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Meeting: 1383rd meeting (29 September - 1 October 2020) (DH)

Communication from an NGO (Equal Rights Beyond Borders) (10/08/2020) concerning the cases of M.S.S. v. Belgium and Greece and RAHIMI v. Greece (Applications No. 30696/09, 8687/08) (160 pages).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

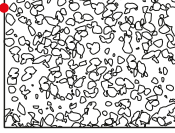
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Réunion : 1383^e réunion (29 septembre – 1^{er} octobre 2020) (DH)

Communication d'une ONG (Equal Rights Beyond Borders) (10/08/2020) concernant les affaires M.S.S. c. Belgique et Grèce et RAHIMI c. Grèce (Requêtes n° 30696/09, 8687/08) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



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SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

COMMUNICATION

IN ACCORDANCE WITH RULE 9.2. OF THE RULES OF THE COMMITTEE OF MINISTERS
REGARDING THE SUPERVISION OF THE EXECUTION OF JUDGMENTS AND OF TERMS OF
FRIENDLY SETTLEMENTS

BY EQUAL RIGHTS BEYOND BORDERS

in the *M.S.S. and Rahimi* Groups v. Greece (Application Nos. 30696/09, 8687/08)

August 2020

A. INTRODUCTION

Ahead of the 1383rd meeting of the Committee of Ministers of the Council of Europe, Equal Rights Beyond Borders would like to submit its observations with regard to the execution of the judgments of *M.S.S. v. Belgium and Greece*¹ and *Rahimi v. Greece*². The aforementioned cases concern the degrading treatment of asylum applicants in Greece on account of their living and detention conditions well as the lack of an effective remedy against expulsion.

Equal Rights Beyond Borders was founded in 2016 and currently operates offices in Athens and Chios, Greece as well as in Berlin. We offer legal assistance and representation in the asylum procedures in Chios and Athens, including Dublin family reunion procedures, visa procedures as well as detention, access to social rights and severe human rights violations. We represent our clients in front of Greek and German authorities and before domestic and European courts. We also take on certain strategic litigation cases. We further offer trainings for legal experts in Greece and Germany and implement targeted advocacy strategies at the intersection of politics, practice and academia. All offices work in close cooperation with partners in Greece, Germany and at EU level.

The submission, focussing on the practices on the island of Chios, is structured as follows:

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¹ ECtHR, Judgement of 21/01/2011, No. 30696/09, *M.S.S. v Belgium and Greece*; hereinafter: *M.S.S.*

² ECtHR, Judgement of 05/04/2011, No. 8687/08, *Rahimi v Greece*; hereinafter: *Rahimi*.

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B. CONTEXT & SCOPE OF THE SUBMISSION

I. SCOPE: ISLAND OF CHIOS

Whereas *M.S.S.* concerned the living conditions in the urban area of Athens and *Rahimi* on those on the island of Lesbos, this submission will focus on the reception and detention conditions, the risk of refoulement, and access to an effective remedy on the island of Chios. In 2015, the Reception and Identification Centre (RIC)³ of Vial officially opened as an EU Hotspot⁴ to implement the EU Hotspot Approach. Since 2016, it has served as one of five RICs used to facilitate the EU Turkey Statement's policy of swift returns.

Even though the *M.S.S.* and *Rahimi* judgements date from 2011, while the EU Hotspots and EU Turkey Statement were established in 2015 and 2016 respectively, the situation on the islands is nonetheless of particular concern for the implementation of the judgements. Art. 3 ECHR is of absolute nature and the findings of the judgements are forward-looking and binding on Greece as a whole, not only certain areas. Because the human rights situation on the island of Chios is of great concern, it is brought to the knowledge of this Committee as a part of the implementation status of the referred judgements.

II. EXPERTISE AND SOURCES OF EQUAL RIGHTS BEYOND BORDERS

Equal Rights Beyond Borders has been operating an office offering legal aid and representation on Chios since 2016 and has worked with thousands of asylum seekers on the island. Its staff visit Vial on a weekly basis. The reporting below is informed primarily by that daily work and our lawyers' first-hand experiences. Additionally, we participate in the Working Groups run by UNHCR and work closely with the other actors on the island of Chios. Furthermore, we operate an office in Athens where we implement the same approach.

Finally, between September 2019 and May 2020, Equal Rights Beyond Borders produced two reports on living conditions in Vial and one expert opinion on the 'suspension of the submission of asylum applications' in March 2020:

- Equal Rights Beyond Borders, 'The Lived Reality of Deterrence Measures: Inhumane Camps at Europe's External Border. Three years after the entry into force of the EU-Turkey Statement: Asylum procedure and reception conditions in the EU Hotspot Vial – Chios, Greece', September 2019, available at: https://bit.ly/M.S.S._vialreport [last accessed: 07/08/2020];⁵
- Equal Rights Beyond Borders, 'Abandoned and Neglected. The Failure to Prepare for a Covid-19 Outbreak in the Vial Refugee Camp', May 2020, available at: <https://bit.ly/covid19invial> [last accessed: 07/08/2020];⁶
- Nora Markard/Robert Nestler/Vinzent Vogt/Catharina Ziebritzki, 'No State of Exception at the EU External Borders. The Implications of the Rule of Law in the Context of the Greek-Turkish Border Closure and the Temporary 'Suspension' of the Asylum Law in Greece', Expert Legal Opinion for the The Greens/EFA group in the European Parliament, March 2020, available at: https://bit.ly/M.S.S._stateofexception [last accessed: 07/08/2020].⁷

³ Hereinafter: RIC.

⁴ The EU Hotspot Vial is hereinafter referred to as Vial.

⁵ Hereinafter: Vial Report; attached, Enclosure 1.

⁶ Hereinafter: COVID Report; attached, Enclosure 2.

⁷ Hereinafter: Expert Legal Opinion; attached, Enclosure 3.

C. MAIN FINDINGS

I. LIVING CONDITIONS

- The living conditions in the EU Hotspot Vial are sub-standard and often violate Art. 3 ECHR
 - Most of the inhabitants live in tents without solid structure, privacy, or protection
 - Vulnerable persons remain in the camps and are not exempted from the so-called border procedure anymore after the recast of the Greek Asylum Law
 - Access to medical and psychological care for asylum seekers on the island is extremely limited and serious physical and mental health conditions are often overlooked or ignored
- The administration failed on a broad scale to prepare for an outbreak of Covid-19 in the EU Hotspot Vial
 - The medical staff was not increased
 - No hygienic material was distributed
 - Social distancing remains impossible
 - The lockdown measures were discriminatorily extended until 31/08/2020 whereas Greece has been open for tourism since July
- Decisions on interim measures of the ECtHR to provide vulnerable persons with adequate living conditions in accordance with Art. 3 ECHR remain unimplemented
- The living conditions for recognized beneficiaries of international protection and rejected applicants are dire as they are excluded from any benefits

II. DETENTION CONDITIONS

- On Chios there is no pre-removal detention centre and persons are detained for several months in the police station
 - There is one room for around 20 persons
 - There is no access to outdoor activities or fresh air
 - The facility is not cleaned on a regular basis
 - The detainees do not have contact to the outside world and access to legal representation and interpretation services is restricted
 - The detention facility remained overcrowded even during the coronavirus lockdown

III. LACK OF EFFECTIVE REMEDY AND PRINCIPLE OF NON-REFOULEMENT

- The recast of the Greek asylum law introduced structural changes such as the abolishment of the suspensive effect for certain appeals or overwhelming preconditions for filing an appeal
- Applications, especially of Syrian nationals, are summarily rejected
 - The quality of the interviews is poor
 - The examination is superficial and does not comply with the absolute nature of Art. 3 ECHR
 - Decision makers rely on outdated country reports to analyse claims
- Certain applications are now not examined on the merits of Art. 3 ECHR at all because of provisions allowing for the 'implicit withdrawal' or rejections without interviews
- Access to information is structurally denied
- Access to legal aid is insufficient
- In March 2020 the submission of asylum applications was impossible by law
- Direct pushbacks by Greek Authorities are reported

D. RECOMMENDATIONS

It should be noted beforehand, as done by the EU Fundamental Rights Agency (FRA), that *“almost three years of experience [of processing asylum claims in facilities at borders] in Greece shows, [that] this approach creates fundamental rights challenges that appear almost unsurmountable⁸ and that it is “the single most worrying fundamental rights issue that we are confronting anywhere in the European Union⁹”.*

After more than four years now, it is clear that installing camps on remote islands is a dead end that has only led to the same conditions the Court found to violate Art. 3 ECHR in *M.S.S. and Rahimi*. The Hotspot Approach, in conjunction with the EU Turkey Statement, has failed. Every recommendation aiming to pointedly improve one issue will not make the countless other issues disappear.

It is therefore first and foremost to be recommended to

- Abolish the measure of geographical restriction on the islands;

All the other recommendations to be given are governed by this and include inter alia:

I. LIVING CONDITIONS OF ASYLUM SEEKERS

- Evacuate vulnerable persons from the EU Hotspot Vial, including single women, victims of torture, elderly persons, and people vulnerable to complications from Covid-19; Immediately evacuate all unaccompanied minors from Vial;
- Increase available medical staff in Vial and remove structural barriers to accessing the public hospital;
- Address barriers to finding accommodation outside of Vial and, in particular, increase the number of available containers and UNHCR apartments for particularly vulnerable;
- Increase the number of hygiene facilities in the camp and provide private facilities for women and girls;
- Implement adequate guidelines and practices for preventing the spread of Covid-19, including by requiring all staff to wear masks, reducing the number of times people have to queue per day, and reducing the number of people in the camp overall.

II. DETENTION AND LIVING CONDITIONS OF ASYLUM SEEKERS AND REJECTED APPLICANTS

- Stop detaining more than 18 individuals in the police station at any given time;
- Allow people who are detained in the police station to access fresh air on a daily basis
- Provide recently released individuals who cannot be deported to Turkey with access to reception and accommodation services; in the alternative, grant a temporary humanitarian status until their deportations can be safely carried out;
- Ensure that detained persons have adequate access to healthcare, bathrooms, interpreters, and legal representation.

III. RIGHT TO EFFECTIVE REMEDY AND PRINCIPLE OF NON-REFOULEMENT

- Provide asylum seekers with correct and accessible information regarding asylum procedures
- Increase the number of state legal-aid attorneys working on Chios

⁸ European Union Agency of Fundamental Rights (FRA), Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy, February 2019, available at: https://bit.ly/mss_submission18 [last accessed: 08/08/2020], p. 7.

⁹ Michael O’Flaherty (Head of FRA), available at: https://bit.ly/mss_submission17 [last accessed: 08/08/2020].

- Introduce a thorough examination with scrutiny to assess whether a readmission would be in violation of Art. 3 ECHR;
- Remove factual barriers to file an appeal such as the obligation to provide reasons;
- Remove legal provisions that enshrine the risk that asylum applications are finally rejected without an examination on the merits (of Art. 3 ECHR), such as the rules for implicit withdrawal;
- Introduce a legal framework that ensures that appeals have an automatic suspensive effect;
- Employ qualified staff.

E. MAIN PART: ANALYSIS

I. LIVING CONDITIONS ON THE ISLAND OF CHIOS

1. WHY IS THIS IMPORTANT FOR *M.S.S.*¹⁰ & *RAHIMI*¹¹?

The *M.S.S.* decision obliged Greece to provide adequate reception conditions to vulnerable asylum seekers. In particular, the European Court of Human Rights¹² in *M.S.S.* found that the applicant's extreme material poverty—unable to address even his most basic needs—an inability to access the job market, and general insecurity all contributed to feelings of degradation and inferiority (§§ 254-261). Although the Greek authorities in *M.S.S.* disputed the extent to which the State was responsible for the applicant's living conditions, the Court ultimately concluded that the authorities should have been aware that the applicant was homeless because it was virtually impossible for a single adult male to obtain housing in a reception centre (§ 258). Stressing the absolute nature of Art. 3 ECHR, the Court also noted that a large or sudden influx of asylum seekers does not absolve a State of its obligations the Convention as Art. 3 ECHR is of absolute nature (§ 223) and non-derogable even during times of emergencies.¹³

Although on paper protections for asylum seekers are far more robust than they were in 2011, in practice living conditions for asylum seekers in Greece remain starkly similar to those described in *M.S.S.* Consequently, the Court's findings in *M.S.S.* continue to be relevant to any conversation about the state of asylum seekers in Greece and the EU more generally.

Although legally speaking Greece considers persons living in Vial as accommodated, in reality there is little difference between the living conditions in the EU Hotspot and the homelessness experienced by the applicant in *M.S.S.* Indeed, while *M.S.S.* highlighted Greece's indifference and neglect towards the applicant, Vial was established by the State in cooperation with EU. In that regard, the living conditions are not only known to the Greek Authorities, but they are actively managed by them. Especially with the camps still under lockdown in the wake of the coronavirus pandemic (cf. below, E I. 3.), people living in Vial are unable to access (even hypothetical) opportunities to care for themselves, and therefore entirely dependent on the care of the state.¹⁴

Whereas the applicant in *M.S.S.* was an adult male, the *Rahimi* case concerned the highly vulnerable class of unaccompanied minors. Like in *M.S.S.*, the Court in *Rahimi* found that the living conditions in Greece violated the applicant's Art. 3 rights and that the State had failed to take adequate measures to provide the applicant with care and protection, despite his young age (§ 95). The Court also expressed deep concern that state-appointed guardians often failed to intervene in matters relating to minors' living conditions and noted the authorities' general indifference towards the applicant (§ 92).

2. LIVING CONDITIONS IN VIAL AND IMPACT OF L. 4636/2019 ON VULNERABLE GROUPS

The Greek Asylum Law 4636/2019¹⁵, which went into force on 1 January 2020, requires most asylum seekers to remain on Chios for the duration of their asylum procedures. This is a departure from the

¹⁰ ECtHR, Judgement of 21/01/2011, No. 30696/09, *M.S.S. v. Belgium and Greece*; hereinafter; *M.S.S.*

¹¹ ECtHR, Judgement of 05/04/2011, No. 8687/08, *Rahimi v. Greece*; hereinafter; *Rahimi*.

¹² Hereinafter "the Court".

¹³ Cf. Art. 15 (2) ECHR.

¹⁴ Cf. for the extended obligation of states arising from this: ECtHR, Judgement of 25/01/2011, No. 38427/05, *Elefteriadis v. Romania*, § 47.

