

Moral Principles of Refugee Protection in the European Union: Rhetoric and Reality

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Submitted to
Central European University
Department of International Relations and European Studies

In partial fulfilment of the requirements for the degree of Master of Arts

Supervisor: Professor Boldizsár Nagy

Word Count:
17,209

Budapest, Hungary
2011

Abstract

The European Union Asylum is an important actor in refugee protection. To support and maintain this goal the EU has formulated a Common European Asylum System based on core values and principles agreed. As asylum is an ethical issue, these principles should include moral values as well. How states respond to the challenges of asylum seekers at their borders and how they examine cases, is various. Some are more open but some have restricted approaches. The thesis aims to understand where the European Union is situated in the morality of protection. As the guidelines formulated throughout the years would suggest: solidarity among Member States, the responsibility to protect, the right to asylum and the humanitarian tradition of Europe are emphasized, these should be presented in EU policies. However, the policies themselves and their implementation suggest the contrary. The reality shows that the policies of the EU have no specific relation with the values agreed upon. The thesis analyzes the relation between the moral principles and policies implemented through the case of the Dublin II. Regulation and its implementation in Greece. The findings will reveal that Member States might implement policies in an unlikely way but the contradictions already start from the level of the principles.

Acknowledgement

I would like to express my gratitude to Professor Boldizsár Nagy who inspired me to write my thesis about refugees and policies of refugee protection. Through his eyes I learned to think critically and understand the importance of refugee protection.

I would like to express my special thanks to the Academic Writing Centre at CEU, especially to Ágnes Tóth. She helped me to better structure and express my thoughts.

I would like to say thanks to Robi who supported me throughout this process and understood and tolerated this stressful writing period. And thanks to Alex, who got involved with the questions of refugee protection and at least once understood my thesis topic. Thanks to my parents who are amazingly supportive.

In addition a big thanks to all IRES friends, for the constant moral support, for the late night discussions and especially for Sara and Veronika for having the “special” talks in front of the library and for being good friends.

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List of Abbreviations

AFSJ	Area of Freedom, Security and Justice
CEAS	Common European Asylum System
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
EU	European Union
EU27	27 Member States of the European Union
JHA	Justice and Home Affairs
NGO	Non-Governmental Organization
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

Introduction

The 20th century has created events and conflicts that re-introduced the term *refugee* to the societies of the world. They are people who are seeking shelter and an opportunity for a better life fearing from persecution and in hope of international protection. According to the Convention Relating to the Status of Refugees, refugees are people who are

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.¹

Asylum seekers, on the other hand, are people who are seeking refuge but their claims have not been examined yet.² It is a broader term as it includes all people who are seeking international protection. Policies of the states address this issue: to determine who could be qualified as a refugee.

Persecution by the country of origin or by non-state actors are most of the time the reasons for fleeing. After the collapse of the Soviet Union and Yugoslavia, Member States of the European Union have experienced the mass influxes of refugees that arrived to their borders asking for protection. The tendency has not changed and since the integration of the European states, the European Union is one of the destinations of refugees. Although there is a constant worrying in the media and increasing restrictive policy measures, the latest statistics show that

¹Convention Relating to the Status of Refugees, 1951, Geneva, under Chapter 1, <http://www2.ohchr.org/english/law/refugees.htm> (accessed: February 14, 2011)

² UNHCR, Asylum Seeker definition, Website of UNHCR <http://www.unhcr.org/pages/49c3646c137.html> (accessed June 2, 2011)

the EU shares approximately 12-15% of the total refugees worldwide.³ The EU statistics also show a decreasing tendency in the number of refugees.⁴ The numbers are indicators to show that refugees are a small portion of immigrants and the EU population itself. Within the EU the main receiving countries in 2010 were Germany, France, Sweden, Belgium and the United Kingdom.⁵ Xenophobia in the Member States and the case of immigrants in the European Union gives the asylum seekers a hard time for legitimately claiming their rights and justify their claims based on –not solely– international protection mechanisms but on the basis of human rights protection and solidarity coming from the Member States. Although the member states of the EU have their own procedures to accept refugees, the aim of the EU is to adopt a unified system where Member States have the same protection mechanism. This is currently based on the common lowest denominator. The aim to unify these policies and create an own system would be necessary as asylum policy is closely related to other areas as border protection and policies towards migrants. Adopting such a policy has severe difficulties as currently some of the Member States are more tolerant to accept refugees but there are also ones that are more restrictive and favor tougher policies.

The interesting aspect of the EU policy is why it protects refugees. This question can show the contradictory aspect of the policies and actions taken. The EU being one of the biggest

³Based on approximate numbers. UNHCR Report from 2006 lists UK and Germany among the top 10 receiving countries. Based on the calculation of the top 10 country shares, the representatives of the EU host 15% of the total number of refugees. Source:

<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4666d25b0&query=refugees%20by%20numbers%202006>

(page 58- accessed May 17, 2011) Based on the presentation by Professor Boldizsár Nagy, the EU protects 12% of the refugees worldwide based on numbers from 2007. CEU IRES 2010/2011 Slides „History Order of Magnitudes,” accessed through CEU E-learning site. <http://e-learning.ceu.hu/> (accessed May 17, 2011)

⁴Anthony Albertinelli, 'Population and Social Conditions,' Eurostat 2011/1, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-11-001/EN/KS-QA-11-001-EN.PDF (accessed February 8, 2011)

⁵Anthony Albertinelli, 'Population and Social Conditions,' Eurostat 2011/1, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-11-001/EN/KS-QA-11-001-EN.PDF (accessed February 8, 2011), 8.

donors for development aid in third countries and being a core promoter of democracy and human rights could explain why it cares about refugees in the first place. However, the EU while formulating its policies regarding refugees does not explain its actions on the basis of human rights protection or the right to life. The documents issued by the EU do relate to the 1951 Convention but the core aims of the policy of the EU is not specifically seen as a human rights issue. Another aspect of the policy formulation of the EU and its contradictory behavior lies within the actions implemented regarding asylum seekers that are getting more restrictive and makes it more difficult for those in need to start a new life. The EU aquis is introducing more types of protection statuses offered, making the refugees stay for temporary periods. The third aspect of the protection is the international conflicts that could also be the root causes of fleeing. In 2010 most of the refugees were from Afghanistan and Iraq, scenes of international conflicts, where EU Member States are also involved militarily.⁶ While development and humanitarian aid is constantly flowing to these countries, the possibility of being persecuted is still there as the aid does not necessarily support establishment of protection mechanisms. The fourth aspect of the protection mechanism relates to the immigration policy of the EU. The policy regarding asylum and the policy regarding immigration are close areas in the European Union. While certain groups of immigrants are welcomed to the EU to maintain the social welfare system in Europe, the refugee policies are restricted and miss the core value of refugee protection: to support and protect those who are in need.

The literature related to refugee protection includes many explanations why states protect refugees and how they see asylum seekers. The ethics of refugee protection lies in two approaches: the partialist and impartialist approach. I am using the definitions by Matthew

⁶Anthony Albertinelli, 'Population and Social Conditions,' Eurostat 2011/1, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-11-001/EN/KS-QA-11-001-EN.PDF (accessed: February 8, 2011)

Gibney. These approaches are close to the theories to legal, sociological and international relations theories but the above mentioned “have done little to shed light on what morality might actually demand in terms of treatment of these entrants.”⁷ The approaches introduced by him address the relation between moral principles and treatment of the ‘outsiders’. Understanding the concepts of partialism and impartialism are key elements of the thesis as they help to determine how the EU and its Member States are seeing asylum seekers. One could expect that the states of the EU, being democracies, could be the basic explanation of protection. Christina Boswell argues that “while most liberal democratic states have retained nominal support for the principles of refugee protection, they have introduced a range of measures to limit the substance and scope of these commitments.”⁸ Other explanations Although the arguments differ related to the asylum question, Boswell emphasizes the fact that today the ethical principles of states are in conflict with their self-interest.⁹ Matthew Gibney as well, raises the question of what would be ethically desirable from states that is politically possible.¹⁰

These questions and explanations above mentioned are closely connected with the research area of this thesis; however the primary focus is the relationship between the principles and their implementation by member states. In this way one could understand how the principles of the EU and their policies correlate with each other. The supranational institutions of the EU are in charge of the ‘Area of Freedom, Security and Justice’ where asylum policies are also included. The EU is divided and currently functions as an actor that has to harmonize the policies of twenty-seven states regarding asylum policy. The current system has important legal

⁷ Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge, Cambridge University Press, 2004), 15.

⁸ Christina Boswell, *The Ethics of Refugee Policy* (Aldershot, Burlington, Ashgate, 2005), 3.

⁹ Ibid., 6.

¹⁰ Matthew J. Gibney, “Liberal Democratic States and Responsibilities to Refugees,” *The American Political Science Review* 93, no. 1 (March 1999):16.

achievements since the Treaty of Amsterdam and this way it has set principles and policy directions for the member states. Meanwhile the *acquis communautaire* and the policies can illustrate how the European Union as a supranational organization sees asylum policy and what direction it is heading to.

The research question of the thesis is how do the principles of the EU asylum policy laid down correlate with the reality? The main focus and prism of the question are the moral principles and if the EU formulates its policies according to these principles. By understanding the rhetoric of the EU, the thesis will show whether the principles of the policies of the EU can be seen in the implementation, so in reality. The thesis will research whether there is moral background of refugee protection in the European Union. I will argue that regarding refugee protection there is an underlying responsibility of political actors to protect refugees and therefore care about asylum seekers. These policies and considerations should be well-communicated and understandable. My assumption is that the behavior of the EU is not straightforward and because principles are not formulated properly, the Member States will implement policies that have no relation to the principles of the EU, therefore having a policy on a shaky ground. This will be shown in the case of Greece through the prism of the adaptation of the Dublin II. Regulation. The regulation has put a heavier burden on Greece, as most of the asylum seekers entering the territory of the EU first arrive to the borders of Greece. Therefore Greece has been coping with more asylum seekers than other Member States and caused many unexpected challenges, such as hundreds of asylum seekers on the streets of Athens. Whether this is only the bad practice of Greece, is one of the questions. My assumption is that it is not just about the bad practice but because of the policies by the EU that do not represent the principles of the EU.

As the main aim of the thesis is related to refugee protection of the EU, the primary sources for my research will be European Union documents, treaties, conventions, directives and

regulations. In order to make the research more in depth, I will also focus on commentaries, debates and court jurisdiction of the Union. To be able to evaluate how these commentaries and primary sources are understood, I will also use secondary sources that can offer an independent opinion about the topic. In order make my assumptions more visible I will also include a case study that could indicate the behavior of different actors. The commentaries, the documents and report can help us understand the main problems and contradictions in the asylum system of the European Union.

The thesis will consist of three essential parts. The first chapter will focus on the ethical understanding of refugee protection. The chapter will include the partial and impartial approaches of refugee protection and show how refugee protection could be based on moral considerations. The aim of the chapter is to understand the motives behind state behavior when dealing with asylum seekers. The second chapter will introduce the European Union as an actor of international protection. The chapter is divided into three parts. It will analyze the principles laid down by the EU and show the most important documents and concepts of the Union. Further on the chapter will reveal policies of the EU that have certain contradictions with the previously introduced principles. These are the deflection policies that aim to restrict aspects of protection seeking in the EU. The chapter will conclude with an EU policy - the Dublin II Regulation - that is considered to be contradictory with the EU principles. The third chapter is a case study, where the policy of the Dublin II Regulation will be analyzed in reality, through the case of Greece. The chapter will help understand what is the relation between the principles laid down and their implementation.

