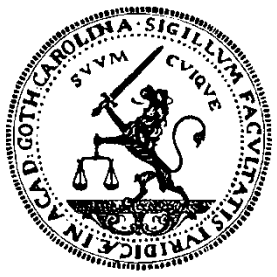

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To Europe and Back Again

A Study of the Legality of Readmissions to Georgia

LAGM01 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

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Contents

Summary

This graduate thesis examines if readmitting asylum seekers from EU member states to Georgia without first thoroughly assessing their claims would be illegal on the grounds that it would expose them to a real risk of ill-treatment contrary to Article 3 of the European Convention on Human Rights. The basis of asylum law is protection based on individual grounds. This graduate thesis therefore studies risks of ill-treatment that would be real enough to render readmissions of all or certain groups of asylum seekers to Georgia contrary to Article 3. The main body of the graduate thesis consists of a study of Georgia's treatment of asylum seekers and a study and application of Article 3 to Georgian circumstances. The study of Georgia's treatment of asylum seekers focuses on issues pertaining to the risk of indirect refoulement and the risk that readmitted asylum seekers would be subjected to inhuman or degrading living conditions when received in Georgia.

The conclusion is drawn that readmissions of asylum seekers from EU member states to Georgia would not give rise to a risk of indirect refoulement for anyone. This is based on the assessment that Georgia has the capacity to seriously examine asylum applications and on the fact that Georgia does not presently detain or deport rejected asylum seekers. The study does not examine how Georgian decision makers assess particular grounds for protection.

How Article 3 should be applied to inhuman or degrading living conditions is very uncertain. Legal scholarship is divided on how to interpret several aspects of the case law and it is clear that more case law is needed in order to decisively decide if living conditions in Georgia would make readmissions there illegal. However, it is concluded, with reservations, that the readmission of any asylum seeker to Georgia would probably be contrary to Article 3 on the grounds that the capacity of the Georgian reception system is severely insufficient to handle the amount of asylum seekers residing in Georgia.

Sammanfattning

Examensarbetet besvarar frågan om överföringar av asylsökande till Georgien som ännu inte fått sina asylskäl utförligt utredda skulle utsätta dem för en verklig risk för omänsklig eller förnedrande behandling och därmed vara oförenliga med Europakonventionens artikel 3. Asylrätten bygger på bedömningar av individuella asylskäl. I examensarbetet studeras därför problem i Georgien som är generella nog att ge upphov till en risk för omänsklig eller förnedrande behandling för hela grupper av asylsökande eller asylsökande i gemen. Examensarbetets huvudtext består dels av en studie av den georgiska asylprocessen och flyktingmottagandet och dels av en studie, tolkning och tillämpning av Europakonventionens artikel 3 på förhållandena i Georgien. Studien av Georgien rör i första hand risker för indirekt refoulement och omänskliga eller förnedrande levnadsvillkor.

Analysen av förhållandena i Georgien och artikel 3 ger att överföringar inte skulle kränka artikel 3 på den grund att de skulle ge upphov till en risk för indirekt refoulement. Det baseras på bedömningen att de generella bristerna i Georgiens asylprocess inte är allvarliga nog och att Georgien i nuläget inte förvarstar eller deporterar de som nekats asyl. Examensarbetet utreder inte hur georgiska beslutsfattare bedömer särskilda typer av asylskäl.

Det råder en osäkerhet kring hur artikel 3 ska tillämpas på levnadsvillkor. Osäkerheten gäller bland annat tillämpningen i länder utanför EU, beviskrav och vad som utgör levnadsvillkor. Doktrinen erbjuder olika tolkningar i dessa frågor och det behövs fler utlåtanden från Europadomstolen för att ett definitivt svar ska kunna ges på frågan om levnadsvillkoren för asylsökande i Georgien medför att överföringar kränker artikel 3. Med denna osäkerhet i åtanke dras den försiktiga slutsatsen att överföringar förmodligen skulle strida mot artikel 3 på grund av Georgiens mycket otillräckliga mottagningskapacitet och de svåra levnadsvillkor som detta kan väntas medföra för många av de som blir överförda.

Acknowledgements

With the submission of this graduate thesis, I will be finishing up four and a half happy years in law school. I would like to take this moment to thank my family and friends for all the love and support they have given me along the way and which I will no doubt continue to rest on in the future.

I would also like to especially thank my friend Björn for introducing me to the field of migration law and policy and for always being a moral inspiration. Without a law degree and in place of the legal support that Sweden did not offer those who would be Dublin returnees, he managed to bring about the *M.S.S. v. Belgium and Greece* of Sweden. It therefore seems fitting that he receive a special mention in this graduate thesis.

Malmö, 4 August 2015

Henning Boström

Abbreviations and short forms

Article 3	Article 3 of the European Convention on Human Rights
The Convention	The European Convention on Human Rights
The Court	The European Court of Human Rights
EU	European Union
GYLA	Georgian Young Lawyers' Association
IOM	International Organization for Migration
LLSA	Law of Georgia on the Legal Status of Aliens and Stateless Persons
LRHS	Law of Georgia on Refugee and Humanitarian Status
MIA	Ministry of Internal Affairs of Georgia
MRA	Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia
UNAG	United Nations Association of Georgia
UNHCR	Office of the United Nations High Commissioner for Refugees

1 Introduction

1.1 Background

Public debate on the migration policies at work at the EU borders has intensified during the last few years. The annually recurring tragedy of migrants drowning in the Mediterranean Sea has put in focus the question what the right to seek asylum constitutes, and in which countries an asylum seeker[1] can make use of this right. According to its most widespread interpretation, the right to seek asylum does not comprise a right to receive a visa for that purpose, leaving many asylum seekers who wish to enter foreign countries with no other entry options than illegal ones. This has led actors who want to limit asylum migration to employ policies that hinder asylum seekers from entering their territories. The EU is one such actor, and the present EU policies of a restrictive visa regime, strict border controls and cooperation with states in the neighbourhood on migration issues work in concert to restrict asylum seekers' access to Europe and as a consequence to the European asylum procedures.[2]

Access to the asylum procedure can also be restricted for asylum seekers who have already succeeded in entering the state in which they would prefer to file their asylum application. One such method is the employment of the safe third country concept. According to the concept, a country that receives an asylum seeker who has fled his or her country of origin by transiting through another country where he or she could have applied for asylum is allowed to send back the asylum seeker to that safe third transit country without thoroughly examining the asylum seeker's application. The basis for this concept is rather

[1] In this graduate thesis, the term asylum seeker will be applied to a person who intends to seek asylum or who is registered as an asylum seeker until his application for asylum has been granted or finally rejected.

[2] See e.g. Thomas Gammeltoft-Hansen & James C. Hathaway (2014): *Non-Refoulement in a World of Cooperative Deterrence*. 2 Columbia Journal of Transnational Law 235–284; Cathryn Costello (2012[1]): *Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored*. 12:2 Human Rights Law Review 287–339; Thomas Gammeltoft-Hansen (2014): *International Refugee Law and Refugee Policy: The Case of Deterrence Policies*. 27:4 Journal of Refugee Studies 574–595.

weak and comes from the prohibition in Article 31 of the 1951 Refugee Convention against imposing penalties on asylum seekers who migrate irregularly. According to Article 31, states should not penalise the irregular entry or presence of refugees '*coming directly from a territory where their life or freedom was threatened*' if they present themselves to the authorities without delay and show good cause for the illegal entry or presence. This has been interpreted as meaning that asylum seekers only have a right to apply for asylum in the first safe country they arrive in.[3]

The safe third country concept is widely employed within the EU, where it forms the basis of the Dublin readmissions. However, EU law also envisions readmissions of third-country nationals to countries outside Dublin space. The new Procedures Directive[4] that went into effect on 21 July 2015 retains the concept of European safe third countries as well as regular safe third countries. According to the new Procedures Directive, a country is considered a European safe third country if it has ratified and observes the provisions in the Refugee Convention and the European Convention on Human Rights and has in place an asylum procedure prescribed by law.[5] The use of the European safe third country concept is less restricted than the use of the safe third country concept.[6] Unlike under the former Procedures Directive, it is now up to each member state to decide what countries to consider European safe third countries.[7] Georgia is one of the countries outside of the EU that has ratified the European Convention on Human Rights and the 1951 Refugee Convention with the 1967 protocol.

[3] Cathryn Costello (2005): *The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection*? 7 European Journal of Migration and Law 35–69, p. 40.
[4] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection [2013] OJ L180/60.
[5] Art. 39 of the 2013 Procedures Directive.
[6] Arts. 38 and 39 of the 2013 Procedures Directive.
[7] Art. 36 (2d) Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L326/13; Art. 39 of the 2013 Procedures Directive.

EU and Georgia base their deepening cooperation on the movement of people on the Mobility Partnership that was launched in 2010. EU and Georgia have since then agreed to facilitate visa issuance and are now in a visa liberalisation process that may lead to short-term visa free travel for Georgians who want to visit the EU. EU nationals are already able to travel to Georgia visa free since 2006.[8] On March 1 2011, the EU-Georgia readmission agreement[9] went into effect, which obliges the parties to receive nationals residing illegally on the other party's territory.[10] With some exceptions, the readmission agreement also obliges the parties to receive third-country nationals who are illegally residing on the other party's territory if they illegally and directly entered that territory after having stayed on, or transited through, the first party's territory.[11] It also obliges a party to receive illegally residing third-country nationals who possess a valid visa issued by that party.[12]

The visa liberalisation process does not only presuppose a readmission agreement,[13] but requires changes that affect most aspects of Georgian migration policy and border control. The Georgian Young Lawyer's Association (GYLA) has said that the EU and its requests have been a more important factor behind the rapid development of Georgia's migration policies than any reform desire from the Georgian government.[14]

Most asylum seekers arrive to the EU through other states than Georgia. However, even if to a smaller degree, Georgia is a transit country for asylum seekers trying to reach and apply for asylum in the EU.[15] Those asylum

[8] The Georgian Young Lawyers' Association (2013): *Georgia and Migration Policy Analysis*, p. 8–9.
[9] Agreement between the European Union and Georgia on the readmission of persons residing without authorisation (The European Union-Georgia). Signed 22 November 2010, entered into force 1 March 2011.
[10] The Georgian Young Lawyers' Association (2013): *Georgia and Migration Policy Analysis*, p. 9, 12; Arts. 2 and 4 of the EU-Georgia Readmission Agreement.
[11] Arts. 3 (1b) and 5 (1b) of the EU-Georgia readmission agreement.
[12] Arts. 3 (1a) and 5 (1a) of the EU-Georgia readmission agreement.
[13] The Georgian Young Lawyers' Association (2013): *Georgia and Migration Policy Analysis*, p. 9.
[14] The Georgian Young Lawyers' Association (2013): *Georgia and Migration Policy Analysis*, p. 7, 12.
[15] The Georgian Young Lawyers' Association (2013): *Georgia and Migration Policy Analysis*, p. 12, 17.

seekers are not readmitted to Georgia today. While the all-time number of requests to Georgia to readmit Georgian nationals under the readmission agreement had reached 3584 at the end of August 2014,[16] EU member states have so far only requested the readmission of five third-country nationals. Georgia granted the four requests that concerned Russian Chechens who already possessed Georgian residence permits. Georgia rejected the fifth readmission request from Poland that concerned a Kenyan national, as she had only transited Georgia through Tbilisi International Airport.[17]

The practice of readmitting third-country nationals from EU member states to the European neighbourhood and Georgia could change quickly in the future. EU legislation has opened up for such readmissions and the EU-Georgia readmission agreement has made them practical. What is required is a policy change in some EU member states and an assessment in those countries that Georgia is a safe third country. Georgia's migration policies have undergone rapid change during the last few years with pressure and assistance from the EU. Nevertheless, is Georgia ready to receive and provide protection to readmitted asylum seekers in accordance with international law?

