

The Indefinite Detention of Undesirable and Unreturnable Third-Country Nationals in Greece

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ABSTRACT

This article critically examines the use of immigration detention as a national response to the problem of “undesirable” – for public order and/or national security reasons – but unreturnable undocumented third-country nationals in Greece. The Greek legislative framework surrounding immigration detention is analysed, as is the practice of the authorities on the ground. It is argued that Greek law and practice in their area is not in line with Greece’s international obligations, both under European Union law and human rights law. Alternate solutions which could be adopted to address the problem of “undesirable and unreturnable” undocumented third-country nationals are explored, as are improvements to the existing framework of immigration detention.

KEYWORDS: undesirable, unreturnable, detention, Greece

1. INTRODUCTION

Since 2012, the Greek authorities have markedly increased the use of immigration detention to address the issue of undocumented third-country nationals (TCNs) in the country.¹ This has prompted criticism from international

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1 Greek Government, Ministry of Public Order and Citizen Protection, *Greek Action Plan on Asylum and Migration Management*, Dec. 2012, 53, available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD\(2013\)711&Language=lanFrench&Ver=rev&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD(2013)711&Language=lanFrench&Ver=rev&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864) (last visited 3 Dec. 2016): “[...] The Ministry established, within 2012, (5) pre-removal centres, thus increasing the capacity from (200) places to (4000) by the end of 2012. [...] Until recently, immigrants arrested at the borders were detained for a short period of time and then, due to the limited [...] capacity of the existing detention facilities, were released [...]”. There are not any available statistics concerning the total number of detainees per year; see European Migration Network, *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies (Greece)*, EMN Focussed Study, 2014, 7, available at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/>

organisations² and civil society organisations.³ In 2013, the Greek Ombudsman pointed out that the use of administrative detention for TCN's in Greece, which should be a limited administrative measure applied only if necessary in view of deportation/removal, had become a general practice even in cases where it was legally impossible to remove foreign nationals from the country.⁴ The systematic use of detention, even where expulsion is not a realistic prospect, had also been noted by the Commissioner for Human Rights of the Council of Europe in his report following his visit to Greece in 2013.⁵

This article discusses the shortcomings and the current challenges of Greek law and practice concerning the use of immigration detention, specifically as concerns “undesirable and unreturnable” TCNs. “Undesirable” TCNs in this article refer to those who are considered to constitute a danger to national security and/or public order, who are arrested due to their lack of documentation and placed under detention in view of removal. Unfortunately, it is beyond the scope of this article to consider TCNs with valid residence permits convicted of criminal offences, whose expulsion and subsequent deprivation of liberty falls within the jurisdiction of the courts. “Unreturnable” here refers to the lack of a feasible prospect of removal, on account of legal or practical obstacles such as Greece’s international human rights obligations and situations in which a removal order cannot be executed because, for example, the consular representation of the country of origin of the TCN does not

networks/european_migration_network/reports/docs/emn-studies/12a-greece_detention_study_august2014_en.pdf (last visited 3 Dec. 2016).

- 2 United Nations (UN) Working Group on Arbitrary Detention, *Working Group on Arbitrary Detention Statement upon the Conclusion of its Mission to Greece (21–31 January 2013)*, 31 Jan. 2013, available at: https://www.ecoi.net/local_link/238325/347421_en.html (last visited 3 Dec. 2016); UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, Addendum: Mission to Greece*, UN Doc. A/HRC/23/46/Add.4, 18 Apr. 2013, paras. 42–67; United Nations High Commissioner for Refugees (UNHCR), *Observations on Administrative Detention of Third Country Nationals, Including Asylum-Seekers, in Greece*, Athens, UNHCR Greece, 29 Aug. 2013, available at: http://www.unhcr.gr/fileadmin/Greece/Extras/other/Detention_Observations_by_Head_of_Office_EN_2013.pdf (last visited 3 Dec. 2016); Council of Europe, Commissioner for Human Rights, *Report by Nils Muiznieks Commissioner for Human Rights of the Council of Europe Following his Visit to Greece from 28 January to 1 February 2013*, CommDH(2013)6, 16 Apr. 2013, paras. 141 and 142; Council of Europe, Parliamentary Assembly, *Migration and Asylum: Mounting Tensions in the Eastern Mediterranean*, Doc. 13106, 23 Jan. 2013, paras. 26–34, available at: <http://www.refworld.org/docid/51384f992.html> (last visited 3 Dec. 2016).
- 3 Human Rights Watch (HRW), *Unwelcome Guests, Greek Police Abuses of Migrants in Athens*, New York, HRW Report, 12 Jun. 2013, available at: <https://www.hrw.org/report/2013/06/12/unwelcome-guests/greek-police-abuses-migrants-athens> (last visited 3 Dec. 2016); Amnesty International, *Submission to Council of Europe Committee of Ministers: M.S.S. v Belgium and Greece*, Application No 30696/09, Strasbourg, Amnesty International, 15 Feb. 2013, available at: <http://www.refworld.org/docid/513095672.html> (last visited 3 Dec. 2016); Doctors Without Borders, *Medical Assistance to Migrants and Refugees in Greece: Findings from MSF's Intervention in Detention Facilities for Migrants, January–April 2013*, 2013, available at: http://www.msf.org.uk/sites/uk/files/greece_refugees_2013.pdf (last visited 3 Dec. 2016); and Doctors Without Borders, *Invisible Suffering: Prolonged and Systematic Detention of Migrants and Asylum Seekers in Substandard Conditions in Greece*, 1 Apr. 2014, available at: http://www.msf.org/sites/msf.org/files/invisible_suffering.pdf (last visited 3 Dec. 2016).
- 4 Greek Ombudsman, *Monitoring Visits in Amigdaleza, Korinthos and Attica Directorate of Aliens (Petrouralli): Problems and Suggestions*, 29 May 2013, available in Greek at: <http://www.synigoros.gr/resources/diapistwseis-stp-29-05-2013-2.pdf> (last visited 3 Dec. 2016).
- 5 Council of Europe, Commissioner for Human Rights, *Report by Nils Muiznieks Commissioner for Human Rights of the Council of Europe Following his Visit to Greece from 28 January to 1 February 2013*.

cooperate. In this article, “undesirable and unreturnable” TCNs include those who apply for asylum while in detention.

As it will be discussed in Section 2, under domestic law administrative detention of undocumented TCNs is only permitted where removal is feasible, for a period of up to 18 months. Administrative detention of undocumented migrants whose removal is not feasible is thus prohibited by the Greek legislation and this is also the case for persons having applied for asylum before arrest as well as for those who have already been granted refugee or subsidiary protection status. However in practice, as it will be examined in Section 3, detention orders are also issued against TCNs for whom removal is not a realistic prospect, despite the legal restrictions apparently in place. This is most commonly the case for TCNs that are considered to constitute a danger to national security and/or public order. Hence, the article concludes that Greece should urgently identify lawful and effective measures to address the problem of undesirable and unreturnable TCNs that may be applied in lieu of arbitrary (and illegal) administrative detention.

In this article, both legal and policy perspectives are employed to examine this question in the Greek context. European Union (EU) law and policy are also relevant in certain areas, as will be considered. The analysis builds on desk research, empirical legal findings,⁶ and information received by the Headquarters of the Hellenic Police for the purposes of this article.⁷ Together, these sources build a picture of the Greek authorities’ use of immigration detention as a national response to the problem of possibly dangerous but unreturnable foreigners.

2. THE LEGAL FRAMEWORK OF DETENTION FOR UNDESIRABLE AND UNRETURNABLE TCNs

In order to analyse and evaluate the use of detention as a national response to the problem of undesirable and unreturnable TCNs, we should first examine the relevant legislative framework regarding immigration detention. Before proceeding to this analysis, it is important to define the target group of this article – “undesirable and unreturnable” TCNs.

Undocumented TCNs may be unreturnable for both legal and practical reasons. Their forced return can be either prohibited for legal reasons, because it would violate the *non-refoulement* principle or Greece’s other international human rights obligations,⁸ or unfeasible due to administrative and practical obstacles to

6 Provision of legal aid to administrative detainees in need of international protection since Feb. 2013 in the framework of a UNHCR project implemented by the Greek Council for Refugees.