Chapter 1 - The moral philosophical considerations behind refugee protection

The reasons behind the protection of refugees are not so obvious. Although these people are persecuted and have to migrate to have international protection, the states mechanisms for accepting these people are not necessarily tolerant and inclusive. Especially, since differences between the developed and underdeveloped world are getting greater, it is very hard to “maintain protection for refugees without attracting large numbers of immigrants.”¹¹ This is a big challenge not only for liberal democratic states, but also for entities formulating common policies relating to this area, for instance the European Union, that has been more exclusive with refugees and have produced restrictionist policies over the last years. Although the numbers of refugees differ year to year, states tend to build walls and discourage asylum seekers to enter. But should they? This is the question that this part of the thesis would like to answer. How do liberal democratic states respond to the refugees?

States signatories to international refugee protection regimes, as the 1951 Geneva Convention Relating to the Status of Refugees and other documents, are the basic documents for the protection of refugees. They include principles as the non-refoulement that obliges states not to return asylum seekers back to countries where they would be persecuted. However, the obligation not to send back people by international treaties should not be the only reason of protection provided by liberal democracies. Liberal democratic states should also have a moral understanding of refugee protection. This section analyzes the different approaches that deal with refugee protection and the existing moral principles of states.

¹¹Matthew J. Gibney, “Liberal Democratic States and Responsibilities to Refugees,” *The American Political Science Review* 93, no. 1 (March 1999): 169.

1.1 Two theoretical approaches: partiality and impartiality

Two approaches analyze the behavior of states regarding how they should deal with the question of ‘outsiders’. The first one is the partialist view, which is a conservative way of understanding the relationship and the duties of states towards refugees. This approach is well summarized by David Hendrickson: “Realists find it morally acceptable that we should prefer the interests of our own collective to those of mankind in general; and they insist that the statesman, the trustee for the community, is under a peculiar obligation to serve the interests of the state he represents.”¹² Impartiality, on the other hand, holds the opposite assumption of moral theories regarding immigration and asylum matters. According to Matthew Gibney impartiality “works with an ideal of states as cosmopolitan moral agents, and sees states as morally required to take into equal account the interests or rights of citizens and foreigners in entrance decisions. It requires, in other words, that states consider impartially the claims of members and strangers alike.”¹³ The impartial view considers more the universal view of human rights and it is demanding an equal consideration from states considering its citizens and the ‘outsiders’.

1.1.1 Partiality

The starting point of this theoretical perspective is that people are living in national communities what they are an essential part of. This gives them power and legitimacy to decide upon entrance decisions themselves. It “works with an ideal of states as distinct cultural

¹²David Hendrickson, “Political Realism and Migration in Law and Ethics,” in *Free Movement Ethical Issues in the Transnational Migration of People and Money*, ed. Brian Barry and Robert E. Goodin (University Park, PA, Pennsylvania State University Press 1992), 215.

¹³Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge, Cambridge University Press, 2004), 59.

communities possessing a right to self-determination which justifies priority for the interests of citizens over those refugees in entrance decisions.”¹⁴ According to Christina Boswell the conservative way of theorizing ethical perspectives of refugee matters in liberal democracies assumes that states do not morally justify their actions and the central aim of states is to privilege the rights and claims of those who are already within their territory.¹⁵ This means that the citizens of the state are the responsible actors of deciding on who should be allowed into the states. As Gibney puts it, citizens have the privilege to formulate the policies regarding this area, which is morally justified.¹⁶

Partialists do admit that refugees and immigrants have been part of the history of states for a long time but they emphasize that not only the ‘outsiders’ are becoming insiders by their integration into society but they also have an influence on the society they arrive to.¹⁷ In addition, partialists do not fully say no to refugees and people in need of protection. Michael Walzer, considered as a partialist, has a stable argument regarding entrance and morality towards refugees. He suggests that states have two reasons to deal with refugee matters that are only partly related to ethical concerns.¹⁸ Because “at the extreme, the claim of asylum is virtually undeniable”¹⁹, he argues that one of the reasons to deal with refugees is their low number of the claim that if states would not deal with defenseless people standing at their borders then they would actually do harm to them by not letting them in. It is interesting to see “if it is immoral to deny the entry of necessitous people at the border” then why and how is it still possible that states

¹⁴Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge, Cambridge University Press, 2004), 23.

¹⁵Christina Boswell, *The Ethics of Refugee Policy* (Aldershot, Burlington, Ashgate, 2005), 22.

¹⁶Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 23.

¹⁷*Ibid.*, 27.

¹⁸Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Oxford, Blackwell, 1983), 51.

¹⁹*Ibid.*, 51

are making restrictive policies in order to keep these people out of their territory.²⁰ Walzer acknowledges that the most compelling among the arguments in favor of protecting refugees are connected to state responsibilities if involved in the situation what generates persecution. These are events when states actually play role in a conflict from where people are fleeing from. In these cases the responsibility of the state, even if it is preventive or non-cooperating with the persecutory actors in a conflict, should be closely considered a valid moral reasoning of why states should not restrict the protection strictly based on their own criteria.²¹ This argument is very close to the current practice of states, as they are deciding who they want to let into their territory, and current international law only recognizes the right to leave a country. There is no universal right to enter another one.

The main points of partialism include these core points, “because partialism tends to vindicate the current policies of liberal democracies, there is good reason to subject its central claim – that the right of citizens to preserve their collective identity entitles them to distribute membership according to their own criteria- to critical scrutiny.”²² Theoretically, the sovereignty of states and their legitimacy to formulate their own refugee policy is adequate, but it is impossible to maintain, as it precludes the environment outside the state. International obligations, dedication to individual human rights protection and the history suggests that liberal democratic states should be more aware of the happenings in this interconnected and globalized world.

²⁰Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 55.

²¹Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 56-57.

²²Ibid., 35

1.1.1.1 Criticism of the Partial Theory

Gibney also criticizes the partial theory to be lacking core elements and he addresses these critics in three important questions. “Any ethical theory that allows states to disregard the needs of those who might be refugees requires a watertight case for investing members with the right to decide who will be admitted. I think the partialist case for allowing states the right to distribute membership according to their own criteria is less than compelling.”²³ The first point is whether the states have true sovereignty to control the migration flow in and out of the territory where they reside. Partialists argue that if borders would be open then there would be a danger of maintaining the cultural communities. However one could ask whether these cultural communities really exist in Europe? By border changes and events after the Cold War, none of the EU member states that we consider liberal democracies could claim that their cultural community within state territories are hundred percent homogenous. Even the constant debate of the maintenance of the welfare state in a continent where demographic statistics are constantly dropping, is the counter-argument for the partialist view of not just immigration itself, but refugee policy as well.

The second question raised by Gibney is connected to the ‘privileged’ citizens of the states on what basis are they privileged and on what grounds can they differentiate themselves from others? Gibney argues that “it is worth noting at the outset that the cultural argument used by partialists is underdetermined as an ethical justification for states excluding refugees.”²⁴ The partialist argument that is based on the ethical and cultural reasoning of the citizens is not compelling, as it is a phenomenon that is very hard to measure and is not proven in any sense. In liberal democracies what the meaning and definition is of this particular membership and

²³Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 35.

²⁴*Ibid.*, 41.

belonging is not based on the ethnic and other cultural ties, Gibney notes, but it is based on the “commitment to a political culture – that is, to a framework of institutions and rights that enables individuals to pursue different and diverse ways of life.”²⁵ If privileged citizens are committed to institutions and the liberal democratic values than one should not restrict the others of enjoying the same way of life, especially under strict international obligations.

The third question by Gibney is whether the responsibilities of liberal democratic states themselves already lie in the cause of the fleeing. The partialist do not deal with the responsibilities states have when dealing with refugees, those who are coming from parts of the world where liberal democracies do certainly have a role in the conflict. This role in the conflict could be anything from direct military intervention to arms trade, or global economic and financial flows that are financing the persecutor actor. Although, it is also difficult to measure how much harm was caused by one state to the other that could lead to a refugee flow, this should not mean that the responsibility of one state is gone because of non-measurable reasons.

1.1.2 Impartiality

As mentioned earlier the impartialist view has an emphasis on the universal human rights protection and the equal, impartial, treatment of citizens and ‘outsiders’. In the moral debate regarding immigration one of the main questions is the question of open borders. Of course for partialists open borders are not even an option but for impartialists the results are not obvious. Relating to the behavior of states it is important to note that in current international law there is no universal right of international free movement and settlement.²⁶ Robert Goodin points out a

²⁵Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 43.

²⁶Veit Bader, “The Ethics of Immigration,” *Constellations: An International Journal of Critical & Democratic Theory*, Volume 12, Issue 3(September 2005), 339.

very important argument in the mechanisms and ideals of liberal democratic states, that they fully support and encourage the free movement of goods and services, but at the same time states are making the free movement of people more and more difficult.²⁷ Veit Bader argues that the only circumstance that states could maintain their closed border regime is if they “fulfill their minimal moral obligations following from humanitarianism or distributive justice.”²⁸ Within the impartial view there are two different kinds of approaches that address the same question: on what basis do states have a moral obligation to deal with non-citizens who would like to enter to their territory.

1.1.2.1 Utilitarian approach

The first approach is the utilitarian approach. The utilitarians like the Singers are in favor of entrants but they see the constraints legitimate if the costs of admitting are greater than the benefits for the asylum seekers. Their most important argument is the following: “liberal democratic states are obliged to increase their intake of new entrants, taking into account both the benefit to them and the costs to the residents, until the costs to current residents outweigh the benefits accruing to new entrants.”²⁹ The utilitarian approach is focusing on the rights based perspective stating that the people of the poor countries have a better argument to be let in than the citizens of the states not letting them in.³⁰

1.1.2.2 Universal liberal approach

²⁷Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 62.

²⁸Veit Bader, “The Ethics of Immigration,” *Constellations: An International Journal of Critical & Democratic Theory*, Volume 12, Issue 3(September 2005), 341.

²⁹Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 62.

³⁰*Ibid.*, 75.

The other side of the impartialist view is the global liberal³¹ argument, which is focusing on the rights based arguments, stating that every human being has the same right to practice civil liberties. This might sound as the most compelling argument in favor of entrance of immigrants and asylum seekers; however it has many problems, especially related to the feasibility in the practice.³² Brian Barry argues that the liberal approach should be the one that dominates the asylum matters but not necessarily reached by open borders.³³ Barry accepts the arguments by the partialists and he believes that the global inequalities could be one of the sources of fleeing; however this should be supported by Western liberal states, by promoting a fair redistribution of the wealth. He also states that liberal democracies should focus more on development issues in third countries that should be a better alternative for people feeling their poor regions and entering through open borders.³⁴

Another feasibility problem is that the universalistic approach does not take into account that there is a lack of moral motivation among the actors who should be dealing with refugee matters. The other problem is connected to the arguments connected to the justification of restrictions. According to the global liberals –like Carens and Dummett- to put entrance restrictions on any human being is an absolute violation of the human liberty. The universalistic liberal approach to address the question, in the viewpoint of Catherine Boswell, is not necessarily the best approach, but she sees it as the “best utopian, at worst counter-productive to their own ends.”³⁵ The problem with this approach is that it does not give any credit to the significance of

³¹ In other literature, global liberals are considered to be the liberal universalists.

