfunctional system with an incredible backlog of asylum applications. Therefore, practice tells that asylum more a hope than reality for immigrants. This practice is under Greek responsibility and Greece should definitely change these practices. However, looking from an EU perspective, one could argue that the Dublin II Regulation has put a heavy burden on Greece instead of more EU solidarity on this issue.

The attacks of people on the immigrants can be seen as a violation of Article 4 of the Charter, stating that no one shall be subject to torture and inhuman or degrading treatment or punishment. The practices to which immigrants are subject on the streets are violating the right to liberty and security (Charter of Fundamental Rights, 2000, Article 6). When immigrants are subject to violent attacks, they are most of the times beaten up and end up injured on the streets (Smallman, & Mara, 2012; Domoney, 2013; Why are they doing this to us, n.d.). Since access to

hospitals is denied when they are injured and moreover there is no access to medical care in the detention facilities, immigrants are deprived of the right to health care under Article 35 of the Charter.

6.4. Detention

Detention facilities and circumstances in Greece are something on which there has been a lot of criticism, in the first place by the CPT (2011). Systematic detention is the practice, while the procedures stated that detention will be done only in certain circumstances. The Greek authority uses one of the clauses in the Return Directive since they reason that there is a risk of absconding and therefore people are detained (Return Directive, Article 15). While the Return Directive provides for the legal basis for detention, the legal basis for detention in Greece could at least said to be questionable. The provision in Article 15(1) clearly states the following:

‘Unless other sufficient but less coercive measures can be applied effectively *in a specific case*, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (1) there is a risk of absconding or; (2) the third-country national concerned avoids or hampers the preparation of return or the removal process’ (Return Directive, Article 15(1), emphasis added).

Practice however is that there is no individual assessment so the authorities use the clause for systematic detention (Pro Asyl, Greek Council for Refugees and Infomobile, 2012). This means that there is no examination of any specific case; no review on other measures is being elaborated.

As seen in section 4.2., none of the detention centers is specialized and they are all overcrowded. Article 16 of the Return Directive establishes the minimum standards on detention centers, for example that they the detention facilities need to be specialized for accommodation of detainees and detainees shall have the opportunity to meet with legal representatives (Return Directive, Article 16 (1) and (2)). As shown in section 5.2., facilities are not specialized and there is great selectivity on legal representation. Sometimes legal representation is being allowed, most of the times it is not.

The Asylum Procedures Directive is being violated on Article 18 for the fact that the Greek officials are detaining people for the reason that they are applying for asylum and that they do not provide for a ‘speedy’ procedure after detaining people; this means that the Greek officials violate this Article (Asylum Procedures Directive, Article 18). The term ‘speedy’ in this article seems a bit arbitrary, what is meant by speedy in this case is not clear. However, having people detained a lot of times until the legal maximum of six months I believe is not speedy. It would not be unbecoming to say that systematic detention without any information about the reason for it deprives people of their liberty and thus one can state that article 6 is being violated from the Charter of Fundamental Rights. Article 6 states that everyone has the right to liberty and security of person, where in this case it could be argued that people’s rights are being violated (Charter of Fundamental Rights, Article 6).

Systematic detention in the facilities in Greece is a complete disaster, as one could have read in the previous chapter. Fundamental rights are being violated on the basis of article 4 from the Charter which states that no one shall be subjected to torture or degrading treatment or punishment (Charter of Fundamental Rights, Article 4). The Return Directive lays down some minimum requirement for detention facilities which are not fulfilled by the Greek authorities. Article 16 (1) states that detention should take place in specialized detention facilities, whilst at least some of the Greek detention facilities are initially built for other purposes as can be read in section 4.2. Sub 5 of this article states that detainees should be provided with information concerning their detention and their rights and obligations; this is being violated by Greece since detainees have been proven to be very badly informed (Pro Asyl, Greek Council for Refugees & Infomobile, 2012).

6.5. Actors

The actors are important in this section, since they are directly involved in these practices. In the first place this section will devote attention to Frontex, where after it will talk about the role of the Greek authorities.

