

Chapter 12

Access to Justice for asylum seekers.

Is the right to seek and enjoy asylum
only black letter law?

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12.1. Introduction

The subject access to justice for asylum seekers is very topical. Many asylum seekers try to reach Europe in order to be recognised as refugees and to find protection from injustice in their countries of origin. However, at the moment the focus is on the interest of European States. After more than one million asylum seekers crossed the Aegean Sea in 2015, EU Member States responded by closing their borders thus displaying a lack of solidarity with the frontline States and finally on 19 March 2016 by concluding the so called EU-Turkey deal in order to prevent asylum seekers leaving Turkey for Greece and obliging Turkey to take asylum seekers back. In effect, after building the Common European Asylum System, which confirms obligations under the Refugee Convention, and consists of, among other legal requirements, the Procedures Directive guaranteeing fair and efficient procedures to asylum seekers, the legal pathways to Europe have become more and more restricted.

The important issues at stake are reception capacity, solidarity between EU States, between the EU and other European States and solidarity with asylum seekers,¹ the right to seek asylum and the concept of safe third country or first country of asylum.² But for the EU it seems to come down to the following three questions:

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- 1 Compare Madeline Garlick, *Solidarity Under Strain. Solidarity and Fair Sharing of Responsibility in Law and Practice for the International Protection of Refugees in the European Union*, (diss. Nijmegen), Mc Plan, Mont-St-Guibert, Belgium 2016.
 - 2 Proposal for a common EU list of safe countries of origin, 9 September 2015, COM(2015) 452 final and Amendment of the recast of the Procedures Directive (Directive 2013/32/EU).

- (1) How do we deal with the burden of receiving more than one million asylum seekers?
- (2) How can we prevent asylum seekers crossing the external borders?
- (3) How can we oblige third countries to take back asylum seekers who have passed through their countries on their way to the EU?

In this atmosphere the asylum seekers' perspective is often missing. For asylum seekers access to justice is the central issue. Access to justice is a broad term with different layers. Firstly, the term is used to express the right of *access to a court of law*, which includes all elements of a fair trial, such as access to an independent judge and an effective remedy and it assumes that this access is financially affordable. Affordable legal aid is also part of access to justice within the meaning of access to a court of law. Secondly, access to justice may encompass *access to the law*, the formal law as it is laid down in legislation and jurisprudence. This not only presupposes knowledge of the law and of the rights it grants and of the possibilities to claim these rights, but also that the law functions, that it is effective, that the formal law is not just black letter law. Thirdly, access to justice may be used to express that everybody should have the right to a *fair solution*, to justice in a very broad sense. Justice in the sense of a fair solution may be required by law but it may be understood as rights that are not or not yet recognised by law: such as 'the right to shelter and health care' for illegally residing migrants. The ideas about justice may not be in conformity with formal law. Asylum seekers whose claims have been rejected and who have lost their appeal before an independent judge may still feel that they have not found access to justice.

12.2. *Sociology of law*

In the sociology of law it is known that there are many obstacles to attaining justice in the first sense (access to the courts). As a result, only a very small portion of all legal problems is solved through the legal system and an even smaller portion leads to a court case. According to Felstiner, Abel & Sarat, this is due to the transformation of law that must be made before a problem can be solved by the legal system.³ This transformation leads to problems of naming, blaming and claiming. In short: people have to recognise that their problem is a legal problem (naming), they have to know whom they can hold responsible (blaming) and after that they have to find out how to use the legal system (claiming).

3 W.F.L. Felstiner, R.L. Abel & A. Sarat, 'The emergence and transformation of disputes: naming, blaming, claiming', *Law & Society Review* 1981, p. 613-654.

This is all different when we look at asylum seekers. They don't have difficulty naming and blaming. Naming happens in the country of origin at the moment the asylum seekers realise that they have to flee from persecution and that their government is to blame. Their main problem is claiming; they all have to find a country of refuge where they can claim to be recognised as refugees and obtain a residence permit. The obstacles to attaining access to justice with which asylum seekers are confronted are, therefore, of a different order. Even if there were full transposition of EU law into national laws – which is not the case: we do not yet have a harmonised system of norms – even if there were fair implementation of norms in practice – which is not the case: the law in the statute books, the Procedures and Reception Directives, and the Dublin Regulation, are often not applied in practice – even if transposition and implementation and harmonisation were realised, we could hardly speak about access to justice as long as there is no access to the territory.

It might be useful to develop a specific access to justice theory for asylum seekers and to recognise that instead of naming, blaming and claiming, asylum seekers are confronted with the following three other obstacles to attaining justice: the obstacles of access to the territory, access to the asylum procedure and access to a fair and durable solution. I will elaborate on each of these obstacles below.

12.3. *Access to the territory*

The first and most important obstacle is getting *access to the territory*: If we imagine a legal iceberg in the field of asylum, the tip of the iceberg would not represent the few cases that reach the courts, but would represent the difficulties with which asylum seekers are confronted when they try to reach Europe safely. For years Member States have more and more openly tried to close the doors of the Fortress of Europe. For a long time there have been prolonged gate checks, visa requirements,⁴ carrier sanctions,⁵ readmission agreements, etc.. It is difficult if not impossible for asylum seekers to legally enter the EU without a valid visa. And the new policies and proposals go even further. Member States on their own initiative have closed their borders. Barbed wire has appeared around Member State after Member State. Instead of criticising Hungary for closing its border, the example has been followed. Safe zones have been built and quotas established

4 Regulation 539/2001.

5 Art. 26 of the Schengen Implementation Agreement and Art. 4 of Directive 2001/51. See also: S. Scholten, *Privatisation of Immigration Control? A socio-legal Study on the Role of Private Transport Companies in the Netherlands and the United Kingdom*, (diss. Nijmegen), Ipskamp Drukkers 2014.