³² Christina Boswell, *The Ethics of Refugee Policy* (Aldershot, Burlington, Ashgate, 2005), 48-49.

³³ Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 75.

³⁴ Brian Barry, “The Quest for Consistency: A skeptical view,” in *Free Movement Ethical Issues in the Transnational Migration of People and Money*, ed. Brian Barry and Robert E. Goodin (University Park, PA, Pennsylvania State University Press 1992), 280-285.

³⁵ Christina Boswell, *The Ethics of Refugee Policy* (Aldershot, Burlington, Ashgate, 2005), 4.

the community and to be able to link together the connection of protecting refugee rights and local ties to the community.³⁶

1.2 Summary and comparison and of the two arguments

Both partiality and impartiality are part of contemporary liberal practices.³⁷ According to Boswell there is a clash between these two concepts and it has emerged recently for two reasons.³⁸ She argues that one of the problems is rooted in the fact that theorists do not necessarily see the practical implications of their approaches in the recent phenomenon of migration. The other part of the argument is connected to the different trends of refugee flows and the political, social and economic circumstances of the receiving countries. Because these circumstances are constantly changing, both of the two approaches are valid in liberal democratic states. According to Gibney, what this behavior teaches us is that regarding refugee policy one of the most important characteristic will always be the domestic political environment that will not only consist of the moral arguments but also will include social and economic factors.³⁹ Boswell makes a clear statement that the clash of the concepts is precisely because of the relation between political thought and empirical events, how theory and historical events have formulated the outcome together.

In comparison of the two liberal approaches and the partialist view, neither of them has a bond to membership, which is so highly emphasized in the partialist approach. Connected to the summary of the two impartial approaches, a criticism by James Woodward of the open borders

³⁶Christina Boswell, *The Ethics of Refugee Policy* (Aldershot, Burlington, Ashgate, 2005), 5-6.

³⁷Matthew J. Gibney, "Liberal Democratic States and Responsibilities to Refugees," *The American Political Science Review* 93, no. 1 (March 1999): 173.

³⁸Christina Boswell, *The Ethics of Refugee Policy* (Aldershot, Burlington, Ashgate, 2005), 16.

³⁹Matthew J. Gibney, "Liberal Democratic States and Responsibilities to Refugees," *The American Political Science Review* 93, no. 1 (March 1999): 175.

lies in the problem that liberals differentiate needy and non-needy people, what is not necessarily the case in every field of human rights.⁴⁰

The two way of understanding the moral responsibilities of the states regarding refugees are very different and emphasize different aspects. However, as mentioned before, both belong to the practices of contemporary states. Although the impartial view is on the side that liberal democracies should accept morally more refugees, “the commitments these states have to represent the views of their citizens currently result in far more restrictive policy”.⁴¹ According to economists, immigration has always been a positive tendency for the economy of states and as Gibney suggests “acting morally often involved making sacrifices; it might well be that the demise of the welfare state is one of them.”⁴²

The clash between the two approaches also “shows [that] conflicts over asylum policy are in the first domestic conflicts over dual mandate of liberal nation-states to respect human rights while protecting the integrity of the people from which their sovereignty derives.”⁴³ According to Joppke, the core point is still that the right to grant asylum is not the right of individuals but the right of the states.⁴⁴ The ethics of asylum policy is connected today with the international human rights regime, which is “a constitutive principle of, not an external imposition on, liberal nation-states.”⁴⁵ Because states are both bound by the international protection regimes but not necessarily think that these principles are their *own*, the clash of principles will have an effect on

⁴⁰Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 75.

⁴¹Matthew J. Gibney, “Liberal Democratic States and Responsibilities to Refugees,” *The American Political Science Review* 93, no. 1 (March 1999): 175.

⁴²Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, 77.

⁴³Christian Joppke, *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, Oxford University Press, 1998), 110.

⁴⁴ *Ibid.*, 110.

⁴⁵ Christian Joppke, *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, Oxford University Press, 1998), 110.

the refugees themselves. According to Jürgen Habermas, liberal nation-states today are both responsible to maintain their popular sovereignty and the principles of human rights protection.⁴⁶

The two approaches can help us to understand the motives and actions of the policy of the European Union regarding asylum policy. How the Member States of the EU act and how these actions correlate with the principles laid down by the institutions of the EU. In Chapter 2, the European Union will be analyzed, in order to understand its protection mechanism and what kind of underlying principle does it have relating to asylum matters and whether there are clashes of principles (partial and impartial) within its policies and the implementation by the Member States. With the help of this theoretical framework, the EU and the relation with the Member States will be further analyzed in the case study in Chapter 3.

⁴⁶ Jürgen Habermas quoted in Christian Joppke, *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, Oxford University Press, 1998), 110.

Chapter 2 - Refugee protection in the European Union

The aim of the second chapter is to understand the protection of refugees in the European Union. The EU is an important actor of refugee protection, there is no doubt about that. However the protection given by the EU, in many cases, is not in accordance with the principles laid down. This chapter will demonstrate that the EU has a positive approach towards asylum seekers but it also has a policy of deflection that is not adequate with the principles of general refugee protection. The chapter will also focus on the Member States' behavior regarding protection.

2.1 Simultaneous approaches: Politics of Restriction and Legal Framework for Inclusion

Politics regarding asylum politics in Western Europe have different aims and approaches. While the European Union is constantly stating the importance of the obligations to the Geneva Convention, governments, for instance in the United Kingdom, has expressed the need to reform the Geneva Convention as it is “outdated” and doesn't correlate with the situations of the 21st century.⁴⁷ Matthew Gibney gives some explanations why restrictionist policies have emerged in Member States of the EU. Further on, the thesis will analysis these policies and the relationship between the EU policies and their implementation by the Member States.

⁴⁷ Tony Blair, “Immigrants are Seeking Asylum in Outdated Law,” *The Times*, May 4, 2001

2.1.1 Emergence of Restrictionist Policies

Gibney's explanation starts with the fact that there is a rising number of asylum seekers throughout the last years. While the number of individuals who are seeking asylum in the EU is still very low, compared to other parts of the world, the numbers since the 80's have shown a rising tendency.⁴⁸ The other explanation from Gibney and other scholars is the behavior and policies made by the political elites in Western countries. Because their unsuccessful policies addressing xenophobia and integration have failed and social tensions have arose, policies regarding asylum had to be changed and done stricter. Analyzing the politics and governments of different Member States will lead to the same conclusion that "governments of all political hues have contributed to the establishment and consolidation of the restrictionist regime."⁴⁹ However, these are not compelling explanations for consciously limiting the number of asylum seekers by tough policies and sending them back to countries to have their applications lodged there. These policies have a partialist tendency. While Member States are conscious of their human rights and international protection obligations; still they pass over responsibility to other states and maneuver politics in a way that others should deal with asylum issues. This does not necessarily come straight from the partialist argument that is restricting 'outsiders' in order to have an inner cohesiveness but more likely because of electoral preferences.

This argument stated takes into account that the end of the Cold War has changed the attitude of governments towards asylum seekers. While there were also restrictionist policies

⁴⁸ Matthew J. Gibney, "The State of Asylum: Democratization, Judicialization and Evolution of Refugee Regime in Europe," UNHCR New Issues in Refugee Research, Working Paper No. 50 (October 2001), 3.

⁴⁹ Ibid., 4.

during the 80's⁵⁰, after the end of the Cold War, the politics of asylum has moved from high politics to low politics.⁵¹ The explanation by Gibney lies in the following:

The roots of restrictive asylum policies, then, lie in a perception by elites that the conduct of asylum policy risks exacting political costs from them. This risk has increased with the rapid growth in the number of asylum seekers seeking entry to Western states since the early 1980s and the demise of a cogent national interest justification for accepting refugees after the end of the Cold War.⁵²

Gibney argues that for more inclusive policies, politics should also consider the public support for refugees. He argues that the European population was shocked by the bombings and actions happened during the Kosovo crisis and the public has influenced politics towards a more inclusive approach, at least till the end of the conflict.⁵³ However "the Kosovo crisis came and went without deep or lasting questions being raised about the adequacy of asylum policies based on restriction and exclusion."⁵⁴

Balzacq and Carrera have come to the same conclusion that within the Union "these are areas [meaning asylum and immigration] where political statements and goals do not necessarily match the policy at hand."⁵⁵ James Hollifield blames the 'liberal paradox' for the two-faced policies of the West. He argues that the liberal paradox "highlights some of the contradictions inherent in liberalism, the quintessentially modern political and economic philosophy and a defining feature of globalization."⁵⁶ He argues that one of the main reasons of these parallel policies is the globalization tendency of today and also the international obligations and treaties

⁵⁰Germans were making restrictionist policies already in the 80's and also the UK was imposing carrier sanctions on the Tamils.

⁵¹ Matthew J. Gibney, "The State of Asylum: Democratization, Judicialization and Evolution of Refugee Regime in Europe," 7.

⁵²Matthew J. Gibney, "The State of Asylum: Democratization, Judicialization and Evolution of Refugee Regime in Europe," UNHCR New Issues in Refugee Research, Working Paper No. 50 (October 2001), 7.

⁵³Matthew J. Gibney, "The State of Asylum: Democratization, Judicialization and Evolution of Refugee Regime in Europe," UNHCR New Issues in Refugee Research, Working Paper No. 50 (October 2001), 9.

⁵⁴ Ibid., 9.

⁵⁵ Thierry Balzacq and Sergio Carrera, *Security Versus Freedom?* (Ashgate Publishing Limited 2006), 9.

⁵⁶ James F. Hollifield, "Migration and International Relations: The Liberal Paradox," in *Migration Between States and Markets*, ed. H.B. Entzinger, Marco Martiniello and Catherine Wihtol de Wenden (Ashgate Publishing Limited 2004), 3.

that are connected and needed for this interconnected world. The other side of the paradox is the nation-state characteristic of the states that expects the states to be more protected and conscious about what is actually happening within their territory and even if they are under international obligations, the protection of the nation-state is the main aim.⁵⁷ However as a conclusion "Hollifield identifies international conventions on the protection on human rights as positive factors that might help states elude this paradoxical situation."⁵⁸ Regarding the policies of the EU he states that "indeed, the application of international legal instruments, such as the European Convention of Human Rights and Fundamental Freedoms and the 1951 Geneva Convention on Refugees could provide the EU with a way out of its liberty versus security paradox, which is so striking in the field of irregular immigration."⁵⁹ Although these documents could be a guideline for protection mechanisms in the EU, and in most of the cases they are very much considered, but still international refugee protection agencies and NGOs are not completely fine with the double-faced EU and Member State approach.

2.1.2 Member States: Restriction and Inclusion

Matthew Gibney addresses the problem of state behavior starting from the assumptions drawn from the partialist view of seeing asylum seekers. In connection with every day politics, the citizens of the Member States view politics as advancing their values and interests. His argument states that "in this account of responsibility, states are perfectly justified in implementing asylum policies that attach more weight to the potential costs to citizens associated

⁵⁷ Balzacq and Carrera, *Security Versus Freedom*, 15.