1.2 Purpose and Scope

This graduate thesis examines the legality of readmitting asylum seekers from EU member states to Georgia today, without first thoroughly assessing their claims. There are several different treaties ratified by all EU member states that contain international obligations that concern readmissions. Community law contains such obligations as well. This graduate thesis however, is limited to a study of the obligations that stem from Article 3 (hereafter: Article 3) of the European Convention on Human Rights (hereafter: the Convention). The Convention with Article 3 has arguably been the most successful supra-

[16] International Organization for Migration (2014): *Readmission to Georgia Issue # 3*. Published September 2014. Newsletter. P, 3.
[17] Representative of the MIA (2015). Interview 19 June 2015; According to Art. 3 (2a) of the EU-Georgia Readmission Agreement, Georgia has no obligation to receive a person in this situation.

national legal instrument in Europe for challenging deportations and it is therefore reasonable to focus a study on Article 3 alone.

Article 3 alone and in concert with Article 13 of the Convention does not only prohibit state parties to deport a person when substantial grounds have been shown that this will expose the person to a real risk of ill-treatment. They also create procedural obligations. This graduate thesis will not comprise a study of whether EU member states fulfil their procedural obligations under Article 3 and Article 13, but will instead focus on establishing if there are substantial grounds to believe that readmissions to Georgia will expose people to a real risk of ill-treatment.

Individual claims and assessments of individual protection needs are the basis of asylum law. This graduate thesis will focus on bigger issues in Georgia that may call into question the legality of readmitting all asylum seekers to Georgia our certain groups of asylum seekers.

Moreover, the study in this graduate thesis will only concern asylum seekers whose asylum applications are not considered manifestly unfounded on the grounds that they do not have a protection need.

1.2.1 Research Question

Having the above delimitations in mind, the research question of this graduate thesis is phrased as follows:

- Are there substantial grounds to believe that all or certain groups of asylum seekers readmitted from the EU to Georgia today, without first having their asylum claims assessed thoroughly, face a real risk of being subjected to ill-treatment prohibited by Article 3 of the Convention?

1.3 Method

In order to assess if it is contrary to Article 3 to readmit asylum seekers to Georgia, it has been necessary to study the treatment of asylum seekers in Georgia and to interpret and apply Article 3 to that situation in a readmission context. To focus the study of the situation in Georgia, it has also been necessary to make a prima facie assessment of what in Georgia's treatment of asylum seekers could give rise to a risk of ill-treatment.

The inspiration for what issues to look for in Georgia has been the European Court of Human Rights' (hereafter: the Court) case law. The areas in which the Court has found violations of Article 3 in readmission cases can be divided, and are divided by the Court, into indirect refoulement, detention conditions and living conditions. There are of course other issues under Article 3 that may affect a large number of asylum seekers readmitted to a certain country. For example, until a few years ago Georgia was still passing substantial jail sentences on asylum seekers who illegally crossed its border.[18] However, this study of the treatment of asylum seekers in Georgia has focused on and exclusively found issues pertaining to either indirect refoulement, detention conditions or living conditions.

In order to determine the facts, the Court '*will assess all the material placed before it and, if necessary, material obtained of its own motion*'.[19] The rules that govern the Court have largely given it free reign in how it gathers and assesses evidence. For example, the Court can carry out on-site investigations[20] and ask experts and institutions to express opinions or write reports regarding matters relevant to the case.[21] The Court may quite generally '*adopt any investigative measure which it considers capable of*

[18] Migreurop (2013): *Country profile Georgia* (www). Retrieved from migreurop, http://www.migreurop.org/article2195.html?lang=fr. Published 3 January 2013. Retrieved 30 July 2015.
[19] *Vilvarajah and others v. The United Kingdom*, 30 October 1991, Series A no. 215, para. 107.
[20] European Court of Human Rights Rules of Court of 1 June 2015, rule A1 (3). Accessible from http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf. Retrieved 30 July 2015.
[21] European Court of Human Rights Rules of Court of 1 June 2015, rule A1 (2).

clarifying the facts of the case'.[22] There is therefore a multitude of relevant primary and secondary sources for determining risks of ill-treatment in readmission cases. That the Court has mostly relied on secondary sources like reports from different international institutions and NGOs in those cases,[23] does not necessarily mean that the Court considers those sources to be more reliable than others. Fact-finding through reports is quicker and less expensive for the Court than conducting investigations on its own accord.[24] What is important is that the gathered sources are able to show substantial grounds for the risk of ill-treatment.

GYLA published two reports on Georgian asylum law and migration policies in 2013. However, these reports mostly contain a reiteration of Georgian legislation and government policy and no critical analysis as to the conformity of Georgian asylum law and practice to Georgia's human rights obligations. Furthermore, Georgia's migration policies have undergone extensive changes during recent years. The reports written by the EU delegations sent to Georgia to study the progress made in relation to the VLAP are more recent and contain some critical observations. However, these studies are not very extensive and they are not academic studies. Moreover, the context of the visa liberalisation dialogue is very political. As to other available sources of information, UNHCR provides some statistics about the amount of asylum seekers in Georgia and Georgia's recognition rate. Moreover, most of the relevant Georgian legislation has been translated to English.

To assess how Georgia treats asylum seekers, it has therefore been necessary to gather a lot of information. Most material in this part of the graduate thesis has come from interviews conducted with people representing different organisations who work with migration in Georgia. The different actors interviewed are the Ministry of Internally Displaced Persons from the

[22] European Court of Human Rights Rules of Court of 1 June 2015, rule A1 (1).
[23] Katayoun C. Sadeghi (2009): *The Problematic Nature of the Court's Reliance on Secondary Sources for Fact-Finding*. 25 Connecticut Journal of International Law 127–151, p. 127–128, 133.
[24] Katayoun C. Sadeghi (2009), p. 127.

Occupied Territories, Accommodation and Refugees of Georgia (the MRA), the Ministry of Internal Affairs of Georgia (the MIA), United Nations Association of Georgia (UNAG), the International Organization for Migration (IOM) and GYLA. These parties all have different positions in the Georgian asylum procedure and the questions posed have mostly been posed to several of them in order to get as comprehensive and unbiased answers as possible. Moreover, the focus of the interviews has been to establish verifiable facts about the Georgian asylum procedure and Georgian reception conditions and not opinions about their qualities. The fact-finding has also comprised a visit to Georgia's only detention facility for migrants and a request for public information from the MRA. There are notes from the interviews but no recordings. However, the correctness of the referenced information has been verified by e-mail.

The Convention and its articles are phrased in very general terms and the content of them can only be well understood by studying the Court's extensive and well developed case law. The Court interprets the Convention and sets precedents.[25] The Court has adjudicated readmission cases on several occasions, and the graduate thesis' study of Article 3 will therefore rest heavily on that case law. If the Court has not clearly addressed a particular issue, it is necessary to interpret its case law. If the Court has assigned particular importance to a particular principle of interpretation in a case, that could give guidance as to how Article 3 is to be interpreted in a case in a similar context.[26]

Legal scholars certainly offer good commentary on how the Court's case law should be interpreted. However, one should be aware both as a reader and a writer that asylum law is a controversial area of law that evokes a lot of emotion. The legality of deportation is not the centrepiece of all commentary.

[25] Article 32 of the Convention.
[26] For a summary on how the Court interprets the Convention, see Bernadette Rainey & Elizabeth Wicks & Clare Ovey (2014): *The European Convention on Human Rights* (6th edn). Oxford University Press, Chapter 4.

Is can be confused with *ought* and conclusions are sometimes influenced by wishful thinking.

1.4 Disposition

The graduate thesis is introduced with a critical study of how Georgia treats asylum seekers (Chapter 2). The study covers issues that may alone or in concert give rise to a real risk of ill-treatment were asylum seekers readmitted to Georgia. The chapter is divided into three parts. The first part focuses on issues pertaining to the risk of indirect refoulement, the second on the detention of asylum seekers and the third on their living conditions.

The first part of Chapter 3 contains an introduction to the general application of Article 3 in non-refoulement cases. The rest of Chapter 3 is divided into two parts relating to issues of indirect refoulement and living conditions. These two parts each contain an analysis of Article 3 and an application of Article 3 to readmissions to Georgia. No part relates to issues of detention, as the study in Chapter 2 did not identify any.

Chapter 4 concludes the graduate thesis by providing an answer to the research question posed in Chapter 1.2.1.

2 Treatment of Asylum Seekers in Georgia

2.1 Issues that May Cause a Risk of Indirect Refoulement

The principle of non-refoulement is the prohibition in asylum law to turn someone fearing persecution or other ill-treatment over to those who would inflict it upon him. In this graduate thesis, non-refoulement is interpreted as the obligation not to deport a person in breach of Article 3 of the Convention. Indirect refoulement is to turn over an asylum seeker to an intermediary state who in turn turns the asylum seeker over to someone who would subject him to ill-treatment. There is a risk of indirect refoulement if an asylum seeker is deported to an intermediary country that deports asylum seekers without making a sufficient assessment of their claims. This will be expanded on in Chapter 3.

2.1.1 Access to the Asylum Procedure

According to Article 11 (2) of the Law of Georgia on Refugee and Humanitarian Status (LRHS), [27] an asylum seeker who illegally crosses the border into Georgia has to report this to the Georgian authorities at the very first encounter and within 24 hours from crossing the border. Otherwise, the asylum seeker's registration as an asylum seeker is to be rejected.[28] If the asylum seeker can show that the delay was due to circumstances outside his or her control, the 24-hour time limit is prolonged for as long as the circumstances remain.[29] The 24-hour time limit is short, and it has to be assumed that many asylum seekers crossing the border into Georgia illegally will fail to report their illegal border crossing in time solely because they lack

[27] All English citations from this law are excerpts from the unofficial translation of the law that is available on the MRA's official webpage http://mra.gov.ge/eng/static/709. Accessed 3 August 2015.
[28] Art. 13 (1b) LRHS.
[29] Art. 11 (3) LRHS.

knowledge about the legislation. Moreover, an asylum seeker that wishes to travel further to Europe may not intend to contact Georgian authorities. If an asylum seeker does not apply for asylum in Georgia before applying for asylum in the EU and is readmitted, Georgian law would most likely not accept his or her registration as an asylum seeker in Georgia. The delay will not be a result of circumstances outside the asylum seeker's control.