7 E-mail correspondence in Jan. 2016 held on file by author.

8 Art. 3 of the European Convention on Human Rights (ECHR), ETS No. 005, 4 Nov. 1950 (entry into force: 3 Sep. 1953), in Legislative Decree 53/1974, Official Gazette A 256; Art. 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 Dec. 1984 (entry into force: 26 Jun. 1987), in Law 1782/1988, Official Gazette A 116; Arts. 6 and 7 of the International Covenant on Civil and Political Rights, 999 UNTS 171, 16 Dec. 1966 (entry into force: 23 Mar. 1976), in Law 2462/1997, Official Gazette A 25. For certain nationalities among those in need of international protection, the Greek authorities officially declare that forced returns are not carried out. According to the Circulars of the Hellenic Police Headquarters 1604/15/1423412/10.8.2015 and 1604/15/2189144/30.11.2015, this provision includes citizens of Syria, Somalia, Eritrea, Myanmar, Mauritania, Palestinians and more recently South Sudan, Yemen and Iraq. See also relevant information to the

return.⁹ While the concept of unremovability appears reasonably clear, it is not easy to define which of these could *a priori* also be considered as “undesirable”. Arguably, all undocumented TCNs present in Greece could be considered “undesirable” in the current socioeconomic climate. Thus, it would be useful to study the characteristics of TCNs placed under administrative detention on national security and/or public order grounds to gain a clearer picture of this group of persons.

Regulations on the basis of which an undocumented TCN should be considered a danger to national security and/or public order do not exist. It is therefore useful to take into consideration the criteria used by the Hellenic Police when issuing detention orders. According to the information received from the Headquarters of the Hellenic Police for the purposes of this article,¹⁰ undocumented TCNs are deemed a danger to public order, and placed under administrative detention on this ground, when they present systematic delinquent behaviour and have already served a term of imprisonment for violations of the Penal Code for offences such as theft, robbery, homicide, trafficking, smuggling, and forgery. However, the Greek Ombudsman observes that the police authorities appear to rely on the “legitimizing reason” of prior prosecution or imposition of a custodial sentence even where the executions of such sentences have been suspended by the courts. Typical examples in this category are sentences for attempting to leave the country illegally or for the use of drugs.¹¹ It therefore appears that the Hellenic Police rely not only on the fact an undocumented TCN has served a criminal sentence, but also instances of prior prosecution without any subsequent sentence imposed by the courts or minor offences where a sentence has been suspended, to justify the use of administrative detention on grounds of “undesirability”.

2.1. Legal framework regarding the detention of TCNs

Undocumented TCNs may be subject to administrative detention in view of return (Law 3907/2011)¹² or administrative expulsion (Law 3386/2005).¹³ In both cases,

Committee of Ministers of the Council of Europe in the context of implementing European Court of Human Rights (ECtHR) Judgement, *M.S.S. v. Greece and Belgium*: DH-DD (2013) 1225F, 13 novembre 2013, 1186 réunion (3-5 décembre 2013), (DH) - *Communication de la Grèce relative à l'affaire M.S.S. contre Belgique et Grèce (Requête n° 30696/09) - Informations mises à disposition en vertu de la Règle 8.2. a des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables*, Doc. DH-DD(2013)1225, 13 Nov. 2013, available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD\(2013\)1225&Language=lanFrench&Site=C](https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD(2013)1225&Language=lanFrench&Site=C) (last visited 3 Dec. 2016).

- 9 Mostly related to the lack of cooperation between Greek authorities and the relevant diplomatic representations regarding the issuing of travel documents, as well as the non-cooperation of the TCNs in the identification of their personal details, or their refusal to return to their countries. See European Migration Network, *Good Practices in the Return and Reintegration of Irregular Migrants: Member States' Entry Bans Policy & Use of Readmission Agreements between Member States and Third Countries (Greece)*, EMN Focussed Study, 2014, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/12a_greece_emn_national_report_return_reintegration_en.pdf (last visited 3 Dec. 2016).
- 10 E-mail correspondence in Jan. 2016 held on file by author.
- 11 Greek Ombudsman, Doc. 175063/49247/2013, 19 Nov. 2013.
- 12 Art. 30(1) of Law 3907/2011 on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of the provisions of the EU Return Directive (Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98) and other provisions
- 13 Art. 76(3) of the Law 3386/2005 on the entry, residence and social integration of third-country nationals on Greek territory.

the removal and detention order are issued by the Hellenic police rather than the courts.

According to the Law 3907/2011 on the return of TCNs, undocumented TCNs who are the subject of return procedures may be detained in order to prepare the return and to carry out the removal process only if, having regard to the individual circumstances of the case, no other sufficient but less coercive measures can be applied effectively. In conformity with international,¹⁴ European¹⁵ and EU law,¹⁶ the Greek legislation prohibits detention of TCNs whose return is not feasible.¹⁷ The term “less coercive measures” corresponds, most probably, to the alternative forms of detention measures provided by the EU Return Directive 2008/115.¹⁸ As a preliminary remark, it should be noted that although Law 3907/2011 provides that detention is permitted only exceptionally when alternative measures cannot be applied, alternatives are neither examined nor applied in practice by the Hellenic Police before issuing detention orders.¹⁹ Nonetheless, challenges to detention orders before the police or the courts on the grounds that the TCN is able to provide a known and stable residence, as an alternative to detention in a specific case, is generally successful in practice.

Under Greek law, detention of undocumented TCNs is permissible when: (1) there is a risk of absconding; (2) the TCN avoids or hampers the preparation of return or the removal process; or (3) for reasons of national security. Greek law departs from EU standards in respect of this last ground, (3), which is not provided as a permissible ground of detention by the Return Directive. As such, the inclusion in Greek law of national security as a ground for administrative detention appears to constitute a serious breach of EU law. According to the Court of Justice of the EU,

- 14 UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/13/30, 18 Jan. 2010, para. 64: “The principle of proportionality requires that detention always has a legitimate aim, which would not exist if there were no longer a real and tangible prospect of removal.” See also Working Group on Arbitrary Detention, *Opinion No. 45/2006*, UN Doc. A/HRC/7/4/Add.1, 16 Jan. 2008, 40.
- 15 Any deprivation of liberty under Art. 5(1)(f) ECHR is justified only for as long as deportation proceedings are in progress. Concerning “realistic prospect of expulsion”, see ECtHR, *Mikolenko v. Estonia*, Judgement, Appl. No. 10664/05, 8 Oct. 2009, para. 68.
- 16 The EU Return Directive 2008/115 provides that detention can be maintained as long as removal arrangements are in progress and that it is necessary to ensure successful removal (Art. 15(1) and (2)). See Court of Justice of the European Union (CJEU), *Said Shamilovich Kadzoev (Huchbarov)*, Judgment, Grand Chamber, Case C-357/09, 30 Nov. 2009, para. 67.
- 17 Art. 30(4) of the Law 3907/2011.
- 18 Art. 15(1). See also Art. 7(3): “Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.”
- 19 Asylum Information Database, *National Country Report Greece*, Brussels, European Council on Refugees and Exiles, Nov. 2015, 92–93, available at: <http://www.asylumineurope.org/reports/country/greece> (last visited 3 Dec. 2016); European Migration Network, *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies (Greece)*, 20–24; UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants*: “As noted earlier, despite the fact that Law 3907/2011 provides for the detention of migrants only when less coercive measures cannot be implemented, in practice, no such measures exist and irregular migrants are systematically detained”; and Council of Europe, Parliamentary Assembly, *Migration and Asylum: Mounting Tensions in the Eastern Mediterranean*, para. 34: “[Detention] a matter of first resort rather than last resort. Alternatives to detention are currently not used or explored.”

the possibility of detaining a person on grounds of public order and public safety cannot be based on the Directive.²⁰ In these terms, as stipulated in the Return Handbook established following a European Commission recommendation, the administrative detention on grounds of public order is not covered by the text of the Directive.²¹ The Handbook advises that Member States are not permitted to use immigration detention as a form of “light imprisonment”.²² Rather, the purpose of detention as provided by Article 15 of the Return Directive is “to assure that returnees do not undermine the execution of the obligation to return by absconding”.²³ Detention cannot be used solely as a means of protecting society from persons that constitute a threat to public policy or security.²⁴ According to the information received from the Headquarters of the Hellenic Police for the purposes of this article, the national security ground for detention was supposed to have been omitted since 2014.²⁵ Thus, it is surprising that the Draft Law modifying Law 3907/2011 published in February 2016 does not provide any modification to this provision.²⁶

The above-mentioned breach of EU law appears even more startling when it is considered alongside another, excessively strict, piece of administrative legislation which addresses the protection of society from dangerous TCNs through detention. The Law 3386/2005 permits the detention of TCNs in view of administrative expulsion if there is a risk of absconding, if they are considered a danger to public order or have been avoiding or obstructing the preparation of their departure or the procedure of their expulsion.²⁷ This provision applies to persons who:

1. have been irrevocably sentenced to a prison sentence of at least 1 year or, irrespective of sentence, for a serious crime;²⁸

20 CJEU, *Said Shamilovich Kadzoev (Huchbarov)*, para. 70: “The possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115. None of the circumstances mentioned by the referring court [aggressive conduct; no means of support; no accommodation] can therefore constitute in itself a ground for detention under the provisions of that directive.”