⁵⁸ Thierry Balzacq and Sergio Carrera, *Security Versus Freedom?* (Ashgate Publishing Limited 2006), 15.

⁵⁹ Ibid., 15.

with the entrance of refugees than the benefits accruing to those seeking asylum.⁶⁰ He argues that when values and interests are in conflict between the citizens and the ‘outsiders’ than citizens expect that the state will give priority to their interests on the first place.⁶¹ Gibney concludes his argument by stating that

States thus have a constitutive interest in demonstrating partiality to the interests and needs of their citizens and, moreover, encouraging an expectation of this partiality in those they rule over. Until we move beyond the state as the dominant form of political organization, we can expect the interests of asylum seekers to be at best a secondary consideration for electorates and governments alike.⁶²

Although states do have concerns regarding entrance of ‘outsiders’, fundamental rights and protection of human rights are part of their values. This is one of the controversies in liberal democracies of the 21st century. This does not only mean that states are signatories to different international treaties but these principles and values also play a significant role in their national constitutions. The obligations can be seen in different perspectives but many scholars⁶³ argue that these obligations are internal to state activity and “these rights based constraints should be understood as self-imposed internal limitations on state activity, rather than as the product of an external diminution of sovereignty.”⁶⁴ Gibney argues that:

Insulated from popular politics and empowered by developments in administrative and human rights law, the courts have been able to expand the responsibilities of states to foreigners, including asylum seekers. In the hands of the judiciary, the universality of liberal principles has provided a basis for undermining legal distinctions between citizens and aliens.⁶⁵

⁶⁰ Matthew J. Gibney, “The State of Asylum: Democratization, Judicialization and Evolution of Refugee Regime in Europe,” UNHCR New Issues in Refugee Research, Working Paper No. 50 (October 2001), 9.

⁶¹ Matthew J. Gibney, “The State of Asylum: Democratization, Judicialization and Evolution of Refugee Regime in Europe,” UNHCR New Issues in Refugee Research, Working Paper No. 50 (October 2001), 9.

⁶² Matthew J. Gibney, “The State of Asylum: Democratization, Judicialization and Evolution of Refugee Regime in Europe,” UNHCR New Issues in Refugee Research, Working Paper No. 50 (October 2001), 10.

⁶³ Scholars like: Joppke and Hansen.

⁶⁴ Matthew J. Gibney, “The State of Asylum: Democratization, Judicialization and Evolution of Refugee Regime in Europe,” 11.

⁶⁵ *Ibid.*, 17.

Because of this distinction courts have a very important role in understanding not just the principles themselves but the motives and morals behind the legislature. The case study will represent the importance of the decision made by the European Court of Justice. In addition, Gibney argues that the responsibilities and the behavior of contemporary Western states does not show us that states are unsuccessfully representing and implementing the principles that they have universally established; but that these principles and moral values were laid down in a way that does not meet the challenges of asylum today.⁶⁶

The following part of the chapter will demonstrate what kind of moral principles the EU has laid down regarding asylum issues. Besides having a strong moral motivation in the rhetoric of the EU documents, in the actual actions and regulations there are also characteristics that prove the opposite. Deflection policies demonstrate that even though the EU and its Members States are stating in their rhetoric that they are in full accordance with the international obligations, the reality shows that the tendency to restrict and make asylum application procedures more difficult, deters people in need of protection.

2.2 EU Protection: Principles of the European Union

The Member States of the European Union are all members to the most important international regimes that are connected to the protection of refugees. This includes the Geneva Convention and its Protocol or the human rights treaties by the UN. Besides all these mechanisms, the EU established an asylum protection system and aimed to create a Common

⁶⁶ Matthew J. Gibney, "The State of Asylum: Democratization, Judicialization and Evolution of Refugee Regime in Europe," UNHCR New Issues in Refugee Research, Working Paper No. 50 (October 2001), 17.

European Asylum System. Although protecting the people in need is one of the main aims of the EU at the same time there is a significant tendency to control irregular migration.

2.2.1 Brief background to the milestones of the establishment of asylum protection system

Asylum did not form any part of the treaties that have established the European Communities. The first time, asylum matters, were put on the agenda was connected to the decision of establishing the abolishment of internal borders and creating the 'Fortress Europe'. The Schengen and Dublin Convention were the first steps to deal with asylum seekers on a Community level. While the implementation of Schengen was on its way, the Maastricht Treaty has put asylum and migration issues into the so called third pillar. This meant that asylum and migration issues could be discussed on a strictly intergovernmental framework, an approach that did not give much space for community actions. Until the formulation of the Treaty of Amsterdam Member States had more concerns regarding migratory flows towards the EU and therefore started to coordinate a possible future for the close cooperation. The Treaty of Amsterdam in 1997 has established this common future by putting the asylum and migration matters to the first pillar, where the Communities had the power to make decisions that was binding on all Member States with the possibility for judicial control.

In 1999 in Tampere Finland, the European Council has laid down the basic principles and aims of the common asylum policy. They have formulated the aim to have a Common European Asylum System, implementing it by the end of 2010. The EU has separated the goals by reaching a common asylum procedure and a uniform status for those granted status.

2.2.1.1 The Tampere Conclusions

The goal to create a common system in 1999 was aimed for various reasons. On one hand, the EU faced an increasing number of people in need for protection and state practices from reception conditions to acceptance were very different.⁶⁷ “These differences have also undermined the effectiveness and viability of efforts to share burdens and responsibilities for hosting refugees and asylum seekers among EU member states.”⁶⁸ Therefore to answer these challenges, Member States started to “deter non-citizens from gaining access to territory and on efforts to enhance the efficiency of asylum procedures.”⁶⁹ The Tampere Summit aimed therefore to create a common system to address the challenges together.

The Tampere Conclusions have set many principles that during the policy making process were set aside by leaders of the Union. Basically, what the Tampere Summit meant in the European asylum policy was that Head of States made a regional commitment not just towards the Geneva Convention but to a start for the Common European Asylum Policy.⁷⁰ The most important part of the Tampere Conclusions, considering the moral agenda of the EU, was that “the European Council accompanies its reassertion of the three unified principles which underlie the process of European integration, the shared commitment to freedom based on human rights, democratic institutions and the rule of law.”⁷¹ The Conclusion has included that the freedoms that are the core principles of the EU should not only be available for the citizens of the Member States of the EU but they should be open for other individuals. The documents states:

⁶⁷ Steve Peers, *EU Immigration and Asylum Law: Text and Commentary*, ed. Steve Peers and Nicola Rogers (Martinus Nijhoff Publishers Leiden Boston 2006), 506-507.

⁶⁸ *Ibid.*, 507.

⁶⁹ Steve Peers, *EU Immigration and Asylum Law: Text and Commentary*, ed. Steve Peers and Nicola Rogers (Martinus Nijhoff Publishers Leiden Boston 2006), 507.

⁷⁰ Rosemary Byrne, “Future Perspectives: Accession and Asylum in an Expanded European Union,” in *New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union*, ed. Rosemary Byrne and Gregor Noll and Jens Vedsted-Hansen (Kluwer Law International The Hague, 2002), 400.

⁷¹ *Ibid.*, 400.

It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union.⁷²

Among the principles of the Common European Asylum System the document states that there should be an absolute right for the respect of the right to asylum. Meaning if an individual applies for asylum, the procedure should be conducted according to the Geneva Convention and an emphasis should be put on the principle of non-refoulment, so people in need of protection are not sent back to persecutory countries. The Tampere conclusions also states that the EU is fully committed to the Geneva Convention and other international protection instruments. One of the most important principles laid down in this document is the EU being "able to respond to humanitarian needs on the basis of solidarity".⁷³ For the future of the CEAS they have set the main aims: clear determination of which country is responsible for the application, common standards for a fair procedure, minimum conditions regarding reception condition, a common procedure and uniform status.

In conclusion, the Tampere Conclusion states that Europe has a tradition to be open and those who have the right to enter legally to the territory of the Union, should be granted protection and be respected. Regarding the evaluation of the Tampere Summit, Rosemary Byrne adds that the Tampere summit has put a stop to Western Europe, being characterized by an "intense struggle between protection based and migration control principles."⁷⁴ Byrne argues that

⁷² Tampere European Council Presidency Conclusions, under: Towards a Union of Freedom, Security and Justice: The Tampere Milestones (15 and 16 October 1999)

⁷³ Tampere European Council Presidency Conclusions, under: Towards a Union of Freedom, Security and Justice: The Tampere Milestones (15 and 16 October 1999)

⁷⁴ Rosemary Byrne, "Future Perspectives: Accession and Asylum in an Expanded European Union," in *New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union*, ed. Rosemary Byrne and Gregor Noll and Jens Vedsted-Hansen (Kluwer Law International The Hague, 2002), 400.

the Tampere Summit was a big break-through regarding the moral agenda, the principles of the CEAS “reflects a triumph for those advocating a protection-based approach to asylum, a triumph that optimally will encourage applicant states to conceive of asylum policy in a more progressive sense than achieved by many of the original Member states.”⁷⁵ Steve Peers argues that at Tampere, representatives of the Member States have “set out broad principles in relation to JHA matters and apparently endorsed a relatively liberal and balanced migration and asylum policy for the European Union.”⁷⁶

2.2.1.2 After Tampere

Throughout the years, the implementation of the CEAS was taking place summits have taken place (Laeken, Seville) where the EU has re-affirmed their goal of a uniform common system. In 2002 at the Seville Summit, partly because of the terrorist attacks in the U.S., Member States have moved toward a more restrictive approach. In the Seville Conclusions it is stated that while it is important to rely on the principles of the Geneva Convention, policies should also be implemented as “making arrangements to prevent abuse of the system and ensuring that those whose asylum applications have been rejected are returned to their countries of origin more quickly.”⁷⁷ In 2003, the Council have decided upon the replacement of the Dublin Convention and introduced the so called Dublin II regulation that still is the binding document of determining the Member State responsible for the examination of the asylum application. It has set criteria and mechanisms to make procedures more straightforward. While the Tampere Program was an

⁷⁵ Rosemary Byrne, “Future Perspectives: Accession and Asylum in an Expanded European Union,” in *New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union*, ed. Rosemary Byrne and Gregor Noll and Jens Vedsted-Hansen (Kluwer Law International The Hague, 2002), 400-401.

⁷⁶ Steve Peers, *EU Immigration and Asylum Law: Text and Commentary*, ed. Steve Peers and Nicola Rogers, (Martinus Nijhoff Publishers Leiden, Boston, 2006), 5-6.