(Austria 37,500 a year).⁶ The idea of open borders within the EU seems to have been abolished. The EU is divided: only 17 of the 27 countries have taken any responsibility for asylum seekers, 10 Member States have refused to cooperate. The solution found has not been to put pressure on these countries - although the European Commission has proposed the imposition of a fine of 250,000 euro on the unwilling countries for each person they refuse⁷ - or to help them by relieving them of some of the burdens, but to conclude the EU-Turkey deal.

And at sea, Frontex has been in action, officially to save asylum seekers from drowning but also to push back the loaded boats and return them to where they came from, without access to justice for the asylum seekers being guaranteed.⁸ Since 25 February 2016 NATO has also been helping with surveillance in the Aegean Sea, outside the territorial zone of the EU. In fact NATO is helping to guard the Turkish borders in this way and to prevent asylum seekers from entering Europe without any guarantee of non-refoulement.

12.4. *So how to reach Europe?*

By land, in a closed truck through Hungary⁹ or on a bicycle via the Russian-Norwegian border?¹⁰ By air, deep frozen and hidden in the landing gear?¹¹ By sea,

6 'Migrant crisis: Austria to slash asylum claims', *BBC News*, 20 January 2016.

7 The proposal formulates it as a choice: 'The Member State which temporarily does not take part in the corrective allocation must make a solidarity contribution of EUR 250,000 per applicant to the Member States that were determined as responsible for examining those applications.' Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 4 May 2016, COM (2016) 270; <eur-ex.europa.eu/procedure/NL/2016_133?qid=1462976943745&rid=1>.

8 Ruben te Molder & Laurie Kampkuiper, 'Frontex: is de grens bereikt?', *A&MR* 2016, nr. 1 p. 10-15; M.H.A. Strik, 'Frontex de grenzen van zijn mandaat', *Justitiële verkenningen* 2015, nr. 3, p. 47-56.

9 On 28 August, 71 dead asylum seekers were found in a truck at the Hungarian-Austrian border.

10 According to Norwegian law, it is prohibited to cross the Russian-Norwegian border on foot or to take a hitch hiker across this border without the necessary documents. However, the Norwegian laws do not mention bicycles. So apparently many asylum seekers buy bicycles to cross the border at Storskog, close to Kirkenes, the only border crossing between Russia and Norway.

11 The official possibilities to flee by air diminish. In the Netherlands for example currently hardly any asylum seeker enters via Schiphol airport. According to the Dutch Refugee Council AC Schiphol registered (Art. 6 Aliens Act) 619 asylum seekers in 2015.

together with 40 other asylum seekers, dressed in fake life jackets in a rubber vessel crossing the Mediterranean?¹²

Where are the necessary legal pathways? For years the UNHCR pointed out that legal pathways to Europe would be necessary to prevent destabilisation of the regions.¹³ It stressed the necessity for resettlement, humanitarian visas, improvement of the possibilities for family reunification and scholarships and sponsorships. Nothing of this has happened and, indeed, the regions have been destabilised with, as a result, more than a million asylum seekers entering in 2015. The reaction of the EU Member States has been painfully lacking in any solidarity. There has been no solidarity with the overburdened regions, no solidarity between the Member States, let alone with the asylum seekers seeking access to justice. The plans by the European Commission to enhance legal avenues into Europe have so far remained nothing but good intentions.¹⁴

EU Member States are reluctant to take responsibility for people intercepted or rescued in international waters. However, since the ECHR condemned the push backs and collective expulsions by Italy to Libya in the important *Hirsi* judgment¹⁵ more asylum seekers than before have been saved in the Mediterranean and brought to Italy. Still, it remains nearly impossible for asylum seekers who have been pushed back to get access to the EU. In practice it is of course very difficult for refused asylum seekers to have a Member State convicted for not fulfilling its responsibilities. Member States at the borders of the Mediterranean are still shamelessly pushing them back. For example Spain has concluded agreements with Mauritania and Senegal to have coastguards preventing asylum seekers fleeing to the Canary Islands; and there are the so-called hot returns by Spain to Morocco and Hungary to Serbia.¹⁶ This might also

12 'Over 5,400 people are estimated to have lost their lives on migratory routes around the world in 2015, and the first half of 2016 has only seen the numbers increase. The Mediterranean alone witnessed a record number of at least 3,770 deaths in 2015, with numbers climbing in 2016. The International Organization for Migration (IOM) estimates that over the last two decades, more than 60,000 migrants have died trying to reach their destinations, and this only includes deaths for which there is some record. Often occurring far from the public eye, an unknown number of deaths go unrecorded.' IOM, *Fatal Journeys Volume 2: Identification and tracing of dead and missing migrants*, 2016.

13 Recent UNHCR EXCOM 2 March 2016, 65th meeting p. 4.

14 Communication from the Commission to the European Parliament and the Council, Brussels 6 April COM (2016) 197 final: Towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe. See also: COM(2015) 240 final and COM(2016) 270 final.

15 EHRM 23 February 2012, appl. no. 27765/09, *Hirsi Jamaa e.a. v. Italy*.

16 Margarita Martínez Escamilla *et. al.*, 'Hot Returns: When the State Acts outside the law.' Legal report, <eprints.ucm.es/27221> 27 June 2014.

be an indirect consequence of, or a response to, the lack of solidarity from other Member States and their resistance to reforming the Dublin system.