Frontex

As has been discussed in the legal framework, the role of Frontex in the operations has been doubted since human rights violations have occurred in its presence. As Human Right Watch notices, Frontex is not the decision- maker since this discretion is formally left to the member states. Informally, Frontex does make decisions; for example concerning the apprehension of irregular migrants or on their nationality determination (see section 5.1.). This is then formalized by the Greek authorities who agree with Frontex' observations or activities (Human Rights Watch, 2011). There is even a case known whereby a Greek official complained about the lack of consultation between them and the Frontex officials. Media reported that Frontex allegedly took decisions by itself on the interviews they conducted with the focus of repatriation of migrants (Keller et al. 2010). As has been shown in sections 5.1. and 5.2., nationality determination constitutes a very important part in the process for an irregular immigrant. If this part is left to Frontex, Frontex can be held responsible for wrongly determination countries of origin or third countries for immigrants with the risk of immigrants being detained for long periods, or immigrants being refouled to the wrong country.

Frontex is moreover involved in transferring immigrants to detention facilities. As one could have read in section 4.2., the detention facilities in the Evros are in worst condition. Frontex is consciously cooperating by transferring people to those facilities (Human Rights Watch, 2011). As could be read in the section 4.2., the ECtHR has in *M.S.S. v. Greece* ruled that the detention conditions in Greece are violating Article 3 of the Convention on Human Rights. Member states are prohibited to knowingly transfer immigrants to the Greek detention centers and therefore expose them to inhuman or degrading treatment. As it appears, member states cannot transfer people to locations where human right violations occur but Frontex can. Frontex is aware of the situation and therefore knowingly transfers people to these detention centers. In section 4.3., the Fundamental Rights Strategy is described and it is argued that Frontex needs to take into account the case law of the ECtHR. This would, according to me, create a responsibility

for Frontex to refrain from transferring people to these detention centers. As Human Rights Watch successfully argues, in *Gäfgen v. Germany* the Court established an unconditional obligation to respect Article 3 of the Charter (ibid.). This means that Frontex cannot state that it is the sole responsibility of a member state to respect Article 3, since unconditionally means that Frontex is bound to it.

In order to circumvent these human rights violations, Frontex has an agreement with the FRA and the UNHCR, and the European Asylum Support Office (EASO) has been active in the field to prevent human rights violations from happening. The agreement with FRA is formally there but does not give the FRA any power to review the acts done by Frontex. The Article covering Joint Operations is an example for this since it states that 'the FRA may offer on request its expertise to Frontex in the different phases of a joint operation' and therefore one can clearly see that the FRA has a weaker position in this than Frontex (Brooks, 2012; Fundamental Rights Agency, n.d.). The FRA may help Frontex when Frontex thinks it is needed, but nothing else. The agreement with the UNHCR was mainly set up in order to raise awareness for human rights among the border officers. This, again, does not influence Frontex activities in any way because it only regards the border officers (Keller et al. 2010).

In September 2012, Frontex and EASO agreed on a Working Arrangement with the following purpose of establishing 'a cooperation framework covering the relevant areas of common work and interest, setting the objectives and principles of such cooperation' (EASO and Frontex, 2012). More specifically, the FRA summarized the cooperation as covering 'operational cooperation and therefore the reception of migrants at the EU external borders and the identification of those in need of international protection' (Fundamental Rights Agency, 2013). As EASO describes in its Working Programme, the cooperation between Frontex and EASO is mainly aimed (1) developing sustainable cooperation on training programs; (2) emergency support programs; and (3) close operation between their analytical units (European Asylum Support Office, 2013). Even though it is not clear what this cooperation exactly has brought in terms of prevention of human rights violations, there have been some additional recommendations on the cooperation between the two agencies. The FRA has issued its opinion concerning the cooperation between Frontex and EASO and has stated that EASO could also be further involved in Frontex debriefing prior to asylum operations, so that more specific guidance is provided for (Fundamental Rights Agency, 2013). Adriano Silverstri, the head of Asylum, Migration and Borders sector of the Fundamental Rights Agency, has argued that EASO could assist in third countries and with debriefing the Frontex officials on asylum operations. By letting EASO have more responsibility concerning reception and asylum system in third countries, one can lower the risk of abuse, exploitation and a lack of justice.