¹⁵ Hereinafter: L. 4636/2019.

previous law, 4375/2016, which exempted certain vulnerable individuals from the fast-track border procedure¹⁶ and the geographical restriction that accompanies it. Instead, under current procedures, the geographical restriction can only be lifted in certain extremely limited cases, including for unaccompanied minors, accepted Dublin III family reunification cases, and for persons belonging to vulnerable groups in need of special reception conditions if those special needs cannot be otherwise met by the border procedure.¹⁷

The new restrictive measures have caused the population in Vial to swell to unprecedented numbers. As a Reception and Identification Centre (RIC), the Vial Hotspot is designed to host approximately 1,000 persons. However, as of 30 July 2020, 4,256 were living in Vial.¹⁸ At the same time only 275 people were hosted in accommodation outside of Vial, either through UNHCR or the National Centre for Social Solidarity.¹⁹

For the vast majority of persons who are subject to the geographical restriction to the island of Chios, there is no other option than to live in Vial. Under Art. 53 L. 4636/2019, asylum seekers can only work six months after they fully register their asylum claim, and many spend their life savings traveling to Greece. Apart from financial constraints and landlords' reluctance to rent, asylum seekers' access to material reception conditions, i.e. food, medical and other services, are conditional upon their residence in Vial. Moreover, information on the stage of individuals' procedures, e.g. changes of dates of interviews as well as calls for notifications about a decision, is only announced in the EU Hotspot, namely on a weekly announcement pinned to a board next to the 'info point' (cf. below, E. III. 5.).

The implementation of L. 4636/2019 has had a particularly devastating impact on the most vulnerable asylum seekers. Although many people on Chios are in need of special reception conditions, in reality such special reception conditions simply do not exist and the waiting list for UNHCR housing is so long that most people on it will never receive a spot. Even so, the process for lifting the geographical restriction for this group is extremely opaque and, with the exception of people in need of urgent medical treatment in Athens, it remains unclear to legal actors on the island which cases qualify for further support.

Equal Rights currently represents numerous persons who would have previously been exempted from the border procedures and are now living in tents in Vial.

CASE STUDIES

A single mother lives in a tent with her three children ages five, nine, and twelve. The mother has several medical conditions, including a severe sensitivity to sun and hot weather. She was recently hospitalized with a high fever for three days, during which she was forced to leave her three young children alone in the camp, despite rampant sexual harassment and abuse in the camp. The experience was so traumatizing for her oldest son that he has threatened to approach the NGO responsible for minors and ask them to deport the family back to Syria.

¹⁶ Cf. Art. 14 (8) L. 4375/2016.

¹⁷ Ministerial Decision 1140, Gov. Gazette B' 4736/20.12.2019, Art. 16(2).

¹⁸ Hellenic Ministry of Citizen Protection, 'National Situational Picture Regarding the Islands at Eastern Aegean Sea', 31/07/2020, available at: <https://bit.ly/31zrK4a> [last accessed: 07.08.2020].

¹⁹ Ibid.

A young Syrian man suffers from schizophrenia and other psychological conditions. He is a victim of torture, and recently told a representative of Equal Right that he contemplates suicide on a daily because of the conditions in Vial.

Two young men with hepatitis B: in the first case, the applicant has English medical reports from Syria confirming that he has hepatitis B, however he still had to wait months to get an appointment at the hospital. After, Equal Rights submitted a request for interim measures to the ECtHR, he was able to get several tests done at the hospital and in Vial. However, although the presence of the virus has now been detected, he needs a follow up test to confirm whether the virus is latent or active. Neither the hospital nor the facilities in Vial have the capacity to conduct the test and so he was referred to a private facility that told him the test would cost over 200 Euros. In the second case, the applicant was similarly referred to a private clinic to do follow up tests, which he also cannot afford. In both cases, there is a real possibility that the applicants are in urgent need of medical treatment, however they cannot get the tests they need to be eligible for treatment, and the authorities have refused to provide further solutions.

In each case, Equal Rights has attempted to refer the clients to appropriate accommodation and support, however the authorities have either failed to respond to the requests or stated that there simply are no available containers or apartments on the island at the moment.

Regardless of their status, everyone in Vial lives in a state of extreme poverty. A small minority of residents are accommodated in containers; however, the majority live in small camping tents or other makeshift structures that surround the central administration building. Although containers admittedly offer better shelter than tents, they too are marked by overcrowding, inadequate heating and cooling, and a general lack of privacy. For people living in tents, they live exposed to extreme heat in the summer and temperatures that can dip as low as zero degrees in the winter. Most of Equal Rights' clients sleep without a mattress and with only a thin blanket in the winter. Further, few have proper clothing, particularly during the winter months, and even fewer have any formal access to laundry facilities.

Bathroom facilities are also severely limited; as of June 2020, there were only 30 functioning bathrooms and 70 showers for the nearly 5,000 residents.²⁰ Moreover, there were no separate or private facilities for women girls.²¹ UNHCR reports that the bathroom and shower facilities are cleaned "occasionally,"²² however Equal Rights has obtained pictures from May 2020 that show washroom facilities covered in sanitary materials, sewage water, and human faeces. Numerous clients of Equal Rights, particularly women and persons living with disabilities, have reported going weeks, in some cases months, without a shower.

Security Situation

Finally, the general lack of security in Vial, particularly for women and girls and LGBTI individuals is of extraordinary concern to actors on the island. Sexual and gender-based violence, in particular, is part of the daily life in Vial, and the majority of Equal Rights' female clients report that they do not use the bathroom at night for fear of being sexually assaulted.

²⁰ UNHCR, 'Greece - Site Profiles', June 2020, available at: <https://bit.ly/2DHl0qm> [last accessed: 07/08/2020].

²¹ Ibid.

²² Ibid.

The opaque system of governance in the Hotspot has created a situation where actors defer to one in a cynical bid to rid themselves of responsibility for violence and abuse in the camp.²³ The result is a complete lack of accountability and apparent lawlessness in a camp where sexual harassment has become part of everyday life, leaving those most vulnerable without protection or safeguarding.

3. IMPACT OF THE CORONAVIRUS CRISIS ON LIVING CONDITIONS

A report published by Equal Rights in May 2020²⁴ found that measures taken in Vial at the time did not meet even the most basic standards for preventing an outbreak and spread of Covid-19 in the camp. All of the residents interviewed by Equal Rights described massive overcrowding, long lines for basic services, intermittent access to tap water, a lack of personal protective equipment and hygiene products, and insufficient medical services. Our interviews also indicate that authorities have not devised an adequate plan for protecting elderly and medically vulnerable residents.

Shortly after the national lockdown began, the government closed Vial and established police controls right outside the camp. Authorities then announced that people who wanted to leave the camp would need to obtain written permission directly from camp officials. Unlike for the general population, permission to leave the camp was difficult to obtain and given out on a limited basis. Permission slips were distributed from 9AM onwards at the 'Info Point' (cf. below, E. III. 5.). To secure an authorization, people reported that they began queuing at five or six o'clock in the morning. The number of authorisations granted per day seems to vary from thirty to fifty, according to testimonies we received. Permission to leave the camp was also only valid for a set time period of time and limited in duration. However, these restrictions seem to have been unclear and confusing for most residents. Only one person interviewed was aware of the specific hours during which he was allowed to remain outside of the camp. Multiple people also complained that they received fines from the police despite having the required authorisation to leave.

Regarding hygiene materials and facilities, disparate efforts were made throughout the lockdown to provide residents of Vial with hygiene material that would help protect themselves against coronavirus. Soap was distributed at least once before May 2020 at the Info Point, and UNHCR seems to have handed out sanitary bags containing toothpaste, a toothbrush and soap. However, many people were unable to obtain a bag due to either a lack of information surrounding the distribution or the length of queues. Almost all of the people interviewed by Equal Rights stated that no additional washing facilities were installed in the camp and that many existing facilities were out of service, while the cleanliness of those functioning was deplorable due to severe overcrowding. Some people reported that the authorities were not cleaning the bathrooms throughout the month of April, and that taking a shower was near to impossible because of the long lines, lack of water, and unclean facilities.

Even prior to the pandemic, a lack of access to medical care for asylum seekers on Chios was a significant problem—there is only a handful of doctors for thousands of people cannot access the hospital without first getting a referral from Vial, which are increasingly difficult to obtain. However, people living in Vial are particularly vulnerable to the virus because of the health risks associated with living in a refugee camp. In theory, this should have led to a significant increase in medical services,

²³ Cf. Vial Report, pp. 10 et seq., Enclosure 1.

²⁴ Equal Rights interviewed sixteen people living and three people working in the Vial refugee camp on Chios regarding the conditions there during the months of March, April, and May 2020 for a report the organization published in May 2020. Residents interviewed by Equal Rights ranged in age from fifteen to fifty-five and three suffered from a chronic illness or serious medical condition, cf. COVID Report, Enclosure 2.

but in practice this did not happen. In a letter submitted to the European Court of Human Rights on May 6, 2020, in a case regarding an applicant represented by Equal Rights, the Greek government reported the following medical services at Vial:

“an infirmary of the National Public Health Organization (EODY), staffed with three doctors and six nurses, provides primary medical care. The NGO Salvamento Marítimo Humanitario, staffed with one doctor and one nurse, provides for complementary services in the afternoon. The infirmary is in contact with the Chios General Hospital by making referrals in case of cases which cannot be dealt with on the spot.”

As a reminder, nearly 5,000 people live in Vial. Residents interviewed for the report, emphasized having to wait in long lines to see a doctor and in many cases being unable to see one at all.

Since Equal Rights filed its report in May, little has changed regarding COVID measures in Vial. Although restrictions on movement are moderately more lenient than they were in March—up to 150 residents can leave the camp every hour—the lockdown measures were recently extended again, this time until 31 August 2020.²⁵ Additionally, a handwritten sign was also posted in the camp on 31 July 2020, notifying residents that masks would be mandatory from that date in the camp. It is unclear if the sign was an official notice from camp authorities, however it seems to be in line with general measures across Greece requiring masks in all indoor spaces or outside where socially distancing is not possible.²⁶ Residents report that there has not been a mass distribution of masks and several NGOs also reported that they were barred by RIC authorities from distributing donated masks in the camp. During a recent visit to Vial, a representative for Equal Rights noted that, although many asylum seekers were wearing masks, none of the staff working inside the RIC or asylum service, including the police, were wearing masks despite the obvious risk they pose to camp residents.

4. NON-PROTECTION OF UNACCOMPANIED MINORS

Under the previous legal framework vulnerable individuals, including unaccompanied minors, were exempted from the fast-track border procedure and consequently excluded from the geographical restriction on Chios.²⁷ Under the current legal framework, however, only unaccompanied minors under the age of fifteen or those who are the victims of torture, rape, or other forms of physical violence are explicitly exempted from the border procedures.²⁸ Even prior to the new law however, many unaccompanied minors were living in Vial under the same conditions as everyone else. Although some unaccompanied minors are accommodated in Chios town – a special shelter with 18 places is available for minors in Chios – approximately 100 unaccompanied and separated children were living in Vial as of 08/08/2020.

A ‘safe zone’ exists for certain unaccompanied minors, however, as reported in the Vial Report, the safe zone is quite simply ‘not safe.’ A general lack of supervision of the area exists in the safe zone; it

²⁵ Migration Greece Info, Facebook (31/07/2020), available at: <https://bit.ly/30EHxQ1> [last accessed: 07/08/2020].

²⁶ Ekathimerini, ‘Coronavirus: Masks to be compulsory at more indoor public spaces in Greece,’ 28/07/2020, available at: <https://bit.ly/3a9MLX2> [last accessed: 07/08/2020].

²⁷ Art. 60 (4) lit. f, Art. 14 (8) L. 4375/2016.

²⁸ Art. 75 L. 4636/2019.

has been reported that unauthorized adults regularly enter the zone, whereas children's movements in and out of the area are apparently not genuinely monitored.²⁹

5. NON-IMPLEMENTATION OF GRANTED INTERIM MEASURES (RULE 39) IN VIAL

Already in 2020, the European Court of Human Rights has found in at least two interim measures cases that the conditions in the EU Hotspot Vial violate the Convention. In the first case, the Court obliged Greece to provide a medically vulnerable individual with appropriate medical treatment, and in the second, to provide an eighty-year-old man with access to appropriate medical care and accommodation. The cases, which were both filed by Equal Rights, also addressed the authorities' inaction to prepare for Covid-19 in the camp.

Despite clear orders from the Court, implementation in both cases has been met with significant resistance by the authorities. Of particular concern to this report is the non-implementation of the Court's order to provide an eighty-year-old asylum seeker with appropriate accommodation.³⁰

CASE STUDY

On 5 April 2020, an application for interim measures on behalf of an eighty-year-old man who has diabetes and a heart condition was filed. On 7 April³¹, the Court obliged Greece to transfer the applicant to an accommodation with reception conditions compatible with Art. 3 of the Convention and the applicant's age, as well as provide him with adequate healthcare. Over the next several weeks the Greek Authorities not only failed, but actively refused to, fully implement the Court's order. Specifically, Greece noted in its letter dated 21 April 2020 that although it had lifted the applicant's geographical restriction, it had delayed his transfer to the mainland because his sons' ages were reassessed as over eighteen. As a result, the authorities refused to lift the sons' geographical restrictions, while also acknowledging that due to the applicant's old age and poor health he could not be moved alone. Rather than proposing an alternative solution, such as exempting the sons from the geographical restriction or finding appropriate accommodation on Chios, the authorities simply left the applicant living in his tent.

For nearly two months following the Court's interim measures decision, the applicant continued to sleep on the ground in a tent he shared with several other members of his family. This, despite repeated efforts by Equal Rights to work with the Greek Authorities to implement the decision. On 21 May 2020, the authorities moved the applicant to a container inside the Vial Hotspot. However, the conditions in the container are still not compatible with Art. 3 of the Convention. The container is small, with only enough space for one to two other family members to be with the applicant at any given time. Further the applicant requires twenty-four-hour care, and so the family has to rotate who stays with him in the container on any given day. The container has no furniture, is infested with bugs, and has little privacy—the applicant sleeps on the ground with several thin blankets and another blanket

²⁹ Regarding the unsafety of Safe Zones in general cf. Equal Rights Beyond Borders, Unbegleitete Minderjährige Flüchtlinge in Griechenland, July 2019, available at: https://bit.ly/mss_submission15 [last accessed: 08/08/2020].

³⁰ It is noted that the Court observed (cf. Judgement of 04/02/2005, No. 46827/99 and 46951/99, Mamatkulov and Askarov v. Turkey, § 128) that a "failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right of [individual application] and, accordingly, as a violation of Article 34."

³¹ No. ECHR-LE2.2ar:ALN/nva.

separates the applicant from a family living on the other side of the container. The applicant also shares a bathroom with several other families.

Further, in the context of Covid-19, the ongoing non-implementation is clear. The applicant, who is clearly a member of a risk group to the Corona virus, continues to share hygiene facilities with several other families, and the applicant's family members who are responsible for caring for him are exposed on a daily basis to the mass crowds and long lines in Vial. Consequently, as long as his caretakers are unable to practice social distancing, the applicant remains at risk of contracting the coronavirus.

6. ANTICIPATED LIVING CONDITIONS UPON RECOGNITION AS BENEFICIARY OF INTERNATIONAL PROTECTION

Although the applicants in *M.S.S.* and *Rahimi* were asylum-seekers, the Council should be aware of the living conditions and personal situation of persons seeking protection after recognition. The specific vulnerability of protection seekers arises from their personal situation, not from the legal status conferred and granted to them by Member States (cf. *M.S.S.*; § 231, below E II. 4.). Consequently, in the *Jawo* decision, the CJEU states that if Member States want to deport persons to a Member State where there is a risk of violation of Art. 3 ECHR/Art. 4 Charter of Fundamental Rights of the EU³², it does not matter which stage of the administrative procedure a person is or would be in.³³ This is because Art. 3 ECHR and Art. 4 of the Charter are of absolute nature³⁴ and therefore clearly indifferent to a person's legal status.