The most recent and far reaching obstacle is the much contested EU-Turkey deal. In exchange for money, skipping visa restrictions for Turkish citizens, and reopening the negotiations for the accession of Turkey to the EU, Turkey has promised to take back all asylum seekers (Syrians and others) and to prevent them fleeing to the EU. The deal also foresees possibilities for resettlement. For each Syrian refugee returned to Turkey, from the Greek islands, the EU will resettle another Syrian refugee from Turkey (the so-called 'one for one' approach), to a maximum of 72,000 Syrian refugees (including the 18,000 already promised). Priority will be given to those who have not tried to enter the EU illegally. So far, the expectations are not high. The EU will start larger humanitarian resettlement programmes (the Voluntary Humanitarian Admission Scheme) only after there has been a structural decrease in the number of arrivals and only if the number reaches 72,000, but there has been no agreement so far on when there will be a structural decrease. Furthermore there has been disagreement over which refugees should be resettled. The UNHCR has urged that it should be vulnerable people, while the EU would prefer to accept the highly educated.¹⁷

And what are the criteria for resettlement? We know that higher educated people are not brought in under the resettlement programme for Europe.¹⁸ There is hardly any control on the way the authorities deal with requests for resettlement by Syrian refugees. With regard to these questions and these small numbers one cannot say that there are realistic legal pathways.

There are serious questions about the legality of the EU-Turkey deal. According to the deal some Syrians will be resettled (however not those who have been sent back from Greece to Turkey¹⁹) but what will happen to other returned asylum seekers, refused by Greece? This aspect of the deal seems to be discrimination based on nationality. But the main problem is that Turkey is regarded as a safe third country and as a first country of origin. Both of these assumptions can be

17 Compare Parliamentary Assembly, Doc. 14028, 19 April 2016, *The situation of refugees and migrants under the EU-Turkey, Agreement of 18 March 2016*, rapporteur Tineke Strik,

18 Wilmer Heck, 'Erdogan: 'EU komt deal niet na', klopt dat?', *NRC Handelsblad* 28 juli 2016.

19 The latter do receive residence permits upon return if they were not yet in possession of such a permit.

and are contested.²⁰ Turkey didn't sign the 1967 New York Protocol to the Refugee Convention, which means that it retained the geographical limitation that exempts it from extending the Convention to cover non-European refugees. According to Amnesty International, Turkey refoules asylum seekers at the Syrian border.²¹ Human Rights Watch even reported that Turkey's border guards shot asylum seekers at the borders.²²

And what about the current situation in Turkey after the failed coup, in which the principle of a free press was abolished and judges and university professors were dismissed?²³ After the failed 15 July coup, Turkey's Government declared a state of emergency and subsequently on 21 July notified the Council of Europe that it might derogate from the European Convention on Human Rights.²⁴ President Erdogan even suggested that the death penalty should be introduced for the coup leaders. Since the EU-Turkey deal and now that the western Balkan route has been closed, refugees are increasingly trying to reach the EU via more dangerous routes, for example via Libya to Italy and via Bulgaria's eastern border, where they meet more and more fences.²⁵

We can without any hesitation conclude that there are major obstacles to accessing justice in the sense of access to the territory for asylum seekers. Member States do not even hide that they do everything to prevent asylum seekers gaining access to EU territory. We must protect our external borders is

20 See for example: UNHCR High Commissioner for Refugees, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23 March 2016; Sergio Carrera & Elspeth Guild, EU-Turkey plan for handling refugees is fraught with legal and procedural challenges, 10 March 2016, CEPS Thinking ahead for Europe; Den Heijer *et. al.*, 'Coercion, Prohibition, and great expectations', *CMLR* June 2016 (translated in Dutch: *NJB* 2016 nr. 24, p. 1672 ff.). See also: DRC/ECRE, *Desk research on application of a safe third country and first country of asylum concepts to Turkey*, May 2016.

21 Amnesty International 31 March 2016: <www.amnesty.nl/nieuwsportaal/nieuws/turkije-stuurt-op-grote-schaal-vluchtelingen-terug-naar-syrie>.

22 Human Rights Watch: *Turkey: Border Guards Kill and Injure Asylum Seekers*, 10 May 2016.

23 According to Amnesty International there is 'credible evidence that detainees in Turkey are being subjected to beatings and torture, including rape, in official and unofficial detention centres in the country. The organization is calling for independent monitors to be given immediate access to detainees in all facilities in the wake of the coup attempt, which include police headquarters, sports centres and courthouses. More than 10,000 people have been detained since the failed coup.' Amnesty international 24 July 2016.

24 It is according to Art. 15 ECHR possible to derogate from the obligations of this Convention in emergency situations.

25 Read for example: Slovenians faith in a fence, Deutsche Welle, 4 August 2016-10-21: <www.dw.com/en/slovenians-faith-in-a-fence/a-19450017>.

the ever repeated message. Many asylum seekers do not survive the dangerous journey to Europe. Nevertheless they keep coming. In the first seven months of 2016, 250,000 asylum seekers managed to reach the EU, since the EU-Turkey deal, mainly to Italy. This number is remarkably lower than the one million asylum seekers in 2015. One could say that at the moment the argument of the high numbers can no longer be an argument for the EU for not organising the legal pathways for which the UNHCR has urged. Besides, legal pathways will probably contribute to further lowering the number of spontaneous arrivals.