⁷⁷ Council of the European Union Seville European Council Presidency Conclusions, 13463/02, (21 and 22 June 2002) Accessed through the website of the European Union, <http://ec.europa.eu/research/era/docs/en/council-eu-29.pdf>, 8. (accessed May 23, 2011)

important starting point in the policies of the EU, the level that should have been reached was rather low.⁷⁸ The aim of the Commission while formulating the Hague Program in 2004 was to give a new push for the policies that should have been implemented. Therefore, as the initiative of the European Commission The Hague Program was adopted in 2004 for setting principles for the next five years in order to improve the AFSJ. In these ten priorities asylum has an important place as the Commission further proposes the establishment of the CEAS based on the Union's values and humanitarian tradition.⁷⁹

The latest amendment of the Treaty on the Functioning of the European Union, the Treaty of Lisbon has entered into force in 2009. Article 78 of the Treaty lists the competences of the EU regarding asylum issues.⁸⁰ The principles laid down in the Article relate to the Geneva Convention and its Protocol and also the principle of non-refoulement. Protection based on these treaties and principles sets that these obligations are derived from the Treaty and not from the Member States obligations.⁸¹ The Treaty sets that those third country nationals that are in need of protection should be offered the appropriate status: Convention refugee, subsidiary or temporary protection. Article 80 lies down: "implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States."⁸² Since, the Stockholm Program was adopted in 2010 by the European Council. Since the Tampere Conclusions, where basic principles of asylum protection was laid down, the Stockholm Program states that the EU wishes to accede to the Geneva Convention and its Protocol and

⁷⁸ Thierry Balzacq and Sergio Carrera, *Security Versus Freedom?* (Ashgate Publishing Limited 2006), 10.

⁷⁹ Communication from the Commission to the Council and the European Parliament - The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice /*COM/2005/0184 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0184:EN:HTML> (accessed May 24, 2011)

⁸⁰ Treaty on the Functioning of the European Union, Accessed, Official Journal of the European Union, 2008/C 115/01, Volume 51(9 May 2008)

⁸¹ Steve Peers, *EU Justice and Home Affairs Law* (Oxford, Oxford University Press 2011), 304.

⁸² Treaty on the Functioning of the European Union, Accessed, Official Journal of the European Union, 2008/C 115/01, Volume 51(9 May 2008), 80.

policies of the EU should have the full inclusion and application of the content of the Convention.⁸³

Principles in the EU protection are laid down; however one can see that these principles are not necessarily constant. Whether they are used and referred to is dependent on circumstances and varying political pressure that the EU faces. Regarding what have been done in the asylum policy of the EU, Balzacq and Carrera states that

Compliance with the 1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, the prohibition of expulsion or 'principle of non-refoulment' as well as other relevant international human rights treaties should have been the point of departure and main philosophy underlying any policy measure dealing with asylum.⁸⁴

While the moral principles are set in the EU documents, there are decisions and regulations that are paradoxical to the principles listed above. While the founding treaties have no reference to the protection of human rights, “based on the jurisprudence of the ECJ and the amended texts of the EU Treaties, there can no longer be any doubt that, today, the EU is based on the rule of law and respect for human rights.”⁸⁵ The next part of the chapter will show that deflection and restrictive policies also play a significant role of the asylum policies. The understanding of the controversy between the two approaches will be the basis for the interpretation of the case study in the next chapter.

2.3 Deflection policies in the EU

⁸³ The Stockholm Program, Official Journal of the European Union, 2010/C 115/01, Volume 53 (4 May 2010) s 6.2, 32.

⁸⁴ Thierry Balzacq and Sergio Carrera, *Security Versus Freedom?* (Ashgate Publishing Limited 2006), 16.

⁸⁵ Evelin Brouwer, “Effective Remedies in EU Migration Law,” in *Whose Security, Freedom and Justice?* ed. Anneliese Baldaccini, Elspeth Guild and Helen Toner (Hart Publishing Portland 2007), 69.

While asylum policy is closely connected to human rights, it is a highly political issue as well. Not just during the Balkan conflict but also afterwards the EU had to manage the flows of asylum seekers coming from Iraq, Afghanistan and other countries of origin. This made the increasing restrictive policies legitimate. Throughout the years UNHCR and other asylum advocate groups called for the original concept of high standards of protection, and even if the EU accomplished a massive amount of legislature related to asylum protection throughout the years, the reality was still worrying.⁸⁶ According to Madeline Garlick, there were three concerns regarding EU policies. The first concern was related to the implementation of the policies on the lowest common denominator that actually made endangered the obligations under international treaties. Because Member States were on different opinions and had different practices, the final approach had to be the lowest common denominator that did not necessarily meet those high protection standards already mentioned.

The second concern was the problem of the *common* character of the common policies. As states had different policies, the binding regulations actually made the formerly higher protection principles lower. The third concern was the problem of enforcement of the lowest common policies. If criticism has already been made of the lowest common denominator, being not compatible with the international standards, and Member States did not fully and correctly implement even these minimum norms that actually could lead to a reality that does not at all comply with international norms.⁸⁷

Although the Tampere Summit has committed the Member States to a morally defined and protection based agenda, still policies that are based on burden-shifting and the notion of

⁸⁶ Madeline Garlick, "Asylum Legislation in the European Community and the 1951 Convention: Key Concerns Regarding Asylum Instruments Adopted in the 'First Phase' of Harmonization," in *Security Versus Freedom* ed. Thierry Balzacq and Sergio Carrera (Ashgate 2006), 46.

⁸⁷ *Ibid.*, 47.

‘protection elsewhere’ have emerged through the years.⁸⁸ Deflection policies in the EU are not contrary to the principle of protection itself, however the notion of shifting responsibilities to other states could seriously harm the right to asylum for the people in need. Noll argues that while the non-refoulement principle of refugee protection, still, should be respected, in order to have a more effective system of protection a more comprehensive perspective of fundamental human rights is needed.⁸⁹

There are two kinds of deflection policies: non-admission and non-arrival policies. The difference between the two is that while the non-arrival policy makes it sure that the asylum seekers are –territory and procedure wise- far from the EU, the non-admission policy “set up restrictive criteria of admissibility of asylum seekers to the examination procedure as well as to the territory.”⁹⁰ In this thesis the focus will be on the non-admission policies, as this thesis aims to understand the EU policies and actions towards those who reached EU territory and are rightfully claiming asylum.

2.3.1 Non-admission policies

Non-admission policies address asylum seekers who have reached the territory of the EU but because of underlying reasons, their protection is not straightforward. In this case the EU Member States have the moral responsibility to investigate the cases⁹¹ and to protect the refugees. However, even if states agree with the fundamental moral principles of protection, they still want

⁸⁸ Rosemary Byrne and Gregor Noll and Jens Vedsted-Hansen, *New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union*, (Kluwer Law International The Hague, 2002), 11.

⁸⁹ Rosemary Byrne and Gregor Noll and Jens Vedsted-Hansen, *New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union*, (Kluwer Law International The Hague, 2002), 11.

⁹⁰ *Ibid.*, 13.

⁹¹ There are situations where asylum seekers are not registered in a member state, so the member state has no responsibility to deal with the asylum seeker

these asylum seekers to be protected somewhere else. According to Noll, non-admission policies can “at least theoretically and in so far as procedures concerned, be implemented in a manner that is compatible with fundamental protection principles.”⁹² Although the notion of having a fair procedure is secured in this policy, the fact that Member States send asylum seekers to another state for determining the procedure, is a mechanism of restricting the admissibility of the applicant.⁹³ The non-admission policies are the ones that highly affect the neighboring countries as well, because of actions such as the ‘Safe Third Country’ and the Dublin II Regulation. Even though non-admission policies do have the possibility to safeguard people in need of protection and could be accepted within the international protection, the tendency of states shifting burdens and concrete actions to other states deflects the right of refugees to have adequate protection.

2.3.2 Responsibility for applications

One of the most controversial policies of the EU that is constantly in the spotlight of the media and on the agenda of the institutions of the EU is the Dublin II Regulation. This section will briefly represent the aims and interests behind the Regulation and its evaluation since the Dublin Convention. Understanding the Dublin II Regulation has a key importance in the thesis as the case study of Greece will show the controversies happening on the Member State level.

2.3.2.1 Dublin Convention

⁹² Rosemary Byrne and Gregor Noll and Jens Vedsted-Hansen, *New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union*, 15.

⁹³ Rosemary Byrne and Gregor Noll and Jens Vedsted-Hansen, *New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union*, (Kluwer Law International The Hague, 2002), 14.

The Dublin Convention was set at the same time as the Schengen Convention and both aimed to have the same goal: to have a system that allows the abolishment of internal borders between the Member States and by this allowing the free movement of people. Because of this decision and aim, external borders had to be strengthened; therefore Member States also had to care about their asylum policies. The Dublin Convention, which finally entered into force in 1997, had main aims: one was to ensure the free movement of people on the territory of the Member States and to have a mechanism to ensure that the asylum seeker will have the examination of the procedure in one of the Member States according to the criteria agreed upon.⁹⁴ The whole system was based on the “States’ mutual confidence in their asylum procedures.”⁹⁵ If states have a mutual confidence in each other’s asylum procedures, ensuring that the applications will be based on international obligations, which could prevent the multiple applications and territorially concentrated asylum applications, the system will function well. Shifting the asylum procedure to another Member State was an action implemented within the EU, but there was also a possibility to make a non-EU country responsible for the examination of the procedure and the protection.

Because the Convention makes it possible that at least one Member State has to make a decision regarding an application, Hurwitz argues that this Convention has been a progress regarding the development of humanitarian law.⁹⁶ However there were many concerns regarding the Convention. According to the article by Hurwitz, reality showed that in practice there were so many differences on the administrative level of the fifteen Member States that cooperation was

⁹⁴ Ágnes Hurwitz, “The 1990 Dublin Convention: A Comprehensive Assessment,” *International Journal of Refugee Law* 11(4) 1999, 648.

⁹⁵ *Ibid.*, 648.

⁹⁶ *Ibid.*, 649.

difficult to reach.⁹⁷ The problem also urged the Member States to have a common asylum system in order to avoid these problems. Hurwitz also mentions that there was a constant tension in the atmosphere of the system because the Dublin Convention only allowed the asylum seekers to choose the country they had a link to, if this was based on the specific set of criteria.⁹⁸ In 1999, Hurwitz already mentions that the system had so many contradictions that “those countries with long external borders prefer a dysfunctional system to one which would make them responsible for most of the illegal asylum seekers arriving in Europe.”⁹⁹ This argument will play a key characteristic in the case study of Greece. One of the biggest criticisms regarding the concept of the Convention was the indirect breach of the non-refoulement principle.

According to Vedsted-Hansen, the Dublin and Schengen Conventions of 1990 have been those tools that actually were more restrictive on the sovereignty of the Member States as the Convention obliged one state to examine the application.¹⁰⁰ “While the personal and territorial scope of non-refoulement may still be subject to some debate, it is beyond doubt that this basic principle of human rights and refugee law does restrict the exercise by states of their sovereign competence to control the entry and residence of aliens.”¹⁰¹ The highest criticism, which further had a possibility for change, was the fact that the Convention was on the road to pressure families to pull apart and it completely abolished the different national interpretations of the Geneva Convention.¹⁰² Peers also notes that the tendency after the implementation of the Dublin Convention ended in the fact that asylum seekers started to destroy all travel documents they had

⁹⁷ Ágnes Hurwitz, “The 1990 Dublin Convention: A Comprehensive Assessment,” *International Journal of Refugee Law* 11(4) 1999, 675.

⁹⁸ *Ibid.*, 675.

⁹⁹ *Ibid.*, 675.