21 See European Commission, *Commission Recommendation of 1.10.2015 Establishing a Common “Return Handbook” to be Used by Member States’ Competent Authorities when Carrying out Return Related Tasks*, C(2015) 6250 final, 1 Oct. 2015; and the “Return Handbook”, in annex to the Commission Recommendation 78, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf (last visited 3 Dec. 2016).

22 “Return Handbook”, 78.

23 *Ibid.*, 79.

24 *Ibid.*

25 E-mail correspondence in Jan. 2016 held on file with the author.

26 The Draft Law modifying Law 3907/2011 is available in Greek at: <http://www.opengov.gr/ypes/?p=3471> (last visited 3 Dec. 2016).

27 Art. 76(3) of the Law 3386/2005 on the entry, residence, and social integration of third-country nationals on Greek territory.

28 Crimes against the regime or treason, drug-related crimes, money laundering, international financial crimes, crimes with the use of high technology, currency-related crimes, resistance, child abduction, crimes against sexual freedom and economic exploitation of sexual life, theft, fraud, misappropriation, extortion, usury, violation of the law on intermediaries, forgery, false statement, slander, smuggling, crimes relating to weapons, antiquities, transfer of illegal immigrants to the mainland or facilitation of their transport or transfer or provision of accommodation thereto for hiding.

2. have infringed the provisions of Law 3386/2005 on the entry, residence, and social integration of third-country nationals on Greek territory;
3. their presence in the Hellenic territory is deemed to be dangerous for the country's public order or security;²⁹ or
4. their presence on Greek territory is considered a danger to public health and they refuse to comply with measures determined by medical authorities.

Following the analysis of the grounds for detention for undocumented TCNs in view of return and administrative expulsion, focusing on “undesirable and unreturnable”, we are going to examine the domestic legislation regarding the extension of their detention in case they apply for asylum.

2.2. Legal framework regarding the detention of asylum-seekers

According to Greek legislation, the Hellenic Police may decide that undocumented TCNs who apply for international protection while in administrative detention shall remain in detention if certain conditions are fulfilled. This provision is now applicable to the “old” as well as to the “new” procedure (as set out below) and excludes detention of those who submitted asylum applications before arrest.

The Greek asylum procedure is governed by a twofold legal framework under Presidential Decree 114/2010³⁰ for asylum applications lodged before 7 June 2013 (old procedure), and Law 4375/2016³¹ for asylum applications filed after that date (new procedure). Presidential Decree 114/2010 transposed the EU Asylum Procedures Directive 2005/85³² into national law. More recently, Law 4375/2016 replaced Presidential Decree 113/2013³³ – which governed the “new procedure” until 2 June 2016 in conformity with Directive 2005/85 – and transposed the provisions of the recast Asylum Procedures Directive and those of the recast Reception Conditions Directive regarding detention (Articles 8–11 of the Directive).³⁴ Following the adoption of the maximum length of detention permitted by the

29 According to Art. 76(1) of the Law 3386/2005, TCNs are considered a danger to public order or security especially if they have been prosecuted for a crime punished by a minimum imprisonment of 3 months.

30 Presidential Decree 114/2010 on the establishment of a single procedure for granting the status of refugee or of beneficiary of subsidiary protection to aliens or to stateless persons in conformity with Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

31 Law 4375/2016 on the organisation and functioning of the Asylum Service, the Appeals Authority, the Reception and Identification Service and other provisions.

32 Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

33 Presidential Decree 113/2013 on the establishment of a single procedure for granting the status of refugee or of subsidiary protection beneficiary to aliens or to stateless individuals in conformity with Council Directive 2005/85/EC “on minimum standards on procedures in Member States for granting and withdrawing refugee status” (L 326/13.12.2005) and other provisions.

34 Directives 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60; and Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96.

Return Directive³⁵ for undocumented TCNs detained in view of return, Presidential Decree 116/2012³⁶ also extended the length of detention for asylum-seekers up to 18 months. Most probably, this extension was considered necessary in order to discourage the submission of abusive asylum applications for the sole purpose of quicker release from detention. However, this provision fails to take into account the obstacles in accessing asylum procedures before arrest.³⁷

Presidential Decree 114/2010³⁸ (the “old” procedure) provides that a TCN who lodges an application for international protection while in detention may be required to remain in detention, if alternatives to detention cannot be applied,³⁹ under the following three grounds:

1. to enable determination of the identity or origin and the circumstances of his/her entry to Greek territory, in particular in the case of mass illegal entries of applicants;
2. if he/she constitutes a danger to national security or public order;⁴⁰ or
3. if detention is deemed necessary for the prompt and effective completion of the examination of his/her application.

Similar grounds, as well as others provided by Article 8 of the recast Reception Conditions Directive, figure among the provisions of Law 4375/2016 (the “new” procedure).⁴¹

According to the above-mentioned provisions, administrative detention should be imposed on asylum-seekers as an exceptional measure and solely be applied to those submitting asylum applications while already in detention. Additionally, the detention provisions of Presidential Decree 114/2010 (the “old” procedure) do not apply

35 Art. 30 of Law 3907/2011.

36 Presidential Decree 116/2012 amending Presidential Decree 114/2010 on the establishment of a single procedure for granting the status of refugee or of beneficiary of subsidiary protection to aliens or to stateless persons in conformity with Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

37 Asylum Information Database, *National Country Report Greece*, 25; Campaign for the access to asylum, *Joint Press Release – First Findings from the Operation of the New Asylum Service*, 19 Dec. 2013, available at in Greek: http://asylum-campaign.blogspot.gr/search/label/Δελτία_Τύπου?updated-max=2014-01-22T00:17:00+02:00&max-results=20&start=6&by-date=false (last visited 3 Dec. 2016).

38 Art. 13(2).

39 See Section 2.1 regarding the non-implementation of alternative to detention measures in practice.

40 Regulations on the basis of which a TCN applying for asylum in detention should be considered a danger to national security or public order do not exist.

41 According to Art. 46(2) of Law 4375/2016 TCNs who lodge an application for international protection while in detention may be required to remain in detention: (1) to determine or verify their identity or nationality; (2) to determine those elements on which the application is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding; (3) when on the basis of objective criteria, including that they already had the opportunity to access the asylum procedure, there are reasonable grounds to believe that they are making the application for international protection merely in order to delay or frustrate the enforcement of the return decision; (4) if they constitute a danger to national security or public order; (5) to ensure transfers in accordance with Dublin Regulation (No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31), if there is a serious risk of absconding.

regarding asylum applications lodged by detainees after 7 June 2013 because the provisions of the “new” procedure are applicable. In practice, however, the Hellenic Police continue issuing detention orders, invoking Presidential Decree 114/2010, for persons who have lodged asylum applications before 7 June 2013 and were subsequently arrested and detained. These cases concern asylum-seekers deemed to be a danger to public order and/or national security, as well as asylum-seekers with interrupted applications. It should be stressed that, due to the obstacles of access to asylum procedures, it is likely that persons in need of international protection may be arrested before succeeding to submit their application. In this case, their only option is to submit an asylum application while in detention where they may remain for a total period of up to 18 months.

The most recent provisions of Law 4375/2016, as was also the case of Presidential Decree 113/2013 which governed the “new” procedure until 2 June 2016,⁴² contains some additional safeguards which are not provided for persons who applied for asylum before 7 June 2013 and are detained under the provisions of Presidential Decree 114/2010. More precisely, in order to impose detention in the framework of the “new” procedure under Law 4375/2016, the authorities must prove that access to asylum procedures, before arrest, was effective. Furthermore, for detention grounds not related to national security and public order, a detention order issued by the police should take into account the opinion/proposal of the Asylum Service. This latter provision could be useful in avoiding systematic prolongation of detention by the police for TCNs who have applied for asylum in detention. Moreover, further safeguards exist under Law 4375/2016. The initial detention order, as well as any extension, is subject to automatic judicial examination and periodic review, and free legal aid for judicial challenge of detention orders is provided. Additionally, Greek legislation provides that asylum applicants should be detained in pre-removal detention centres, excluding the possibility of detention in police holding cells or border guard stations where conditions are generally worse.⁴³ Finally, the possible lack of appropriate spaces and difficulties in ensuring decent living conditions for the detainees as well as any vulnerabilities should be also considered in the decision to extend detention.