The European Commission criticised the 24-hour time limit in its first Visa Liberalisation Action Plan (VLAP) report.[30] The Georgian authorities' reply to this critique can be found in the second VLAP report, where they stated that Article 11 (2) LRHS is not applied in practice.[31] According to a representative of GYLA, this is indeed the case.[32]

From January to June this year, 18 people crossed the Georgian border illegally and then reported to the authorities that they wished to apply for asylum.[33]

2.1.2 Status Determination Procedures, Decisions and Judgments

The MRA is responsible for assessing and making decisions on asylum applications.[34] The ministry employs nine decision makers and since 2014, there are three people working in a dedicated country of origin information unit.[35] Decision-makers can pose questions to the country of origin

[30] European Commission (2013): *First Progress Report on the implementation by Georgia of the Action Plan on Visa Liberalisation: Report from the Commission to the European Parliament and the Council*. COM(2013) 808 final, 15 November 2013, p. 13.
[31] European Commission (2014): *Second Progress Report on the implementation by Georgia of the Action Plan on Visa Liberalisation: Report from the Commission to the European Parliament and the Council*. COM(2014) 681 final, 29 October 2014, p. 3.
[32] Representative of GYLA (2015). Interview 22 May 2015.
[33] Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia (2015): Reply to request for public information received on 22 June 2015. N 04/07/18182.
[34] Art. 24 LRHS.
[35] European Commission (2015): *Commission staff working document accompanying the document Third Progress Report on Georgia's implementation of the action plan on visa liberalisation: Report from the Commission to the European Parliament and the Council*. SWD(2015) 103 final, 8 May 2015, p. 11–12.

information unit, which mostly bases its answers on international English sources.[36] There seems to be a consensus that the procedures for interviewing asylum seekers and determining their identity have improved a lot during the last few years.[37] In normal cases, the main interview with an asylum seeker will last around two or three hours.[38] According to UNAG however, interviews are still far from meeting international standards. The staff conducting the interviews will sometimes not pose important follow-up questions and the quality of the interviews seems to be higher when they are monitored.[39] According to the Commission staff working document accompanying the third VLAP report, Georgia's refugee status determination procedure is of sufficient quality. The same working document found that the MRA's decisions contain detailed reasoning about law and facts and information about available remedies.[40]

Asylum seekers are entitled to use the services of an interpreter at the interviews conducted by the MRA.[41] This right is upheld in practice as well.[42] Providing interpretation in a language that the asylum seeker understands well is generally not an issue,[43] although the quality of the interpretation can sometimes be lacking.[44]

Judges in Georgia receive some training in asylum law. According to UNAG, a few Georgian judges are well familiar with asylum law, but more judges than those adjudicate asylum cases. Some of them are not familiar with basic asylum law concepts like internal flight alternatives or persecution. Most

[36] Representative of the MRA (2015). Interview 9 June 2015.
[37] Representative of the MRA (2015). Interview; Representative of GYLA (2015). Interview; European Commission (2015), p. 12.
[38] Representatives of UNAG (2015). Interview 16 June 2015.
[39] Representatives of UNAG (2015). Interview; UNHCR and UNAG have access to the interviews and the right to pose questions themselves.
[40] European Commission (2015), p. 12.
[41] Article 18 (1a) LRHS.
[42] Representative of GYLA (2015). Interview.
[43] Representative of GYLA (2015). Interview; Representatives of UNAG (2015). Interview.
[44] Representatives of UNAG (2015). Interview.

judgments are of a standard character and only contain the parties' arguments, a very extensive recital of legislation and the decision itself.[45]

MRA's standard time limit for making decisions on asylum applications is six months. Due to the high amount of asylum applications filed as of late, the MRA is making use of an option to prolong this time with an additional three months.[46] All appeals included, it might take a year or a year and a half for an asylum seeker to get a final rejection.[47]

2.1.3 Protection Statuses and Protection Against Refoulement

The LRHS went into force in 2012.[48] According to the LRHS, asylum seekers can be granted either refugee status or humanitarian status. According to Article 4 (1b) LRHS, an asylum seeker will receive humanitarian status if he or she '*cannot be returned to the country of origin because of legal requirements, namely, international responsibilities undertaken by Georgia (stipulated in article 2*[49] *of the Convention on Human Rights (prohibition of torture, inhumane treatment or punishment)…*'. Articles 3 (1) and 4 (3) LRHS contains exceptions to when refugee and humanitarian status should be granted. An asylum seeker is not entitled to humanitarian or refugee status if he or she '*may, based on a reasonable assumption, create a threat to state security, territorial integrity as well as to the public order of Georgia*' or if '*his/her presence in Georgia is conflicting with the interests of this country for any significant reason*'.

These exceptions are applied in practice. When the MRA has registered an asylum seeker, it sends the case to the MIA for a security check. If the MIA decides that an asylum seeker can be of concern to national security, it sends

[45] Representatives of UNAG (2015). Interview.
[46] Representative of the MRA (2015). Interview.
[47] Representative of the MRA (2015). E-mail received 27 July 2015.
[48] Article 36 LRHS.
[49] The original Georgian document correctly refers to Article 3 of the Convention.

back a negative recommendation. The MRA will then reject the asylum application.[50] The information that security recommendations are based on is classified and it is not shared with applicants or their legal counsel.[51] Asylum seekers therefore have their asylum applications rejected without knowing the grounds for rejection and concomitantly do not possess any effective means to appeal the negative decision on their asylum application.

According to the Commission staff working document accompanying the third VLAP report that was published 8 May this year, the MIA sent back a negative security advice in 193 out of 703 or 24.5 % of cases during an undefined period. In 178 out of the 193 cases, no grounded arguments supplemented the negative security advice.[52] As to the amount of applications that receive a negative security advice, it is reportedly lower in 2015 than in 2014.[53] According to public information requested from the MRA, 16 out of 233 or 6.9 % of cases were rejected from January to June this year because of security concerns.[54] The MIA gives negative security recommendations to a higher extent in cases regarding certain nationalities. Iranians are one group that still receives a very high amount of negative security recommendations.[55]

According to the MRA, a negative security recommendation from the MIA will not result in an applicant's asylum application not being examined. If an asylum application is rejected because of security concerns, it will still be clear from the decision if the applicant risks ill-treatment if deported.[56] However, people with protection needs that have their asylum applications rejected because of security concerns do not receive a protection status. Their stay in Georgia is illegal and they will therefore not enjoy any social rights.

[50] Representative of the MRA (2015). Interview.
[51] Representative of the MRA (2015). Interview; Representatives of UNAG (2015). Interview.
[52] European Commission (2015), p. 11.
[53] Representative of the MRA (2015). Interview.
[54] Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia (2015): Reply to request for public information received on 22 June 2015.
[55] Representatives of UNAG (2015). Interview.
[56] Representative of the MRA (2015). Interview.

A proposal for new legislation is being written, which will most likely correct this issue and grant the people concerned some kind of protection.[57]

Article 21 LRHS contains a prohibition against refoulement. Article 21 (3) prohibits the deportation of people who hold refugee or humanitarian status if there is a reasonable risk that they will be subjected to inhuman or degrading treatment upon their return. Article 21 (2) LRHS prohibits the return of asylum seekers until their case has been tried and the final decision entered into force. However, the law does not protect people whose claims are rejected for security reasons, but still fear inhuman or degrading treatment or punishment upon their return to their home countries. Refoulement is also regulated in the Law of Georgia on the Legal Status of Aliens and Stateless Persons (LLSA)[58]. Art. 59 (2) LLSA does not expressly prohibit the deportation of a person to a country where the person fears inhuman or degrading treatment, but does prohibit deportation if the person's life or health is threatened. It also prohibits the deportation of people that are entitled to protection according to the refugee convention. As Georgia has not yet, or at least not during recent times, carried out any deportations of asylum seekers,[59] it is not clear how Georgian legislation would protect people fearing ill-treatment who have had their asylum applications rejected because of security concerns. According to an MRA representative, Georgia would not deport anyone fearing ill-treatment.[60]

2.1.4 Recognition Rates

According to the annexes to UNHCR's 2013 Global Trends Report, 301 asylum cases were decided finally in Georgia that year. In 66 of these cases, the asylum seeker received either refugee or humanitarian status, which gives

[57] Representatives of UNAG (2015). Interview.
[58] An English translation of this law is available on the webpage of the Legislative Herald of Georgia at https://matsne.gov.ge/en/document/view/2278806?impose=translateEn. Accessed 3 August 2015.
[59] Representative of the MIA (2015). Interview.
[60] Representative of the MRA (2015). Interview.

a recognition rate of 21.9 %.[61] According to the annexes to UNHCR's 2014 Global Trends Report, the MRA made a decision in 366 asylum cases in Georgia that year. In 138 of these cases, the asylum seeker received either refugee or humanitarian status, which gives a recognition rate of 37.7 % at first instance. The appeal courts made a decision in 49 asylum cases and the decision was positive in 16 of them. This gives a change rate of 32.7 %. The recognition rate in 2014 for Iranians and Azerbaijanis was 0 %.[62]

2.1.5 Deportation in Practice

The MIA and the courts both make decisions on deportations. The MIA generally makes decisions that regard rejected asylum seekers. The MIA's decisions can be appealed to a court within 10 days and then appealed again to an appellate court.[63]

As of today, Georgia has concluded readmission agreements with the EU, Denmark, Moldova, Norway, Switzerland and Ukraine.[64] Georgia is negotiating readmission agreements with Belarus, Bosnia and Herzegovina, Montenegro and Serbia and has proposed negotiations on readmission agreements with Armenia, Azerbaijan, Bangladesh, India, Israel, Pakistan and Sri Lanka.[65] Negotiations with Bangladesh and India have reportedly been unsuccessful.[66] There are also plans to start negotiations on readmission agreements with Algeria, China, Iran, Nepal, Nigeria and Turkey.[67]

Georgia does not have a tradition of deporting foreigners. The reason for this has been a lack of infrastructure, a lack of allocated resources and a lack of

[61] UNHCR (2014): *Global Trends 2013 data tables v3 ext (1)* (excel document). Retrieved from https://s3.amazonaws.com/unhcrsharedmedia/2013-global-trends/Global_Trends_2013_data_tables_v3_ext.xls. Published online with UNHCR Global Trends 2013 20 June 2014. Retrieved 30 July 2015. Annex table 10.
[62] European Commission (2015), p. 12.
[63] Representative of the MIA (2015). Interview.
[64] European Commission (2015), p. 7.
[65] European Commission (2015), p. 8.
[66] Representative of IOM (2015). Interview 1 June 2015.
[67] Representative of the MIA (2015). Interview.

readmission agreements. Forced returns have not been a priority.[68] Georgia has recently allocated more resources to identifying and finding irregular migrants and opened its first detention facility for migrants in March this year.[69] Between 1 March and 1 June, the MIA detained five people in this facility.[70] The systems that were created to identify and find irregular migrants by coordinating information between ministries were going to be put online 1 July this year, at the same time as the transition rules in the new LLSA turned obsolete.[71] Since then three more people have been detained in the detention facility.[72] According to the MIA, the five people who were originally detained were all detained because their identity could not be determined. They were not asylum seekers, although one of them applied for asylum in detention and was therefore released.[73] Two of the three recently detained people are not rejected asylum seekers but convicted criminals. The story of the third recently detained person is unknown to the author, but it is quite clear that Georgia has not started to detain rejected asylum seekers.[74]

Even if Georgia would start to detain rejected asylum seekers, this would not necessarily result in a big increase of deportations. Due to a lack of readmission agreements with important countries of origin, Georgian authorities might have trouble carrying out their deportation orders. As of today, there have been a few cases of assisted voluntary return supported by the IOM.[75] The MIA had received a laissez-passer for the detainee concerned in one of these cases and would have deported him if he had not opted to accept to return with the aid of the IOM.[76]

[68] The Georgian Young Lawyers' Association (2013): *Georgia and Migration Policy Analysis*, p. 35.
[69] European Commission (2015), p. 9–10.
[70] Representative of IOM (2015). Interview; Representative of the MIA (2015). Interview.
[71] Representative of the MIA (2015). Interview.
[72] Representative of IOM (2015). E-mail received 20 July 2015.
[73] Representative of the MIA (2015). Interview.
[74] Representative of IOM (2015). E-mail received 22 July 2015.
[75] Representative of IOM (2015). Interview.
[76] Representative of the MIA (2015). Interview; Representative of IOM (2015). E-mail received 20 July 2015.

2.2 Detention of Asylum Seekers

Unlike many EU member states, Georgia does not have a practice of detaining asylum seekers. This is clear from Chapter 2.1.5. There are no indications that asylum seekers would be summarily detained if they were readmitted to Georgia. Of course, without any readmissions to this date, one cannot say much about future practices regarding readmitted asylum seekers specifically.