¹⁰⁰ Jens Vedsted-Hansen, “Non-admission Policies and the Right to Protection: Refugees’ Choice Versus States’ Exclusion?,” in *Refugee Rights and Realities* ed. Frances Nicholson and Patrick Twomey (Cambridge University Press 1999), 274.

¹⁰¹ *Ibid.*, 274.

¹⁰² Steve Peers, *EU Justice and Home Affairs Law* (Oxford, Oxford University Press 2011), 359.

and this way not providing evidence regarding the route and the first safe country they have entered to. However destroying the documents was a risky action, as persecution was much difficult to prove without these documents.¹⁰³

Morally the Dublin Convention faced a lot of criticism. The EU had to replace the Convention. According to the Commission Communication there were three reasons that the Convention had to be replaced.¹⁰⁴ The first one was the inclusion of the Schengen acquis into the Community competences. Because of the connection of the two areas, the aims of the Convention had to be transformed into a binding policy measure. The second reason was the future enlargement of the Union, which meant that the external borders will significantly increase, especially in the new Member States. The third reason was the feasibility of the system, so the EU introduced the Eurodac system for a 'clear and workable' solution.

According to the evaluation of the Convention, what the Regulation should have covered and corrected was the lengthy time of the decision made regarding which is the responsible state and also the real possibility for the examination of the case.¹⁰⁵ Other further aims were to prevent the multiple asylum applications within the EU, to have a strong link between the entry controls and the responsibility to examine applications, to abolish the possibility to choose asylum granting country. The Commission states that "Member States are concerned that if people are free to choose the Member State in which they lodge an asylum application, there is increased scope for them to go to a particular state for economic reasons and to lodge an asylum application

¹⁰³ Steve Peers, *EU Justice and Home Affairs Law* (Oxford, Oxford University Press 2011), 359.

¹⁰⁴ Commission of the European Communities, SEC (2000) 522, Commission Staff Working Paper, Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, 4.

¹⁰⁵ Commission of the European Communities, SEC (2000) 522, Commission Staff Working Paper, Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, 7.

to ensure that they cannot be removed.”¹⁰⁶ This is an interesting argument from the side of the Commission. The overall Convention clearly states that the EU is providing refugee protection but not based on human rights or moral principles. The tone of the documents suggests that the process has to be a narrowed down policy that even if it goes against principles it is still formulated in a straightforward manner. The result was the Dublin II Regulation that became a regulation similarly debated.

2.3.2.2 Dublin II Regulation

The Dublin Convention was replaced by the previously analyzed Convention. The goal of the Dublin regulation was to have a “clear and workable method”¹⁰⁷ to determine which member state of the EU is responsible for the asylum procedure. The Regulation states that in case the applicant has a family member that has been granted asylum or is in the process of examination, the Member State that is handling that application is responsible for the application of the spouse or minor child. In case of no family in a Member State, there are still specific cases where Member States should take responsibility. In case of visa issuing or granting residence permit that state should be responsible which has issued or granted these documents. In case these do not form the case, the country where the asylum seeker lodged the application should be responsible to examine the application. For the support and feasibility of this regulation, a special common system was established, the Eurodac, which through the recording of fingerprints makes it clear where asylum seekers and immigrants were first stopped.

¹⁰⁶ Commission of the European Communities, SEC (2000) 522, Commission Staff Working Paper, Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, 10.

¹⁰⁷ Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

There is also a possibility to use a humanitarian clause, meaning if there are humanitarian concerns states could consider the application and be responsible for the examination, but since the Regulation entered into force this principle is only focusing on family reunion.¹⁰⁸ However this has a non-binding nature and evidence and practice shows that it is rarely used.¹⁰⁹ Main concerns regarding the Dublin II Regulation, according to Garlick, are the facts that until claimants are not under the responsibility of a certain Member State, conditions like those included in the Reception Condition do not necessarily apply to them, only in some States. The Regulation and the effect it has can cause long disputes among Member States and makes the applicants' life more unpredictable and uncertain.¹¹⁰ Garlick highlights another important fact that because the regulation gives certain time frames to determine the state responsible, in practice that means that asylum seekers and people in need of protection have no examination of their cases and are actually pushed out of the territory of the EU.¹¹¹

Elsbeth Guild sees the aim of the Dublin Convention from a Member State point of view to “prevent asylum seekers from applying for asylum in more than one state, either simultaneously or consecutively, by taking advantage of unrestricted access to the territory of all the member states once within one of them.”¹¹²

As it is put, the Regulation did not fulfill the expectations: “although applied to determine responsibility in a large proportion of cases, they are also no criteria which encourage a fair distribution of asylum claims amongst Member States with reference to their capacity or

¹⁰⁸ Steve Peers, *EU Justice and Home Affairs Law* (Oxford, Oxford University Press 2011), 361.

¹⁰⁹ Madeline Garlick, “Asylum Legislation in the European Community and the 1951 Convention: Key Concerns Regarding Asylum Instruments Adopted in the ‘First Phase’ of Harmonization,” in *Security Versus Freedom* ed. Thierry Balzacq and Sergio Carrera (Ashgate 2006), 53.

¹¹⁰ Madeline Garlick, “Asylum Legislation in the European Community and the 1951 Convention: Key Concerns Regarding Asylum Instruments Adopted in the ‘First Phase’ of Harmonization,” in *Security Versus Freedom* ed. Thierry Balzacq and Sergio Carrera (Ashgate 2006), 53.

¹¹¹ *Ibid.*, 53.

¹¹² Elspeth Guild, “The Impetus to Harmonise: Asylum Policy in the European Union,” in *Refugee Rights and Realities* ed. Frances Nicholson and Patrick Twomey (Cambridge University Press 1999), 318.

numbers.”¹¹³ However the system was established and high expectations were awaited, between 2003 and 2005, only 4.1% of the asylum seekers were transferred.¹¹⁴ Steve Peers concludes that “The Dublin rules remain an expensive waste of time, ultimately still applying to only a small percentage of asylum seekers and imposing an extra cost on top of the cost of considering each asylum application.”¹¹⁵ However an improvement in the Regulation was the family reunion, which was still rather narrow and limited. The fundamental principles of the EU to protect people in need based on solidarity cannot be proved with the policy of the Dublin Regulation. What one can see is that asylum seekers might be within the territory of the EU but are put ahead of a form of administrative and legislative complexity and uncertainty that should not be sensible on one’s life. Because of the overcomplicated policy measures of the EU, asylum seekers are not considered as the victims of human right violations but are tools to overcome the frustration of European states. Andrew Nicol argues that “giving primacy to the asylum applicants’ choice would have made good sense in terms of common humanity because it would have minimised the trauma of delaying substantive consideration of the asylum claim.”¹¹⁶ What the Dublin system clearly set was that the least favorable option is to make the asylum seeker decide where he/she wants to apply for asylum but this concluded small numbers of actual transfers and a not solidarity but unequal burden for the Eastern and Southern Member States.¹¹⁷

After analyzing the different policy tendencies of the EU, the Dublin II Regulation was introduced to see how the rhetoric and the concerns put on papers have effect on the everyday implementation of the Regulation. The case of Greece has opened many debates not just in the

¹¹³ Madeline Garlick, “Asylum Legislation in the European Community and the 1951 Convention: Key Concerns Regarding Asylum Instruments Adopted in the ‘First Phase’ of Harmonization,” , 53.

¹¹⁴ Steve Peers, *EU Justice and Home Affairs Law* (Oxford, Oxford University Press 2011), 362.

¹¹⁵ *Ibid.*, 362.

¹¹⁶ Andrew Nicol, “From Dublin Convention to Dublin Regulation: A Progressive Move?,” in *Whose Security, Freedom and Justice?* ed. Anneliese Baldaccini, Elspeth Guild and Helen Toner (Hart Publishing Portland 2007), 266.

¹¹⁷ *Ibid.*, 267.

EU institutions but through the media as well. The case study of Chapter 3 will show this contradiction existing in the EU, putting on the emphasis on moral principles and the debate between principles and the feasibility of their implementation.

Chapter 3 – Principles in Reality: Case study of Greece

Formal commitments, principles were analyzed by the previous chapters dealing with the moral principles of asylum policy in the European Union. After dealing with the rhetoric, the case study of Greece will show that the reality has many inconvenient consequences. Although Greece is a Member State for more than twenty years of the EU, the practices and realities of this country have created a situation where the reports have suggested that the EU Asylum system should be reconsidered. This will be further analyzed. After understanding the concerns regarding the Dublin system, Greece was chosen to further understand the tensions between the formulated policies of the EU, their implementation and underlying principles.

3.1 The Case of Greece

The Dublin system has many problems from many different perspectives. Not just NGOs and UN bodies are having concerns with it, but within the EU institutions problems are also highlighted, for instance in the European Parliament. Greece has been one of the countries that have been put in the spotlight by the media and research, as it had a bad reputation for case examination for a long time and since many of the asylum seekers coming to the EU are crossing the borders of Greece. According to the Dublin system, if asylum seekers have been registered by the Eurodac in Greece, asylum seekers getting for instance to Germany, Sweden are sent back to Greece, where case examination is not considered to reach an EU standard. So, is it affordable in the EU system to send back asylum seekers to a country where no sufficient reforms have been made in order to change asylum politics? Or is the Dublin system not a fair, burden-sharing mechanism in the EU to deal with asylum seekers? This section will present this dilemma and in

the findings one will see if tension are due to the Member State's implementation of certain policies or the tensions arise from a system that has no relation to the principles laid down.

According to the statistics, the total number of asylum applications from 1997 to 2003 doubled in Greece. While in 1997 the Greek authorities registered 4376 applications, in 2003 there were 8178 applications in total.¹¹⁸ This number was 22,115 in 2007.¹¹⁹ Out of the 2007 data, the total number of rejections was 20,865.¹²⁰ The Greek case is the most visible case within the EU, where the number of rejections is so high and the acceptance significantly low. According to a 2008 statistic, the number of positive decisions was 1%, that is considered to be the lowest within the EU.¹²¹ The numbers also show that Greece is among the countries where most of the asylum decisions have to be made; these numbers are similar to the UK, Sweden and Germany.¹²²

Another interesting statistics is the number of Dublin ingoing and outgoing requests. The incoming requests, so in the case of Greece, the number of applications that should be the responsibility of Greece, are various. Those Member States where the external borders are also long, like in Spain, the number of incoming requests was 84 in 2009. In the same year this number was 456 in Italy and 774 in Greece.¹²³ At the same time the outgoing requests in 2009, passing the responsibility to other Member States by the Dublin criteria, were the highest in

¹¹⁸ Costas N. Kanellopoulos and Maria Gregou, Annual Report on Statistics on Migration, Asylum and Return in Greece, Centre of Planning and Economic Research, EMN Greek National Contact Point (Athens, 2003) http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/2003/country_reports/greece.pdf (accessed May 23, 2011)

¹¹⁹ Eurostat Statistics, Under International Migration and Asylum, Asylum Applications 1997-2007, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tps00021&plugin=0> (accessed May 24, 2011)

¹²⁰ Eurostat Statistics, Under International Migration and Asylum, Asylum Rejections 1999-2007, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tps00164&plugin=0> (accessed May 23, 2011)

¹²¹ Eurostat News Release, "Asylum Decisions in the EU27," December 8, 2009, http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-08122009-AP/EN/3-08122009-AP-EN.PDF (accessed May 24, 2011)

¹²² Ibid.