12.5. *Access to the asylum procedure*

The second burden is obtaining *access to the asylum procedure*: Lack of access to the territory also means lack of access to an asylum procedure. But even if asylum seekers reach the EU access to an asylum procedure is problematic. Of course we have the important recast of the Procedures Directive²⁶ and Art. 47 of the Charter which require fair procedures for every asylum seeker. The purpose of the recast of the Procedures Directive is to establish common standards for Member States' procedures for granting and withdrawing refugee status. It guarantees, for example, access to procedures, the right to appeal an asylum decision, the right to remain in the country during appeal procedures and the right to legal aid.²⁷ However, this Directive also contains many derogation clauses and many optional clauses and a part of it is still black letter law. Not every Member State has implemented the Directive but even if it has the law in the statute books is not always law in action. For example in Germany the recast of the Procedures Directive has not yet been implemented. The European Commission has started an infringement procedure. Besides, there are signs that in other countries the Procedures Directive has been implemented in the most minimal way. There is, at the very least, reluctance to implement the Directive in a full and positive way.²⁸

²⁶ Recast procedures Directive (Directive 2013/32/EU).

²⁷ American research shows that nationwide only 37 percent of all immigrants in the U.S. had legal representation, and only 14 percent of immigrants had a lawyer (Michelle Waslin, 'Access to Legal Representaion is Unequal and the Consequences are serious' in Immigration Courts, Right to Council Immigrants', Paper submitted 28 September 2016: <immigrationimpact.com/2016/09/28/immigrants-access-legal-representation-unequal-consequences-serious>). I am not aware of European research with regard to legal representation of asylum seekers, but regarding the consequences of not having access to legal representation, such research would be useful.

²⁸ The European Commission evaluation report on the application of the Directive on minimum standards on procedures for granting and withdrawing refugee status: <ec.europa.eu/dgs/home-affairs/news/intro/docs/com_2010_465_en.pdf>.

The Dublin system is aimed at sharing responsibilities, preventing refugees in orbit and preventing forum shopping, but in practice seems to have turned out to be contra productive as Member States are reluctant to take responsibility for refugees.²⁹ The Dublin responsibility rules are based on the idea of a harmonised asylum system but the situation for asylum seekers in the EU is far from harmonised and the responsibility division rules, which are primarily based on the idea that the country of first entry or where the asylum claim is first lodged, leads to frustration on the part of both asylum seekers and the countries at the external borders.³⁰ For the asylum seekers this leads to non-registration in the first country of arrival and throwing away any documents that can prove that they entered the EU. The Member States of first asylum entry close their eyes to this and are tempted to keep their asylum system below the EU norms in order to prevent returns from other Member States (or prevent Dublin claims). Other Member States close their borders³¹ in order to prevent secondary movements or to be held responsible if they cannot return the refugees.³² In short, the Dublin system has failed.³³

But the main problem of access to an asylum procedure at the moment exists for the around 50,000 asylum seekers who are in Greece. So far ‘the total number of

From the conclusion (be aware: concerns *first* Procedures Directive): ‘This evaluation confirms that some of the Directive's optional provisions and derogation clauses have contributed to the proliferation of divergent arrangements across the EU, and that procedural guarantees vary considerably between Member States. This is notably the case with respect to the provisions on accelerated procedures, ‘safe country of origin’, ‘safe third country’, personal interviews, legal assistance, and access to an effective remedy. Thus, important disparities subsist. A number of cases of incomplete and/or incorrect transposition and flaws in the implementation of the Directive have also been identified. The cumulative effect of these deficiencies may make procedures susceptible to administrative error. It is noteworthy, in this regard, that a significant share of first instance decisions is overturned on appeal. The present report shows that the objective of creating a level playing field with respect to fair and efficient asylum procedures has not been fully achieved.’

29 René Bruin, Stefan Kok & Ashley Terlouw, ‘Dublin, Interstatelijk vertrouwen is een fictie’, *Justitiële Verkenningen*, 3-15; Stefan Kok, ‘Hoe functioneert het Dublinsysteem? Over de weerbarstige praktijk’, *A&MR* 2016 nr. 6/7 p. 291 ff.

30 Compare Den Heijer *et. al.*, ‘Coercion, Prohibition, and great expectations’, *CMLR* June 2016 (in Dutch: *NJB* 2016 nr. 24, p. 1672 ff.).

31 Art. 26 Schengen Border Code. Regulation 562/2006 allows for reintroduction of internal border controls for periods of two years.

32 Compare: Guild *et al.* ‘Enhancing CEAS and alternatives for Dublin’, Study for the LIBE Committee, July 2015.

33 DG Migration and Home Affairs, Evaluation of the implementation of the Dublin III regulation, 18 March 2016.

pledges remains low at 7,463 - only 11% of the total target of 66,400 to be relocated from Greece to other EU Member States by September 2017'.³⁴ After the closure of the borders between Macedonia and Greece in 2015 they found themselves between the Scylla of the Mediterranean and a possible return to Turkey and the Charybdis of the closed Macedonian borders and the reception camps without a real prospect of an asylum procedure. Due to the EU-Turkey deal the new arrivals in Greece diminished in April 2016. Nevertheless, according to the Parliamentary Assembly report refugees at risk: 'as a result of the coordinated closure of borders along the western Balkans route, there are now 46,000 refugees and migrants blocked in mainland of Greece and a further 8,500 on the islands. Those on the mainland who qualify for international protection will be forced to stay in Greece, whose reception and integration capacity remains seriously insufficient, until relocated to another country participating in the European Union's relocation scheme – or until they find a clandestine way to continue their journey north, most probably in the hands of migrant smugglers. Those on the islands are for the most part detained in inadequate conditions, and in all cases subject to the vagaries of the dysfunctional Greek asylum system for assessment of whether or not they will be returned to Turkey. In 2016, 89% of arrivals were from Syria, Afghanistan or Iraq but the asylum seekers who arrived after the closing of the Macedonian border in February, were stuck over in Greece.'³⁵

Refugees on the mainland do not fall within the EU-Turkey deal, but Greece has to offer them a fair asylum procedure in accordance with the Procedures Directive. These procedures have hardly started, as the Greek Government first had to organise the reception of tens of thousands of refugees. Nevertheless, this is of course not a good reason for not organising access to the procedure. Besides, the other Member States should, to reduce the burden on Greece, comply with their promise to relocate 66,000 refugees.