Any other assumption would allow Member States to evade their obligations by changing the legal status of persons. In particular, it would also allow Greece to escape the obligation to implement the *M.S.S.* and *Rahimi* decisions by turning asylum seekers into recognised beneficiaries of international protection by a simple administrative act and then exposing them to a situation contrary to Art. 3 ECHR.

However, it is brought to the attention of the Council, that the Greek state works communicatively (a), with legal instruments (b) and factually (c) towards exactly this scenario.

a. Communicational Dimension

In March 2020, the Greek Minister for Migration Notis Miterachi, made a declaration of political intent aiming to change the legal status of a person through an administrative act only to later expose them to a situation that makes a violation of Art. 3 ECHR likely:

„our aim is to grant asylum to those entitled within 2-3 months and from then on we cut any benefits and accommodation, as all this works as a pull factor [...] Greece is cutting these benefits. Anyone after the recognition of the asylum status is responsible for himself.”³⁵

³² Hereinafter: the Charter.

³³ CJEU, Judgment of 19/03/2020, C-163/17, *Jawo*, §§ 87 et seq; hereinafter: *Jawo*.

³⁴ *Ibid.*, cf. ECtHR, Judgement of 01/06/2010, No. 22978/05, *Gäfgen v Germany*, § 107

³⁵ Cf. Protothema, 07/03/2020, available at: <https://bit.ly/3hPXQzo> [last accessed: 07/08/2020].

b. Legal Implications

Shortly after, on 07 April 2020, a joint ministerial decision came into force, making clear the government's intent to act on Minister Miterachi's promise. According to Article 5 of the decision, recognized beneficiaries of international protection must leave their accommodation within 30 days of recognition, after which their Cash Assistance benefits will also end.³⁶

c. Factual Dimension

This Joint Ministerial Decision has already led to homelessness and extreme material poverty³⁷ likely to violate Art. 3 ECHR. In Athens in particular, but also on Chios and elsewhere, homelessness and poverty have rapidly become commonplace among recognized refugees, who now have to scramble to find housing in thirty days, despite the depressed job market in Greece.³⁸ Additionally, the State has recently started recognizing on the merits some Syrian applicants whose asylum applications have been found admissible.³⁹ Whereas this submission is not the place to discuss the European law implications of such an approach, it is to be noted that these Syrians upon their recognition are subject to the Joint Ministerial Decision and therefore obliged to leave their accommodation and deemed to live without cash assistance or any other social benefits.

That the situation for recognized beneficiaries of international protection can lead to 'extreme material poverty' – as defined by the CJEU in *Jawo* and *Ibrahim*⁴⁰ and following *M.S.S.*⁴¹ – is recognized in solid case law of other Member States, especially Germany, where courts regularly refuse to reject asylum applications as inadmissible⁴² because a return to Greece would violate Art. 4 ChFR / Art. 3 ECHR.⁴³

³⁶ Cf. Joint Ministerial Decision No 13348, 07/04/2020, Gov. Gazzetta B' 1190/7-4-2020.

³⁷ *Jawo*, §§ 92 et seq.; *M.S.S.*, §§ 252 et seq.

³⁸ There are several reports, especially on the situation on the Victoria Square in Athens, cf. only: MSF, 14/07/2020, 'Vulnerable refugees evicted and left to sleep on streets', available at: https://bit.ly/M.S.S_submission1 [last accessed: 07/08/2020]; Financial Times of 20/07/2020, 'Europe shows a Janus face to migrants', available at: <https://on.ft.com/39VcQt6> [last accessed: 07/08/2020]; Keep Talking Greece 15/06/2020, 'Recognized Refugees: From the islands Hotspots, Homeless in Athens', available at: <https://bit.ly/3k04mW1> [last accessed: 07/08/2020]; InfoMigrants 22/06/2020, 'Greece reduces funding for migrant housing program', available at: <https://bit.ly/30keTUb> [last accessed: 07/08/2020].

³⁹ While according reports are missing, Equal Rights Beyond Borders represented several Syrians that have been recognized accordingly.

⁴⁰ CJEU, Judgement of 19/03/2019, C-297/17, *Ibrahim*.

⁴¹ The judgements of the CJEU have sometimes been understood as introducing a higher threshold for a violation of Art. 4 of the Charter/Art. 3 ECHR. However, the court emphasises the transfer clause of the Charter (cf. Art. 52 (3)) according to which "the meaning and scope of those rights shall be the same as those laid down by the [ECHR]" (cf. *Jawo*, § 91) and is directly referring to the *M.S.S.* judgement (ibid) underlining that this status is to be adapted (for this understanding of the judgement cf. discussions, especially in German literature as this case concerned Germany, Anna Luebbe, *Europarecht* 2019, p. 352 et seq.; Vinzent Vogt, *Neue Zeitschrift für Verwaltungsrecht* 2020, p. 137 et seq.

⁴² Cf. Art. 33 (2) lit. a Directive 2013/32/EU.

⁴³ For caselaw cf. inter alia: Administrative Court Aachen, Judgements of 13/07/2020, No. 10 K 870/20.A; 15/06/ 2020, No. 10 K 1855/19.A; 16/03/2019, No. 10 K 157/19.A; 16/03/2019, No. 10 K 875/19.A; Administrative Court Gießen, Judgement of 23/04/2020, No. 3 K 3861/18.GI.A, Administrative Court Minden, Judgement of 06/02/2020, No. 12 K 491/19; Administrative Court Arnsberg, Judgement of 07/07/2020, No. 4 K 3842/19.A; Administrative Court Duesseldorf, Decisions of 07/06/2020, Nos. 12 K 4935/19.A and 12 K 2714/19.A; Administrative Court Ansbach, Decision of 14/07/2020, No. AN 17 S 19.50717.

d. Outcome: More than 'indifference' by Greek State

The behaviour of the Greek authorities in this respect goes communicatively and factually beyond mere 'indifference'⁴⁴ as a disinterest in preventing a situation for recognised refugees which is contrary to Article 4 ChFR / Art. 3 ECHR. The statement of the Greek Minister for Migration to discontinue cash assistance after recognition and to force those affected to leave their homes because both are "pull factors" (cf. above) shows, just like the Joint Ministerial Decision, that the Greek government not only has no interest in the humane treatment of beneficiaries of international protection, but consciously seeks to prevent such a treatment. That recognized refugees are outside the scope of *M.S.S.* and *Rahimi* cannot be a valid argument against taking into account their situation regarding the implementation of the judgements, because the Greek Government is deliberately and actively trying to exclude the group.

7. SUMMARY: LIVING CONDITIONS IN VIOLATION OF ART. 3 ECHR

In its latest report on the status of the *M.S.S.* group of cases, the Greek Authorities reported that the situation for asylum seekers had "completely changed."⁴⁵ In support of their assertion, authorities pointed to the fact that Greece now provides asylum seekers with accommodation, food, clothing, and access to health care either at public hospitals or in accommodation facilities.⁴⁶ Authorities further highlighted the RICs as further evidence of an improved situation.

Yet, however much these benefits exist on paper, the stark reality for asylum seekers living in the Chios RIC is one of poverty and degradation; the majority of residents in Vial live in tents, have no practical access to the job or housing market, and often face insurmountable bureaucratic and legal hurdles to accessing even the most basic services such as food, clothing, and healthcare. Further, because of recent changes to asylum procedures, the situation for the most vulnerable seekers has deteriorated immensely, leading to a state of complete desperation on the island. Speaking off the record, one caseworker for EASO recently stated that the currently situation for asylum seekers on Chios is the worse he has ever seen. Consequently, the material conditions for asylum seekers on Chios continue to raise concerns similar to those that led the court to find a violation of Art. 3 *M.S.S.*

II. DETENTION CONDITIONS ON THE ISLAND OF CHIOS

1. WHY IS THIS IMPORTANT FOR *M.S.S.* & *RAHIMI*?

In the latest report on the status of execution of the *M.S.S.* group of cases in June 2019, the Deputies "*expressed serious concern at the fact that a number of immigration facilities and police stations seem to be below Convention standards*" and "*invited the authorities to give effect to the recommendations made by the Committee for the Prevention of Torture and Inhumane or Degrading Treatment*"⁴⁷ and "*to improve the conditions in immigration detention facilities, including by providing adequate health-*

⁴⁴ Cf. only *M.S.S.*, § 252; *Jawo*, § 92.

⁴⁵ Cf. Implementation Report on *M.S.S.*, available at HUDOC-EXEC at: https://bit.ly/M.S.S._hudoc-exec [last accessed: 07/08/2020][hereinafter 'Implementation Report'], p 3.

⁴⁶ *Ibid.*

⁴⁷ Hereinafter: CPT.

*care services*⁴⁸. More specifically, they “called on the [Greek] authorities to [...] further enhance the provision of health care services to asylum seekers and irregular migrants in detention.”⁴⁹ Such a statement explicitly acknowledges that access to healthcare for those in detention has not substantially improved since the Court issued its judgement in *M.S.S.* and it remains one of the main concerns of the Committee of Ministers.

2. LACK OF INFRASTRUCTURE ON CHIOS

Chios island does not host a formal pre-removal detention centre. In the framework of the Reception and Identification Centres on the Eastern Aegean islands, such centres are only present on the islands of Lesbos and Kos to detain offenders or third country-nationals awaiting deportation.⁵⁰ Detention of third-country nationals on Chios island is of particular concern because they are detained in the police station of Chios city, a facility that is completely inappropriate for the purpose of immigration detention. In a February 2019 report, the CPT, returning from a visit of detention facilities throughout Greece, expressed concern for the fact that almost all “*police stations visited were not suitable places to hold asylum seekers and irregular migrants and conditions of detention remained totally inadequate for stays exceeding 24 hours.*”⁵¹ Similarly, the ECtHR has consistently held that prolonged detention in police stations *per se* is not in line with guarantees provided under Article 3 ECHR and has already found in several instances that Greece violated its obligations under this Article for detaining people in police station for extended periods of time.⁵² Regarding the situation of Chios, conditions of detention in the police station show a situation which has not substantially improved and that calls for an in-depth assessment of compliance with the requests of the Committee of Ministers.

Although not the subject of this submission, it is important to note but note that the preconditions for detaining asylum seekers and rejected applicants were considerably lowered in the 2020 recast of the asylum law.⁵³

3. LIVING CONDITIONS IN CHIOS POLICE STATION

Chios police station does not constitute an exception to the finding of the CPT regarding police stations employed as detention facilities. It is not equipped to be a detention center and to host individuals for periods of time exceeding 24 hours. In a 2019 submission to this Committee in the framework of these monitoring proceedings, Greek authorities assured that detention conditions of third country nationals awaiting their deportation have improved and meet the convention standards. In particular, they stated that in pre-removal detention centres the personal space available to each detainee corresponds at least to four sq. meters, there is outdoor space for activities; three meals are offered per day; direct access to telephones is ensured; all detainees can communicate with lawyers, members of NGOs and other agencies, which have daily access to the centres; health-care services are provided by public medical and nursing personnel, or other organizations or agencies; cases which

⁴⁸ Implementation Report at p 11.

⁴⁹ Ibid, p. 10.

⁵⁰ Ibid, p. 5.

⁵¹ Ibid, p. 9; CPT, Report on the visit to Greece from 13 to 18 April and 19 to 25 July 2016, CPT/Inf (2017) 25, 26/09/2017, available at: <https://bit.ly/2g4Y9bU> [last accessed: 07/08/2020], p 6.

⁵² ECtHR, Judgement of 25/09/2012, No 50520/09, *Ahmade v. Greece*, § 101; Judgement of 21/06/2018, No 66702/13, *S.Z. v. Greece*, § 40; Judgement of 28/02/2019, No 19951/16, *H.A. and others v. Greece*.

⁵³ Cf. Greek Council for Refugees, AIDA Country Report Greece 2019, Update June 2020, available at: https://bit.ly/mss_submission14 [last accessed: 07/08/2020], pp. 175 et seq. Hereinafter: AIDA Report Greece.

cannot be handled in the above centres are referred to state-run hospitals.⁵⁴ Chios police station falls short of almost all of these services.

An internal room on the ground floor of the Chios Police Department is the space dedicated to the detention of third country nationals. The space's official capacity is 18 people; however, it is common for more than 20 people to be held there. Because of the lack of a courtyard in the Chios police station, detainees remain locked up 24 hours a day from the day of their arrest, a period which can last up to several months. The air in the room is not recycled, resulting in an environment that is suffocating, especially during the summer months. Except for a small window on the top of the wall, the room does not have natural light, making it impossible for people who are detained to know the time of day. Detainees are not informed of their procedures in a language they can understand as there is no interpretation services within the facility. Recreational activities are non-existent, and the cell does not have a radio or television. Hygiene conditions are almost non-existent. Sheets and blankets are not regularly washed and access to personal hygiene items is extremely limited, leading detainees to go weeks without showering.

Medical staff is not present in the Chios police station, nor is there any doctor providing services in the facility. The Greek Council for Refugees confirms in its recent report for the Asylum Information Database, that no doctor, interpreter, or psychiatrist was present in any of the Eastern Aegean detention centres - either PRDC or police stations - as of the end of 2019.⁵⁵ When the police consider the medical condition of a detainee to be sufficiently serious, he or she may be transferred to the hospital, a procedure which often leads to potentially serious conditions being overlooked or to unjustified delays in access to necessary healthcare. Instances of scabies are common on the Chios detention facility. Because of its high contagiousness, the police's policy has been to release of infected detainees, however, appropriate hygiene and disinfection measures do not regularly take place.

CASE STUDIES

The conditions of four detainees with whom our lawyers have come in contact during the Covid-19 emergency demonstrate a systematically concerning situation. The clients all received second rejections decision to their applications for international protection, leading to their detention. However, due to the pandemic, readmissions to Turkey were stalled indefinitely. Although they were not issued decisions extending their detention, all four were detained in the Chios police stations for periods of time ranging from 3 and a half to 5 months. Regardless of the heightened risks of the spread of Covid-19 inherent to overcrowded spaces such as detention facilities⁵⁶, conditions of detention during the pandemic remained unchanged. No measures regarding the decongestion of detention facilities or the implementation of physical distancing were taken. A ventilation system was not installed nor

⁵⁴ Secretariat of the Committee of Ministers, 1348th meeting (June 2019), Communication from Greece concerning the *M.S.S. and RAHIMI* groups of cases v. Greece (Applications No. 30696/09, 8687/08), DH-DD(2019)372, p. 5 et seq.; in particular p. 9.

⁵⁵ AIDA Report Greece, p. 23.