¹²³ Eurostat Statistics, Under International Migration and Asylum, Dublin Incoming Requests 2008-2010, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_dubin&lang=en (accessed June 1, 2011)

Germany, the UK and Sweden. In Greece the outgoing requests for shifting the responsibility to another Member State was 3.¹²⁴

This overview gives a better understanding that the burden of dealing with asylum applications are not based on the principle of solidarity among the Member States and that Greece, among states situated on the geographical periphery of the EU, has to deal with more applications than the rest of the EU²⁷¹²⁵. So is the low acceptance number because Greece is too protective of its nation-state and therefore not letting in and accepting more refugees; or are the principles of the EU and therefore the policies formulated in a certain way not acceptable for either the asylum seeker or the Member State?

3.2 Background to the Greek Situation

Greece signed the Geneva Convention and its Protocol later than other Member States and adopted its own asylum system in the 70s. One of the problems that is visible in the principles of the regime is that

the same administrative branch which is entrusted with the examination of, and decision on, asylum applications (the Ministry for Public Order and specifically the police authorities) is also responsible for preventing illegal entry into the country, which is virtually the only means of entry for persons fleeing persecution.¹²⁶

In the early 1990s the Greek authorities made a reform in their asylum legislature and according to Papadimitriou and Papageorgiou, this was a significantly liberal one that included all important

¹²⁴ Eurostat Statistics, Under International Migration and Asylum, Dublin Incoming Outgoing Requests 2008-2010, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_dubout&lang=en (accessed June 1, 2011)

¹²⁵ France has the biggest number of asylum claims, mostly because of family reunification.

¹²⁶ Panayiotis N. Papadimitriou and Ioannis F. Papageorgiou, "The New Dubliners: Implementation of European Council Regulation 343/2003 (Dublin II) by Greek Authorities," *Journal of Refugee Studies* (September 2005): 300.

elements of refugee protection that are included in the Geneva Convention.¹²⁷ Because until 2000 Greece was not a popular destination for asylum seekers, it was considered a transit country. However, the economic developments in Greece and the emerging conflicts of the Middle East changed the pattern and Greece started to receive more applications that could not be handled by the authorities after a while. The Greek Authorities implemented the Dublin II Regulation and put the Eurodac system fully into work as well. Without the Eurodac, the numbers of the returned asylum seekers were low, but since the straightforward mechanism to determine the Member State where the asylum seeker entered EU territory, the numbers increased year by year.

Because the situation was alarming and the Greeks could not handle the increased applications the authorities claimed “the majority of the applications lodged in recent years were abusive and that many third-country nationals used the asylum procedures and weighed down Greek administration, which suffers from chronic understaffing and lack of infrastructure, in order to ensure a longer stay in Greece.”¹²⁸ In most of the cases, the authorities rejected the claims on the basis that there was no evidence that one would be persecuted in the country of origin and the authorities often stated that the reason for leaving their country behind is strictly for economic purposes.¹²⁹ Papadimitriou and Papageorgiou argues that Greece has a more liberal asylum policy than some other Member States of the EU and that asylum seekers have specific rights, such as the right to employment.¹³⁰ This is particularly because the reception centers are so full that it is not possible to maintain the needs and benefits laid down in the Reception Conditions Directive, therefore they are in the need of looking for a job. The events and situation of Greece have spilled over to

¹²⁷Panayiotis N. Papadimitriou and Ioannis F. Papageorgiou, “The New Dubliners: Implementation of European Council Regulation 343/2003 (Dublin II) by Greek Authorities,” *Journal of Refugee Studies* (September 2005): 300.

¹²⁸ *Ibid.*, 306.

¹²⁹ *Ibid.*, 306.

¹³⁰ *Ibid.*, 307.

international media and concern, however The Papadimitriou and Papageorgiou note that “nonetheless, this is by no means a particular Greek problem.”¹³¹

3.2.1 The Cases of Interruption

The Greek Authorities use ‘interruption’ for the Dublin cases that they consider legitimate by their national legislation. Basically, the authorities accept responsibility from other Member States, based on the Dublin II Regulation criteria, and when the applicants are transferred back to Greece, asylum and the examination of the case is denied, because the case has been interrupted.¹³² “Once the examination of the asylum application has been interrupted, the applicant loses the status of asylum seeker—and consequently is present in Greece illegally—unless he or she can prove that the arbitrary departure was due to reasons of ‘force majeure’.”¹³³ This can barely be proved, therefore the applicant who is brought back to Greece has his/her application interrupted because of the departure to other Member States. This causes the applicant staying in Greece illegally and having an un-examined application for asylum.¹³⁴ This is not only the practice of Greece, other Member States practice this as well in cases when the applicant has abandoned the application, like in Belgium, France, Ireland, Italy, the Netherlands and Spain.¹³⁵

For these tensions, human rights advocates and refugee protecting organizations as the UNHCR and the ECRE have issued several reports and suggestions to change the system. For this particular case of interruption, the ECRE suggests, that cases should be re-opened if asylum

¹³¹Panayiotis N. Papadimitriou and Ioannis F. Papageorgiou, “The New Dubliners: Implementation of European Council Regulation 343/2003 (Dublin II) by Greek Authorities,” *Journal of Refugee Studies* (September 2005): 307.

¹³² ECRE, “Summary Report on the Application of the Dublin II Regulation in Europe,” March 2006, 6.

¹³³ Papadimitriou and Papageorgiou, “The New Dubliners: Implementation of European Council Regulation 343/2003 (Dublin II) by Greek Authorities,” 309.

¹³⁴*Ibid.*, 310.

¹³⁵ ECRE, “Summary Report on the Application of the Dublin II Regulation in Europe,” March 2006, 6.

seekers should be transferred back to the responsible Member State in case there has been no final decision made.¹³⁶

3.3 Main Concerns of the Dublin II Regulation in the Context of Greece

While Greece has a hard time processing all applications, the problem also lies in the European system that is technically not offering any benefits for countries that are the ones receiving most of the asylum seekers arriving to the EU. This way these countries¹³⁷ will tolerate the asylum seekers as illegally residing on their territory or will use other tools in order to decrease the numbers.¹³⁸ The main problems are still connected to the fact that the national legislation and the regulation had to be applied at the same time and there is no uniform legislation, therefore, differences will still stay part of the EU system. Papadimitriou and Papageorgiou mention the importance of the fact that the perception of the Dublin Regulation is rather idealistic: assuming that the asylum seekers will have the same procedure and treatment in all of the Member States while the national legislations are differing in the EU27, is unrealistic.¹³⁹ An example to this situation could be the case of Iraqi refugees arriving to the EU. Those who came from Iraq definitely faced a different approach in protection, as in Sweden the acceptance was 90% and in Greece, where around 5000 applications were lodged, none received status on

¹³⁶ ECRE, "Summary Report on the Application of the Dublin II Regulation in Europe," March 2006, 7.

¹³⁷ The Authors also refer to the 12 "New" Member States of the European Union, who are also consisting a significant part of the external borders of the EU.

¹³⁸ Panayiotis N. Papadimitriou and Ioannis F. Papageorgiou, "The New Dubliners: Implementation of European Council Regulation 343/2003 (Dublin II) by Greek Authorities," *Journal of Refugee Studies* (September 2005): 316.

¹³⁹ *Ibid.*, 317.

first instance.¹⁴⁰ It could be concluded that the main problems come from the clash of the national and EU legislation, as Papadimitriou and Papageorgiou explain

It is the fact that the combination of national rules on discontinuation of asylum applications and the European rules of allocating responsibility may, in fact, lead to some applicants being deprived of the right (among others enshrined in the EU Constitutional Treaty currently under ratification) to have their claim examined in substance in any one EU State.¹⁴¹

In addition, an ECRE report reveals that there is evidence that suggests that the ‘Regulation acts as an incentive for states to resort to the increased use of detention in order to secure the transfer of Dublin cases.’¹⁴²

Mutual trust is one of the key elements of the principle of the EU. In case this breaks down between the Member States there is a possibility that the policies regarding asylum will get nationalized that would not reach the goals and principles laid down in the Tampere Conclusions. Valentina Pop in an article of EUObserver quotes the Belgian Immigration Minister, who claims that Greece and its practice is endangering the mutual trust that is needed to form and fully implement the CEAS.¹⁴³ Papadimitriou and Papageorgiou however conclude

It would be wrong, however, to blame the Greek authorities exclusively for in fact depriving some asylum seekers of their right to have their application examined in substance and with due respect to the rule of law and fundamental rights, or to dismiss this issue as another example of Mediterranean ‘lax rules’. The case described above is paradigmatic for two reasons: it brings to the surface the shortcomings of the national asylum legislations in a semi-constructed European Asylum Area and exemplifies the problems that other national asylum administrations might encounter when dealing with unusually high numbers of asylum applications.¹⁴⁴

¹⁴⁰ Norwegian Helsinki Committee, Greek Helsinki Monitor and NOAS, “A Gamble With the Right to Asylum in Europe, Greek Asylum Policy and the Dublin II. Regulation,” 2008, 39.

¹⁴¹ Panayiotis N. Papadimitriou and Ioannis F. Papageorgiou, “The New Dubliners: Implementation of European Council Regulation 343/2003 (Dublin II) by Greek Authorities,” *Journal of Refugee Studies* (September 2005): 311.

¹⁴² ECRE, “Summary Report on the Application of the Dublin II Regulation in Europe,” March 2006, 24.

¹⁴³ Valentina Pop, „Human Rights Court Deals Blow to EU Asylum System,” EUObserver.com, January 21 2011, Website of EU Observer, <http://euobserver.com/9/31681?print=1> (accessed May 15, 2011)

¹⁴⁴ Panayiotis N. Papadimitriou and Ioannis F. Papageorgiou, “The New Dubliners: Implementation of European Council Regulation 343/2003 (Dublin II) by Greek Authorities,” 315.

EU policies and legislation often highlight the importance of solidarity between the Member States, as a main principle. Solidarity is one of the key concepts of the EU system but burden-sharing is also a key element. However, in the case of Greece there is no specific burden-sharing from Member States. A report made by the Norwegian Helsinki Committee stresses that “As for the question of “responsibility sharing” with regard to asylum seekers who come to Europe, we agree that it does not at the present moment appear fair or expressing sufficiently solidarity taking the number of arrivals into account compared to the size of the population, the economy etc.”¹⁴⁵ Because this system was established by the EU itself, the report quotes the ECRE document in which ECRE suggests “Europe must act now to devise an efficient responsibility-sharing regime that serves European solidarity and promotes the integration of people who seek, and deserve, international protection.”¹⁴⁶

According to the findings of the ECRE from 2006, the “Dublin Regulation creates unequal burdens depending on the state’s geographical location.”¹⁴⁷ States that have a long external border with third countries are supposed to be transit states; so for these reasons are they the ones responsible for all refugees who enter the territory of the EU?¹⁴⁸ The article by Papadimitriou and Papageorgiou was written in 2005 and the authors stated that “if a court in a Member State, examining a soon-to-be-transferred-to-Greece asylum seeker, rules that Greece is no longer to be considered a safe third country for a particular—or any—asylum seeker, the provisions of the Regulation would no longer be able to fully apply throughout the EU.”¹⁴⁹ Since the practice of the Greeks have received international attention, the UK, Norway, The

¹⁴⁵ Norwegian Helsinki Committee, Greek Helsinki Monitor and NOAS, “A Gamble With the Right to Asylum in Europe, Greek Asylum Policy and the Dublin II. Regulation,” 2008, 47.