Since 2011, both European Courts have regarded the procedures and the reception of asylum seekers in Greece as insufficiently fair.³⁶ At the time of writing, August 2016, the situation seems to be even worse. Until 20 March 2016 the asylum seekers and other migrants could freely enter and leave the hotspots

34 See: <data.unhcr.org/mediterranean/documents.php?page=1&view=grid> consulted 14 August 2016.

35 As of June 10th there were 57,000 asylum seekers stranded in Greece. See COM(2016)817. More than 8,500 of them remained on the Islands with hotspots.

36 ECHR 21 January 2011, appl. no. 30696/09, *MSS v. Belgium and Greece*; CJEU 21 December 2011, C-411/10 *NS* and C-493/10 *M.E.*

on the islands of Lesbos and Chios; since then this has no longer been possible and the hotspots have been turned into detention centres. Procedures have gradually been established, but according to the Parliamentary Assembly the Greek asylum system lacks, among other things the capacity to ensure timely registration of asylum applications, issue first instance decisions or determination of appeals. Furthermore, remedies against decisions to return asylum seekers to Turkey do not always have automatic suspensive effect.³⁷ Moreover, the Assembly warns that the detention of asylum seekers in the hotspots on the Aegean Islands may be incompatible with the requirements of Art. 5 of the ECHR, due notably to procedural failures undermining the legal grounds for detention and adequate detention conditions. On 19 April 2016, three Afghan refugees lodged a complaint with the ECtHR against Greece: they considered their detention in the hotspot on Chios to be a violation of Art. 5 ECHR, because of the duration and the circumstances of their detention and the lack of information on the reason for the detention.³⁸ On 26 May, the Court asked the parties if the detention circumstances in the hotspot in Chios had led to a violation of Arts. 3 or 5 and if the length of the detention had been reasonable, taking into account the (lack of) progress in the processing of the asylum claims, and if the detainees had been informed in an understandable language about the reasons for their detention, in conformity with Art. 5(2) ECHR.

According to the European Commission, by 12 June 2016 the Appeals Committees had decided in 70 cases of Syrian refugees that Turkey was not a safe country.³⁹ On 16 June, the Greek parliament adopted an amendment to the new Greek Law (Law 4375, entered into force in April 2016) with a view to introducing a new Appeals Body. This happened after the Greek Government disagreed with the outcome of these appeals, and decided to review the composition of the Appeals Committees). The Appeals Committees had decided in almost all appeals that the claims could not be declared inadmissible; they were not convinced that Turkey would be a safe third country within the sense of Article 38 APD. Two appeals have been rejected so far: in these cases the applicants have filed a complaint with the ECHR. In one of the two cases, the Court has already decided not to take an interim measure.⁴⁰

37 See the Resolution of the Parliamentary Assembly of 19 April 2016. Doc. 14028 Report; Tineke Strik, 'Gestrand in Griekenland', *A&MR* 2016, nr. 6/7 p. 311 ff.

38 ECHR introduite 19 avril 2016, 22696/16, *Javid Raoufi v. Greece*, <hudoc.echr.coe.int>.

39 Second Report on the progress made in the implementation of the EU-Turkey; Brussels, 15.6.2016 COM(2016) 349. And: ECRE 17 June 2016: The Lesbos hotspot: refugees stuck on the island, <http://www.ecre.org/the-lesvos-hotspot/>

40 ECHR 31181/16, *Maliki vs Greece*.

Moreover, on 22 March and 19 May, three similar applications for annulment of the EU-Turkey deal were lodged with the General of the EU Court of Justice under Article 263 TFEU. Two cases were brought on behalf of nationals from Pakistan residing in Lesbos, the third one was launched by an Afghan national staying in Athens. The applicants stated that the EU-Turkey deal exposed them to the risks of refoulement to Turkey or indirect refoulement to Pakistan or Afghanistan. Besides they complained that they were, in this way, obliged to apply for international protection in Greece, against their will. The applicants have requested that the case proceed under an expedited procedure.⁴¹

So far the Greek asylum procedure can still not be regarded as a real and functioning fair procedure. Nevertheless a start has been made. Although incomparable to the Greek disaster, all over Europe asylum seekers are confronted with long waiting periods sometimes in dreadful conditions. This is also the case in the Netherlands. In the company of some Macedonian lawyers I visited the reception centre in the former prison in de Havenstraat Amsterdam. I was shocked by the detention-like situation in which some 350 men had been living for five months. But the Macedonians were impressed and compared it to the situation of refugees at their borders, waiting in containers in the snow.

We can conclude that although the differences in this respect within the EU are enormous, access to justice for asylum seekers in the sense of access to an asylum procedure is problematic; even if they overcome the obstacle of access to the territory and manage to reach Europe, access to an asylum procedure is far from guaranteed.