Though increased safeguards for asylum-seekers under the “new” procedure are welcomed, the coexistence of two legislative tools – Presidential Decree 114/2010 and Law

42 Art. 12(4) of Presidential Decree 113/2013 provided that when detention was imposed on grounds (1) and (3) the detention order was taken upon a proposal of the Head of the respective examination authority, Art. 12 5) provided that applicants should be detained in detention areas as provided in Art. 31 of Law 3907/2011 (pre-removal detention centres established in accordance with the provisions of the Return Directive) excluding detention in police holding cells or border guard stations where conditions are generally worse and Art. 12(6) provided that the possible lack of appropriate spaces and difficulties in ensuring decent living conditions of the detainees should be also considered for the imposition or prolongation of detention.

43 Art. 31 of Law 3907/2011 provides that detention takes place in the pre-removal detention centres established in accordance with the provisions of the EU Return Directive. See also CJEU, *Adala Bero v. Regierungspräsidium Kassel and Ettayebi Bouzalmate v. Kreisverwaltung Kleve*, Judgment, Grand Chamber, Joined Cases C-473/13 and C-514/13, 17 Jul. 2014, para. 29: “The national authorities responsible for applying the national legislation transposing Article 16 of Directive 2008/115 must therefore be able to detain third-country nationals in specialised detention facilities”.

4375/2016 – establishing different standards on procedures and on the use and conditions of detention, raises significant concerns about the equal treatment of asylum-seekers, depending on the date and circumstances in which they lodged their asylum applications.

2.3. The paradoxes of the Greek legislation regarding the detention of undesirable and unreturnable TCNs

As outlined in the above sections, detention of TCNs in view of return or administrative expulsion is only permitted if the deportation is feasible, while asylum-seekers may remain in detention until their application is fully examined. In other words, a possibly dangerous “undesirable” TCN is not allowed to be detained after arrest, if his/her removal is not feasible. In contrast, an asylum applicant may be detained if he/she is considered a danger to national security or public order. Non-asylum-seeking TCNs would be able to challenge their detention if they were able to show it did not serve the legitimate purpose of return, for example if return was not a feasible prospect. However, having submitted an asylum application, they would be subject to a new detention order regarding the examination of the asylum application. In this case, the fact that removal is not a realistic prospect is not a factor taken into considering under the current legislative framework.⁴⁴ Thus, if an unremovable administrative detainee decides to apply for international protection instead of challenging his/her detention in view of return first (which may occur due to lack of information and/or legal aid), they risk remaining in detention until their asylum application has been fully examined. The paradox of Greek law is evident here – a TCN considered to pose a danger to national security has greater protection than a likely vulnerable asylum-seeker. The inconsistency of the regime is further demonstrated in the fact that, if the asylum claim is considered and international protection granted, the same individual should be released without any further examination of the initial grounds for detention (i.e. that they were considered to pose a danger to public order or national security) and measures preventing potential risks following release. This last remark, confirms that the broad and vague construction of the “national security” and “public order” detention ground has the potential to lead to arbitrary detention related mostly to the breach of immigration legislation rather than to an individual applicant’s conduct being such as to present a genuine, present and sufficiently serious threat.⁴⁵

44 It should be noted that, despite the legal safeguards in place, the detention of unremovable TCNs continues in practice, as considered in Section 3. As it will be described in Section 3, the use of detention in view of removal has become a general practice, even for third-country nationals whose return is not feasible – either they are detained on public order and/or national security grounds or not. See among others ECtHR, *Tabesh v. Greece*, Judgement, App1. No. 8256/07, 26 Nov. 2009 (detention for impossible expulsion).

45 See CJEU, *Zh and O v. Staatssecretaris van Veiligheid en Justitie*, Judgment, Case C-554/13, 11 Jun. 2015, para. 50: “Accordingly, it must be held that a Member State is required to assess the concept of ‘risk to public policy’, within the meaning of Article 7(4) of Directive 2008/115, on a case-by-case basis, in order to ascertain whether the personal conduct of the third-country national concerned poses a genuine and present risk to public policy. When it relies on general practice or any assumption in order to determine such a risk, without properly taking into account the national’s personal conduct and the risk that that conduct poses to public policy, a Member State fails to have regard to the requirements relating to an individual examination of the case concerned and to the principle of proportionality. It follows that the fact

Regarding the length of administrative detention of unremovable TCNs, it would be pertinent to address the Advisory Opinion no. 44/2014 of the Legal Council of the State issued in February 2014. According to the Advisory Opinion, the authorities should invite administrative detainees to consent to their “voluntary” return. In case of non-cooperation, the authorities can impose an obligation to stay in a defined location of mandatory residence after the 18-month detention period. Thus, since March 2014, the Hellenic Police had been issuing decisions of “mandatory residence” for those TCNs who had not been returned after 18 months in detention, effectively obliging these individuals to remain in detention for an indefinite period of time, exceeding 18 months which is the maximum length of detention permitted by the EU Return Directive.⁴⁶ Although in February 2015 the new Greek Government announced the revocation of the Ministerial Decision allowing for administrative detention beyond 18 months, and concluded a friendly settlement with an appellant before the European Court of Human Rights,⁴⁷ the Ministerial Decision endorsing the Legal Council’s Advisory Opinion is still valid. Although this provision is no longer

that a third-country national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law cannot, in itself, justify a finding that that national poses a risk to public policy within the meaning of Article 7(4) of Directive 2008/115.” See by analogy Art. 27 of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77, that allows Member States to restrict the free movement of Union nationals on grounds of public policy, public security, or public health but requires that those measures “shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned”. It is explicitly required that “the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted”.

- 46 The Advisory Opinion No. 44/2014 of the Legal Council of the State is available in Greek at: http://www.nsk.gov.gr/web/nsk/anazitisi-gnomodoteseon?p_p_id=nskconsulatories_WAR_nskplatformportlet&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-4&p_p_col_pos=2&p_p_col_count=3&_nskconsulatories_WAR_nskplatformportlet_jspPage=%2Fjsps%2Fconsulatories%2Fview-consulatory.jsp&_nskconsulatories_WAR_nskplatformportlet_returnURL=%2Fweb%2Fnsk%2Fanazitisi-gnomodoteseon%3Fp_p_id%3Dnskconsulatories_WAR_nskplatformportlet%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_pos%3D2%26p_p_col_count%3D3&_nskconsulatories_WAR_nskplatformportlet_consultId=1868995 (last visited 3 Dec. 2016). See also Greek Council for Refugees, *Indefinite Detention: A Direct Infringement of National, European and International Law*, Press Release, 9 Apr. 2014, available at: <http://www.gcr.gr/index.php/en/news/press-releases-announcements/item/352-ep-aoriston-kratisei-mia-eftheia-prosvoli-tou-ethnikoy-evropaikoy-kai-diethnoys-dikaiou> (last visited 3 Dec. 2016); UNHCR Greece, *UNHCR Asks the Greek Government to Review the Measure for Prolonged Administrative Detention*, Athens, UNHCR Greece, 15 Apr. 2014, available at: <http://www.unhcr.gr/nea/artikel/2b713d4f68c7e44faa2b8917ee2ecf86/i-ypati-armosteia-z-3.html> (last visited 3 Dec. 2016); Hellenic League for Human Rights, *SLC: They Called the Detention of Foreign Nationals a Restrictive Measure so as Not to Confess that the Operation Xenios Zeus Was a Fiasco...*, 25 Mar. 2014, available in Greek at: <http://www.hlhr.gr/index.php?MDL=pages&SiteID=1029> (last visited 3 Dec. 2016); and E. Koutsouraki, “Commentary on the Decision n° 2258/23.5.2014 of the Administrative Court (First Instance) of Athens Judging Illegal the Administrative Detention of Aliens over 18 Months”, *Immigration Law Review*, 2014(1), 2014, 74–79 (in Greek) (Κράτηση πέραν του 18μηνου –Υποχρεωτική διαμονή προς επιστροφή αλλοδαπού σε χώρο που ήδη κρατείται).