It is clear that the role of Frontex in these missions is at least ambiguous. The Charter of Fundamental Rights applies since the Lisbon Treaty to all agencies (and therefore also on Frontex) but it seems that Frontex still does not have to comply with the rules to the same extent as member states have to. In my eyes Frontex is trying to escape from its responsibilities as an EU agency with the consent of the EU. The rulings from the European Court of Justice apply to all member states who have ratified it (all member states of the Union), the Charter of Fundamental

Rights is binding to all Member States and EU agencies but the only gap here seems that the EU is not a member of the Convention of Human Rights (of which accession is discussed currently). If the Union would ratify the Convention, hopefully agencies such as Frontex will not be able to avoid the consequences of its actions and has to take responsibility.

The Greek authorities

Even though the role of Frontex might be more slippery in the context of the operations in Greece, one should not close his or her eyes for the Greek authorities who did not manage to reform their governance of irregular migration. The violations of EU law will regard the Greek authorities since they are responsible for what happened in their territory and Greek legislation is directly built on EU Directives and is therefore violated to the same extent as EU legislation. Greek legislation will therefore constitute a repetition of violations. However, efforts from Greece to achieve remedy on these issues need to be addressed.

There have been numerous calls by organizations upon Greece to improve its governance of irregular migration and therefore its asylum system. Greece has launched an Action Plan in 2010 on Migration Management and Asylum Reform (also called the Greek Action Plan) where is stated its ambitions in order to improve the current affairs concerning migration governance and asylum system (Pro Asyl, Greek Council for Refugees and Infomobile, 2012). The objectives of this plan were the following: (1) establish an effective First Reception Service; (2) establish an Asylum Service with an Appeals Authority; (3) an overall improved management of the backlog of asylum appeals; and (4) an improved returns policy and an effective Integrated Border Management (Ministry of Public Order and Citizen Protection, 2012).

The progress report from January 2013 until May 2013 shows that Greece makes progress. The First Reception Service will be fully operational at the end of June, 2013 in Fylakio and two mobile units will be realized in cooperation with the UNHCR and other NGOs. The management of backlog asylum applications is under way and it is expected that all cases will be examined mid-2014. Concerning the Asylum Service; it has been realized in two places and will be operational on the 7th of June, 2013. However, the Greek authorities still encounter serious budgetary problems in order to assure legal assistance. The returns policy is being realized in cooperation with the International Organization for Migration (IOM) whereby 8,500 immigrants who showed interest in return will be returned. At last, the Integrated Border Management has improved because of the installation of new equipment and the Greek operation 'Shield' in the Evros has been effective (Ministry of Public Order and Citizen Protection, 2013).

It can be stated that there is a lot to fix on this issue. As it appears to me, Frontex is still under construction with regard to its operations in the field. The fact that Frontex argues repeatedly that it only assists but practical it turn out that is in fact has major influence in for example nationality determination is inadmissible; simply for the fact that it can escape from its responsibility concerning human rights violations resulting from its actions. Frontex officials transferring immigrants to detention facilities that have a reputation of violating human rights in Greece are not a violation of human rights but these transfers are touching upon it.

Greece's actions concerning the governance of irregular migration are very problematic on the compliance with EU Directives, EU fundamental Rights and the Convention of Human

Rights. This has been clearly shown in chapter 5. However, the violations on EU Directives are the ones expected in the literature. This leaves an obligation to the Union in order to amend these Directives in such a way that an inadmissible obligation arises to comply for example with the principle of non- refoulement.

Even though Greece is in violation of human rights and there is no escape to this obligation, a concern of EU solidarity must be raised. The Dublin II Regulation in this sense has resulted in a greater burden for the countries holding the external border and especially in the case of Greece this has turned out to be devastating for immigrants. Greece does not have the financial capabilities to improve its governance of irregular migration and needs help in order to be able to cope with the amount of asylum applications for people whose destination is not Greece.