If readmitted asylum seekers were detained, they would be detained at Georgia's first detention facility for people illegally residing in Georgia that was opened in March this year.[77] Some of the dormitories for single adults seem to comprise less than three square meters per bed, judging from the MIA's own photographs.[78] The dormitories that were shown to the author in person looked to have considerably more space per bed, the amount of beds having seemingly been cut in half.[79] However, with the capacity to accommodate 80 single adults and 4 families, and the detainees held there at present only amounting to a few,[80] any potential risks of overcrowding lie far ahead in the future. The conditions in the detention facility are monitored by the Public Defender of Georgia, which has yet to release its first monitoring report.[81]

At present, there are no indications that asylum seekers in general face a real risk of being detained if they are returned to Georgia. Moreover, there is nothing that indicates that those conditions would constitute ill-treatment. Chapter 3 will therefore contain no part discussing the conformity of detention conditions with Article 3.

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[77] European Commission (2015), p. 10.
[78] Ministry of Internal Affairs of Georgia (2014): *Prime Minister and the Minister of Internal Affairs of Georgia Opened the Temporary Accommodation Center of the Migration Department* (www). Retrieved from the Ministry of Internal Affairs of Georgia, http://www.police.ge/en/saqartvelos-premier-ministrma-da-shinagan-saqmeta-ministrma-migratsiis-departamentis-droebiti-gantavsebis-tsentri-gakhsnes/7220. Published 8 October 2014. Retrieved 29 July 2015.
[79] Tour of the Temporary Accommodation Centre. 19 June 2015.
[80] Representative of the MIA (2015). Interview.
[81] Reports are available at http://www.ombudsman.ge/en/reports/national-preventive-mechanism-reports/reports-after-the-visit.

2.3 Living Conditions of Asylum Seekers

According to the LRHS, asylum seekers have the right to live in a reception centre or other temporary accommodation provided by the MRA free of charge.[82] Asylum seekers are primarily accommodated in the country's only reception centre in Martkopi, which can accommodate a maximum of 60 people.[83] A new building with the capacity to accommodate another 72 people is being constructed beside the old building.[84] UNAG considers the conditions at Martkopi to be acceptable and the capacity of the reception centre was sufficient for Georgia's needs when it was built a few years ago. However, since then immigration has outgrown the reception centre's capacity.[85]

The 60 available places at Martkopi are not nearly sufficient to accommodate everyone who seeks asylum in Georgia. At the start of 2014, there were 380 pending asylum applications and at the end of 2014, the backlog of pending asylum applications had increased to 1257.[86] Even if each asylum application had only regarded a single person, the places at Martkopi would have been sufficient to accommodate less than 5 % of all people within the Georgian asylum process by the turn of the year. Georgia received 1792 asylum applications in 2014[87], which is a considerably higher amount than the 716 asylum applications that were filed in Georgia in 2013.[88] The pressure on Georgia's reception capacity will however still be high this year with around 600 asylum applications having been filed during the first six months of 2015.[89] Single mothers, ill people and other vulnerable people are given priority for accommodation at Martkopi.[90]

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[82] Art. 18 (2) LRHS.
[83] Representative of the MRA (2015). Interview.
[84] Representative of the MRA (2015). Interview.
[85] Representatives of UNAG (2015). Interview.
[86] UNHCR (2015): *UNHCR Global Trends 2014 Annexes* (zip-file). Retrieved from http://www.unhcr.org/globaltrends/2014-GlobalTrends-annex-tables.zip. Published online with UNHCR Global Trends: *Forced Displacement in 2014* 19 June 2015. Retrieved 30 July 2015. Annex table 10.
[87] UNHCR (2015), annex table 10.
[88] UNHCR (2014), annex table 10.
[89] Representatives of UNAG (2015). Interview.
[90] Representatives of UNAG (2015). Interview.

Asylum seekers who do not receive accommodation at the reception centre can still receive other forms of aid, including assistance to pay rent for an apartment and other social assistance and medical aid, if they are in need of support.[91] Support for renting apartments ranges from 280 to 480 GEL[92] a month and depends on the size of the supported family.[93] Asylum seekers in need of support can also receive a monthly allowance of 80 GEL plus 60 GEL per family member. Protection status holders on the other hand, are entitled to a monthly allowance of 45 GEL.[94] A commission at the MRA assesses applications from both protection status holders and asylum seekers and decides if they are in need of support or if they have other means to support themselves.[95] The MRA's statistics on the matter do not differentiate between the two groups. Moreover, it does not differentiate between the type of support requested or given. According to the MRA, this is because people who request aid often do not specify the aid they need themselves.[96]

The Commission was set up in January this year and assessed 238 applications from February to June. It granted aid in 60 of these cases and refused aid in 164 of them. 50 of the positive replies regarded families and the other 10 replies regarded single adults. According to the MRA, the same people often apply more than once.[97] According to an MRA representative, the MRA's funds are not sufficient to meet all needs and therefore only people who are in need of financial support the most receive it.[98] Both representatives at GYLA and UNAG have the impression that financial support to asylum

[91] Representative of the MRA (2015). Interview; Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia (2015): Reply to request for public information received on 22 June 2015.
[92] As of 30 July 2015, 1 EUR roughly equals 2.5 GEL and 1 SEK roughly equals 0.26 GEL.
[93] Representative of the MRA (2015). Interview.
[94] Representative of the MRA (2015): E-mail received 27 July 2015.
[95] Representative of the MRA (2015). Interview.
[96] Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia (2015): Reply to request for public information received on 22 June 2015.
[97] Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia (2015): Reply to request for public information received on 22 June 2015; The remaining 14 cases are unaccounted for in the statistics in the MRA's reply.
[98] Representative of the MRA (2015). Interview.

seekers is rare.[99] Moreover, UNAG has the impression that the financial support that is provided is mainly provided to people who have received a protection status and not to asylum seekers.[100]

Since January this year, Georgia offers all asylum seekers access to basic healthcare.[101] Asylum seekers also have the right to work in Georgia after they have received a temporary identity card,[102] but because of poor Georgian language skills and a difficult labour market, they have trouble finding work.[103] Asylum seekers also lack the necessary connections. The official unemployment rate in Georgia was 12.4 % in 2014.[104] According to a National Democratic Institute survey in August 2014, 61 % of the people interviewed were either employed or unemployed and looking for work. Of those people, 52 % were employed and 48 % were unemployed and looking for work.[105] The difference is explained by the methodology used by the National Statistics Office of Georgia that for example counts subsistence farmers and people trying to sell various objects or fruit on the street as self-employed even if they are looking for actual employment and are doing what they do to be able to put food on their table.[106]

According to UNAG, no organisation monitors the living conditions of asylum seekers that are not provided with accommodation by the state.[107]

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[99] Representative of GYLA (2015). Interview; Representatives of UNAG (2015). Interview.
[100] Representatives of UNAG (2015). Interview.
[101] Art. 18 (f) LHRS; European Commission (2015), p. 12.
[102] European Commission (2015), p. 13.
[103] Representative of the MRA (2015). Interview.
[104] National Statistics Office of Georgia (GEOSTAT) (2015): *Employment and Unemployment 2014 (Annual)* (pdf-document). Retrieved from http://www.geostat.ge/cms/site_images/_files/english/labour/employment%20and%20unemployment%202014%20press%20release.pdf. Published 27 May 2015. Retrieved 29 July 2015.
[105] National Democratic Institute (2014): *Public attitudes in Georgia: Results of a August 2014 survey carried out for NDI by CRRC-Georgia* (pdf-document). Retrieved from https://www.ndi.org/files/NDI_Georgia_August-2014-survey_Public-Issues_ENG_vf.pdf. Published 25 August 2014. Retrieved 29 July 2015.
[106] National Statistics Office of Georgia (GEOSTAT) (2015): *Labour Force Statistics* (pdf-document). Retrieved from http://www.geostat.ge/cms/site_images/_files/english/methodology/labour%20force%20statistics%20Eng.pdf. Retrieved 29 July 2015.
[107] Representatives of UNAG (2015). Interview.

Judging from the statement that mostly protection status holders are the ones who receive aid, the absolute majority of asylum seekers in Georgia do not receive enough financial aid to provide for their living. The statistics do not tell how many asylum seekers apply for aid but it is clear that many do not. Whether this is because they receive money from another source or that they are not aware of the possibility to apply for aid from the MRA is unknown. It could also be that they are aware that asylum seekers are not likely to be granted support. However, it is unlikely that many of them find work in Georgia and provide for themselves that way.

3 Article 3 Applied to Readmissions to Georgia

3.1 An Introduction to Article 3 in Asylum Law

No one shall be subjected to torture or to inhuman or degrading treatment or punishment – Article 3 of the Convention

Article 3 protects people within the jurisdiction of the Convention's state parties from torture and inhuman or degrading treatment or punishment (ill-treatment). It is an absolute article, which means that it is an unqualifiable article without exceptions and that no derogations from it are allowed under any circumstances.[108] It does not mean that something that is considered ill-treatment in one case is always ill-treatment under other circumstances. Ill-treatment is seen as related to but less severe than torture, and it happens that the Court starts considering treatment that has formerly been considered ill-treatment as torture.[109] The study of Article 3 will focus on ill-treatment, as something that is considered torture will always be considered ill-treatment as well.

Ill-treatment has a very broad scope and definition. Inhuman treatment comprises both actual bodily injury and intense physical and mental suffering.[110] Intent is an aggravating factor but not a necessary requirement.[111] The Court has defined degrading treatment as treatment that '*humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable*

[108] Art. 3 and 15 of the Convention; Natasa Mavronicola & Francesco Massineo (2013): *Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK*. 76:3 Modern Law Review 589–619, p. 592.
[109] Jane McAdam (2007): *Complementary Protection in International Refugee Law*. Published to Oxford Scholarship Online March 2012. P. 141; Bernadette Rainey & Elizabeth Wicks & Clare Ovey (2014), p. 171.
[110] *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III, para. 52.
[111] Bernadette Rainey & Elizabeth Wicks & Clare Ovey (2014), p. 174.

of breaking an individual's moral and physical resistance'.[112] Intent is neither necessary in order to find treatment degrading, but it is taken into account.[113] Punishment is when treatment takes the form of a reprimand or a penalty.[114] There have been no indications that asylum seekers readmitted to Georgia are in a particular risk of being subjected to any form of punishment.

Ill-treatment has to attain a minimum level of severity, or a significant threshold, to fall within the scope of Article 3.[115] Not all bodily or mental suffering and humiliation counts as ill-treatment. The level of severity is relative and depends on all the circumstances of the case, such as the duration of the treatment, its effects and in some cases the sex, age and state of health of the victim.[116] The vulnerability inherent in being an asylum seeker is one such circumstance that can accentuate feelings of distress in certain situations.[117] As has been stated above, intent is also an aggravating factor.

Since *Soering v. the United Kingdom*[118], Article 3 also obliges the state parties to the Convention to not deport a person if this would expose him or her to ill-treatment, whether the ill-treatment concerned would take place in a Convention state or in another state.[119] According to the Court, an extradition, as it were in this particular case, engages the responsibility of the extraditing state under Article 3 '*where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment*'.[120] Article 3 does not entail a right to asylum, but it gives everyone within the jurisdiction of a state party to the Convention a right not to be deported under certain circumstances.