- 47 ECtHR, *Lohar v. Greece*, Decision, App1. No. 67357/14, 12 Nov. 2015.

being applied in practice,⁴⁸ it is interesting to note that undocumented migrants could potentially face the risk of indefinite detention in Greece. Taking into consideration the presumed danger they pose to public order and/or national security, the provisions concerning the length of detention of undocumented migrants should also be compared to the legislation regarding judicial expulsion and detention for foreign ex-convicted prisoners. According to the Greek Penal Code, TCNs whose judicial expulsion order cannot be executed within 3 months after their sentence has been served are released.⁴⁹ Hence, a Court rather than an administrative authority orders the removal, and unremovable individuals who have already been convicted pursuant to a court decision also enjoy a higher level of legal certainty than undocumented migrants regarding the length of deprivation of their liberty.

3. THE USE OF DETENTION FOR UNDESIRABLE AND UNRETURNABLE TCNS IN PRACTICE

The Greek practice regarding the detention of undesirable and unreturnable TCNs appears even worse than the above-mentioned legislative violations of EU Law. This phenomenon will be analysed within the broader context of Greek detention policies and practices, with particular emphasis on the Greek Ombudsman's observations. Furthermore, some characteristic examples of unlawful detention recently imposed on undesirable and unreturnable TCNs, as well as current challenges and possible future solutions in this area, will be discussed.

3.1. Detention of undesirable and unreturnable TCNs in the general context of Greek detention policies and practices

Since 2012, detention had been being routinely and excessively applied as a measure of first rather than last resort for all undocumented TCNs apprehended in the Greek territory, including those whose removal is unfeasible, without individual assessment of each case.⁵⁰ In early August 2012 the Greek Government launched the police operation "Xenios Zeus", connecting irregular immigration with crime in Athens and aiming to crack down on both.⁵¹ Undocumented migrants and asylum-seekers who did not have access to asylum procedures were arrested during this operation and detained in view of return. They were held in five pre-removal detention centres which had just been established under the European Return Fund, but also in police stations, for 18 months or longer.⁵²

48 Asylum Information Database, *National Country Report Greece*, 90.

49 Art. 74(4) of the Greek Penal Code.

50 Greek Ombudsman, *Monitoring Visits*, 7.

51 HRW, *Unwelcome Guests*: "It is cruelly ironic that the authorities decided to call the initiative Operation Xenios Zeus. The name of the Operation refers to the ancient Greek god Zeus' patronage of hospitality and guests. In Greek mythology, Zeus, the king of the gods, was called upon to avenge wrongs done to strangers. In fact, Operation Xenios Zeus is anything but hospitable towards foreign migrants and asylum seekers in the Greek capital."

52 According to the HRW Report between 4 Aug. 2012 and 22 Feb. 2013, Greek police detained almost 85,000 people of foreign origin to check their identification papers and legal status (*ibid.*). At that time, the Greek Government was using detention as a first rather than last resort measure, seeking "to send a strong signal to third-country nationals that willing to illegally enter Greece", to "warn all immigrants who do not fall under the status of international protection that they will be arrested, detained and

In February 2015, before the mass influx of migrants and asylum-seekers to the Greek islands had reached the levels they are at present, the new Government (SYRIZA) announced a range of measures aimed at reducing the use of immigration detention.⁵³ These measures included revocation of the Ministerial Decision allowing for detention beyond 18 months, and the immediate release of persons held pursuant to this Decision. Furthermore, it was announced that alternatives to detention would be implemented, the maximum period of detention would be limited to 6 months and that persons belonging to vulnerable groups and asylum-seekers held in detention would be immediately released. As a result of these measures the total number of detainees and the length such persons were held in detention were significantly reduced.⁵⁴ However, according to two national non-governmental organisations' findings, in November and December 2015 respectively, the "danger for national security and/or public order" ground for detention was being used excessively in relation to both asylum-seekers and TCNs in view of removal.⁵⁵

One year after the above-mentioned government announcements, in February 2016, the European Commission recommended that the return activities of the Greek authorities should:

Focus more on the nationalities most relevant in the context of the hot-spots⁵⁶ which do not fall under a refugee-profile (Pakistanis, but also Afghans, Iranians and Bangladeshis) [...] Greece should make full use of the possibilities offered by the Greek legislation in line with the Return Directive to maintain irregular migrants in detention up to the 18-month maximum limit to avoid that detention is ended before effective removal [...] and the International Organization

returned to the countries of origin": *Greek Action Plan on Asylum and Migration Management*, 53; European Migration Network, *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies (Greece)*.

- 53 Ministry of Interior and Administrative Reconstruction, "Press Release of Alternate Ministers of Interior and Administrative Reconstruction, Mr Yianni Panousi, and Ms. Anastassia Christodouloupoulou, regarding the Detention Centres", 17 Feb. 2015, available in Greek at: http://www.mopocp.gov.gr/index.php?option=ozo_content&lang=&perform=view&id=5374&Itemid=607 (last visited 3 Dec. 2016).
- 54 In Dec. 2015, 324 TCNs were placed under administrative detention while the capacity of the detention centres was 5,500 places: Information provided by the Headquarters of the Hellenic Police during Greek Council's for Refugees Round Table on Alternatives to detention, 17 Dec. 2015.
- 55 Asylum Information Database, *National Country Report Greece*, 92; Aitima, *Monitoring Immigration Detention, Quarterly Report September–December 2015*, Athens, Aitima, Dec. 2015, available at: <http://aitima.gr/images/aitima/documents/EPIMbulletinDec2015/bulletinenglish.pdf> (last visited 3 Dec. 2016).
- 56 According to the Agenda on Migration (European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration*, COM(2015) 240 final, 13 May 2015, 6): "[...] the Commission will set up a new 'Hotspot' approach, where the European Asylum Support Office, Frontex and Europol will work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants. The work of the agencies will be complementary to one another. Those claiming asylum will be immediately channelled into an asylum procedure where EASO support teams will help to process asylum cases as quickly as possible. For those not in need of protection, Frontex will help Member States by coordinating the return of irregular migrants. Europol and Eurojust will assist the host Member State with investigations to dismantle the smuggling and trafficking networks."

for Migration should be present in all detention centres in Greece to offer the Assisted Voluntary Return option to migrants to be returned.⁵⁷

Hence, taking into consideration the recommendations of the European Commission (which may silently imply its disagreement with the national measures towards reducing detention) and the transformation of the open hotspots into detention centres, it is perhaps unsurprising that immigration detention became systematically used in Greece following the EU-Turkey statement of 18 March 2016 regarding the return to Turkey of undocumented migrants arriving in the Greek islands, who had previously passed through Turkey en route to Greece.⁵⁸ Since the beginning of the operations for the implementation of this EU-Turkey statement, the European Commission has stated that arrivals on the Greek islands are now accommodated “either in open or in closed reception facilities”, while recalling that EU law permits the detention of asylum-seekers in certain circumstances, “especially if there is a risk of absconding”. However, the Commission noted this must “only ever be a means of last resort and must be proportionate”.⁵⁹

Law 4375/2016⁶⁰ was adopted by the Greek Government with immediate entry into force, in order to permit the implementation of the EU-Turkey statement. Law 4375/2016 provides for potentially continuous detention during initial processing of identity verification and asylum claims and then pending removal.⁶¹ The European Commission itself stated that the hotspots have been “transformed [...] into closed reception facilities to avoid irregular migrants absconding when they are subject to return decisions”.⁶² Thus, the three largest hotspots (located on the islands of

57 European Commission, *Annex to the Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*, COM(2016) 85 final, 10 Feb. 2016, 6.