6.6. Generalizability of this research

In the broader context of this issue, this case study presented will only apply to the case of the Greek- Turkish border concerning the practice. Practice along the Greek- Turkish border cannot be externalized in any way since practices concerning compliance of human rights will in every situation be of a different nature. However, the legal framework and the criticisms presented apply to a broader framework since the risk of human rights violations is apparent. With this, I mean that in any case there should be no violation of human rights and European legislation should guarantee this. As I see it, practice of the Greek- Turkish border makes some doubts from scholars about the setup of EU law valid since practice shows that the EU legal framework in some way still enables human rights violations (for example non- refoulement). In this sense, there is an aspect of EU legislation that could be externalized because this example shows that human rights violations are possible regardless of all safeguards.

6.7. Recommendations

Recommendations that are written in this section include both case- specific recommendations as well as EU wide recommendations.

It is clear that the aspect of external border management in the context of the European Union is still under construction concerning fundamental rights obligations. An important argument in this research is that the principle of non- refoulement is not safeguarded enough. A recommendation of mine would be that the Union should join the European Convention for the Protection of Human Rights and Fundamental Freedoms. This has happened, and I wonder how this will develop concerning the responsibilities for Frontex. Concerning the Greek authorities, there is a problem with capacity and resources to cope with the migratory pressures. Especially shown with the implementation of the Dublin II Regulation, Greece is in need of more EU solidarity instead of less EU solidarity. Regardless of the inadmissibility of Greece's responsibility of what happens on its territory, relief should be sought for the states holding the external border by increasing the burden of states that do not hold the external border. In order to have a common Schengen Area with free movement of persons, one has to realize that there is a much greater burden on states holding the external border; regardless of the state being a

‘destination country’ or not. Solidarity in this sense is important in my eyes. Greece has agreed to improve its dysfunctional asylum system in the Action Plan for Migration Management, but still does not have the budgetary resources to operationalize them. A recommendation of mine would be to split responsibilities further and to enhance Frontex and EASO responsibility in the field so that their role becomes less blurred between Greek activities and Frontex activities. Assistance can be given more explicitly by taking responsibility for certain parts of the process in order to increase burden- sharing.

Besides operational recommendations, some legal revisions would be necessary in order to create inadmissibility for states to obey the rules. According to me, the provisions concerning ‘safe countries of origin’ and ‘safe third countries’ should be completely removed from the Asylum Procedures Directive. Safe countries of origin are dangerous, since it could become a way out for states to examine every individual application by ruling that someone comes from a safe country of origin. Besides, the requirements for a state for being a ‘safe country of origin’ are not applicable to any state outside to EU. The references in EU legislation to detention are ambiguous too. The Asylum Procedures Directive states that a state can detain someone, but needs to have a ‘speedy’ procedure after detention. At least, there must be clarification on what is ‘speedy’.

Concerning the Return Directive, the provision on the risk of absconding is too wide and therefore too flexible. It should be defined more thoroughly; otherwise it will be used as a primary reason for returning migrants (see section 4.2.2.). The detention provision is also too flexible; member states can detain someone up to eighteen months and the only safeguard for the migrant is that it must be a matter of last resort and it must be used in preparation of return. Detaining people for these periods without any judicial opinion is harsh; at least the duration of detention should be reduced but even better would be to use other measures instead of detention.

Another recommendation would concern the Schengen Borders Code; it is necessary to define how the principle of non- refoulement has to be respected in the field in order to make sure it is complied with by the member states.

The Dublin II Regulation has turned out to be devastating for Greece and for the EU overall. Solidarity seems to be completely absent when looking at this Regulation. However, solidarity is important, the Union wants to uphold its Schengen Area and this Area is constituted by external border controls and absence of internal border checks. It cannot be the case that the states holding the external border have to have an in proportional burden. Therefore, this Regulation should be rephrased in order to examine more asylum applications in other EU countries and more in destination countries for migrants.

It is very hard to point at the responsibilities of Frontex. As it appears in this research, Frontex does not have responsibilities at all but is main actor in a very important phase of asylum applications, namely: nationality determination. If Frontex is engaged in the process as described, it should take full responsibility and pre- determine that it will be mainly responsible for this task. This means that responsibilities will be split, as argued in the first paragraph of this section. If Frontex would be assigned with some responsibility, it would intrinsically mean that there have to apply sanctions in case it breaches its responsibilities.

7. References

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8. Appendix

Appendix 1: the Evros area in Greece



Source: Pro Asyl, Greek Council for Refugees & Infomobile, 2012.