⁵⁶ WHO, 'Preparedness, prevention and control of Covid-19 in prisons and other places of detention Interim guidance', 14/03/2020, available at: https://bit.ly/M.S.S_submission8 [last accessed: 07/08/2020] ; IASC, 'Interim Guidance - Covid-19: Focus on Persons deprived of their liberty', March 2020, available at: https://bit.ly/M.S.S_submission9 [last accessed: 07/08/2020], p. 2.

were detainees ever allowed to routinely leave the room. Hygiene measures aiming at preventing the possible spreading of the virus and medical monitoring of detainees were not put in place.

In conclusion, the material conditions of individuals detained in the Chios Police station raise concerns that are similar to those which led the court to find a violation of Article 3 ECHR in the *M.S.S.* case (§§ 214-234). Although detainees are not asylum seekers in this case, they have been so, a fact that renders still valid the consideration that they are *“particularly vulnerable because of everything [they] had been through during [their] migration and the traumatic experiences [they are] likely to have endured previously”* (*M.S.S.*, § 231). Their status is of no matter in that regard (cf. above E.I. 6.). As an aggravating condition, not only is the police station not a formal detention facility and thus not suitable for the prolonged detention of third country nationals, but the actual detention conditions demonstrate that not even a *de facto* comparable access to the minimum level of services that should be granted to detained individuals awaiting deportation is granted to those detained in Chios.

4. CONDITIONS OF RELEASED PERSONS DUE TO IMPOSSIBILITY OF DEPORTATION

The unprecedented situation that Covid-19 presented states with, had repercussions on pre-removal detention schemes. Even before the coronavirus, readmissions to Turkey were already on hold due to the political tensions between Turkey and Greece. As a result, third country nationals awaiting deportations after the definitive rejection of their asylum applications find themselves in a state of temporary non-deportability. The resumption of administrative activities on 15 May 2020 following the shutdown in March, led to the issuing of new rejections and to the rapid overcrowding of the already unsuitable detention facility of the island of Chios. The practical impossibility of detaining all newly rejected applicants led to a new policy of temporary release. As of the first weeks of July 2020, a group of individuals were released and handed a document stating their temporary status.⁵⁷

For these individuals, a situation of material poverty and complete destitution is inevitable. They have no legal immigration status, and therefore no access to reception conditions. However, at the same time, the practical impossibility of deporting them means that they must remain on the Greek territory, with their movements restricted to the island of Chios. With no viable way to change their condition, these individuals find themselves homeless, without access to food and water, and without the possibility of finding a job or applying for social security or any financial or in-kind support. During a UNHCR ‘Protection Working Group’ meeting on 05/08/2020, UNHCR confirmed that staff had tried to negotiate with the Reception and Identification Service to open access for this group to food cards for basic subsistence, but that that the proposal was rejected. A condition which calls for a responsibility of the state under Article 3 ECHR *“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”*⁵⁸. Their lack of legal status and of possibilities for regularization renders them all the more reliant and dependent on the state and its authorities given their state of *“most extreme poverty, [inability] to cater for [their] most basic needs: food,*

⁵⁷ The entity of this phenomenon is still uncertain: Equal Rights Beyond Borders is in contact with four individuals in this situation and has come to know that at least other fifteen approached other actors on the island of Chios with an identical condition. The decision they are given orders the lifting of detention in light of impossibility of readmission to Turkey; in addition, it imposes a geographical restriction to the island of Chios and appearance every 1st and 15th of each month to the officer of the Security Sub-Directorate of Chios, until the readmission to Turkey.

⁵⁸ ECtHR, Judgement of 20/06/2009, No. 45603/05, *Budina v. Russia*; *M.S.S.*, § 253

hygiene and a place to live. Added to [...] the total lack of any likelihood of [their] situation improving” (cf. M.S.S., § 254).

III. THE LACK OF EFFECTIVE REMEDY AND PRINCIPLE OF NON-REFOULEMENT

1. PRINCIPLE OF NON-REFOULEMENT FROM ART. 3 ECHR AND ITS PROCEDURAL IMPLICATIONS

It is recalled that, inter alia, in M.S.S. the Court underlined that all actions of states must

“have particular regard to Article 3 of the Convention, which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim’s conduct.” (§ 218)

Given this, there is also a *“procedural obligation under Article 3 of the Convention to assess the risks of treatment contrary to that provision before removing”*⁵⁹ a person from the territory.

When violations of Art. 3 ECHR are at issue, special requirements are imposed on states because of the irreversible damage that could occur when asylum seekers – a per se vulnerable group – are affected (M.S.S., § 232) Where evidence demonstrates that a real risk of an Art. 3 violation exists, it is then the Government’s burden to remove any doubt.⁶⁰ Therefore, all foreseeable consequences of the individual’s return or denial of entry to the country of destination must be assessed by the state and *“in the light of the general situation there as well as the applicant’s personal circumstances”*.⁶¹ The actual dangers that could occur as a result of a denial of entry or return must be carefully evaluated and based on the available current reports and opinions, including those by international and non-governmental organizations.⁶²

Therefore, the asylum procedure, in the sense of the procedure to assess possible violations of the ECHR, be it directly or indirectly, must be effective, thorough and accessible (M.S.S., § 301). Furthermore, according to Art. 13 taken in conjunction with Art. 3 ECHR, there must be an effective remedy to challenge the decision that itself must be *“available in practice as well as in law”* and *“requires close scrutiny by a national authority”* and an *“automatic suspensive effect”* (M.S.S., §§ 292 et seq.).

After all, the court underlined in M.S.S. that

“[the] main concern is whether effective guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect” (§ 286).

so that preventive measures are to be introduced. It was lately recalled by the court that there is

*“broad consensus within the international community regarding the obligation and necessity for the Contracting States to protect their borders – either their own borders or the external borders of the Schengen area, as the case may be – in a manner which complies with the Convention guarantees, and in particular with the obligation of non-refoulement”*⁶³

⁵⁹ ECtHR, Judgement of 23/11/2019, No. 47287/15, Ilias and Ahmed v. Hungary, § 163.

⁶⁰ ECtHR Judgment of 20/07/2010, No. 23505/09, N. v Sweden, § 53; Judgment of 09/06/2010, No. 41827/07, R.C. v. Swenden, § 50.

⁶¹ ECtHR Judgment of 28/06/2011, Nos. 8319/07, 11449/07, Sufi and Elmi v. UK, § 216.

⁶² Cf. *ibid.*; CJEU, Judgment of 21/12/2011, C-411/10, C-493/10, N.S., §§ 90 et seq.

⁶³ ECtHR, Judgement of 13/03/2020, No. 8675/15, ND & NT v. Spain, § 232.

2. WHY IS THIS IMPORTANT FOR *M.S.S.* AND *RAHIMI*

Taking these findings into account, in *M.S.S.*, the applicant “*alleged that the shortcomings in the asylum procedure in Greece were such that he faced the risk of refoulement [...] without any real examination of the merits of his asylum application*” (§ 266).

This especially concerned:

1. That non information on the asylum system and the procedure were given (§ 269);
2. That there was no guarantee that his asylum procedure would follow its course (§ 270);
3. That the procedure offered no guarantee that his fears would be examined on the merits (§ 270);
4. That first instance interviews were known to be superficial (§ 270);
5. That the remedies would have no automatic suspensive effect (§§ 270, 293);
6. That the procedure was lengthy (§ 270).

The Court found “*that there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 because of the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk he faces of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy.*” (§ 321).

This submission will show that access to an effective remedy is systematically denied on Chios and in the Greek asylum system. Therefore, it will assess the structural shortcomings in the Greek asylum law (3.), the lack of scrutiny in interviews and examination (4.), the non-accessibility to personal interviews for several reasons (4.), the lack and the non-accessibility of information on the asylum procedure (5.), the lack of legal aid and the lengthy procedure (6. And 7.) as well as further violations of the principle of non-refoulement (8.-10.).

3. STRUCTURAL SHORTCOMINGS IN THE GREEK ASYLUM LAW

With regard to structural problem areas in the Greek asylum law, the submission endorses the findings of other submissions and reports.⁶⁴ As UNHCR states, within the framework of L. 4636/2019, “*asylum seekers may be easily excluded from the process without having their international protection needs adequately assessed. This may expose them to the risk of refoulement*”.⁶⁵

Of particular concern with view to the risk of refoulement and the right to an effective remedy are for example:

- the unclear procedures and the corresponding short deadlines laid down in Art. 83 et seq. L. 4636/2019;⁶⁶
- the shortcomings in the protection of vulnerable applicants and their obligation to remain in the border procedure;⁶⁷
- the limitations in the access to second instance procedures, such as

⁶⁴ Especially AIDA Report Greece and the recent Rule 9.2. Submission of Refugee Support Aegean and Stiftung Pro Asyl dated from July 2020 to this Committee to this Committee in the *M.S.S. and RAHIMI Groups v. Greece* (Applications No. 30696/09, 8687/08; hereinafter RSA Submission July 2020).

⁶⁵ UNHCR, ‘UNHCR’s Intervention at the hearing for actors to the Standing Committee of Public Administration, Public Order and Justice of the Hellenic Parliament regarding the Draft Law on the Improvement of Migration Legislation’, 09/052020, available at: <https://bit.ly/3dJEB8H> [last accessed: 07/08/2020].

⁶⁶ AIDA Report Greece, pp. 63 et seq.

⁶⁷ Cf. above, E.I. 2.

- that an appeal to be admissible and be assessed on the merits needs to be submitted in a written form (in Greek) and mention the “specific grounds,” making it practically possible only with a lawyer;⁶⁸
- that the automatic suspensive effect, which the court in *M.S.S.* stressed to be mandatory when violations of Art. 3 are at issue (§ 293), has been abolished for certain appeals;⁶⁹
- that the notification can be fictitious, creating a risk that applicants will miss deadlines without being informed;⁷⁰

It is furthermore mentioned, that the court in *M.S.S.* (§ 302), was “concerned” that the watchdog role of UNHCR in the appeals stage was abolished. However, with the introduction of L. 4636/2019, UNHCR is removed from the appeals committee once more.⁷¹

4. LACK OF SCRUTINY IN INTERVIEWS AND EXAMINATIONS & NON-ACCESSIBILITY OF PERSONAL INTERVIEWS

In order to prevent unlawful refoulement, both European Law, namely the Directive 2013/32/EU, and Art. 3 ECHR itself (cf. above E III. 1.) require a thorough individual examination that takes into account up-to date information and evaluates the risk of an Art. 3 ECHR violation ‘on the merits’ (cf. *M.S.S.*, § 315). Whereas it is a well-known legal fact that there is no legal requirement to assess the ‘merits’ of an application for international protection, e.g. Member States can find applications inadmissible⁷² without assessing the claim’s eligibility, the Court – when referring to ‘the merits’ – refers to the merits of Art. 3 ECHR. These merits, with respect to the absolute nature of Art. 3, must be examined in any case where Convention States exercise effective control (Art. 1 ECHR) (cf. above E III. 1.).

a. Lack of Scrutiny and Structural Assumption of Turkey being safe

The primary assumption that governs the procedures on the Eastern Aegean Islands on which the EU-Turkey Statement is implemented is that Turkey meets the criteria for a safe third country, including complying with Art. 3 ECHR⁷³. In a letter to the Greek government in May 2016, the representative of the European Commission Matthias Ruete, who was then “Director-General” of the General Secretariat for Migration and Home Affairs (DG HOME), also explained why Turkey can be considered a safe third country in the sense of Article 38 Directive 2013/32/EU. He finally hopes that *“the Greek authorities will find these considerations [...] useful for the carrying out of the individual assessments of whether to consider Turkey as a first country of asylum or as a safe third country [...] for applicants for asylum who had irregularly crossed into the Aegean Islands via Turkey as of 20 March 2016.”*⁷⁴

These structural shortcomings, triggered by the EU-Turkey Statement and by the expectations of the European Union, in the admissibility procedures are also found by administrative courts of other Member States. The Administrative Court of Munich, Germany, consequently refused to return an applicant to Greece, because there would be *“indications, that asylum applications of Syrian nationals*

⁶⁸ AIDA Report Greece, p. 65.

⁶⁹ AIDA Report Greece, pp. 32, 65.

⁷⁰ AIDA Report Greece, p. 64.

⁷¹ AIDA Report Greece, p. 61.

⁷² Art. 33 Directive 2013/32/EU,

⁷³ Cf. only Art. 38 (1) lit. d Directive 2013/32/EU.

⁷⁴ Letter Matthias Ruete to Vasileios Papadopoulos, 04/05/2016, available at: https://bit.ly/mss_submission16 [last accessed: 08/08/2020].

[...] in Greece would be systematically treated in a way that is not in accordance⁷⁵ with the requirements of Directive 2013/32/EU.

aa. Lack of Scrutiny in Interviews

The common practice of the admissibility procedures, especially for Syrians, on the island of Chios, as on other islands, is superficial and systematically assumes that the situation in Turkey complies with Art. 3 ECHR. Therefore, as on Lesbos⁷⁶, asylum applications by Syrian nationals are summarily rejected as inadmissible.

Both actors involved in the examination of asylum applications, the Greek Asylum Service and the European Asylum Support Office EASO, implement a common practice.

i. Poor Quality of Interviews

The quality of asylum interviews on Chios remains considerably low and most of the staff is employed with short-term contracts and are poorly trained. The findings⁷⁷ of other submissions to this Committee are therefore endorsed and it is recalled that the Court in *M.S.S.* criticised, in addition to the lack of legal aid, the lack of training of the staff that is conducting interviews (§ 301).

ii. Abolishment of every individual examination

According to information obtained by Equal Rights Beyond Borders and other actors on the island, the policy is now to reject all applications of Syrians as inadmissible without prejudice, except in truly extraordinary cases. Combined with the described factual and legal non-accessibility of remedies, this practice dramatically increases the risk that an application will not be assessed on the merits of Art. 3 ECHR before being readmitted to Turkey. Additionally, in asylum interviews, questions to Syrians now only address a person's most recent attempt to cross to Turkey. A representative from Equal Rights Beyond Borders recently accompanied a Syrian man who was arrested and accused in 2017 of working with the PKK and deported from Turkey to Syria after trying to cross in October 2019. However, the interview focused exclusively on the applicant's final attempt to cross in 2019, during which he managed to stay safely in Turkey for three days, and the interviewer failed to further examine the 2017 and 2019 incidents.

iii. Template Rejections and General and Outdated assurances by Turkey

Finally, the inadmissibility rejections use "*boilerplate reasoning and outdated country information.*"⁷⁸ The country information still in use⁷⁹ was introduced to Greece in the discussed letter of Matthias Ruete (cf. above), and is dated from April, May and July, 2016.⁸⁰ The rejections are, still, mainly based on the assurances given by Turkey, in which

"Turkey assures that due to the Syrian crisis, citizens of Syrian Arab Republic who irregularly crossed into the Aegean Islands via Turkey as of 20 March 2016 and being

⁷⁵ Administrative Court Munich, Judgement of 17/07/2019, Nos. M 11 S 19.50722 and M 11 S 19.50769, para. 57, cf. Press Release Equal Rights Beyond Borders 16/08/2019, 'Court of Munich again: Turkey is not a safe third country – Is the EU- Turkey Deal dead?', available at: https://bit.ly/M.S.S_submission3 [last accessed: 07/08/2020]; translation by Equal Rights Beyond Borders.