58 In return, the EU agreed to resettle an equivalent number of refugees from Turkey. EU-Turkey statement, 18 Mar. 2016, available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-g/> (last visited 3 DEC. 2016). The Office of the UNHCR and numerous non-governmental organisations protested against the transformation of the hotspots into detention centres. See UNHCR, *UNHCR Redefines Role in Greece as EU-Turkey Deal Comes into Effect*, UNHCR Briefing Notes, 22 Mar. 2016, available at: <http://www.unhcr.org/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html> (last visited 3 Dec. 2016); Doctors Without Borders, *Greece: MSF Ends Activities at Primary Lesbos Transit Camp*, Press Releases, 22 Mar. 2016 available at: <http://www.doctorswithoutborders.org/article/greece-msf-ends-activities-primary-lesvos-transit-camp> (last visited 3 Dec. 2016); Norwegian Refugee Council, *NRC is Suspending Activities at Chios 'Hotspot', Though Will Maintain a Protection Presence to Ensure Rights of Refugees Are Upheld*, Updates, 23 Mar. 2016 available at: <http://reliefweb.int/report/greece/nrc-suspending-activities-chios-hotspot-though-will-maintain-protection-presence> (last visited 3 Dec. 2016); Oxfam, *Oxfam Suspends Aid Operations in Moria Camp in Protest to the Suspension of Migrants' Rights by the EU and Turkey*, Press Releases, 24 Mar. 2016, available at: <https://www.oxfam.org/en/pressroom/pressreleases/2016-03-24/oxfam-suspends-aid-operations-moria-camp-protest-suspension> (last visited 3 Dec. 2016).

59 European Commission, *Implementing the EU-Turkey Agreement – Questions and Answers*, Fact Sheet, 4 Apr. 2016, available at: http://europa.eu/rapid/press-release_MEMO-16-1221_el.htm (last visited 3 Dec. 2016).

60 Art. 14.

61 Council of Europe, Parliamentary Assembly, *The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016*, Report, Committee on Migration, Refugees and Displaced Persons, Doc. 14028, 19 Apr. 2016, para. 5, available at: <http://www.statewatch.org/news/2016/apr/eu-coe-parl-assembly-refugee-crisis-resolution.pdf> (last visited 3 Dec. 2016).

62 European Commission, *Implementing the EU-Turkey Agreement*.

Lesvos, Chios, and Samos), which began operating as detention centres shortly after the conclusion of the EU-Turkey statement, rapidly became overcrowded and detention conditions deteriorated drastically, with poor quality food, insufficient shelter, poor sanitation, and inadequate access to appropriate medical care.⁶³ Poor detention conditions, the uncertainty detainees face regarding their future and the stress of imminent deportation led to mass protests and outbreaks of violence in the centres.⁶⁴ The situation does not differ significantly in the open camps, which were swiftly established all over Greece after the closure of the “Balkan route”, via which asylum-seekers had previously left Greece in order to make onward journeys to other European countries. The close of the “Balkan route” resulted in large numbers of asylum-seekers and migrants effectively trapped in Greece without adequate support or facilities. Tensions due to destitution and overcrowding are common, and often exacerbated by the mandatory coexistence of persons with very different cultural backgrounds.⁶⁵ Following any disturbances, detention orders on public order grounds are issued after the police’s interventions, and the vicious circle continues.

Currently, administrative detention is systematically imposed on TCNs apprehended in the islands, at the land border with Turkey and in the Greek mainland.⁶⁶ However, the number of undesirable and unreturnable TCNs in Greece –including those who are detained – remains unknown, because the Hellenic Police’s computer system is not supported on a country-wide level.⁶⁷ Thus, it is impossible to draw any safe conclusions regarding the scale of the problem.

63 Council of Europe, Parliamentary Assembly, *The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016*, para. 11. See also Amnesty International, *Greece: Refugees Detained in Dire Conditions Amid Rush to Implement EU-Turkey Deal*, News, 7 Apr. 2016, available at: <https://www.amnesty.org/en/latest/news/2016/04/greece-refugees-detained-in-dire-conditions-amid-rush-to-implement-eu-turkey-deal/> (last visited 3 Dec. 2016); HRW, *Greece: Asylum Seekers Locked Up – Wretched Conditions for People in Need*, HRW News, 14 Apr. 2016, available at: <https://www.hrw.org/news/2016/04/14/greece-asylum-seekers-locked> (last visited 3 Dec. 2016); UNHCR, *UNHCR Urges Immediate Safeguards to Be in Place Before Any Returns under EU-Turkey Deal*, UNHCR News Briefing, 1 Apr. 2016, available at: <http://www.unhcr.org/news/briefing/2016/4/56fe31ca9/unhcr-urges-immediate-safeguards-place-re- turns-begin-under-eu-turkey-deal.html> (last visited 3 Dec. 2016).

64 See for example: “Refugees Hospitalised after Huge Fire and Clashes at Lesbos Detention Centre Amid Warnings over More Violence. Humanitarian Agencies Warned that ‘Deplorable’ Conditions in Detention Centres in Greece Were Heightening Tensions”, *Independent*, 2 June 2016, available at: <http://www.independent.co.uk/news/world/europe/refugees-hospitalised-after-huge-fire-and-clashes-at-lesbos-detention-centre-amid-warnings-over-more-a7062016.html> (last visited 3 Dec. 2016).

65 See for example: “Protests Grow as Greece Moves Refugees to Warehouses not Fit for Animals”, *The Guardian*, 28 May 2016, available at: <http://www.theguardian.com/world/2016/may/28/greece-refugee-warehouses-not-fit-for-animals> (last visited 3 Dec. 2016).

66 Consequently, recognised refugees who do not hold their residence permit during police controls, refugees who did not have the chance to register asylum applications – including vulnerable groups such as unaccompanied children wrongly registered as adults upon arrest and victims of torture – as well as non-removable persons in need of international protection (e.g. Palestinian, Somali, Eritrean nationals) may be detained. See Asylum Information Database, *National Country Report Greece*, 89.

67 European Migration Network, *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies (Greece)*. According to the information received by the Headquarters of the Hellenic Police for the purposes of this article, their computer system will soon be upgraded and extended in order to respond to these and related issues (e-mail correspondence in Jan. 2016).

3.2. The Greek Ombudsman's observations regarding the detention of undesirable and unreturnable TCNs

The Greek Ombudsman had noted that, since 2013, to impose detention on TCNs the police authorities appear to rely on “legitimizing reasons” of prior prosecution or earlier imposition of custodial sentences, whose execution have, however, been suspended by the courts. Thus, they ignore that judicial authorities are solely and exclusively competent for the imposition of restrictions of freedom in the context of criminal procedures, while administrative detention is imposed for the execution of return decisions to facilitate removal. Typical examples in this category are sentences for attempting to leave the country illegally or for the use of drugs. According to the Greek Ombudsman:

As evidenced by a sufficient number of submitted petitions, debate around the legitimacy of return decisions and the enforcement of detention has intensified. The heart of the problem seems to be the apparent confusion on the part of the Hellenic Police regarding the different categories of aliens and the different legal systems they may fall in; this has serious impact on their treatment, particularly as regards interpreting and applying the measure of detention, which seems to be the administration's primary concern, regardless whether the alien's return/expulsion may be realistically effectuated or not.⁶⁸

In fact, as the Ombudsman explains, although legislative provisions regarding administrative detention are now clear and make distinctions in the treatment of various “categories” of aliens (e.g. irregular newcomers, irregular residents, irregular residents with a family, asylum-seekers, rejected asylum-seekers, unremovables, etc.), the provisions seem to be “interpreted and enforced with a view to provide a uniform treatment for aliens, despite the fact that they fall in different legal regimes, or by appealing to reasons of public order in a manner that is usually far from meeting the requirements of a clear and sufficient reasoning”.⁶⁹ Additionally, the Ombudsman had noted that detention orders referred to the provisions of Laws 3386/2005 and 3907/2011 at the same time, to impose detention on the ground of public order, which is not provided by Law 3907/2011.⁷⁰ As such, it appears that the Hellenic Police is not correctly following the legal framework surrounding immigration detention, and in fact tries to subsume the different categories of TCNs into one all-encompassing group, employing an expanded ground of danger to public order to justify the detention of TCNs.

68 Doc. 175063/49247/2013, 19 Nov. 2013 (author's translation).

69 European Migration Network, *Annual Report on Migration and Asylum Policy*, Athens, Ministry of Interior, 2013, 54, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/annual-policy/annual-policy-12a_greece_national_policy_report_part_2_2013_en_version.pdf (last visited 3 Dec. 2016).

70 Law 3907/2011 allows for detention in view of return while Law 3386/2005 allows for detention in view of administrative expulsion, See Section 2.1. See also A. Beduschi, “Detention of Undocumented Immigrants and the Judicial Impact of the CJEU's Decisions in France”, *International Journal of Refugee Law*, 26(3), 2014, 341.