12.6. *Access to a fair and durable solution*

The third obstacle is getting access to *a fair and durable solution*. It sometimes seems to be forgotten that asylum seekers do not only have the immediate right to non-refoulement as long as their claims have not been processed in a fair and efficient procedure, but that if they are refugees, they also have other kinds of rights, the right to safety and perspective in the long term. They have the right to access to justice in the widest sense: access to a fair and durable solution (*the right to enjoy asylum*). The Refugee Convention is not only about protection but also about full participation in the host country. In fact the Refugee Convention is mainly about these other kinds of rights. It requires for example in Arts. 23 and 24

41 CJEU (pending), T-192/16 *NF v. European Council*; CJEU (pending), T-193/16 *NG v. European Council*; CJEU (pending), T-257/16, *NM v. European Council*.

equal treatment with citizens with regard to elementary education, social security and health care and in Art. 21] with regard to housing treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

According to the UNHCR, 65.3 million individuals have been forcibly displaced worldwide as a result of persecution, conflict, generalized violence, or human rights violations. It estimates that 41% of those under the UNHCR's mandate were in a protracted situation by the end of 2015.⁴² As far as the Syrian refugees in Turkey are concerned, Mr. Hanno van Gemund, Protection Officer at the UNHCR with responsibility for developing and implementing programmes for refugees in Turkey, writes that Turkey houses 2.7 million Syrian refugees of whom 260,000 are in refugee camps. The living conditions of the latter are good: there is education for the children, shops, medical care. However the situation for the 90% of the other refugees, living outside the camps, is much more difficult. According to the World Food Programme, 90% of them live below the poverty line. Only 40% of the Syrian children attend school.⁴³

Within the EU, durable solutions and material rights are not always offered. Apart from the situation in Greece, in other better equipped Member States, like Germany and the Netherlands, asylum seekers are also confronted with several problems with regard to their reception and material situation.

The European Commission, which always seemed to be in favour of equal treatment for refugees and persons eligible for subsidiary protection, announced that it would investigate whether differentiation was necessary in order to prevent secondary movement.⁴⁴ In the most recent proposal to replace the Qualification Directive by a Regulation, the Commission concluded (fortunately) that support for differentiation is lacking and some Member States even stressed 'the importance of not unduly undermining integration prospects via the perception that the protection may only be temporary'.⁴⁵ So we may assume that

42 UNHCR Global trends. Forced displacement in 2015.

43 Hanno van Gemund, 'Medeverantwoordelijk voor meer dan 2,7 miljoen vluchtelingen, Europese column', *A&MR* 2016, nr. 6/7, p. 351.

44 COM (2016) 197 final.

45 Proposal for a regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, explanatory memorandum, p. 10 "On the

equal treatment for refugees and those persons with subsidiary protection will be required.

The right for a third country national to accept work in another Member State is only permitted with conditions after five years' legal stay.⁴⁶ Art. 34 of the Refugee Convention prescribes that the Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees and in particular that they shall make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings. How does this relate to the integration requirements Member States more and more also impose on refugees⁴⁷ and to the requirements of longer and longer periods of legal stay before a refugee may be naturalized?

The 1951 Convention Relating to the Status of Refugees is silent on the issue of family reunification. And although Article 8(1) ECHR grants everyone 'the right to respect for his private life and family life', Article 8 ECHR does not grant a right to family reunification. Nevertheless according to steady jurisprudence of the European Court of Human Rights (ECtHR) Article 8 ECHR does protect the family life of refugees if the interruption of family life was solely a result of the decision to flee the country of origin out of a genuine fear of persecution within the meaning of the Refugee Convention. In such cases there are insurmountable obstacles to re-establishing family life in the country of origin and family reunification in the country of refuge should be granted.⁴⁸ In 2003, the Family Reunification Directive was adopted.⁴⁹ More favourable rules for family reunification for refugees (but not for those persons with subsidiary protection) are laid down in Articles 9-12, exempting refugees from the waiting period and from complying with income, housing and integration requirements. However since the number of refugees has risen, Member States are giving an increasingly minimalistic interpretation of the requirements of Art. 8 ECHR and the Family Reunification Directive, some of them by making a distinction between family reunification for refugees and those persons with subsidiary protection. Germany and Sweden, for example, are suspending the right to family reunification for the

level of rights granted to beneficiaries, Member States did not generally support the idea of further differentiating between the two international protection statuses.'

46 Art. 14 Directive 2011/51/EU (Long-term residence)

47 In the Netherlands asylum seekers have the obligation to integrate as soon as they are recognized as refugees and have to do an integration exam within three years. Sanctions are primarily financial (a fine of 1250 euro) but failing the test can also lead to refusal of permanent status (Art. 34(1) Dutch Aliens Act.

48 For example ECtHR 1 March 2006, appl. no. 60665/00, *Tuquabo-Tekle a.o. v. the Netherlands*.

49 Directive 2003/86 on the right to Family Reunification.

latter group.⁵⁰ But there are also proposals to make the conditions for family reunification for refugees more restrictive. For example in Belgium, the special treatment given to family members of refugees will be reduced from twelve to three months after the status has been granted, and in Norway waiting periods of four years have been proposed and Sweden wants to allow family reunification only if both spouses are 21 years of age. According to Groenendijk, in several countries the waiting period has or will be introduced or existing periods extended. In Norway the government proposed to allow family reunification only after persons with international protection have worked and studied for four years in Norway. In Denmark a waiting period of three years has been introduced for beneficiaries of temporary or subsidiary protection. In Austria, a bill with a similar restriction has recently passed.⁵¹ In February 2016, Germany introduced a two-year waiting period for persons with subsidiary protection.⁵² The Swedish government proposed to suspend the family reunification for all protection categories suggesting that the suspension might be lifted for convention refugees after three years.⁵³

As there was no common definition of subsidiary protection at the moment of adoption of the Family Reunification Directive, this group doesn't fall within its scope. And as the Directive has never been reviewed, this exclusion has not yet been lifted. But what could be the justification for treating those with subsidiary protection (among them many Syrians) in this regard differently from Convention Refugees? It seems as if the Member States are simply taking advantage of this legal loophole.