⁷⁶ Cf. the recent Rule 9.2. Submission of HIAS Greece dated from August 2020 to this Committee in the *M.S.S. and RAHIMI Groups v. Greece* (Applications No. 30696/09, 8687/08); hereinafter: HIAS Submission August 2020.

⁷⁷ Cf. RSA Submission July 2020, §§ 24 et seq.

⁷⁸ HIAS Submission August 2020.

⁷⁹ Regarding the outdated Templates cf. also RSA Submission July 2020, §§ 31 et seq.

⁸⁰ All can be found on the Homepage of the Greek Asylum Service at: https://bit.ly/mss_submission13 [last accessed: 07/08/2020].

taken back by Turkey as of 4 April 2016, will be granted temporary protection status in line with the Temporary Protection Regulation no 2014/6883 and the Regulation no 2016/8722 Amending the Temporary Protection Regulation.

Each Syrian national returned to Turkey who previously enjoyed the temporary protection status, or who transited the country and did not previously enjoy the temporary protection status and who do not have a profile that could bring them under the scope of the exclusion clauses, as set out in the above mentioned Regulation and relevant Turkish national or international law and legislation will be granted such status in accordance with the above mentioned Regulation and other relevant legislations.”

Besides the general nature of the statement and the missing individual assessment, a general assurance cannot remedy the according shortcomings. In *M.S.S.* (§ 325), the court underlined that the Belgium authorities (but as a matter of course these findings are also binding Greece) had taken “*the decision to deport him [...] solely on the basis of the presumption – by virtue of the tacit acceptance provided for in the Dublin Regulation – that the Greek authorities would honour their obligations, without any individual guarantee concerning the applicant.*” But the court attaches little importance to vague assurances⁸¹, especially since they are difficult to control. Although the Court has become more open to these types of assurances, they must still relate to the individual case and not be general.⁸²

bb. Lack of Scrutiny in Second Instance Proceedings and Lack of Effective Remedy

Additionally, in *M.S.S.* the Court was especially concerned that the “*decisions are drafted in a stereotyped manner*” (§ 302), the remedy of appeal is, as a rule, not successful and uses “*boilerplate reasoning and outdated country information.*”⁸³ According to the Greek Council for Refugees, 87.9% of the appeals have been rejected in 2019.⁸⁴ Further, it is concerning that the Greek government stopped publishing asylum statistics.⁸⁵ This submission has already stressed (cf. above E III. 3.) that L. 4636/2019 introduces structural shortcomings to the appeals process, in particular by removing the automatic suspensive effect and requiring applicants to submit their reasonings in Greek. At the same time, there are massive deficits in available legal aid (cf. below E III. 6.), while deadlines remain unclear.

According to UNHCR this, combined with the abhorrent living conditions in the EU Hotspots like Vial, “[i]n some circumstances [...] [make it so] difficult to appeal against a rejection that the right to an effective remedy enshrined in international and EU law, would be seriously compromised”⁸⁶.

⁸¹ Cf. ECtHR, Judgement of 24/04/2008, No. 2947/06, *Ismoilov et al v. Russia.*, § 127.

⁸² Cf. ECtHR, Judgement of 17/01/2012, No. 8139/09, *Othman v. UK*, § 189.

⁸³ Cf. HIAS Submission August 2020.

⁸⁴ Greek Council for Refugees, ‘Overview of Statistical Practice’, 2019, available at: https://bit.ly/M.S.S_submission4 [last accessed: 07/08/2020].

⁸⁵ Refugee Support Aegean, ‘Asylum statistics for 2020 should be published and unpacked’, 15/07/2020, available at: https://bit.ly/M.S.S_submission5 [last accessed: 07/08/2020].

⁸⁶ UNHCR, ‘UNHCR urges Greece to strengthen safeguards in draft asylum law’, 29/10/2020, available at: https://bit.ly/M.S.S_submission10 [last accessed: 07/08/2020].

b. Silent Revocations and Implicit withdrawals

Further, Greek Asylum L. 4636/2019 adapts Art. 28 Directive 2013/32/EU and allows for authorities to discontinue an asylum procedure when the application is “implicitly withdrawn” due to a “lack of cooperation” by asylum seekers.⁸⁷

However, L. 4636/2019 insufficiently adapts Art. 28 Directive 2013/32/EU for several reasons. First, it does not allow for applicants to reopen their applications, whereas the Directive 2013/32/EU clearly allows applicants to reopen their procedures within 9 months without having to state reasons⁸⁸. Notably, Member States are required to reopen cases upon application precisely because an individual examination of the ‘merits’ (*M.S.S.*, § 315) is needed. Recently, with Law 4686/2020⁸⁹ a new Art. 81 (4) was introduced that implements this precondition of the Directive 2013/32/EU. However, the provision for the implicit withdrawal is implemented arbitrarily in practice.

CASE STUDY

One of the reasons a claim can now be considered implicitly withdrawn is that the applicant does not “appear to renew the card on the first working day after its expiry in accordance with Article 70”⁹⁰ On Chios, the international protection applicants cards are, in most cases, valid for 15 days.⁹¹

In one example, Equal Rights represented a family that fled Iraq and had their asylum interviews in the beginning of 2019. Their asylum application was rejected on 31 May 2019, and they submitted their appeal the same day. In January 2020, their appeal was rejected because their application was ‘implicitly withdrawn’ because the family did not renew their asylum cards their expiration date. However, the director of the Regional Asylum Office (RAO) of Chios had issued a certificate stating that from October 2019 to December 2019 the Regional Asylum Office did not have asylum cards to provide to the applicants and that the Appeals Authority was already informed about the issue. The certificate also stated that, however, the RAO cannot confirm the names of the applicants that approached the Asylum Service to renew their asylum cards.

In addition to this case example, Equal Rights Beyond Borders is aware of a number of applicants that have tried on numerous occasions to approach the info point (cf. below, E. III. 5.) or the reception staff to renew their international protection applicants cards, but are denied access and therefore the card expires accordingly and the application is considered implicitly withdrawn. Without the representation of the lawyer – to which access is limited (cf. below E III. 6.) – the risk of being denied an examination on the merits is high, because a person needs to file an application to reopen their case.

⁸⁷ Article 81 L. 4636/2019.

⁸⁸ Argument a contrario: Art. 28 Directive 2013/32/EU states reasons to discontinue the case, but no reasons for reopening.

⁸⁹ Art. 13 (3) L. 4636/2019.

⁹⁰ Art. 81 (2) lit. f L. 4636/2019.

⁹¹ Art. 70 (4) lit. c L. 4636/2019.

c. Rejections without Interviews

Additionally, there have been attempts, especially on the island of Lesbos, to reject asylum application of applicants without conducting any interview and any individual examination⁹² - clearly in violation of the principle of non-refoulement arising from Art. 3 ECHR.

5. LACK OF INFORMATION

In addition to the unclear procedural rules outlined above, insufficient examinations, and the structural assumption of Turkey being safe for a certain group of people, applicants receive little to no information about the asylum procedures they face. This is particularly problematic for people who undergo admissibility interviews, who are often learn for the first time during their interviews that they will be asked why they fled Turkey rather than their countries of origin. This makes a full examination of their claim even more challenging because applicants are often unprepared to discuss what happened to them in Turkey, where they might have spent only a few days.

The Court in *M.S.S.* considered “*insufficient information for asylum-seekers about the procedures to be followed*” (§ 301) to be of concern when assessing a violation of Art. 13 in conjunction with Art. 3 ECHR.

a. Legal Obligation in Greek Law

According to Greek law, applicants ‘shall have the right to be informed in writing, in a language which they understand, in a simple accessible format [...] on the procedure to be followed, [...] their rights.’⁹³ In addition, ‘applicants, following a relevant request [...] shall be provided with legal and procedural information free of charge on the procedure concerning their case.’⁹⁴ EU law provides further that ‘Member States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care.’⁹⁵

b. Practice on Chios⁹⁶

In practice, persons staying in Vial face widespread uncertainty and are left largely to ‘navigate the complex asylum system on their own, without sufficient information’.⁹⁷ The complete lack of information creates an environment of rumours, fear and insecurity.

Persons are not informed upon arrival on the course and the content of the proceedings by authorities.

The one place where applicants are supposed to access any information in Vial is the so-called ‘info point’ or ‘kiosk’ that has been set up in all Reception and Identification Centres – a container with a barred window. Through this barred window, staff of EASO, GAS or UNHCR – depending on the shift – are supposed to give information to applicants for international protection on their individual asylum procedure. This is also the supposed way for applicants to submit any information relevant to their

⁹² Cf. Press Release by HIAS Greece, Refugee Support Aegean [RSA] Greek Council for Refugees, Equal Rights Beyond Borders, Legal Centre Lesbos, Danish Refugee Council [DRC] and FENIX Humanitarian Legal Aid of 29/11/2020, available at: https://bit.ly/M.S.S_submission6 [last accessed: 07/08/2020].

⁹³ L. 4636/2019, Art. 69 (1). It is to be noted that this provision is likely to stay behind Art. 12 Directive 2013/32/EU under which applicants do not only have “the right to be” but “shall be” informed accordingly.

⁹⁴ L. 4636/2019, Art. 71 (2).

⁹⁵ Art. 5 (2) S. 2 Directive 2013/33/EU,

⁹⁶ For more detailed information cf. Vial Report, p. 29 et seq., Enclosure 1.

⁹⁷ Greek Council for Refugees, ‘Provision of Information on the Procedure’, available at: https://bit.ly/M.S.S_submission11 [last accessed: 07/08/2020].

asylum procedure. Urgent information – such as interview dates or calls for notification about decisions – are displayed on a single ‘info board’ next to the ‘kiosk’.

On a daily basis, applicants are forced to crowd at the info point, regardless of the threat of Covid-19(cf. above E I. 3.). Still, applicants are often sent away without getting the information they ask for. This lack of access to information in particular concerns applicants who are sick or have disabilities, as well as women who are subject to constant sexual harassment in the camp.

Even when people do obtain information, that information is confusing, contradictory, and, in many cases, wrong. Moreover, sudden changes to individuals’ procedures are left unexplained. Documents submitted by an applicant through the info point in many cases never reach the relevant casefile, creating further confusion as the applicant, having submitted the documents, rightfully assumes that the information was taken into account by the administration. Information given orally is simply not taken into account at all.

For certain applicants—such as LGBTI applicants, applicants with certain diseases, or survivors of sexual or gender-based violence—it is practically impossible for them to give or receive information privately. At the same time, the info point is the only official way to submit information regarding any kind of disease, or to ask for female interpreter, which must be explained by referring to an experience of an SGBV incident.

As a result, this group of people are often uninformed about the proceedings and their legal remedies, or, worse, their credibility is questioned because they failed to inform the authorities about crucial elements of their claim earlier on in their procedure.

6. INSUFFICIENT ACCESS TO LEGAL AID DURING THE ASYLUM PROCEDURE

No state-funded free legal aid is provided at first instance, nor is there an obligation to provide it in law. NGOs and private actors therefore provide free legal assistance and counselling to asylum seekers at first instance based on their availability, staffing and capacity. The scope of these services remains severely limited, bearing in mind the high number of applicants subject to the fast-track border procedure.

A state-funded legal aid scheme in the appeal procedure has been in place since September 2017, and it operates on the basis of a list managed by the Asylum Service. The capacity of this scheme however remains generally limited and almost 2 out of 3 appellants do not benefit from free legal assistance at second instance.⁹⁸ This problem is exacerbated in the islands where, as underlined in a report issued by Oxfam and Greek Council of Refugees, “*the situation is far worse, with only two out of 100 people able to get the free legal aid needed to appeal their cases. On Lesbos, for most of 2018, there were no state funded lawyers for the appeal stage and now, in 2019, there is only one. Every month approximately 50 to 60 asylum seekers who are rejected in the first instance require legal aid at the appeal stage. But the single state-appointed lawyer only has capacity to assist a maximum of 10 to 17 new cases, depending on the month*”.⁹⁹ Compliance of this legal aid scheme with Greek obligations under national and EU legislation is dubious in terms of effectiveness of access to legal remedies.

⁹⁸ AIDA Report Greece, p. 20.

⁹⁹ Oxfam and Greek Council for Refugees, ‘No-Rights Zone. How people in need of protection are being denied crucial access to legal information and assistance in the Greek islands’ EU ‘hotspot’ camps, available at: https://bit.ly/M.S.S_submission12 [last accessed: 07/08/2020].

On the island of Chios, the state-funded legal aid scheme translates into the presence of one registered lawyer.¹⁰⁰ In addition, and as a way to complement the state-funded legal aid scheme, there are a number of NGOs operating on Chios that have the capacity to undertake appeals.¹⁰¹ However, with nearly 5000 asylum seekers on the island, the limited capacity of second instance legal aid is clearly limited. NGOs' complementary work is also restricted in numbers, in capacity, as well as by legal and political restrictions towards their work.¹⁰² As a consequence, only a small share of all applicants obtain second-instance legal assistance, thus rendering uncertain their access to an effective remedy.

The already inadequate state-funded legal aid system is easily strained. A sudden increase in number of appeals may rapidly lead to a situation of over-burdening of the system, with the state-lawyer unable to fulfill the task of undertaking all the submitted appeals.¹⁰³ The latest of these instances took place in the first weeks of June 2020 when, confronted with an increased number of rejections in the first days of the reopening of services in the wake of the Covid-19 emergency, the state lawyer was unable to take on all the cases which required legal aid. Many applicants for international protection first instance rejections were denied access to legal assistance and missed the 10-day deadlines for the submission of the appeal. In practice, the situation stripped many of their right to an effective remedy simply because of a complete lack of access to such remedy. This situation was addressed by referring rejected asylum seekers from Vial RIC to Registry lawyers of different Regional Asylum Offices. Even under this new system though, many still missed the deadlines for the submission of appeals because there was little clarity as to which lawyer and from which RAO was assigned to their case, making it impossible for applicants to communicate with their lawyers. Moreover, access to legal services external to the camp was - and continuous to be - rendered more arduous by the ongoing measures of restriction of movement within the Vial RIC.¹⁰⁴ Since the measures were first announced, numerous asylum seekers have been issued 150 euros fines for violating the movement restrictions in search of legal aid. Structural understaffing and under-resourcing of the state-funded legal aid system has the expectable outcome of leaving many without access to a lawyer. At the same time, free legal aid organizations are evidently unable to respond to the high demand.

7. LENGHTY PROCEDURE

Additionally, the applicants in *M.S.S.* complained about the length of the asylum procedures (§ 270). As on Lesbos¹⁰⁵, after L. 4636/2019 entered into force in January 2020, the Regional Asylum Service of Chios began prioritising the cases of 2020 arrivals at the expense of pre-2020 arrivals. This has resulted

¹⁰⁰ Asylum Service, Decision No 20165/2019, 13 December 2019. This decision appointed 9 lawyers on the islands in order to provide free legal aid on the second instance under the state funded legal aid scheme. Appointed lawyers were to be divided as follows: 2 lawyers on Lesbos, 1 lawyer on Samos, 1 lawyer on Chios, 1 lawyer on Kos, 2 lawyers on Rhodes.