¹⁴⁶ Ibid., 47.

¹⁴⁷ ECRE, “Summary Report on the Application of the Dublin II Regulation in Europe,” March 2006, 24.

¹⁴⁸ Norwegian Helsinki Committee, Greek Helsinki Monitor and NOAS, “A Gamble With the Right to Asylum in Europe, Greek Asylum Policy and the Dublin II. Regulation,” 2008, 47.

¹⁴⁹ Panayiotis N. Papadimitriou and Ioannis F. Papageorgiou, “The New Dubliners: Implementation of European Council Regulation 343/2003 (Dublin II) by Greek Authorities,” *Journal of Refugee Studies* (September 2005): 314.

Netherlands, Sweden, Belgium, Iceland and Germany have suspended transfers to Greece.¹⁵⁰

Recently the European Court of Human Rights had made a final judgment to a case that will be analyzed in the next session.

3.3.1 The Most Recent Case: M.S.S. v. Belgium and Greece

M.S.S. is an Afghan man who arrived to Belgium through entering Greece in 2008. As Belgium was not responsible for the examination of the application, in accordance to the Dublin II Regulation, the man was sent back to Greece. Beforehand, the UNHCR has informed the Belgian Officials that the circumstances and deficiencies of the asylum system in Greece are not promising, therefore suggested to suspend the transfer. Belgium sent back M.S.S. to Greece, where he was immediately put to detention to horrible and inhuman circumstances. After the release, he tried to leave Greece but once again he was caught and put to detention. After his release, because of no adequate reception conditions available, he was living on the street. His application was lodged at the European Court of Human Rights in June 2009. At the Court, on the one hand, the charges were against Greece for violating Article 2¹⁵¹ and 3¹⁵² of the ECHR and

¹⁵⁰ECRE, „The European Court of Human Rights Condemns Belgium and Greece,” 21 January, 2011, http://www.ecre.org/files/2011_01_21%20ECHR%20MSS%20case%20_ECRE_final-1-1.pdf (accessed May 31, 2011)

¹⁵¹Article 2 of the European Convention of Human Rights: Article 2 – Right to life 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a, in defence of any person from unlawful violence; b, in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c, in action lawfully taken for the purpose of quelling a riot or insurrection.

¹⁵² Article 3 of the European Convention of Human Rights: Article 3 – Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

also for Belgium to violate Article 2 and 3. In addition because there was no efficient remedy from the Belgian side they were also charged for violating Article 13.¹⁵³

In the decision of the Court, the judges describe that - relating to the concerns previously mentioned relating to the geographical location of Greece – they acknowledge the difficulties of external fails to make it easier.¹⁵⁴ However they also state that this fact does not absolve the obligation of the Member States to give adequate treatment and basic fundamental rights. The judgment points out that Greece has violated Article 3.¹⁵⁵ Regarding the Belgian authorities the Court has considered them also violating Article 2 and 3, because Belgium should have re-considered the transfer of the applicant to Greece. The base for reconsideration should have been noticed by Belgian authorities from the alarming reports from various international bodies stating that the asylum system is not working sufficiently in Greece. In conclusion, the Court has declared both Greece and Belgium violating articles of the ECHR. This is considered a very important case, but opinions and criticism are arguing differently.

In addition to the Court judgment, one of the judges, Judge Rozakis, who is the vice-president of the ECHR and a Greek national, has added his additional opinion. Although he is in full agreement with the judgment of the ECHR, he still emphasizes the fact that 88% of the immigrants today arriving to the European Union, enter through the territory of Greece. Therefore he found it important to add that

In these circumstances it is clear that European Union immigration policy – including Dublin II – does not reflect the present realities, or do justice to the disproportionate burden that falls to the Greek immigration

¹⁵³ Article 13 of the European Convention of Human Rights: Article 13 – Right to an effective remedy: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

¹⁵⁴ Paragraph 223 of *M.S.S. vs Belgium and Greece*, Council of Europe: European Court of Human Rights, January 21 2011, accessed through RefWorld, <http://www.unhcr.org/refworld/docid/4d39bc7f2.html> (accessed May 14, 2011)

¹⁵⁵ European Court of Human Rights, Press Release (no.043), “Belgian Authorities Should Not Have Expelled Asylum Seeker to Greece,” January 21 2011, Accessed through Statewatch.org, <http://www.statewatch.org/news/2011/jan/echr-prel-belgium-greece.pdf> (accessed May 28, 2011)

authorities. There is clearly an urgent need for a comprehensive reconsideration of the existing European legal regime, which should duly take into account the particular needs and constraints of Greece in this delicate domain of human rights protection.¹⁵⁶

The M.S.S. case has proved that while Greece has several problems and difficulties of its own asylum system, there is evidence that the situation in Greece is not only because Greece has a non-EU-compatible asylum system but the Dublin system puts a higher burden on the Greek system as well.

3.4 Evaluation of recent judgment and situation

The case of M.S.S had a huge impact on those working in the area of asylum and policy making as well. It is considered an important evaluation of the current system of the EU. The judgment has not only judged the actions and situation in Greece, but has also highlighted the deficiencies of the European asylum system. While many observers had commented on the case as a success to prove the failures of the Greek system, Cecilia Malmström, European Commissioner for Home Affairs stated that

The judgment does not affect the underlying principles of the functioning of the Dublin system: to have a clear system to identify which Member State is responsible, to examine an asylum application, to guarantee effective access to the procedures of determining refugee status, and to prevent abuse of asylum procedures in the form of multiple applications. However, the evaluation of the Dublin system made by the Commission has shown that there is room for improvement.¹⁵⁷

While the Commissioner comments the case very carefully, other members of the European Parliament have various comments regarding the case. Regarding the situation in Greece there

¹⁵⁶ Opinion of Judge Rozakis of M.S.S. vs Belgium and Greece, Council of Europe: European Court of Human Rights, January 21 2011, 58. Accessed through RefWorld, <http://www.unhcr.org/refworld/docid/4d39bc7f2.html> (accessed May 14, 2011)

¹⁵⁷ Cecilia Malmström at European Parliament debate, February 2011, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20110215+ITEM-013+DOC+XML+V0//EN&language=EN> (accessed May 23, 2011)

are members who have been emphasizing for instance the less compelling behavior of Turkey. Barry Medlener blames Turkey for letting all immigrants to Greece and he adds that “the European asylum legislation should be a great deal more stringent. Let us be honest: 99% of asylum seekers are, in fact, not asylum seekers at all, but economic fortune seekers abusing our asylum laws.”¹⁵⁸ Apart from the extreme opinions, many of the representatives have highlighted the importance of the case for a possible reform of the EU asylum policy. Gesine Meissner makes an important remark regarding the whole crisis in the EU asylum matters and states that the EU needs a sensible asylum policy that is truly based on fundamental rights and the promotion of human rights and the burden on the Southern European states should lessen.¹⁵⁹ In conclusion, the case has further pushed the debate of the Dublin system and not only human rights organizations and the UNHCR are calling for a better system but also actors in the Parliament. How the Commission will revisit the Dublin system is the task of the future but it should definitely revisit the fundamental moral principles laid down in EU documents as well and consider them as the building blocks of a possible new system.

From the side of the ECRE, the Secretary General has evaluated the case by the following: “This judgment is a major blow to the Dublin system. The assumption that all EU Member States respect fundamental rights and that it is therefore safe to automatically transfer asylum seekers between EU countries no longer stands. Europe must seriously rethink the Dublin system.”¹⁶⁰ The Organization of ECRE straightforwardly expresses the need to abolish the Dublin

¹⁵⁸ Barry Medlener at European Parliament debate, February 2011, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20110215+ITEM-013+DOC+XML+V0//EN&language=EN> (accessed May 23, 2011)

¹⁵⁹ Gesine Meissner at the European Parliament Debate, February 2011, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20110215+ITEM-013+DOC+XML+V0//EN&language=EN> (accessed May 23, 2011)

¹⁶⁰ ECRE, „The European Court of Human Rights Condemns Belgium and Greece,” 21 January, 2011, http://www.ecre.org/files/2011_01_21%20ECHR%20MSS%20case%20_ECRE_final-1-1.pdf (accessed May 31, 2011)

system and have it “replaced by a more humane and equitable system that considers the connections between individual asylum seekers and particular Member States.”¹⁶¹

Through the case of Greece one could see that the contradictions in the EU system are significant and it does not only have an impact on the Member States but more importantly on the asylum seekers. As the different national legislations and the understanding of the directives are not ‘uniform’, asylum seekers are treated differently in each Member State. If the underlying principles would weight more in the policy making of the EU, the EU could diffuse its norms to the policies and mentality of the Member States. As Bjarte Vandvik, Secretary General of ECRE puts it “Europe must act now to devise an efficient responsibility-sharing regime that serves European solidarity and promotes the integration of people who seek, and deserve, international protection. As long as the Dublin system continues in operation, Europe can never build a true Common Asylum System.”¹⁶²

¹⁶¹ ECRE, „The European Court of Human Rights Condemns Belgium and Greece,” 21 January, 2011, http://www.ecre.org/files/2011_01_21%20ECHR%20MSS%20case%20_ECRE_final-1-1.pdf (accessed May 31, 2011)

¹⁶² ECRE Press Release, “Dublin Mechanism: Obstacle to the Future European Asylum System,” 31 March, 2008, <http://www.ecre.org/files/Dublin%20mechanism%20obstacle%20to%20EAS.pdf> (accessed June 1, 2011)

Conclusion

In the thesis the aim was to present the moral principles of the European Union and the contradictions evolving from the declared principles and the reality that has no connection to the principles. While the EU asylum system has been set for more than ten years, the reality, its implementation, has shown that the system has many contradicting characteristics.

The paper contributes to the better understanding of tensions in the European Union through the example of asylum policy. Because the Member States are responsible of implementing the agreed policies, the reality and feasibility of the policies will be seen only at the implementation. In the thesis the Dublin II. Regulation was analyzed to interpret the contradictions already on the level of the principles. The implementation of the regulation, in the case of Greece has proved that while implementation is a technical action, the causes of actions can lead to extreme circumstances, like the vast amount of asylum seekers on the streets of Greece. Although Greece is responsible to implement the policies of the EU in an adequate way, the analysis of the policy and reality have shown that the Member State actions could be more promising to the morals of asylum, if the supranational legislation would be using its guiding principles.

To conclude the main finding: successful policies can be built if the basics are laid down properly. In the case of the asylum system in Europe the basics are laid down but there are certain gaps in the system. For this reason the system built up stands on a shaky ground.

Due to the constraint in time and space the thesis is limited to the case of Greece and the specific debate about the tension between the principle of Dublin II Regulation and the consequences of implementation of the Regulation. Further research should address other asylum areas of the European Union to find out whether the same contradictions exist. This could help to draw conclusions on the whole asylum system of the EU. Further research could also analyze the principles of the EU and why and how they are not seen in the law-making and the implementation.

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