50 See Mark Klaassen & Jorrit Rijpma, 'Vluchtelingencrisis, gezinsleven en het risico van een race to the bottom', *A&MR* 2016, nr. 6/7 p. 316 e.v. The CJEU in its recent judgment in the *Alo and Osso* case observed that from the recitals of Directive 2011/95 it is clear that "the EU legislature intended, in responding to the call of the Stockholm Programme, to establish a uniform status for all beneficiaries of international protection and that it accordingly chose to afford beneficiaries of subsidiary protection the same rights and benefits as those enjoyed by refugees, with the exception of derogations which are necessary and objectively justified." CJEU 1 March 2016, C-443/14, *Alo* and C-444/14, *Ossso*, par. 32.

51 996 der Beilagen zu den Stenographischen Protokollen des Nationalrates XXV. GP: <www.parlament.gv.at/PAKT/VHG/XXV/I/I_00996/fname_498905.pdf> [accessed 18 August 2016].

52 Migrationsverket, Legislative changes that will effect asylum seekers, 16 April 2016; Die Bundesregierung, Asylpaket II in Kraft: Kürzere Verfahren, weniger Familiennachzug, 17 March 2016.

53 Commissioner for Human Rights, Concept Note in the view of the Expert Brainstorming meeting on Family reunification for refugees, beneficiaries of other forms of international protection and asylum seekers, Strasbourg, 1 April 2016, prepared by Professor Kees Groenendijk.

In the Netherlands, the total waiting period for family reunification may amount to two years. At the end of 2015, the Secretary of State announced that, it might take fifteen months before a decision on the asylum application was given. Moreover the Dutch Government decided to extend the time limit for deciding on family reunification for refugees to the maximum time limit in the Directive, which is nine months.⁵⁴ This race to the bottom with regard to the possibilities for family reunification is in contradiction with the harmonisation, equal treatment and protection aims of the CEAS. As a result it may take an unacceptably long time before the families of the refugees can join them. Some asylum seekers even return to dangerous situations out of concern for their family members left behind.

In the meantime, asylum seekers are more and more confronted with the anti-migrant actions of the extreme right and xenophobic and racist reactions. As the UN Secretary General stated in his report of 21 April 2016: 'I note with grave concern that xenophobic and racist responses to refugees and migrants seem to be reaching new levels of stridency, frequency and public acceptance....'⁵⁵ So even after eventual access to the country of reception is granted to the refugees, it is far from guaranteed that they will be able to integrate within a friendly climate. To conclude, even if there is access to the EU territory and even if there is access to an asylum procedure, access to justice in the sense of access to a fair and durable solution is not guaranteed at all.

12.7. *How can access to justice be improved?*

Firstly there should be access to the territory, which means a safe and, thus, legal pathway to Europe. This has been stressed by the UNHCR for years.⁵⁶ It has subsequently been underlined by many others who also stress that this is the only way to combat human smuggling. Eduard Nazarski, director of the Dutch Section of Amnesty International has asked us to remember the Comprehensive Plan of Action, by which in 1989, 1.6 million Vietnamese boat refugees were saved. Why can't we make such a Comprehensive Plan of Action for the Syrians? It is not

54 Letter of the Dutch Secretary of State for Safety and Justice, Dijkhof, 27 November 2015, *TK* 2015-2016, nr. 19637, nr. 2086.

55 United Nations, General Assembly 21 April 2016, Seventieth session, In safety and dignity: addressing large movements of refugees and migrants, report of the Secretary-General, p. 11.

56 For example by António Guterres, Geneva 10 December 2014: High Commissioner's Dialogue on Protection Challenges, Protection at Sea. Opening remarks. See also UNHCR General Assembly 21 April 2016 A/70/59: In safety and dignity: addressing large movements of refugees and migrants. Report of the Secretary-General.

impossible, but it is a lack of will and solidarity and the fear that this will attract more asylum seekers to the EU than would otherwise come.⁵⁷ And why do we only focus on Syrians? We should not forget all the other asylum seekers. At least we should accept that people will keep coming and open the possibility for asylum seekers to apply for a visa to the EU and strive for resettlement of people who are staying in the overloaded camps in the region⁵⁸ and in third countries at the borders of the EU.

Secondly, access to a fair procedure should be guaranteed. As full implementation of the Procedures Directive was not achieved, it seems to be a good idea to replace it with a directly applicable Regulation (COM (2016) 467 final). It can however be questioned whether the content of this Regulation will really contribute to improving access to justice for asylum seekers, if the proposed further acceleration of the procedures and the obligatory safe country provisions are accepted.