¹⁰¹ As of August 2020, five lawyers are present on the island who undertake appeals (one from Equal Rights Beyond Borders, two from METAdrasi and two from Assist. One lawyer from Greek Council for Refugees is on leave for the month of August).

¹⁰² Expert Council on NGO Law of the Council of Europe, Opinion on the Compatibility with European Standards ff Recent and Planned Amendments to the Greek Legislation on NGO Registration, July 2020, CONF/EXP(2020)4.

¹⁰³ See for example: Greek Council for Refugees, 'Άνευ νομικής συνδρομής οι πρόσφυγες στα νησιά', 28 November 2018, available in Greek at: <https://bit.ly/2XZuup2>. [last accessed: 08/08/2020] A public statement issued by Greek Council for Refugees in November 2018, noting that for several months applicants on the Eastern Aegean Islands did not have the possibility to benefit from free legal aid at the appeal stage.

¹⁰⁴ The movement restriction measures for residents of RICs and of accommodation facilities for third country nationals are extended up to 31 August 2020, cf. above E.I. 3.

¹⁰⁵ HIAS Submission August 2020.

in pre-2020 arrivals having their interview rescheduled for 2021, as their initial appointments for interviews in 2020 are being reassigned to the new arrivals.

8. SUSPENSION OF ASYLUM LAW

As documented extensively in the other submissions, the Greek government reacted to Turkish President's decision to open the "doors to Europe", with violence, pushbacks and, on 2 March 2020 by adopting an "Act of Legislative Content" (Emergency Legislative Order), which suspended for one month the submission of asylum applications for "persons who enter illegally in the country". Under the act, those who did manage to enter were to be returned to their country of origin (or Turkey¹⁰⁶) without any proceedings.¹⁰⁷ The fact that this measure is manifestly unlawful and fundamentally contrary to Art. 3, which requires an individual examination, is not the subject of the present submission and the authors have already discussed it in detail elsewhere.¹⁰⁸ However, it is relevant to note that March arrivals were subjected to deportation procedures and pre-removal detention in the port area without any protective structure or access to running water.

Further, March arrivals were never informed about the available legal remedies or avenues to obtain legal aid, and authorities refused to interpret detention and deportation decisions into a language they could understand.¹⁰⁹ On the contrary, lawyers were systematically denied access to those people being held at the port. In Chios, 254 were held in the port area. Upon several applications by a lawyer from Equal Rights Beyond Border, the prosecutor did not grant her access to meet with them.¹¹⁰ Among those detained at the port were a number of unaccompanied minors. By mid-March authorities transferred them to detention camps on the mainland.

9. DIRECT REFOULEMENT: PUSH-BACKS

Finally, there are several reports, that, also from the island of Chios¹¹¹, that direct push backs are conducted by Greek authorities¹¹², without doubt directly violating the principle of non-refoulement.

¹⁰⁶ Cf. for the uncertainty HIAS Submission August 2020.

¹⁰⁷ For a chronology cf. Expert Legal Opinion, p. 5 et seq., Enclosure 3.

¹⁰⁸ For an extensive analysis cf. Expert Legal Opinion, p. 12 et seq., Enclosure 3.

¹⁰⁹ Cf. for this practice on Lesbos cf. Submission HIAS August 2020.

¹¹⁰ Cf. also Amnesty International, 'Caught in a Political Game', April 2020, available at: https://bit.ly/M.S.S_submission7 [last accessed: 07/08/2020], p. 15.

¹¹¹ For other credible information on Push-Backs especially from the mainland border at the river Evros cf. Expert Legal Opinion, pp. 8 et seq., Enclosure 3.

¹¹² Cf. only Human Rights Watch, 'Greece: Investigate Push Backs, Collective Expulsion', 16/07/2020, available at: https://bit.ly/M.S.S_submission2 [last accessed: 07/08/2020].

F. ANNEX

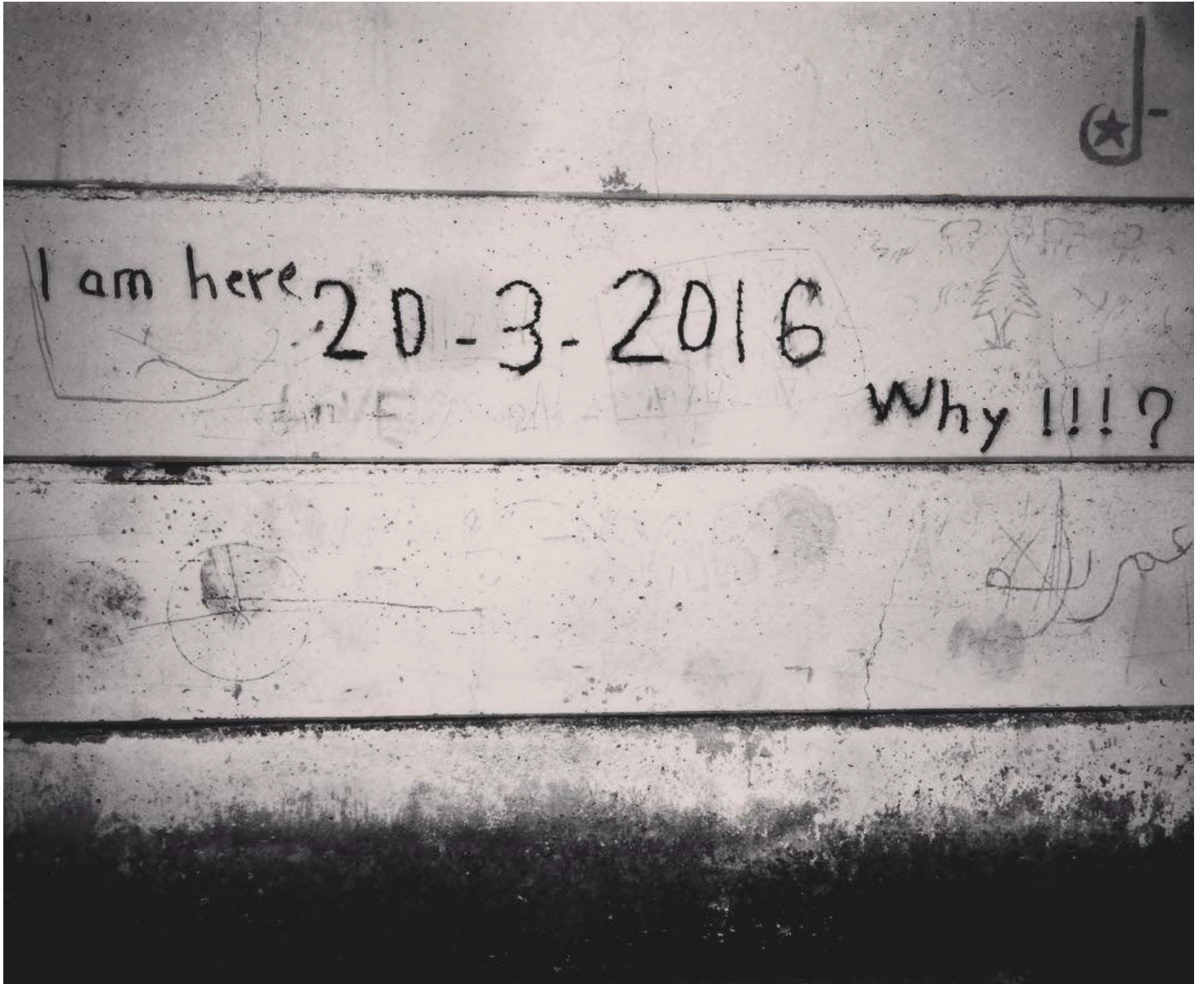
1. VIAL REPORT
2. COVID REPORT
3. EXPERT LEGAL OPINION

ENCLOSURE 1

Equal Rights Beyond Borders,

'The Lived Reality of Deterrence Measures: Inhumane Camps at Europe's External Border. Three years after the entry into force of the EU-Turkey Statement: Asylum procedure and reception conditions in the EU Hotspot Vial – Chios, Greece', September 2019, available at: https://bit.ly/M.S.S._vialreport [last accessed: 07/08/2020].

EQUAL RIGHTS BEYOND BORDERS



REPORT

12/19

THE LIVED REALITY OF DETERRENCE MEASURES INHUMANE CAMPS AT EUROPE'S EXTERNAL BORDER

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I. INTRODUCTION

It is now the third year in which individuals and families in search of protection are forced to live in camps at the external borders of the European Union (EU) as part of the so-called EU 'Hotspot Approach'.¹ This concerns all asylum seekers who risk their life crossing the Aegean Sea from Turkey to the Greek islands. Three years on from the signing of the EU-Turkey Statement,² and despite urgent calls from NGOs and human rights groups working on the ground, as well as from the Anti-Torture Committee and the Human Rights Commissioner of the Council of Europe, the EU Agency for Fundamental Rights (FRA), the European Parliament, and United Nations High Commissioner for Refugees (UNHCR), the inhumanity of the conditions in those camps persists.³

This report aims at illustrating the daily life of asylum seekers in the EU Hotspot Vial, on the Greek island of Chios. The report describes first the procedures asylum seekers have to go through, and secondly the reception and living conditions in Vial. It further provides a legal assessment of the situation, taking into account Greek, EU and international law. A detailed legal analysis however goes beyond the scope of this report.⁴ The extent of this legal assessment will thus remain to what is necessary to roughly understand the situation in Vial. This report is addressed to the interested public.

While correct that the situation in the EU Hotspots has already been well documented, we are convinced of the importance of shining a light on what we have and are still experiencing during our daily work in Vial. Our findings overall confirm what has been documented so far and highlight that not much has changed in the Hotspots. At the same time, we want to present a detailed situation of Vial in particular, which we believe is relevant considering that the focus of most reports lies on the EU Hotspot Moria in Lesvos, and the EU Hotspot Vathy in Samos. To make it easier for the reader to understand what it means to remain in a camp such as Vial, the report provides illustrative examples of individual cases which we have witnessed during our work as legal counsellors on the island of Chios, excerpts of interviews with persons staying in Vial, and photographs of the camp.⁵

1 In May 2015, the European Commission introduced the EU Hotspot Approach as a means to provide assistance to EU member states geographically located at the EU external border facing a high number of arrivals of migrants. 'Hotspot' facilities for initial reception, identification and registration of asylum seekers were hereby created in Italy and Greece, with European agencies being deployed in support of national authorities. See in more detail and from a legal perspective on the EU Hotspot Approach and its implementation in Greece: Catharina Ziebritzki and Robert Nestler, 'Working Paper. Hotspots at the EU External Border. A Legal Survey' (2017) MPIL Research Paper No. 17 (publication in German), available online: <https://bit.ly/352ke25> [last accessed: 14 November 2019].

2 The EU-Turkey Statement was published as Press Release on 18 March 2016 and entered into force on 20 March 2016, available online: <https://bit.ly/2NLcATN> [last accessed: 08 October 2019].

3 To give only a few examples: Amnesty International, 'Greece and EU Must Move Asylum Seekers to Safety', 6 December 2018, available online: <https://bit.ly/2qV62cd>; Danish Refugee Council, 'Fundamental Rights and the EU Hotspot Approach', October 2017, available online: <https://bit.ly/2QksWVg> [last accessed: 12 November 2019]; Human Rights Watch, 'Greece: Dire Conditions for Asylum Seekers on Lesbos', 21 November 2018, available online: <https://bit.ly/2O8kzuz> [last accessed: 10 November 2019]; Médecins Sans Frontières, 'EU-Turkey deal continues cycle of containment and despair', 18 March 2019, available online: <https://bit.ly/2QfaVYi>, [last accessed: 10 November 2019].

4 In this regard, we refer to other publications by Equal Rights Beyond Borders, available at: <https://www.equal-rights.org/hotspots> [last accessed: 09 November 2019].

5 Out of respect for the persons staying in the inhumane conditions, we refrain from showing pictures which focus on individuals in a recognizable manner.

The report covers the period from September 2018 to September 2019.⁶ The information is based on the daily experiences of lawyers, legal interns and interpreters working with the Equal Rights Beyond Borders office in Chios, as well as research carried out for the purpose of this report – comprising both field research, including qualitative semi-structured interviews with asylum seekers and legal experts from other NGOs in Chios carried out between December 2018 and September 2019, and interviews with lawyers in Izmir carried out in February 2019, as well as desk research.

All information which is not substantiated by a written source is based on the daily experience of the lawyers, legal interns and interpreters working with Equal Rights Beyond Borders in Chios and on interviews conducted for the purpose of this report.

The report is co-authored by Emily Cunniffe⁷, Alik Potamianou⁸, Stephanie Pope⁹, Nicolas Wéry¹⁰, and Catharina Ziebritzki¹¹.

The report was made possible by the indispensable support, such as with conducting interviews, gathering data and proofreading, provided by numerous staff members, legal interns and interpreters working with Equal Rights Beyond Borders in Chios – in particular Karin Åberg, Ahmad Manabi, Michal Arm-

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Last but not least, the report could not have been realized without the efforts and willingness of our interviewees, most of them asylum seekers in Chios, but also lawyers and legal experts working in Chios, whom we would herewith like to thank for their time and openness.

6 References to the 'current situation' refer to the situation in September 2019.

7 Emily Cunniffe worked with Equal Rights Beyond Borders on Chios as a legal intern from January to March 2019.

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11 Catharina Ziebritzki is co-founder of Equal Rights Beyond Borders, and worked as legal coordinator of the office in Chios from December 2017 to February 2018 as well as from September to December 2018. Further information on all team members available online:
<https://www.equal-rights.org/team>.

II. THE CONTEXT

EU Hotspots and EU-Turkey Deal

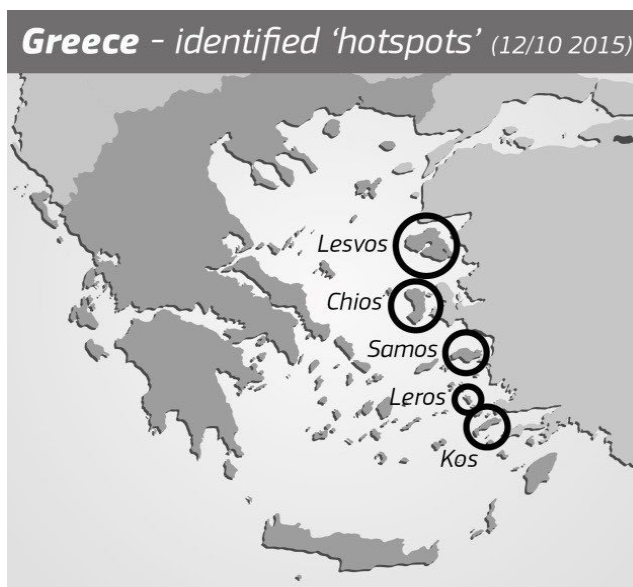


Fig. 2

Map of the EU Hotspots, source: EUR-Lex, <https://bit.ly/34Y1dxJ> [last accessed: 14 November 2019]

Chios hosts one of the five EU Hotspots in Greece, with the four others being located on the islands of Lesvos, Samos, Leros and Kos.¹ After the start of the crisis of the Common European Asylum System due to the relative increase in asylum applications in 2015, and before the practical implementation of the Hotspot Approach in 2016, asylum seekers stayed in different locations in Chios, of which Souda camp is worth mentioning.²

1 Current and detailed information on each EU Hotspot is provided by Refugee Support Aegean, available online: <https://rsaegean.org/en/the-hotspots-experiment/> [last accessed: 13 November 2019].