3.3. Characteristic examples of unlawful detention imposed on undesirable and unreturnable TCNs

Currently, many categories of undesirable and unreturnable persons are placed under detention on national security and/or public order grounds, with a systematic, legally controversial and unjustified invocation of these grounds by the police.⁷¹

The following example of administrative detention for public order and security grounds, imposed on an unreturnable TCN only because of having previously served a custodial sentence, is very characteristic. In July 2014, a Somali national, who had been placed under administrative detention after serving a custodial sentence, was released following the registration of his asylum application – after 8 months in administrative detention. The day after, while trying to obtain his asylum-seeker registration card from the Regional Asylum Office of Attica, he was arrested again. According to his account, the police staff in charge of conducting the arrest informed him that the decision for release was wrong, because it had not been taken into account that he had been detained on “public security” grounds. This person remained in detention for several months until he was granted subsidiary protection.⁷²

Another example, confirming the great importance that the Hellenic Police attaches to the detention of TCNs for reasons of public order, is the issue of a detention order against a recognised refugee in October 2015. Following a decision of the Secretary General of Public Order concerning the revocation of his refugee status, attributed by the Asylum Appeal Commission in 2013, this person was apprehended and placed in detention. The decision of the Secretary General of Public Order had not been notified to the refugee yet and in any case, it was not final as it could be subject to an appeal. The detention decision referred to public order grounds, which were already known and had been examined by the Commission in 2013. Thus, the detention order not only treated a recognised refugee as an asylum-seeker in order to justify detention on the grounds provided by Presidential Decree 114/2010, but it also ignored that the relevant provisions of the Presidential Decree applied to persons lodging asylum applications before 7 June 2013, while already detained.⁷³

A last example, confirming that detention is an objective of the police *per se*, is that during 2014 detention orders were issued on public order grounds for unreturnable TCNs who were arrested in “drug trafficking areas”, without any further determination of the place, time or the circumstances under which their presence in those areas was considered as a reprehensible act.⁷⁴ According to the Greek Ombudsman, it was particularly worrying that under the above “specific action” of the Hellenic Police, persons with common ethnic characteristics whose removal was unfeasible (e.g. citizens of Eritrea and Somalia) were arrested despite measures in place which stated removal of persons from certain countries was not to be pursued.

71 Asylum Information Database, *National Country Report Greece*, 92; Aitima, *Monitoring Immigration Detention, Quarterly Report September – December 2015*.

72 Asylum Information Database, *National Country Report Greece*, 92.

73 Case supported by the Greek Council for Refugee.

74 Greek Ombudsman, *Administrative Detention of Aliens in View of Removal – Unfeasible Deportation – Public Order and Security Grounds/ Specific Action of the Hellenic Police*, 23 Jul. 2014.

3.4. Current challenges and future perspectives

Given the fact that the deprivation of liberty of undocumented TCNs in view of return is permitted under international, European, EU and national law only in cases where return is feasible, Greece should urgently identify lawful and effective measures to address the problem of undesirable and unreturnable TCNs, rather than applying arbitrary administrative detention. It is crucial the Greek authorities define level of seriousness of the risk presented by undesirable and unreturnable TCNs, which would justify the use of such measures for reasons related to criminality, and elaborate specific regulations for this purpose. At the same time, there is an urgent need for data collection, in order to estimate the nature and the scale of the problem. Only on the basis of concrete and specific numbers, and quantitative and qualitative analysis, will it be possible to determine the appropriate response to this group of persons. It would also be useful to consider best practices of other countries dealing with dangerous but unreturnable TCNs, which could also be suitable for the nature and scale of the Greek problem. Residence permits for tolerated stay and community support projects could be possible alternatives to detention.⁷⁵

Meanwhile, the current shortcomings of both the legal framework and practice surrounding undesirable and unreturnable TCNs should be addressed. More precisely, it should be ensured that all TCNs who wish to apply for asylum to have effective access to asylum procedures before being arrested and detained. Additionally, circulars and special training for police officers responsible for issuing detention orders would assist the Hellenic Police in correctly applying the law to different groups of TCNs, and mitigate against the use of unlawful detention orders on grounds of custodial sentences, which fall within the exclusive jurisdiction of the courts rather than the police. In this respect, obstacles to carrying out forced returns, such as difficulties in establishing identity, lack of co-operation by consular authorities of countries of origin in terms of issuing travel documents, and the non-implementation of existing readmission agreements (with the EU and bilaterally) should not be underestimated.⁷⁶ Thus, administrative detention in view of removal should not only be prohibited for undesirable undocumented TCNs who are unreturnable on account of legal obstacles – e.g. human rights obligations such as the *non-refoulement* principle – but also for those who are unreturnable on account of practical obstacles.

75 See for example Detention Action's alternative to detention project for young migrant ex-offenders at risk of indefinite immigration detention in the UK providing intensive case management support to 30 young migrants per year, identifying local services to meet their individual needs, addressing accommodation problems, facilitating access to advice and information about the immigration process, and identifying opportunities for participation in the community, available at: <http://detentionaction.org.uk/thinking-out-side-the-cell> (last visited 3 Dec. 2016). See also Flemish Refugee Action, Detention Action, France terre d'asile, Menedék – Hungarian Association for Migrants and European Council on Refugees and Exiles, *Point of No Return: The Futile Detention of Unreturnable Migrants*, Jan. 2014, 76–84, available at: http://pointofnoreturn.eu/wp-content/uploads/2014/01/PONR_report.pdf (last visited 6 June 2016).

76 European Migration Network, *Annual Report on Migration and Asylum Policy*, Athens, Ministry of Interior, 2014, 72, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/annual-policy/2014/12a_greece_apr_2014_part2_english.pdf (last visited 3 Dec. 2016). See also M. Gregou, "Drawing the Geographic Boundaries of Expulsion and Readmission in Greece: The Dynamics of an Elusive Process", *European Journal of Migration & Law*, 16(4), 2014, 524.

Another important issue which should be addressed is the effective legal protection of TCNs who may be subject to unlawful detention orders. Although the issue of unlawful detention orders such is common, their judicial challenge is rather difficult to pursue in practice.⁷⁷ More precisely, oversight of the legality of administrative detention by the courts is highly restricted,⁷⁸ the judicial control of detention conditions remains ineffective⁷⁹ and there is no provision of free legal aid for detained TCNs. The provisions of Law 4375/2016 providing free legal aid for detained asylum-seekers have not yet been brought into effect.⁸⁰

77 See Greek Council for Refugees, *Administrative Detention of Aliens*, Athens, Nomiki Bibliothiki, 2015 (in Greek: *Ελληνικό Συμβούλιο για τους Πρόσφυγες, Η διοικητική κράτηση των αλλοδαπών*), 75–96 and 201–212.

78 The legal remedy for challenging detention decisions before the administrative courts (objections against detention) is not considered by court composition, but solely by the President of the Court, and is not subject to an appeal. The ECtHR has considered it as a non-effective remedy. It has also been noticed, that courts do not examine the lawfulness of detention in the case of detainees who cannot certify a known and stable residence, even for vulnerable cases such as mentally ill persons and victims of torture. Thus, except from the fact that the capacity of having a residence is irrelevant to the control of lawfulness, it is also ignored that it is impossible for asylum-seekers who have just arrived in Greece to declare an address, while the State itself fails to fulfil its obligation to provide sufficient number of places in accommodation centres. ECtHR, *Housein v. Greece*, Judgement, App1. No. 71825/11, 24 Oct. 2013, paras. 79–84; Asylum Information Database, *National Country Report Greece*, 102–103; European Migration Network, *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies (Greece)*, 18, 23–24 and 27; Greek Council for Refugees, *Submission of the Greek Council for Refugees to the Committee of Ministers of the Council of Europe in the case of M.S.S. V. Belgium & Greece*, in Doc. DH-DD(2014)591, 25 Apr. 2014, 13–14, available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD\(2014\)591&Language=lanFrench&Site=CM](https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD(2014)591&Language=lanFrench&Site=CM) (last visited 3 Dec. 2016).