An improvement in access to justice for asylum seekers cannot be expected from the proposal of the European Commission for a new recast of the Dublin regulation.⁵⁹ The proposal is not based on solidarity; it sticks with the status quo and even contains an obligation to return and negative stimuli for asylum seekers as rights will be withheld if they decide to travel onward to another Member State. Furthermore it aims to conclude other agreements with transit countries comparable with the EU-Turkey deal without taking sufficiently into account the asylum seekers' perspective.⁶⁰

The EU should also take the *Hirsi* judgment seriously and take responsibility if there is causality between a violation of the fundamental rights of asylum seekers in a third country, like Libya, or Turkey or Serbia, on the one hand, and a readmission agreement or other forms of push backs on the other hand. The proposal by the European Commission to make Union law applicable in cases of

57 Eduard Nazarski, 'De Vietnamezen gingen bijna zonder wanklank op in hun nieuwe landen', *Wordt Vervolgd*, maart 2016, nr. 3.

58 T. Strik, Resettlement Report Council of Europe. UNHCR Projected Global resettlement Needs 2016: www.unhcr.org/53408c4fda.html.

59 Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) Brussels, 4.5.2016 COM(2016) 270 final.

60 20 May 2016, COM (2016)270 final.

extraterritorial action by Frontex is hopeful.⁶¹ Moreover, Europe should invest in research for alternatives in order to offer fair procedures. In my view, the proposals on joint processing within the EU are rather promising: the establishment of a migration protection agency at EU level with joint teams of officials (asylum expert teams) who have the power to take decisions on claims submitted to Member States (or to the EU as such).⁶² This joint processing could be combined with the idea of hotspots. This, of course, requires a real, uniform and common procedure which includes lawyers and judges present at the hotspots, as well as adequate reception standards in open centres. It also requires that the EU takes responsibility for providing durable solutions to relocation for those whose requests have been positively decided, which means social inclusion and access to family reunification, education, work and free movement; and return of those whose requests have been refused, in order to avoid their staying in orbit around the hotspots.

The idea of joint processing in Europe is so much better than ideas about reception and eventual processing in the region. In the regions access to justice is a fairy tale. The idea of joint processing is not new. The UNHCR proposed it in 2003⁶³ and the EASO even started eight joint processing pilots in 2014.⁶⁴ But there still seems to be a lack of political will to join forces and competences.

Finally, as the UN Secretary General stressed, migration and development are linked. There is therefore ‘a need to strengthen the nexus between humanitarian and development assistance in responding to large movements of refugees and migrants. Humanitarian and development actors must work together towards

61 European Commission, Strasbourg, 15.12.2015 COM(2015) 671 final 2015/0310 (COD); Proposal for a regulation of the European Parliament and the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC. Preambles 28 and 29.

62 Goodwinn Gill (2015), ‘Regulating Irregular’ Migration: International Obligations and International Responsibilities’: Keynote Address at an international workshop, National and Kapodistrian University of Athens Faculty of Law, 20 March 2015, in Goodwinn-Gill (2015) *The Mediterranean Papers*. See also...Stockholm Programme 2009, 6.2.1.: the Council ...invites the Commission to finalise its study on the feasibility and legal and practical implications to establish joint processing of asylum applications.’; H. Urth, M. Heegarard Bausager, H. M. Kuhn, J. Van Selm, ‘Study on the legal and practical implications of establishing a mechanism for joint processing of asylum applications on the territory of the European Union’, *Ramboll and Eurasyllum* February 2013, HOME/2011?ERFX/FW/04; ACVZ 2016, *Delen in verantwoordelijkheid* (Sharing responsibilities; A proposal for a European Asylum System based on solidarity).

63 See UNHCR Working Paper ‘UNHCR’S three-pronged proposal’, UNHCR Geneva June 2003.

64 EASO Newsletter September 2015, ‘establishment of ‘hotspots’.

achieving collective outcomes over multi-year periods on the basis of comparative advantage, particularly in situations of protracted displacement'. He also points to the need for changing the tenor of policy and public discourse on migrants and refugees.

*'The tenor (...) must be shifted from one of threat to one of international solidarity, protection of dignity and recognition of positive contributions. Such efforts need to take address the fears and concerns of host communities, and they must be based on facts rather than assumptions and misinformation. Given the overwhelming evidence that personal contact significantly reduces prejudice, more creative ways of fostering contacts between host communities on the one hand and refugees and migrants on the other, are urgently needed.'*⁶⁵

12.8. Conclusion

In conclusion, with regard to access to justice for asylum seekers in the EU, the problem is of course that in order to realise any alternative closer collaboration, more solidarity and acceptance of responsibilities for the externalisation of EU policies will be needed. And the EU is not in the mood for this. That is not only a pity, it is very unwise. In order to succeed, the Common European Asylum System should not remain black letter law, for law in action a true asylum seekers' perspective will be needed.

The conclusions above are all rather normative. With regard to my earlier remark that there should be a specific access to justice theory for asylum seekers I do not aim at a normative theory but at a theory based on the empirical findings that access to justice for asylum seekers is – in contrast with other fields of law – not a question of naming, blaming and claiming. Asylum seekers are confronted with other obstacles on the road to access to justice. The theory should seek to analyse and understand these obstacles. One of the explanations could be that asylum seekers are seen as a burden and that obstacles are raised on purpose in order to prevent asylum seekers access to justice in Europe. Another explanation could be that asylum seekers are more and more regarded as a group instead of as individuals. Finally these obstacles could be understood by realising that asylum seekers who have not yet reached the EU are not seen as people with rights but as outsiders, not falling within the responsibilities of the EU. This is only meant as a starting point for a sociology of law theory of access to justice for asylum seekers, but it is clear that the current theories on access to justice can insufficiently

65 United Nations, General Assembly 21 April 2016, Seventieth session, In safety and dignity: addressing large movements of refugees and migrants, report of the Secretary-General, p. 11.

explain the obstacles asylum seekers are confronted with if they seek protection against persecution.

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