2 On the dire living conditions in Souda see e.g. Mohamad Alhussein Saoud and Marta Welander, 'Chios at Breaking Point: New Research Finds Humanitarian Support Must be Strengthened, Not Withdrawn', Blogpost of 12 July 2017, available online: <https://bit.ly/34Y1qkv> [last accessed: 09 November 2019]; The Guardian, 28 April 2017, 'Europe's dirty secret: officials on Chios scramble to cope with rising tensions', available online: <https://bit.ly/3747N7A>, [last accessed: 10 November 2019].

At the request of the European Commission, a space for the establishment of an EU Hotspot had to be found by local authorities. The decision was made to create a camp on the site of Vial, a decommissioned aluminium processing facility, and seemed to be the most suitable place on the island – remote, not too small, and with a building to host the administration.



Fig. 3

„Hotspot“ Vial, administrative building, Chios 2016

The EU Hotspot Vial today is a refugee camp with an official capacity of about 1000 people, but which usually hosts between 1000 and 3000 people (see below IV.1). The camp consists of both containers and tents that surround the industrial building. The building itself partly serves as an administrative area and partly as a waste processing facility.³

3 Unlike Moria in Lesvos, Vial does not contain a 'pre-removal section' because applicants are transferred from detention in the police station in Chios to the pre-removal centre in Moria from where deportation to Izmir takes place (see below).

1. EU Hotspots: From relocation to return and containment

The EU Hotspot Approach was put forward by the European Commission in May 2015 in the context of the European Agenda on Migration.⁴ Initially, there was no precise legal definition or legal framework regulating the Hotspot Approach. The reformed Frontex Regulation of 2016 provides a first legal definition of ‘Hotspot’ as ‘an area in which the host Member State, the Commission, relevant Union agencies, and participating Member States, cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders’.⁵



Fig. 4
EU Hotspot Vial, sign referring to the authorities in charge of the camp and the EU funding, own photograph, 2016

Greek Asylum Law 4375/2016 implements the Asylum Procedures Directive⁶ and was adopted in April 2016 in the context of a complete reform of Greek asylum system. It is tailor-made to the implementation of the Hotspot Approach on the Aegean islands

and the EU-Turkey Statement and defines EU Hotspots as ‘Reception and Identification Centres’ (RIC).⁷



Fig. 5
EU Hotspot Vial, graffiti referring to the date of entry into force of the EU-Turkey Statement, own photograph, 2017

Originally, EU Hotspots have been conceived as centres in which irregularly arriving asylum seekers could be ‘swiftly identified, registered and fingerprinted’ so that ‘those claiming asylum [could be] immediately channelled into an asylum procedure’.⁸ At the same time, the EU Hotspots were intended as a mechanism to implement the EU Relocation Program, which was meant to alleviate the migratory pressure on Greece and Italy by relocating asylum seekers to other EU member states.⁹

Yet, upon entry into force of the EU-Turkey Statement on 20 March 2016, the purpose of the EU Hotspots was completely overhauled: EU Hotspots were no longer conceived as centres to implement the Relocation Program, but as centres to implement a return policy to Turkey. In the words of the European Commission: ‘the hotspots have been adapted to facilitate swift returns to Turkey from the islands’.¹⁰

This transformation of the EU Hotspots into return

4 The Agenda intended to ‘address immediate challenges’ linked to the refugee crisis and ‘equip the EU with to better manage migration.’ See: European Commission, European Agenda on Migration, COM(2015) 240 final, Annex II concerning the EU Hotspot Approach.

5 Art 2 para. 10 Frontex Regulation 2016/1624.

6 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 [hereinafter: Asylum Procedures Directive].

7 Greek Asylum Law 4375/2016, Art. 8, para. 4, lit. a. An official English translation which does not cover recent amendments is available online: <https://www.refworld.org/docid/573ad4cb4.html> [last accessed: 08 November 2019].

8 European Commission (Fn. 15).

9 European Commission (Fn. 15).

10 European Commission, Second Report on the progress made in the implementation of the EU-Turkey Statement, COM(2016) 349 final, p. 6.

centres had major repercussions on both the procedures and the reception conditions in these centres at the EU external border.¹¹ Immediately upon the entry into force of the EU-Turkey Statement, the EU Hotspots were transformed into detention centres. This generated widespread criticism¹² and triggered the UNHCR - a major actor on site - to redefine its role and suspend some of its activities within the Hotspots out of protest.¹³ Due to the critics as well as to practical difficulties to maintain large amounts of individuals detained, the detention scheme was soon replaced by the so-called 'geographical restriction', i.e. an obligation on all asylum seekers arriving on the Greek islands to remain there (see below III.3. for more detail).¹⁴

Even though the return policy cannot practically be implemented 'effectively' because Turkey can in most cases not be considered as 'safe third country' (see below III.2), the EU Hotspots are up to this day still conceived as return centres. The 'asylum procedure' is designed with the aim of return, and the same seems to be true for the reception conditions. In other words, the EU Hotspots' function as sites of containment and as a sorting zone to implement - politically envisaged, but legally not feasible - returns to Turkey.¹⁵

11 See e.g. Catharina Ziebritzki, 'EU Hotspot Approach and EU-Turkey Statement in Greece: Implementing a return policy? A legal perspective' (2017) JuWiss Blog, 13 December 2017, available online: <https://www.juwiss.de/134-2017/> [last accessed: 05 November 2019].

12 See e.g. Médecins sans Frontières, 'Doctors Without Borders to pull out of 'inhumane' Greek migrant centre', 23 March 2016, available online: <https://bit.ly/2qaFjbG> [last accessed: 12 November 2019]; Human Rights Watch, 'Greece: Refugee "Hotspots" Unsafe, Unsanitary', 19 May 2016, available online: <https://bit.ly/2qfGDKm> [last accessed: 09 November 2019].

13 UNHCR, 'UNHCR redefines role in Greece as EU-Turkey deal comes into effect', 22 March 2016, available online: <https://www.unhcr.org/56f10d049.html> [last accessed: 12 November 2019]; 'UNHCR has till now been supporting the authorities in the so-called "hotspots" on the Greek islands, where refugees and migrants were received, assisted, and registered. Under the new provisions, these sites have now become detention facilities. Accordingly, and in line with our policy on opposing mandatory detention, we have suspended some of our activities at all closed centres on the islands.'

14 See in more detail on the geographical restriction below.

15 Cf. European Council on Refugees and Exiles (ECRE),

2. Inhumane living conditions – intention or indifference

The inhumane conditions in the EU Hotspots have been highlighted regularly and continuously over the past three years in reports by UN bodies, including UNHCR and OHCHR, by the Council of Europe, by EU institutions, including the European Parliament and the EU Agency for Fundamental Rights, by the Greek Ombudsman, as well as by several NGOs, and by academia.¹⁶

To give only a few examples: in October 2017, as every autumn, urgent warnings regarding the upcoming winter were given by the NGO Refugee Support Aegean: 'Despite repeated warnings from numerous organizations, thousands of refugees will be in danger as weather deteriorates.'¹⁷ In February 2018, UNHCR further emphasized that 'refugee women and children face heightened risk of sexual violence amid tensions and overcrowding at reception facilities on Greek islands.'¹⁸ In June 2018, the European Parliament came to the conclusion that 'reception conditions remain a concern [...] in particular for vulnerable migrants and asylum seekers'.¹⁹

Asylum Information Database (AIDA), 'National Country Report: Greece', Update March 2019, available online: <http://www.asylumineurope.org/reports/country/greece> [last accessed: 14 November 2019].

16 An overview is provided by Isabelle Majcher, 'The EU Hotspot Approach: Blurred Lines between Restriction on and Deprivation of Liberty (Part 1)', 4 April 2018, available online: <https://bit.ly/2Obejpk> [last accessed: 15 November 2019]; further references also in Catharina Ziebritzki and Robert Nestler (Fn. 1).

17 Refugee Support Aegean, 'Winter has arrived: Thousands left at the mercy of winter in Greek hot-spots', 25 October 2017, available online: <https://bit.ly/2NjgpJf> [last accessed: 13 November 2019].

18 UNHCR, 'Refugee women and children face heightened risk of sexual violence amid tensions and overcrowding at reception facilities on Greek islands', 9 February 2018, available online: <https://bit.ly/2NNUGd0> [last accessed: 13 November 2019].

19 European Parliament, 'Hotspots at EU external borders. State of Play. Briefing', June 2018, available online: <https://bit.ly/2KmVA4h> [last accessed: 10 November 2019].

In the same month, the Anti-Torture Committee of the Council of Europe stated with regard to Moria that ‘conditions of detention remain very poor [...] and might easily amount to inhuman and degrading treatment’.²⁰

In August 2018, UNHCR stressed that the EU Hotspots are still ‘severely overcrowded. This means that thousands of asylum-seekers and migrants, including many children, live in squalid, inadequate and rapidly deteriorating conditions.’²¹ In September 2018, Médecins Sans Frontières stressed the serious gaps in medical services as well as the extreme repercussions of the conditions on the human body and mind: ‘Moria is in a state of emergency. [...] The vast majority of people [we] see are presenting with psychotic symptoms, suicidal thoughts – even attempts at suicide – and are confused. [...] In their island prison on Lesbos, they are forced to live in a context that promotes frequent violence in all its forms – including sexual and gender-based violence that affects children and adults.’²² In October 2018, the Amnesty International Expert for Asylum Policy and Law after her visit to Vial concluded: ‘Deaths are tolerated.’²³

A month later, UNHCR described the situation in the EU Hotspots in Samos and Lesbos as ‘abhorrent’, the situation on the other islands only ‘marginally better’ in terms of overcrowding, and reiterated its call ‘to take urgent steps to address the humanitarian situa-

tion for around 11,000 asylum-seekers on the islands [...]’.²⁴

In short, the fact that living conditions in the EU Hotspots remain inhumane is not only well known, it has become a commonplace. Everybody who wants to know knows what is happening in the camps at the EU external border for three years now. And yet, living conditions have not been improved. Will they ever be improved – and if not, why not? Finding an answer to this question obviously goes beyond the scope of this report. One can however note with Amnesty International’s Secretary General that ‘The [EU Turkey Statement] is the main driver behind the inhumane conditions refugees and migrants face today in Moria and on some other islands in Greece.’²⁵

Refugee Support Aegean similarly stated that ‘the EU-Turkey Statement [...] which is being implemented since March 20th, 2016 aimed to deter and eliminate further new refugee arrivals from the Turkish coast to Europe. While the ‘Deal’ is being advertised as a ‘success’ story in migration control, for protection seekers it is just a new model of systematic repression creating immense human suffering. Since the entry into force of the EU-Turkey Statement, protection seekers suffered from new forms of grave human rights violations that followed these policies.’²⁶

In other words, the inhumane conditions characterizing the EU Hotspots in Greece seem apparently to be central to a policy of deterrence from seeking asylum in Europe, and thereby central to the implementation of the EU-Turkey Statement which pursues the main

20 Council of Europe, ‘Preliminary observations made by the delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which visited Greece from 10 to 10 April 2018, CPT/Inf(2018) 20’, June 2018.

21 UNHCR, ‘UNHCR urges Greece to address overcrowded reception centres on Aegean islands’, 31 August 2018, available online: <https://bit.ly/2QdKaUi> [last accessed: 14 November 2019].

22 Médecins Sans Frontières, ‘Moria is in a state of emergency. Open letter by Dr. Alessandro Barberio, clinical psychiatrist, MSF Lesbos project’, September 2018, available online: <https://www.msf.org/moria-state-emergency> [last accessed: 15 November 2019].

23 Amnesty International Germany, ‘Flüchtlingslager auf Chios: Tote werden billigend in Kauf genommen’, Blogpost by Franziska Vilmar, Policy Expert for Asylum Politics and Law, October 2018, available online: <https://bit.ly/34SR85c> [last accessed: 16 November 2019].

24 UNHCR, ‘UNHCR urges Greece to accelerate emergency measures to address conditions on Samos and Lesbos’, 8 November 2018, available online: <https://bit.ly/2O9kZQc> [last accessed: 13 November 2019].

25 Amnesty International, Kumi Naidoo, ‘A scar on the conscience of Europe: Letter to Greek Prime Minister on conditions facing refugees in Greece’, 23 November 2018, available online: <https://bit.ly/2XeY4Hd> [last accessed: 14 November 2019].

26 Refugee Support Aegean, ‘EU Turkey Statement’, available online: <https://rsaegean.org/en/eu-turkey-deal-2/> [last accessed: 14 November 2019]: ‘RSA is on a regular basis documenting and highlighting the impact caused by the intensive implementation of the EU-Turkey deal to the rule of law as well as to the lives of the people that are subject to the deal.’

The following pictures clearly illustrate that nothing has changed within one year:



Fig. 6, 7: Photographs of EU Hotspot Vial, own photographs, winter 2017/18



Fig. 8, 9: EU Hotspot Vial, own photographs, winter 2018/19

objective to ‘end the irregular migration from Turkey to the EU.’²⁷ If one further agrees with the Greek Ombudsman’s statement that ‘the institutions and Member States of the most prosperous and politically developed Union should provide political solutions and respond to the challenges under the terms of the rule of law and the protection of human rights’,²⁸ and if

one similarly agrees that the EU and its Member States are actually able to provide decent living conditions in line with EU law and human rights for about 15,000 people within a timeframe of three years, the only conclusion seems to be that the sub-standard and illegal living conditions are either met with indifference or, worse, politically intended.

²⁷ EU-Turkey Statement (Fn. 2).

²⁸ Greek Ombudsman, ‘Migration Flows and Refugee Protection. Administrative Challenges and Human Rights Issues’, April 2017, available online: <https://bit.ly/32Osq4m> [last accessed: 14 November 2019], p. 93.

3. Multitude of actors – blurring and shifting responsibilities

To attribute the intention or indifference towards the inhumane living conditions to a particular actor is made particularly difficult by the existence of blurred responsibilities, which de facto lead to responsibility-shifting. While – as has been explained above – much speaks in favour of intention, or at least indifference of ‘the political actors’, the question remains who is actually politically and legally responsible. Finding an answer to this question appears as not that evident.