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[112] See e.g. *Pretty v. the United Kingdom*, para. 52.
[113] See e.g. *Peers v. Greece*, no. 28524/95, ECHR 2001-III, para. 74 and *M.S.S. v. Belgium and Greece*, no. 30696/09, ECHR 2011, para. 220.
[114] Jane McAdam (2007), p. 142.
[115] Bernadette Rainey & Elizabeth Wicks & Clare Ovey (2014), p. 171.
[116] See e.g. *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25, para. 162 and *Hilal v. The United Kingdom*, no. 45276/99, ECHR 2001-II, para. 60.
[117] *M.S.S. v. Belgium and Greece*, paras. 232–233.
[118] *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161.
[119] Bernadette Rainey & Elizabeth Wicks & Clare Ovey (2014), p. 176.
[120] *Soering v. the United Kingdom*, para. 91.

Non-refoulement cases differ from other Article 3 cases in that they regard ill-treatment that has not yet happened. They therefore include a risk assessment. The applicant has to fear future ill-treatment that is severe enough to be protected by Article 3 and show substantial grounds that he or she faces a real risk of being subjected to such treatment. A real risk means a foreseeable risk. A mere possibility of ill-treatment is not a real risk.[121] Both general and personal circumstances are relevant for the risk assessment.[122] In principle, it falls to the applicant to adduce evidence that show substantial grounds.[123]

3.2 Article 3 and Indirect Refoulement

3.2.1 The Protection in Article 3 Against Indirect Refoulement

Article 3 prohibits state parties from exposing people to a real risk of ill-treatment by deporting them. In *T.I. v. the United Kingdom*, which regarded a Dublin transfer from the United Kingdom to Germany, the Court confirmed that this obligation persists when a state party deports a person to an intermediary country in which the person does not face a direct threat of ill-treatment. A deporting state has to take into account the risk that an intermediary country will in turn deport the person to a country in which the person faces a direct threat of ill-treatment.[124] After establishing that an applicant faces an arguable risk of ill-treatment in his country of origin, the assessment of the risk of indirect refoulement will focus on the risk of arbitrary return.[125] A deportation will expose an asylum seeker to a risk of

[121] See eg *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008, para. 131 and *Daytbegova and Magomedova v. Austria* (dec.), no. 6198/12, 4 June 2013, para. 61; Cathryn Costello (2012[2]): *Dublin-case NS/ME: Finally, an end to blind trust across the EU?*. 2 Asiel & Migrantenrecht 83–92, p. 90.
[122] *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011, para. 216.
[123] See e.g. *Sufi and Elmi v. the United Kingdom*, para. 214.
[124] *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III, p. 15, 18.
[125] *Hirsi Jamaa and others v. Italy* [GC], no. 27765/09, ECHR 2012, para. 148.

indirect refoulement and ill-treatment if the intermediary country's asylum procedure does not provide sufficient guarantees that people who fear ill-treatment receive protection and the intermediary country carries out deportations.[126]

There is a presumption that states will fulfil their obligations in national law and conventions.[127] However, this presumption can be rebutted by showing deficiencies in the intermediary country's asylum procedure. Deficiencies in asylum procedures vary and do not form an exhaustive list.[128] The Court has identified many deficiencies both in the context of deportations to intermediary countries challenged with Article 3 and in the context of Article 3 and Article 13 combined when the applicant has complained about the lack of an effective remedy to challenge a deportation that would lead to ill-treatment. In concert, these deficiencies may render the protection for asylum seekers against refoulement ineffective. Any deficiency will not constitute a risk of indirect refoulement. In *M.S.S. v. Belgium and Greece*, where the Court found that a readmission would give rise to a risk of indirect refoulement, the Court concluded that the Greek asylum procedure did not guarantee that the applicant's application would be seriously examined.[129]

Some deficiencies identified in the Court's case law relate to the access to the asylum procedure. Poor information, communication and infrastructure for accepting applications are examples of issues that may hinder asylum seekers that fear ill-treatment from effectively seeking protection.[130] The Court has also found that an automatic and mechanical application of a five-day time limit for applying for asylum after entering the country does not conform to the requirements of Article 3.[131]

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[126] *M.S.S. v. Belgium and Greece*, para. 342–343; *K.R.S. v. the United Kingdom* (dec.), no. 32733/08, 2 December 2008, p. 17.
[127] *K.R.S. v. the United Kingdom*, p. 17; *M.S.S. v. Belgium and Greece*, para. 353.
[128] Violeta Moreno-Lax (2012): *Dismantling the Dublin System: M.S.S. v. Belgium and Greece*. 14 European Journal of Migration and Law 1–31, p. 28.
[129] *M.S.S. v. Belgium and Greece*, para. 358.
[130] *M.S.S. v. Belgium and Greece*, paras. 173–182, 301.
[131] *Jabari v. Turkey*, no. 40035/98, ECHR 2000-VIII, paras. 16, 40.

Deficiencies can also relate to the quality of the status determination procedures. In order to give protection to those who fear ill-treatment, the procedures need to be of a certain quality. The people who work in the system have to be competent in asylum law and conduct interviews that bring relevant facts to light. They have to produce good decisions and judgments that contain information about the applicant's individual situation and the country of origin and legal reasoning so that they are possible to effectively appeal. Asylum seekers must have access to interpretation and legal aid so that they can effectively make their claims.[132]

Low recognition rates for all or certain groups of asylum seekers can be an indicator that their fears of ill-treatment are not given enough consideration. Differences in recognition rates between countries can be explained by chance or that the composition of asylum seekers in the countries differ. Some nationalities are usually entitled to protection statuses to a higher degree than others are. It can also be that countries with high recognition rates give protection to more asylum seekers than their international obligations oblige them to. However, in some cases the differences are too big to be explained by these sources of error. In *M.S.S. v. Belgium and Greece*, the Court took note of Greece's very low recognition rate in 2008. At first instance, 0.1 % of decisions granted the applicant refugee status, humanitarian status or subsidiary protection. The recognition rate after appeals was around 4 %.[133] In European countries with a comparable number of claimants, the recognition rate at first instance was between 25 % and 36 % at the same time.[134] This fact alone makes it very likely that many asylum seekers who faced a real risk of ill-treatment and applied for asylum in Greece did not receive protection.

If an intermediary country that is party to the Convention does not award protection to an asylum seeker who faces a real risk of ill-treatment, the

[132] *M.S.S. v. Belgium and Greece*, paras. 183–188, 301.
[133] *M.S.S. v. Belgium and Greece*, paras. 126, 313.
[134] Gina Clayton (2011): *Asylum Seekers in Europe: M.S.S. v. Belgium and Greece*. 11:4 Human Rights Law Review 758–773, p. 760.

asylum seeker still has the possibility to lodge an application to the Court. The Court has the power to stop a deportation order according to Rule 39 until the lodged application has been assessed. If asylum seekers have effective access to this procedure in the intermediary country, deportations there will not give rise to a risk of indirect refoulement. Poor access to legal counsel and practice of unlawful deportations are issues that may render this procedure inaccessible.[135]

3.2.2 The Risk of Indirect Refoulement Through Georgia

The time limit for applying for asylum in Georgia after an illegal border crossing does not seem to be applied in practice and therefore does not hinder people from applying for asylum. It could be that the rule would be applied differently in readmission cases when the breach of the rule is all the more obvious. However, the authorities do not seem intent to apply it and would probably have done so if they had been.

Asylum seekers in Georgia have access to an asylum procedure where their claims are seriously assessed by staff dedicated to work with asylum law. Decision makers base their decisions on individual facts provided by interviews that mostly last several hours as well as country of origin information and the decision makers are trained in asylum law. The asylum procedure at the MRA level certainly has issues, but it can in no way be compared to what the situation was like in Greece at the time of *M.S.S. v. Belgium and Greece*. The deficiencies at court level seem to be more serious, but only cases that have been rejected by the MRA will be appealed and thereby end up in court. The protection afforded by Georgian legislation and practice is not illusory and there is therefore no general real risk that asylum seekers who fear ill-treatment will not receive a protection status in Georgia and thus be unprotected from refoulement.

[135] *M.S.S. v. Belgium and Greece*, paras. 356–357.

A lack in the study in Chapter 2 is that it does not reveal if the Georgian asylum procedure pays sufficient attention to particular protection needs that for instance stem from gender-based violence or ill-treatment of sexual minorities.

If one compares Georgia's recognition rate in 2014 to that in the EU, they are very similar. The recognition rate in Georgia at first instance in 2014 was 37.7 % whereas the recognition rate in the EU as a whole was 45 %.[136] The composition of asylum seekers in Georgia is of course not the same as in the EU, but these general statistics do say something about whether the Georgian asylum procedure generally affords protection to asylum seekers to the same extent as the asylum procedures in the EU.

The situation for certain nationalities is a more serious concern. Most Iranians who seek asylum in Georgia, including those who fear ill-treatment in Iran, will have their asylum applications rejected because of security reasons. Moreover, those negative decisions cannot be appealed effectively. Iranians who fear ill-treatment will therefore not be awarded a protection status in Georgia.

There seems to be a gap in national legislation prohibiting non-refoulement that according to the letter of the law leaves rejected asylum seekers who fear ill-treatment that cannot be considered a threat to their life or health out of protection. This does not necessarily mean that there has been an intention to exclude those asylum seekers from the scope of the obligation of non-refoulement. Georgia's international obligations still prohibit the deportation of those asylum seekers. That the MRA assesses the asylum applications of asylum seekers who will have their application rejected because of security

[136] Alexandros Bitoulas (eurostat) (2015): *Asylum applicants and first instance decisions on asylum applications: 2014* (pdf-document). Data in focus, Issue number 3/2015. Retrieved from http://ec.europa.eu/eurostat/documents/4168041/6742650/KS-QA-15-003-EN-N.pdf/b7786ec9-1ad6-4720-8a1d-430fcfc55018. Published 20 March 2015. Retrieved 29 July 2015. Table 9, p. 12.

concerns shows that Georgian authorities are aware of the need to not deport them. Even if this legislative gap fitted a rejected Iranian asylum seeker who was considered a security threat to Georgia, it does not seem likely that Georgia would not recognise the need to not deport him.

At the moment, no deficiency in Georgia's asylum procedure, however serious, will translate into a risk of indirect refoulement as Georgia does not detain or deport rejected asylum seekers. If the will to change practice arises in the future, Georgia's lack of readmission agreements with most countries of origin will still make refoulement unlikely. Readmission agreements are not necessary to carry out deportations, especially if the deportee fears ill-treatment from state authorities. The lack of readmission agreements is however a major obstacle to deportation in many cases. That the Georgian authorities have constructed and started to utilise a detention centre for foreigners shows that there is an intent to deport foreigners in the future. However, it is still too early to say how many deportations, especially deportations of rejected asylum seekers, the new systems to identify irregular migrants, the new detention centre and the will to conclude more readmission agreements will actually result in.

There are concerns about some nationalities not receiving a protection status in Georgia. However, as Georgia does not presently detain or deport rejected asylum seekers, those concerns do not translate into concerns about indirect refoulement. There is a presumption that Georgia will live up to its international obligations, including the obligation of non-refoulement. No substantial grounds have been shown in this graduate thesis to believe that this is not the case.