79 Detention conditions of migrants and asylum-seekers have been found to be even worse than in the regular prisons by the UN Working Group on Arbitrary Detention and they have been the subject of many reports issued by international, European, and national human rights monitoring bodies: dirty, inexistent or insufficient healthcare services, lack of clothing, bad quality and insufficient quantity of food, lack of hygiene products, lack of heating and/or hot water, problematic communication with the “outside world”, no provision for leisure activities and recreation. Although the Greek legislation prohibits detention without decent living conditions (Art. 30(1) of Law 3907/2011 and Arts. 14(5) and 46(8) of Law 4375/2016), complaints are either not taken into consideration or are rejected as non-proven, even in cases that reports about conditions issued by international organisations, the Greek Ombudsman and non-governmental organisations are brought to the attention of the courts (Greek Council for Refugees, *Administrative Detention of Aliens*, 206–208). Regarding detention conditions, See among others: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Greek Government on the Visit to Greece Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 23 April 2015*, Doc. CPT/Inf (2016) 4, 1 Mar. 2016; Greek Ombudsman, *Monitoring Visits; Campaign for the access to asylum, Conditions of Administrative Detention and Access to Asylum Procedure*, 23 Oct. 2014, available in Greek at: http://asylum-campaign.blogspot.gr/2014/10/blog-post_23.html (last visited 3 Dec. 2016). See also European Commission, *Communication from the Commission to the European Parliament and the Council Progress Report on the Implementation of the Hotspots in Greece*, COM(2015) 678 final, 15 Dec. 2015, 10: “Severe shortcomings related to conditions in detention – in particular in the provision of food supplies – have been identified. This needs to be improved immediately”.

80 Free legal aid for detainees provided by non-governmental organisations is extremely limited due to lack of funding. See Greek Council for Refugees, *Submission of the Greek Council for Refugees to the Committee of Ministers of the Council of Europe in the case of M.S.S. V. Belgium & Greece*, 14 and European Migration Network, *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies (Greece)*, 23–24 and 27.

Finally, there are certain measures, which could be considered effective solutions to the problem of undesirable and unreturnable TCNs: assisted voluntary return, which is already being applied, and implementation of alternative to detention measures, which is expected to start being applied soon. The signature of a Memorandum of Cooperation between the International Organization for Migration and the Minister for Public Order for the voluntary return of migrants to their countries of origin, in June 2014, is a positive step towards reducing the use of detention for undocumented TCNs whose return is difficult due to practical obstacles. However, it is important that such efforts – including information on the possibility of voluntary return – not be implemented in detention centres, to avoid possible risks for persons in need of protection. It is not safe to offer such “options” to persons possibly suffering from post-traumatic stress and detained under particularly difficult conditions.⁸¹

Additionally, if Greece is willing to undertake efforts to reduce the use of administrative detention and to implement alternative measures such as regular reporting to the authorities and obligation to stay at a certain place, it is important that such alternatives to detention should be implemented only in cases of feasible return.⁸² Otherwise, unnecessary and disproportionate detention would be replaced by other restrictions of freedom, which are also inappropriate for unreturnable TCNs, including those considered “undesirable”.⁸³ Hence, the use of alternative to detention measures should not be considered as an appropriate solution for the problem of undesirable and unremovable TCNs.

4. CONCLUSION

Given the fact that the Greek legislation does not permit administrative detention of TCNs for whom removal is not a realistic prospect, the full respect of the current legislative framework would prevent the use of unlawful detention as a national response to the problem of “undesirable” but unreturnable undocumented TCNs. In other words, not only unreturnable TCNs should not be detained in view of return and administrative expulsion if legislative provisions were fully respected, but this would also prevent the extension of detention for those applying for asylum in detention. Because detention of unreturnable TCNs would never take place and thus, the hypothesis of unreturnable TCNs applying for asylum in detention would be also

81 See also M. Bosworth, *Inside Immigration Detention*, New York/Oxford, Oxford University Press, 2014; and M. Bull, E. Schindeler, D. Berkman & J. Ransley, “Sickness in the System of Long-Term Immigration Detention”, *Journal of Refugee Studies*, 26(1), 2012, 47–68.

82 UNHCR, “Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees 2014–2019”, *International Journal of Refugee Law*, 27(2), 2015, 375–389; V. Türk & A. Edwards, “Introductory Note to the Summary Conclusions of the Global Roundtable on Alternatives to Immigration Detention”, *International Journal of Refugee Law*, 23(4), 2011, 873–875; “Summary Conclusions of the Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons Geneva, Switzerland, 11–12 May 2011”, *International Journal of Refugee Law*, 23(4), 2011, 876–883; C. Costello & E. Kaytaz, “Building Empirical Research into Alternatives to Detention: Perception of Asylum Seekers and Refugees in Toronto and Geneva”, Geneva, UNHCR, Legal and Protection Policy Research Series, 2013, 10–11, available at: <http://www.unhcr.org/51c1c5cf9.html> (last visited 3 Dec. 2016); A. Bloomfield, “Alternatives to Detention at a Crossroads”, *Refugee Survey Quarterly*, 35(1), 2016, 29–46.

83 See also M. Flynn, “Who Must Be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy”, *Refugee Survey Quarterly*, 31(3), 2012, 40–68.

excluded. While there is still some space for improvement of the relevant legislation,⁸⁴ it seems that the actual problem concerns mostly the treatment of these cases in practice within the current policy context.

The first issue to be addressed concerns the use of public order and/or national security as grounds for detaining unreturnable TCNs. As explored above, significant steps were taken to reduce the use of detention before the transformation of the hot-spots into detention centres.⁸⁵ The backwards move could be explained by the external and domestic political pressure to avoid Greece and Europe being seen as attractive destinations for migrants. As such, detention measures could be being imposed as a deterrent to new arrivals, entailing less high political costs for a left government when applied against possibly dangerous persons.⁸⁶ Moreover, following the recent terrorist attacks in Europe since November 2015, deep concerns have been expressed at the EU level regarding security controls of newcomers in the Greek islands. Detaining individuals may therefore be seen as a security measure. In this respect, it should be acknowledged that Greece's incapacity to address the problem of dangerous but unreturnable foreigners is also a part of the broader European incapacity to manage mixed migration flows.⁸⁷

There is no evidence that long detention periods facilitate return in general.⁸⁸ It is also clear that detention of unreturnable TCNs in view of return is *a priori* unlawful because the principle of proportionality requires that detention always has a legitimate aim, which would not exist without a real and tangible prospect of removal.⁸⁹ At the same time, the need to protect society from possibly dangerous but unreturnable undocumented TCNs should not be underestimated. In this respect, lawful and effective measures facilitating social inclusion such as residence permits for tolerated stay and community support projects could be envisaged instead of arbitrary detention for crime prevention.⁹⁰ Otherwise, segregation from the community constitutes

84 See Sections 2.1, 2.2 and 2.3.

85 On 17 Feb. 2015, 3 weeks after the SYRIZA Government came to power, a range of measures presenting an important step towards reducing the use of immigration detention were announced. See Section 3.1.

86 During a radio emission, the previous Alternate Minister of Interior and Administrative Reconstruction, Ms Anastassia Christodouloupoulou, admitted that detention centres are not going to close because the Government is not able to return the money used for their establishment under the European Returns Fund, available at: <http://www.capital.gr/story/2261711> (last visited 3 Dec. 2016).

87 See also B. Hastie & F. Crepeau, "Criminalising Irregular Migration: The Failure of the Deterrence Model and the Need for a Human Rights-Based Framework", *Journal of Immigration, Asylum and Nationality Law*, 28(3), 2014, 213–236.

88 European Migration Network, *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies, Synthesis Report for the EMN Focused Study 2014*, 2014, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/00_synthesis_report_detention_study_final.pdf (last visited 3 Dec. 2016); Greek Council for Refugees, *Implementing Alternative Measures to Administrative Detention in Greece*, Dec. 2015, available in Greek at: <http://www.gcr.gr/index.php/en/news/press-releases-announcements/item/536-efarmozontas-ta-enallaktika-metra-tis-dioikitikis-krasisis-stin-ellada> (last visited 3 Dec. 2016); Hellenic Foundation for European and Foreign Policy, *Evaluating the Relationship between Cost and Effectiveness of Policies Controlling Irregular Migration in Greece*, Migration and Detention Assessment Report, Oct. 2014, available in Greek at: <http://www.eliamep.gr/wp-content/uploads/2014/11/MIDAS-REPORT-GR-1.pdf> (last visited 3 Dec. 2016).

89 UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, para. 64.

90 See Section 3.4.

a clear blow to equality between the liberty rights of citizens and those of non-citizens, where the discrimination against non-citizens by reference to “dangerousness”, is against the rule of law.⁹¹

91 R. Thwaites, *The Liberty of Non-Citizens. Indefinite Detention in Commonwealth Countries*, Oxford/Portland, Hart Publishing, 2014, 297.