3.3 Living Conditions

Article 3 of the Convention was originally not applied to situations in which the suffering concerned was a result of poor living conditions and the

signatories of the Convention most likely neither intended it to be.[137] Article 3 is mostly associated with ill-treatment suffered at the hands of states or state officials and the obligations that stem from Article 3 are mainly negative. In concert with Article 1, Article 3 also contains positive procedural obligations to investigate ill-treatment of citizens conducted by private individuals and substantive positive obligations to prevent ill-treatment conducted by private individuals in certain cases.[138] The Court has however been reluctant to apply the Convention in a way that creates social rights. Regardless of their severity, some inhuman or degrading situations simply do not fall within the scope of Article 3, creating obligations for states. The Court has made clear that the Convention does not obligate states to provide everyone within their jurisdiction with a home[139] and that there is no general obligation to provide economic support to refugees.[140] However, the latter statement might not be true anymore. As the Court stated in *Airey v. Ireland*, '*Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature.*' From time to time, the Convention may therefore bring the Court into the sphere of social and economic rights anyway.[141]

3.3.1 State Responsibility for Inhuman or Degrading Living Conditions

States are definitely capable of causing poverty that amounts to inhuman or degrading treatment. This was found to be the case in *Sufi and Elmi v. the United Kingdom*, where the Court found that exposing the applicants to living conditions in IDP camps in Somalia by deporting them would amount to a violation of Article 3. The Court found that the parties of the conflict in Somalia were mainly responsible for the living conditions that the IDPs were

[137] *D. v. the United Kingdom*, 2 May 1997, *Reports* 1997-III, para. 49.
[138] *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII (extracts), paras. 148–153; *Z and others v. the United Kingdom* [GC], no. 29392/95, ECHR 2001-V, paras. 73–75.
[139] *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I, para. 99; *M.S.S. v. Belgium and Greece*, para. 249.
[140] *Müslim c. Turqie*, no. 53566/99, 26 April 2005, paras. 85–87.
[141] *Airey v. Ireland*, 9 October 1979, Series A no. 32, para. 26.

suffering in the camps. The basis for applying Article 3 when a state does not directly cause inhuman or degrading living conditions is more dubious. A passive state, like Georgia in this case, can hardly be accused of causing the poverty of asylum seekers that live within its jurisdiction. An obligation to provide financial support under these circumstances is purely social. Nevertheless, the Court has not completely refrained from applying Article 3 even then.

The first time that Article 3 put a stop to a deportation because of poor living conditions was in *D. v. the United Kingdom*.[142] The case concerned an AIDS patient in a terminal phase of his illness with no evident support available to him in his home country. A deportation would result in the abrupt withdrawal of his support at a critical moment and leave him in a deplorable condition in his home country.[143] The Court found that even if the harm would not emanate '*from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources*',[144] due to the compelling humanitarian considerations at stake, and the very exceptional circumstances of the case, a deportation would breach Article 3.[145] The Court has not found these circumstances to be at hand in any subsequent case.[146] The D test involves a truly individual evaluation of an applicant's circumstances and it is not likely that it could be found applicable where general issues are concerned.

The line of case law introduced in *M.S.S. v. Belgium and Greece* has had a much more profound effect. In this landmark case, the Court found that the living conditions of homeless destitute asylum seekers in Greece amounted to inhuman and degrading treatment and that Greece was responsible under

[142] *D. v. the United Kingdom*, para. 54; *N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008, para. 42.
[143] *D. v. the United Kingdom*, para. 52.
[144] *D. v. the United Kingdom*, para. 49; *N. v. the United Kingdom*, para. 43.
[145] *D. v. the United Kingdom*, para. 54.
[146] Helene Lambert (2013): *The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence*. 25:2 International Journal of Refugee Law 207–234, p. 231.

Article 3 for their situation.[147] Moreover, it also found that Belgium had breached Article 3 by deporting and exposing M.S.S. to those conditions, and thereby established the extra-territorial effect of this responsibility, at least regarding deportations to other Convention states.[148] There were no exceptional circumstances in the case. The Court simply stated that substantial grounds had been shown to believe that M.S.S. would be subjected to ill-treatment if returned to Greece, and thus applied the standard test used in non-refoulement cases.[149] The Court discussed bureaucratic obstacles for asylum seekers that obstructed them from accessing the labour market and thereby providing for themselves.[150] The Court could have argued that this caused the asylum seekers' inhuman and degrading living conditions,[151] but instead argued that certain circumstances in the case gave rise to a responsibility for Greece to provide for the basic needs of its asylum seekers.[152] In *Tarakhel v. Switzerland*, the Court confirmed that direct state responsibility could arise for inhuman or degrading living conditions, even when those were not caused by the state.

To explain its reasoning, the Court cited itself from *Budina v. Russia*[153] where it had stated that "*State responsibility [under Article 3] could arise for 'treatment' where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity*".[154] The Court also made clear that this responsibility does not arise in relation to anyone who fits the criteria above. The Court attached considerable importance to the

[147] *M.S.S. v. Belgium and Greece*, para. 264.
[148] *M.S.S. v. Belgium and Greece*, paras. 367–368; *S.H.H. v. the United Kingdom*, no. 60367/10, 29 January 2013, para. 90.
[149] *M.S.S. v. Belgium and Greece*, paras. 365–368.
[150] *M.S.S. v. Belgium and Greece*, para. 172.
[151] That bureaucratic obstacles denied asylum seekers the possibility to provide for themselves and therefore caused their inhuman and degrading living conditions was indeed the line of argument chosen by the AIRE Centre and Amnesty International in the case. It was also a line of argument that the dissenting Judge Sajó stated that he could have followed given enough evidence had been presented linking the practical difficulties finding work to restrictive regulation or state practice. See *M.S.S. v. Belgium and Greece*, para. 246 and p. 104.
[152] *M.S.S. v. Belgium and Greece*, paras. 251–254.
[153] *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009.
[154] *M.S.S. v. Belgium and Greece*, para. 253.

fact that asylum seekers constitute a particularly vulnerable group. Therefore, the Court awarded them special protection.[155] The Court also attached considerable importance to the existence of positive law protecting the rights of asylum seekers, and especially the Reception Directive.

The finding that a passive state can be held responsible for the inhuman or degrading living conditions of asylum seekers is a new development in the Court's case law and unsurprisingly surrounded with many uncertainties. The importance of the finding that asylum seekers constitute a vulnerable group, the importance of the breach of the Reception Directive and how to interpret the terms state indifference and state dependence that appear in *Budina v. Russia* will be discussed below. A discussion on how the Court has judged the severity of living conditions and what kind of living conditions states can be held responsible for will follow as well.

3.3.1.1 Limiting Responsibility to Vulnerable Groups

The classification of asylum seekers as a particularly vulnerable group, and as such a group in need of special protection, seems to have been essential for the finding that states could be held responsible for their inhuman or degrading living conditions.[156] Vulnerability is a concept that has also been applied to Roma, HIV-patients and mentally disabled.[157] Dissenting Judge Sajó, later supported by Marc Bossuyt, criticized the use of the concept in the case of asylum seekers because asylum seekers are not a homogenous group and not treated as such.[158] The concept of vulnerability is a heuristic device that grants groups an advanced level of protection as a whole.[159] Individual

[155] *M.S.S. v. Belgium and Greece*, para. 251.
[156] *M.S.S. v. Belgium and Greece*, para. 251; *S.H.H. v. the United Kingdom*, para. 76; Helene Lambert (2013), p. 232.
[157] Lourdes Peroni & Alexandra Timmer (2013): *Vulnerable Groups: The Promise of an emerging concept in European Human Rights Convention law*. 11:4 International Journal of Constitutional Law 1056–1085, p. 1057.
[158] *M.S.S. v. Belgium and Greece*, p. 102; Marc Bossuyt (2011): *Belgium condemned for inhuman or degrading treatment due to violations by Greece of EU asylum law: MSS v Belgium and Greece*. 5 European Human Rights Law Review 582–597, p. 593.
[159] *M.S.S. v. Belgium and Greece*, para. 251, p. 92; Lourdes Peroni & Alexandra Timmer (2013), p. 1057–1062; Nesa Zimmermann (2014): *Tarakhel v. Switzerland: Another Step in a Quiet (R)evolution?* (www). Retrieved from

circumstances are relevant when the Court assesses severity and the risk that a readmission will expose a person to ill-treatment. However, state responsibility for inhuman or degrading living conditions seems to arise in relation to particularly vulnerable groups.

The Court based its decision in *M.S.S. v. Belgium and Greece* to consider asylum seekers particularly vulnerable and award them special protection on the existence of both international and other documents, especially the Receptions Directive, that have been adopted to protect asylum seekers.[160] This is an example of how the Court evolutively interprets the Convention and adds to its substance by borrowing from law and practice throughout the Convention territory.[161] Article 3 should be interpreted consistently in regard to all state parties. All state parties should therefore be responsible for the living conditions of asylum seekers as a particularly vulnerable group. However, it is not clear if asylum seekers would necessarily be classified as a particularly vulnerable group in all states. According to Peroni and Timmer, the Court in *M.S.S. v. Belgium and Greece* seems to have derived the particular vulnerability of asylum seekers from both issues that were particular to Greece and issues that are general for all or most asylum seekers.[162] The issues particular to Greece, and in subsequent cases to Italy, were the same issues that made the living conditions of asylum seekers inhuman or degrading. In effect, to show empirically that asylum seekers face poor living conditions on a large scale in a certain state is to show that they are particularly vulnerable to poor conditions there. If a study shows that asylum seekers readmitted to Georgia face a real risk of ending up in destitution and homelessness, it is very likely that they would be considered a particularly vulnerable group there in this regard.

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http://strasbourgobservers.com/2014/12/01/tarakhel-v-switzerland-another-step-in-a-quiet-revolution/. Published 1 December 2014. Retrieved 30 July 2015.

[160] *M.S.S. v. Belgium and Greece*, paras. 250–251; *S.H.H. v. the United Kingdom*, para. 90; Violeta Moreno-Lax (2012), p. 22: Helene Lambert (2013), p. 232.

[161] Bernadette Rainey & Elizabeth Wicks & Clare Ovey (2014), p. 76.

[162] Lourdes Peroni & Alexandra Timmer (2013), p. 1069.

3.3.1.2 The Role of Positive Law

Positive law was important for the Court's evolutive interpretation of Article 3 in *M.S.S. v. Belgium and Greece*. However, the importance of positive law for finding a breach of Article 3 for living conditions may be even greater. In *S.H.H. v. the United Kingdom*, the Court stated that Greece breached Article 3 in *M.S.S. v. Belgium and Greece* not only through inaction, but also because of '*its failure to comply with its positive obligations under both European and domestic legislation to provide reception facilities to asylum seekers*'.[163] The Court has made similar statements expressing the importance of breached positive law in the other judgments that relate to living conditions.[164] This has led some authors to argue that the Court seems to treat the breach of positive law, notably the Reception Directive, as a requirement for finding living conditions to be in breach of Article 3.[165] Some authors have gone further and argued that the importance of the Reception Directive in the Court's case law means that the judgments possibly only have clear implications for the responsibility of EU member states.[166] This would create a situation of different human rights standards within the Convention area, something that would usually require that a number of Convention states sign a protocol to the Convention.

To assign critical importance to the existence of positive law in order to find that living conditions breach Article 3 equates to adding a legality test to Article 3. As several authors have said, this would be inappropriate.[167] If positive law strictly defined the scope of Article 3, it would no longer be

[163] *S.H.H. v. the United Kingdom*, para. 90.
[164] *M.S.S. v. Belgium and Greece*, para. 250; *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014, para. 96
[165] Laurens Lavrysen (2011): *M.S.S. v. Belgium and Greece (2): The impact on EU Asylum Law* (www). Retrieved from http://strasbourgobservers.com/2011/02/24/m-s-s-v-belgium-and-greece-2-the-impact-on-eu-asylum-law/. Published 24 February 2011. Retrieved 30 July 2015; Laurens Lavrysen (2012): *European Asylum Law and the ECHR: An Uneasy Coexistence*. 4 Goettingen Journal of International Law 197–242, p. 228–229; Cathryn Costello (2012[2]), p. 85.
[166] Marc Bossuyt (2011), p. 592; Marlies Hesselman (2013); *Sharing International Responsibility for Poor Migrants? An analysis of Extra-Territorial Social-Economic Human Rights Law*. 15:2 European Journal of Social Security 187–208, p. 201.
[167] Laurens Lavrysen (2011); Laurens Lavrysen (2012), p. 229–230; Gina Clayton (2011), p. 767.

absolute. According to Clayton, *M.S.S. v. Belgium and Greece* in its most reasonable interpretation prohibits all state parties to the Convention from leaving asylum seekers in absolute destitution. EU member states that fail to fulfil the obligations in the Reception Directive as well as Convention states that have no similar obligations can all be held responsible for the inhuman or degrading living conditions of asylum seekers.[168] This view is shared by the author.

Clayton's alternative interpretation of the importance that the Court attached to the Reception Directive in *M.S.S. v. Belgium and Greece* is that the breach of it added to the frustration and suffering of M.S.S.[169] That the breach of the Reception Directive is more frustrating than the lack of it in the first place is highly debatable. There are much more important reasons as to why poverty is experienced as inhuman or degrading. To attach importance to the breach of positive law when assessing the severity of poor living conditions would be to circumvent the absoluteness of Article 3. The importance of positive law in finding that living conditions constitute ill-treatment must mainly be that it legitimises treating asylum seekers as a particularly vulnerable group, and as such a group that needs special protection.

3.3.1.3 Dependence on State Support and State Indifference

In *M.S.S. v. Belgium and Greece* and subsequent case law, the Court has cited *Budina v. Russia*, where it said that state responsibility "*could arise for 'treatment' where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity*".[170] What the Court means with dependence on state support and official indifference and if they are particularly important circumstances or just circumstances that affected the severity of Budina's particular case is unclear from the statement

[168] Gina Clayton (2011), p. 767.
[169] Gina Clayton (2011), p. 768.
[170] *M.S.S. v. Belgium and Greece*, para. 253.

and the Court's case law. As the Court cites this statement in full in the general principles summaries of many of the cases that relate to the M.S.S. line of case law, the statement merits some scrutiny.

What is clear from the Court's case law is that ill-treatment relating to living conditions does not presuppose a complete dependence on state support if by that one means a legal, physical or mental inability to provide for oneself. In the non-refoulement context, the Court does not discuss asylum seekers' ability to provide for themselves as much as the likelihood that asylum seekers will end up unemployed and in need of support. In *M.S.S. v. Belgium and Greece*, the Court found that it was not a reasonable option for the applicant to provide for himself. This was partly because of bureaucratic obstacles that made the labour market inaccessible to asylum seekers, but also because the applicant did not speak Greek, did not have a network and because of the generally unfavourable economic climate in Greece.[171] In *Tarakhel v. Switzerland*, the fact that asylum seekers were mostly entitled to work in Italy did not preclude the application of Article 3. The Court noted that asylum seekers could not find private accommodation as the economic situation made it very hard to find work[172], and went on to find that deporting the Tarakhel family to Italy would breach Article 3 due to the risk that they might face inhuman or degrading living conditions there. In *A.M.E. v. the Netherlands*, the Court noted that A.M.E. was an '*able young man*', but did not rule out that the living conditions he faced in Italy could have amounted to ill-treatment if they had been severe enough to fall within the scope of Article 3.[173]

If dependence means nothing else than need of support, the question if an asylum seeker will find himself in circumstances wholly dependent on state support or not if deported seems to be subsumed under the general question if it is foreseeable or not that he or she will be subjected to inhuman or

[171] *M.S.S. v. Belgium and Greece*, paras. 261.
[172] *Tarakhel v. Switzerland*, para. 47, 64.
[173] *A.M.E. v. the Netherlands* (dec.), no. 51428/10, 13 January 2015, paras. 34, 36.

degrading living conditions. For example, an asylum seeker who possesses the means to provide for himself does not need state support and will not risk inhuman or degrading living conditions if deported. This is probably how it works in theory at least. In practice, the Court does not seem to have taken much interest in the individual financial situations of asylum seekers risking deportation and their actual dependence on state support. Perhaps it considers that it would be too demanding to ask asylum seekers to show that they cannot provide for themselves and that such a demand would render the new protection it has granted them ineffective. Nevertheless, this has been criticised by dissenters in both *Tarakhel v. Switzerland* and *M.S.S. v. Belgium and Greece*.[174]

State indifference can be an aggravating factor that make living conditions more degrading and severe. State indifference is probably a factor in most cases where living conditions have become severe enough to be considered inhuman or degrading. However, it is not necessarily so. In *Tarakhel v. Italy* the Court noted that UNHCR had welcomed the Italian authorities' efforts to improve reception conditions.[175] The Italian government had therefore at least not been as indifferent as the Court had considered the Greek government to be a few years earlier.

If state indifference is instead interpreted as an independent requirement, it seems to imply that a state that is responsible for inhuman or degrading conditions through its inaction cannot be held responsible for them if it is not indifferent towards them. Interpreted in this way, the requirement seems to resemble a requirement of due diligence or a requirement that states take reasonable steps to prevent inhuman or degrading living conditions. Laurens Lavrysen has put forward an interpretation to that end, even if not based on the statement from *Budina v. Russia*, and stated that the importance of the breach of the Reception Directive could be that it showed that Greece had not taken reasonable steps to prevent ill-treatment.[176] This interpretation would

[174] *Tarakhel v. Switzerland*, p. 55; *M.S.S. v. Belgium and Greece*, p. 106.
[175] *Tarakhel v. Switzerland*, para. 112.
[176] Laurens Lavrysen (2012), p. 230.

be reasonable if the responsibility to provide for asylum seekers was defined as an implied positive obligation. Those obligations are not absolute, and states are only required to take reasonable steps to fulfil them. However, the Court's case law does not support this interpretation. Implied positive obligations are usually derived from Article 1 and a substantive provision in concert.[177] The Court does not refer to Article 1 in any of the judgments where the M.S.S. line of reasoning is applied. Moreover, the Court does not discuss whether the efforts of the Greek or Italian authorities to increase their reception capacity and improve its condition have been reasonable or not. As the author sees it, there is no reason to consider the obligation to prevent inhuman or degrading living conditions for asylum seekers as anything else than absolute.

3.3.1.4 The Nature and Severity of Poor Living Conditions

The notion of living conditions is vague. Before *M.S.S. v. Belgium and Greece*, the Court did not consider abandoning destitute homeless asylum seekers a breach of Article 3. Now it does, but does that mean in principle that states can be held responsible for everything that can be defined as inhuman or degrading living conditions? The interpretation of this vague notion defines the width of the social responsibilities that can be interpreted from Article 3. In *M.S.S. v. Belgium and Greece*, it was the applicant's inability to cater for his most basic needs that constituted ill-treatment. These basic needs were food, hygiene and a place to live.[178] In *Tarakhel v. Switzerland*, that regarded a family with children, the potential split up of the family or that the children would not be accommodated in a facility that was adapted to their age constituted ill-treatment.[179]

[177] See Jean-François Akandji-Kombe (2007): *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights*. Human Rights Handbooks, No. 7. Council of Europe Publishing.
[178] *M.S.S. v. Belgium and Greece*, para. 254.
[179] *Tarakhel v. Switzerland*, paras. 120–122.

Asylum seekers who have challenged readmissions to Italy have on several occasions also argued that a readmission would amount to a violation of Article 3 because it would deprive them of sufficient mental healthcare. The Court has found on all occasions that there were no grounds to believe that Italy would not recognise the vulnerability of the mentally ill and treat them accordingly. It has not clearly stated if a failure to do so would create a situation that amounted to ill-treatment, but said that it might.[180] It could be that like children, other vulnerable subgroups of asylum seekers are entitled to specially adapted reception conditions through Article 3. The notion of living conditions does not seem to limit the scope of ill-treatment to the non-fulfilment of basic needs in *M.S.S. v. Belgium and Greece*, but probably works to create a wider range of potential social responsibilities, at least for some particularly vulnerable groups of asylum seekers.

The scope of Article 3 is moreover limited to treatment that attains a minimum level of severity. The assessment of the minimum level of severity is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.[181] Some treatment is inhuman or degrading to some but not to others. In this way, Article 3 is subjective. The threshold for ill-treatment is certainly lower for children in many cases, and especially asylum seeking children, who the Court has pointed out as extremely vulnerable.[182] The same is true for asylum seekers, because of the likely traumatic experiences that many will have endured in the past.[183]

There have been no indications in this study that the conditions at the Martkopi reception centre are unacceptable in general. Further study could question its capacity to deal with children, mentally ill or other particularly

[180] *Abubeker v. Austria and Italy* (dec.), no. 73874/11, 18 June 2013, paras. 70–71; *Daytbegova and Magomedova v. Austria*, paras. 67–70; *Halimi v. Austria and Italy*, paras. 70–72.
[181] See, e.g. *Kudła v. Poland* [GC], no. 30210/96, ECHR 2000-XI, para. 91 and *M.S.S. v. Belgium and Greece*, para. 219, and *Tarakhel v. Switzerland*, para. 94.
[182] *Tarakhel v. Switzerland*, paras. 99, 119.
[183] *M.S.S. v. Belgium and Greece*, para. 232.

vulnerable groups. However, the following discussion will be about how the Court has assessed the severity of destitution and homelessness.

In *M.S.S. v. Belgium and Greece*, the Court found that the living conditions for asylum seekers in Greece were severe enough to preclude even readmissions of English speaking men like M.S.S. Like many other asylum seekers, M.S.S. had lived a destitute life on the street. The Court noted that he was unable to cater for his most basic needs: food, hygiene and a place to live and that he lived in an ever-present fear of being attacked and robbed.[184] This had '*without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation*'. The Court concluded that these conditions combined with their long duration and the lack of hope for improvement had attained the level of severity required to fall within the scope of Article 3.[185] M.S.S.' situation, which the Court had compared to that of many others, had already lasted about one and a half years by that time. Quite importantly, the Court stated that the Greek authorities could substantially have alleviated the suffering of M.S.S. if they had examined his asylum application promptly.[186] If M.S.S.' situation had not lasted as long as it did, at some point it might not yet have constituted inhuman or degrading treatment.

The Court has stated on multiple occasions that there is no general real risk that asylum seekers readmitted to Italy will be exposed to inhuman or degrading living conditions.[187] In *Tarakhel v. Switzerland*, the Court stated that the situation in *M.S.S. v. Belgium and Greece* differed from the one in Italy in that the reception capacity in Greece was much less sufficient and conditions of extreme poverty much more widespread.[188] Judging from the Court's own calculations, there seems to have been a foreseeable risk that asylum seekers readmitted to Italy would end up without accommodation, at

[184] *M.S.S. v. Belgium and Greece*, para. 254.
[185] *M.S.S. v. Belgium and Greece*, para. 263.
[186] *M.S.S. v. Belgium and Greece*, para. 262.
[187] *Halimi v. Austria and Italy* (dec.), no. 53852/11, 18 June 2013, para. 68; *Tarakhel v. Switzerland*, para. 115; *Daytbegova and Magomedova v. Austria*, para. 66.
[188] *Tarakhel v. Switzerland*, para. 114.

least for some time.[189] However, a bigger reception capacity in Italy and a faster and more functional asylum procedure meant that it was not likely that asylum seekers in Italy would remain homeless for as long as was the case in Greece at the time of *M.S.S. v. Belgium and Greece* and moreover, their situation would not be as uncertain and hopeless.[190] That might be the reason why the Court has not considered that everyone readmitted to Italy face a real risk of being subjected to living conditions severe enough to be considered ill-treatment.

As has been stated above, child asylum seekers or families with children seeking asylum and perhaps other groups of vulnerable asylum seekers as well need special reception conditions. Conditions that '*create...a situation of stress and anxiety, with particularly traumatic consequences*' for children are not compatible with Article 3.[191] Insalubrious, overcrowded or violent conditions that are not severe enough to be inhuman or degrading for adults can be considered ill-treatment for minors.[192] It seems unlikely that the Court would consider exposing children to a real risk of even shorter periods of homelessness and destitution compatible with Article 3.

3.3.2 Readmissions and Living Conditions in Georgia

The following assessment will be based on the premises that a breach of the Reception Directive is not critical in order to hold states responsible for asylum seeker's living conditions and that asylum seekers should be classified as a vulnerable group in Georgia. If these premises are accepted, what is to be established is if there are substantial grounds to believe that a readmission to Georgia would expose asylum seekers to a real risk of being subjected to living conditions that are severe enough to fall within the scope of Article 3. As the Court adds to its case law, the premises may well turn out to be wrong.

[189] *Tarakhel v. Switzerland*, para. 110.
[190] *Tarakhel v. Switzerland*, para. 108.
[191] *Tarakhel v. Switzerland*, para. 119.
[192] *Tarakhel v. Switzerland*, para. 120–121.

With no organisations reporting about the situation of asylum seekers outside of the Martkopi reception centre, nothing certain can be said about the conditions they find themselves in.[193] There is no reason to believe that unsupported asylum seekers fare better in Georgia than they do in Italy or Greece. Unemployment in Georgia is ripe and it is likely that many asylum seekers there live in very poor material conditions that are similar to the conditions that asylum seekers lived in in Greece in 2010. What can also be said is that unlike in Greece, the asylum procedure in Georgia is not dysfunctional and therefore not as degrading as the Greek one was. Asylum seekers in Georgia will receive a decision on their asylum application and a large minority will receive a positive answer. However, one to one and a half years of waiting for a final decision is still a substantial amount of time.

The Court has taken on an activist role in regard to asylum seekers in Europe and awarded them special protection. *M.S.S. v. Belgium and Greece* added state responsibilities for asylum seekers' living conditions and *Tarakhel v. Switzerland* clarified that their extent was wider than many had believed. *Tarakhel v. Switzerland* could still become a high-water mark in the Court's protection of asylum seekers, but as of now, nothing indicates that the Court is retracting from its new case law. In material terms and the length of the destitute conditions suffered, the situation for unsupported asylum seekers in Georgia probably resembles the situation described in *M.S.S. v. Belgium and Greece* more than the one that has been described in cases regarding Italy. On the other hand, the Georgian asylum procedure is not degrading like the Greek one was in *M.S.S. v. Belgium and Greece*. The severity assessment undoubtedly allows the Court to relativize a lot and in this case, it could choose to go the way it finds more suitable. The author believes that the Court would find homelessness and destitution that is likely to last for up to one and a half years severe enough to be considered ill-treatment in the case of asylum seekers, regardless of the qualities of the asylum procedure. That it would consider leaving children in such conditions ill-treatment is almost certain.

[193] Representatives of UNAG (2015). Interview.

Whether ill-treatment has been proven in the case of Georgia is another question. Except the requests for aid to the MRA, there are no concrete grounds to show that asylum seekers in Georgia are living in severe conditions. However, by drawing parallels to the situation in other countries, one can conclude that it is likely that a sizeable part of the asylum seekers who live in Georgia live in conditions that are severe enough to fall within the scope of Article 3. The author believes that in the case of a small country, where civil society is not as resourceful and developed as in the EU and where asylum seekers receive very limited coverage by international and national organisations, the Court could accept the absence of state support as sufficient evidence for the severity of asylum seekers' living conditions.

There is a glaring discrepancy between the capacity of Georgia's reception centre and the amount of asylum cases that are being processed at the moment. The MRA had a backlog of 1257 cases at the turn of the year and only 60 places available in the Martkopi reception centre.[194] There is therefore clearly a real risk that any adult asylum seeker readmitted to Georgia will face inhuman or degrading living conditions there.

Financial support and access to the reception centre in Martkopi is prioritised for families. It also looks like families receive aid from the MRA to a higher degree than single asylum seekers. However, the statistics do not show if those who receive support are protection status holders or asylum seekers and neither how many families are denied financial support for accommodation. Regarding children facing deportation, the Court no longer seems to require that substantial grounds are shown to prove a risk of ill-treatment. In *Tarakhel v. Switzerland*, the readmission of the Tarakhel family was stopped because serious doubts had been raised about the Italian reception system's capacity to receive them as a family and because Switzerland had not received sufficient guarantees that the family would be properly received in Italy.[195]

[194] UNHCR (2015), annex table 10; Representative of the MRA (2015). Interview.
[195] *Tarakhel v. Switzerland*, para. 115.

The burden of providing evidence that raises serious doubts is certainly lower than the burden to provide substantial grounds. The author believes that serious doubts have been raised about the capacity of Georgia to adequately receive children, and readmissions of families to Georgia would therefore be contrary to Article 3. According to Costello and Mouzourakis, there is no reason to believe that *Tarakhel v. Switzerland* only has implications for the burden of evidence in non-refoulement cases concerning children.[196] If that is so, it has not yet had an impact on the Court's case law.

[196] Cathryn Costello & Minos Mouzourakis (2014): *Reflections on reading Tarakhel: Is 'How Bad is Bad Enough' Good Enough?* 10 Asiel & Migrantenrecht 404–411, p. 410.

4 Conclusion

The aim of this graduate thesis has been to establish if there are substantial grounds to believe that all or certain groups of asylum seekers readmitted to Georgia today, without first having their asylum claims assessed thoroughly, would face a real risk of ill-treatment prohibited by Article 3.

The first risk of ill-treatment that merited study was the risk of indirect refoulement that was studied in Chapters 2.1 and 3.2. No general deficiencies were found that put into question Georgia's capability to seriously assess asylum applications. However, the study failed to assess if Georgia competently assesses particular protection needs. This merits further study. One issue that was revealed was the practice to deny Iranians and possibly certain other nationalities protection statuses because of security concerns. This raises doubts as to how well protected these nationalities are from refoulement. According to the MRA, Georgia would not deport them if they feared ill-treatment. The fact that possible protection needs are made clear in the decisions even if the asylum seeker concerned is rejected because of security reasons supports this statement.

The question if that is correct is not very important today, as Georgia does not detain or deport rejected asylum seekers. Therefore, it cannot be said that there are substantial grounds to believe that people readmitted to Georgia would face a risk of indirect refoulement. As Georgia continues to build its capacity to identify and detain foreigners staying illegally in Georgia, this could of course change.

The second risk of ill-treatment studied was the risk that people readmitted to Georgia would face poor detention conditions studied in Chapter 2.2. This risk was immediately dismissed because asylum seekers are not detained in Georgia and because there are no indications that foreigners that are detained in Georgia are ill-treated.

The third risk of ill-treatment studied was the risk that asylum seekers readmitted to Georgia would face living conditions severe enough to fall within the scope of Article 3. This was studied in Chapters 2.3 and 3.3. That passive states can be held responsible for not providing decent living conditions for asylum seekers is a new development and the case law is therefore riddled with uncertainty. This merited a more extensive study of the Court's new case law, but the conclusion is still very uncertain.

The main uncertainty regards the requirements for applying Article 3 to living conditions. The author, like Clayton, argues that the Court has made clear that Article 3 is in principle applicable to the inhuman or degrading living conditions of asylum seekers if they are considered to be a particularly vulnerable group. What is then required in order to find that a readmission would breach Article 3 is simply that substantial grounds be shown to believe that there is a real risk that asylum seekers will be subjected to conditions that are severe enough to fall within the scope of Article 3 if returned. Some authors have argued that the Court seems to treat the breach of positive law or even the breach of the Reception Directive as a requirement for finding a breach of Article 3. According to the author, any interpretation that gives the Convention different meanings within and outside of the EU or challenges the absoluteness of Article 3 in any other way has to be flawed.

The graduate thesis then assessed if there were substantial grounds to believe that asylum seekers readmitted to Georgia would risk being subjected to living conditions amounting to ill-treatment. The general conditions for homeless and destitute asylum seekers in Georgia were found to probably be slightly better than the living conditions described in *M.S.S. v. Belgium and Greece*. Nevertheless, the author believes that if the Court would accept them proven, it would find the conditions severe enough to fall within the scope of Article 3. Moreover, it was found that the conditions are likely enough to say that every asylum readmitted to Georgia risks being subjected to them.

It was also found that conditions of destitution and homelessness are certainly severe enough to fall within the scope of Article 3 when asylum seeking families are concerned. It was found that serious doubts had been raised as to the capacity of the Georgian reception system to receive asylum seeking families and that readmissions of asylum seeking families would therefore not be compatible with Article 3. There was not enough information gathered regarding the situation for other particularly vulnerable groups of asylum seekers in Georgia. How Article 3 would be applied in their case was therefore not thoroughly studied either.

In sum, the graduate thesis concluded that there are probably substantial grounds to believe that all asylum seekers readmitted to Georgia would face a real risk of being subjected to ill-treatment because of Georgia's severely insufficient reception capacity and the risk that asylum seekers may end up in destitution and homelessness. It concluded that it is much more probable that readmissions of asylum seeking families would constitute a breach of Article 3 for the same reasons. However, the conclusion is uncertain as the Court's case law regarding the application of Article 3 to inhuman or degrading living conditions is still unclear.

4.1 Concluding Remarks

One of the issues with applying Article 3 on mainly social issues is its absoluteness. In theory, Article 3 sets absolute standards for the social responsibilities of states. In contrast, Article 11 of the International Covenant on Economic, Social and Cultural Rights, that is not enforceable for most state parties, asks the state parties to '*take appropriate steps*' to ensure the realization of the right to adequate living conditions, '*recognizing to this effect the essential importance of international co-operation based on free consent*'. It makes sense to not construct international social human rights as absolute articles because states have a very varying capacity to provide social welfare to its citizens.

The application of Article 3 to combat social injustice might make at least moral sense in cases where certain particularly vulnerable groups of people are much more dependent on and have much more limited access to social welfare than the majority. It might make less sense in a country like Georgia that has a very limited state budget and several other very serious social issues to deal with.[197] Georgia is a poor country with a GDP (PPP) per capita equalling that of Morocco and Guatemala and begging children and disabled are not an uncommon sight in its capital Tbilisi. Even if Georgia, with a lot of international support, has put much effort into providing adequate housing to its sizeable community of internally displaced people, and could probably manage to do the same to its asylum seekers if supported, it might not be very constructive to brand the failure to do so a human rights violation.

This however, is not important to the application of Article 3, as it is absolute. Whether something that falls within the scope of Article 3 should be considered ill-treatment or not depends on its severity, which depends on all the circumstances of the case. This gives the Court a possibility to relativize a lot, which could be used to find living conditions inhuman or degrading in some countries and not inhuman or degrading in others. It is hard to see that for instance relatively poorer surroundings or a relatively poorer state would make a decisive difference to how an asylum seeker experiences his or her living conditions. It remains to see how the Court will manage to apply Article 3 to social issues in states with a very varied degree of affluence. It would be unfortunate if it relativized circumstances to such a degree that in effect, it split up the degree of human rights protection in the states within its jurisdiction.

[197] The potentially strange implications of how *M.S.S. v. Belgium and Greece* gives priority to some welfare expenses was brought up by Marc Bossuyt in Marc Bossuyt (2012): *The Court of Strasbourg Acting as an Asylum Court*. 8 European Constitutional Law Review 203–245, footnote 98.

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