The EU Hotspots are characterized by a multitude of actors. This is well illustrated by the number of actors which have their offices in containers in the administrative area of Vial: Greek authorities – in particular the Greek Asylum Service (GAS), the First Reception and Identification Service (RIS), the Hellenic Police and the Hellenic Army,²⁹ the refugee education coordinator appointed by the ministry of education, the Hellenic Centre for Disease Control and Prevention (KEELPNO)³⁰; EU agencies – in particular the European Asylum Support Office (EASO), the European Border and Coast Guard Agency (Frontex), the European Agency for Law Enforcement Cooperation (Europol); a representative of the European Commission (COM representative); international organizations – the International Organization for Migration (IOM), the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC); NGOs – in particular Caritas, Salvamento Marítimo Humanitario (SMH), METAdrasi, and PRAKSIS; and the private security company G4S.³¹



Fig. 10
 Leaflet designed by UNHCR, provided in RIC
 (July 2019)

29 See for a list of the ‘actors involved’ in the asylum procedure in a strict sense: ‘Standard Operating Procedures for the implementation of the Border asylum procedures in the context of the EU Turkey Statement 18/03/2016’ (version of 19 July 2019), available online: <https://fragdenstaat.de/a/166838>, p. 7 et seq. which differentiates between ‘staff coordinated by the Asylum Service’, ‘staff seconded from the Hellenic Police to the Asylum Service’, ‘staff seconded from EASO to the Asylum Service’, ‘staff coordinated by EASO’, and ‘EASO experts and interim caseworkers’, and explicitly notes that ‘the roles of the actors involved may differ according to the needs of each [...] operation.’

30 Which is a private entity supervised and funded directly by the Ministry of Health and Social Solidarity, established by Law 2071/91, cf. AIDA country report Greece (Fn. 26) p. 36.

31 See on the latter: Apostolis Fotiadis, ‘While hot-spots become chaotic, EASO calls in G4S for protection’, blogpost of 21 June 2016, available online: <https://bit.ly/2ObiQmV> [last accessed: 14 November 2019].

According to Greek law, RIS is responsible for the management of the EU Hotspots or Reception and Identification Centres.³² RIS is under the authority of the Hellenic Ministry of Migration Policy which has been created in 2016.³³

According to the relevant EU soft law, however, which corresponds to what is implemented in practice, EU Hotspots are managed jointly by the European Commission, EU agencies and Greek authorities.³⁴ Addressing the ensuing legal questions would go far beyond the scope of this report. However, it should be noted that while the legal responsibility for the living conditions in the EU Hotspots – at least at first sight – lies exclusively with Greece, the administrative and political context rather shows that the EU and its member states are responsible for the implementation of the EU Hotspots.

GAS, which is evenly subordinated to the Hellenic Ministry of Migration Policy, is legally responsible for conducting the asylum procedures in the Hotspots and is assisted in this task by EU agencies.³⁵ In practice, the asylum procedures are conducted jointly by EU agencies and Greek authorities. Under the current Operating Plan agreed upon by EASO and Greece, EASO is providing ‘support to the Asylum Service for processing applications for international protection

at first instance falling under the border procedure.’ The Plan further specifies that this support will, inter alia, include registering asylum-seekers, conduct vulnerability and best interest assessments, as well as first instance interview.³⁶

The multitude of actors and the unclear legal framework obviously leads to blurred responsibilities and actors shifting responsibility to one another. This issue has been highlighted for the past three years by reports and academic publications.³⁷ Yet, the statement of the Greek Ombudsman of April 2017 still holds true: ‘The diffusion and overlap of competences [...] renders accountability and [...] attribution of liability quite blurry.’³⁸

Without going into detail, it is important to keep in mind that the question of responsibility, in particular regarding the inhumane living conditions, is further complicated by the following two issues. First, the EU Hotspot Approach shifts legal responsibility for reception conditions to the ‘hosting Member State’ while providing operational support only with regard to the procedures. Second, due to the Hotspot Approach and in line with the traditional ‘territoriality’ of asylum based on the idea of national sovereignty, the responsibility for asylum procedures lies with Greece.

What this means in practice is that the European Commission usually refers to Greece as the Member State ‘hosting’ the EU Hotspot and thus legally responsible for the living conditions. At the same time, the Greek Ministry of Migration and in particular local authorities on the islands usually emphasize that

32 Greek Asylum Law 4375/2016, Art. 8.

33 Note that the English translation of Art. 8 Greek Asylum Law 4375/2016 still refers to the former Ministry of Interior and Administrative Reconstruction.

34 On the level of central cooperation, through the ‘inter-agency coordination meetings’ in which national authorities, the European Commission, and EU agencies participate. Operative cooperation lies with the so-called EU Regional Task Force. Operative implementation of the EU asylum procedures by EU agencies and national authorities. Cf. with further references: Catharina Ziebritzki and Robert Nestler (Fn.1) p. 9 et seq.; Federico Casolari, ‘The EU’s Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?’ in ‘The Italian Yearbook of International Law Volume XXV’ (2017), p. 109, 118 et seq.; Lilian Tsourdi, ‘Bottom-Up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office’ (2017) 1 European Papers 997 et seq.

35 Greek Asylum Law 4375/2016, Art. 1, 14 para. 6, and 60 para. 4 lit. b.

36 EASO Operating Plan to Greece 2019, agreed upon by EASO and Greece, Valletta Harbour and Athens, 19 December 2019, available online:

<https://www.easo.europa.eu/archive-of-operations> [last accessed: 14 November 2019].

37 See for further references: Catharina Ziebritzki and Robert Nestler (Fn.1) p. 8 et seq.; F. Casolari (Fn. 44).

38 The Greek Ombudsman, ‘Migration Flows and Refugee Protection. Administrative Challenges and Human Rights Issues’, April 2017, available online: <https://bit.ly/2XjcVQT> [last accessed: 14 November 2019].

the Hotspots are an 'EU project' carried out on the Aegean islands simply due to their geographical location at the EU external border with Turkey.

With regard to the conditions in Vial specifically, the European Commission in its answers to our open letters has stated the following: 'Whilst the management of the RICs and providing adequate reception conditions is primarily the responsibility of the Greek authorities, in particular the Reception and Identification Service, we share your concerns about the situation. [...] Urgent actions are required by the Greek Authorities to use the EU funds available and deliver on the ground.'³⁹

Questioned by our organization on the same topic, the mayor of Chios however indicated that: 'The issue is too big to be solved on a local level. The EU must do something. The EU must decide which policy it wants to follow, and then effectively implement it.'⁴⁰

In the same vein, the manager of the refugee camp Kara Tepe in Lesvos expressed what seems to be the general sense of the legally responsible among Greek authorities: 'European member states should act and not refuse to view this as a European issue. [...]

An EU solution is needed [...].⁴¹ Indeed, the EU Hotspots have been opened on the Aegean islands despite strong local opposition, initially under the responsibility of the Greek Ministry of Defence upon pressure by the EU.⁴² The Greek Ministry of Migration – to which responsibility has been handed over from the Ministry of Defence shortly after the establishment of the EU Hotspots – has stated repeatedly that Greece has been left alone to deal with the migration crisis.⁴³

The result of this blurring and shifting of responsibilities is that nothing changes in practice – and that it is even difficult to clearly identify who is responsible for the persisting inhumane conditions on the ground.

39 European Commission, Letter of 4 November 2018, available online: <https://www.equal-rights.org/hotspots>. Without mentioning an ongoing investigation by the European Anti-Fraud Office (OLAF), regarding alleged irregularities concerning the provision of EU funding for refugees, see on this issue e.g. The Brussels Time, 'OLAF investigates irregularities in EU aid for refugees in Greece', 08 October 2018, available online: <https://bit.ly/374dIPs> [last accessed: 14 November 2019].

40 Maonalos Vournous, Mayor of Chios, in his speech on 16 October 2018 during the 15th European Conference on Asylum held in Chios and Athens, cf. Diakonie Deutschland and Churches' Commission for Migrants in Europe, 'Solidarity First. Reclaiming the Values of Europe', Report on the 15th European Conference on Asylum Law, Chios/Athens 15-20 October 2018, available online: <https://ccme.eu/index.php/downloads/reports/> [last accessed: 10 November 2019], p. 13 et seq.: 'The EU Refugee System from a Local Perspective'.

41 Stavros Miroyannis, manager of the refugee camp Kara Tepe on Lesvos, as quoted by DW News, 18 December 2018: <https://bit.ly/2pgeKkY> [last accessed: 15 November 2019].

42 See e.g. DW News, 16 February 2016, available online: <https://bit.ly/2OavDWT> [last accessed: 14 November 2019].

43 Ekathimerini News 17 March 2019, 'EU calls migrant hotspot conditions in Greece ,a shame for Europe,' German paper reports', available online: <https://bit.ly/33MvvDI> [last accessed: 13 November 2019].

III. ASYLUM PROCEDURE

in the EU Hotspot Vial

Upon entry into force of the EU-Turkey Statement, the asylum procedure carried out in the EU Hotspots was adapted to the aim of return.

This was in particular achieved by the application of the ‘safe third country concept’ which allows the rejection of asylum claims as ‘inadmissible’ if Turkey can be considered a ‘safe third country’ for the applicant (1). However, Turkey is not a ‘safe third country’ in general, and is not considered as such by the Greek authorities in most cases (2). The adaptation to the aim of return was further achieved by the imposition of the ‘geographical restriction’ to which asylum seekers are subject during the whole asylum procedure (3). Vulnerable persons are, according to the law, nevertheless excluded from the EU Hotspot procedure i.e. exempt from being returned to Turkey as well as from the geographical restriction. However, vulnerable asylum seekers are in many instances either not identified or identified with considerable delay. Further, even if identified, they are usually transferred to the Greek mainland with delay (4). Lack of information as well as difficulties regarding access to legal aid not only prevent persons staying in Vial from the possibility to make use of their rights but also lead to further distress and frustration (5).

Each section provides the relevant legal framework against which the practical situation is then assessed.

1. The EU Hotspot procedure – not really a ‘fast track’ border procedure

Basic legal framework and context

With the entry into force of the EU-Turkey Statement on 20 March 2016, the procedure conducted in the EU Hotspots was adapted to the aim of return. If one wants to use an ‘asylum procedure’ to implement a return policy, the question becomes how to reject an applicant as quickly as possible. According to EU asylum law, simply put, an asylum claim can be rejected in two ways: by being declared either unfounded – meaning that the person is not in need of international protection –, or inadmissible – meaning that another state should provide international protection to that person.

In order to reject an asylum claim as inadmissible, it is entirely irrelevant whether a person is in need of international protection. In line with the central idea of the EU-Turkey Statement to externalize responsibility to Turkey, the objective of the EU Hotspot procedure is to reject an asylum claim as inadmissible with the argument that Turkey is responsible for examining it. This argument either relies on the fact that Turkey has provided protection in the past or could simply do so in the future. While the first is reflected in EU law by the concept of ‘first country of asylum’,¹ the latter is by the concept of ‘safe third country’.² On 1 April 2016, only a few days after the entry into force of the EU-Turkey Statement, Greek Asylum Law 4375/2016 was adopted. It is tailor-made to the im-

1 Asylum Procedures Directive, Art. 33.

2 Asylum Procedures Directive, Art. 38.

plementation of the EU-Turkey Statement in the EU Hotspots, and therefore encapsulates the concepts of first country of asylum and safe third country.³

The EU Hotspot procedure is supposed to be conducted in the form of a so-called ‘fast-track border procedure.’⁴ The relevant administrative guidelines are laid down in the so-called ‘Standard Operating Procedures for the implementation of the Border asylum procedures in the context of the EU Turkey Statement 18/03/2016’, which is a non-public and non-binding internal document.⁵

Characteristic of the procedure is that it provides for restricted procedural guarantees and questionable shortened delays, and allows for enhanced support of EASO to GAS. The entire procedure is supposed to be conducted within 28 days.⁶ An asylum seeker should only be provided one day to prepare for his first instance interview and seek legal assistance.⁷ As will be explained below, the vast majority of these interviews are moreover conducted by EASO personnel. First instance decisions should further be issued the day following the interview.⁸ In case of a rejection of the asylum claim at first instance, either as inadmissible or as ineligible, an appeal can be lodged within five working days before the Appeals’ Authority.⁹ In case of a rejection by the Appeals’ Authority, a so-called action for annulment can be brought before an Administrative Court.¹⁰

In line with the political aim of rejecting an asylum claim as quickly as possible, different ‘workflows’ have been established depending on the nationality of the applicant.¹¹ For Syrians, an admissibility interview is first conducted by EASO. Based on this interview,

EASO issues a legal opinion¹² – usually coming to the conclusion that Turkey is a ‘safe third country’, and that therefore the claim can be rejected as inadmissible. Based on this legal opinion and without ever having seen the applicant, GAS then issues the decision concerning the admissibility of the claim. In almost all cases, GAS follows the legal opinion of EASO. If the claim is considered admissible, an eligibility interview is subsequently conducted by GAS on the Greek mainland. The same procedure applies in essence for applicants of countries of origin with an EU average recognition rate above 25%. However, the admissibility and the eligibility interview are usually conducted as one so-called ‘merged interview’. These interviews are conducted by EASO. For applicants originating from countries with an EU average recognition rate below 25% percent, because the chances of a rejection as ineligible are quite high, there is ‘no need’ to conduct the admissibility procedure from the political perspective of the return policy. Therefore, these persons directly undergo an eligibility interview which is conducted by GAS.¹³

While GAS is legally responsible, in practice GAS and EASO are ‘jointly processing’ asylum claims in the EU Hotspots. EASO is conducting interviews both regarding the admissibility and eligibility of the claim for international protection as well as vulnerability assessments (see below III.4). EASO issues legal opinions based on which GAS issues decisions without ever having seen the applicant in many cases. This practice constitutes a clear violation of Art. 2 para. 6 of EASO’s founding Regulation which provides that EASO ‘shall have no powers in relation to the taking of decisions by Member States’ asylum authorities on individual applications for international protection.’ This clear overstepping of EASO’s mandate in the EU Hotspots has repeatedly been criticized. In April 2017 already, a complaint had been submitted to the European Ombudsman by the European Center for Constitutional and Human Rights. Later in 2017, a report of the Danish Refugee Council similarly concluded

3 Greek Asylum Law 4375/2016, Art. 55 and 56.

4 Greek Asylum Law 4375/2016, Art. 60.

5 The version of July 2019 is available online: <https://fragdenstaat.de/a/166838> [last accessed: 14 November 2019], cf. Fn. 40, hereinafter referred to as ‘SOP Border Procedure in the context of the EU Turkey Statement’.

6 Greek Asylum Law 4375/2016, Art. 60 para. 2.

7 Greek Asylum Law 4375/2016, Art. 60 para. 2 lit c.

8 Greek Asylum Law 4375/2016, Art. 60 para. 3 lit d.

9 Greek Asylum Law 4375/2016, Art. 61 para. 1 lit d.

10 Greek Asylum Law 4375/2016, Art. 64.

11 SOP Border Procedure in the context of the EU Turkey Statement (Fn. 59) p. 18 et seq., p. 23 et seq.

12 SOP Border Procedure in the context of the EU Turkey Statement (Fn. 59), p. 30 et seq.

13 Cf. Catharina Ziebritzki and Robert Nestler (Fn.1) p. 28 et seq.

that EASO's active role in individual applications clearly goes beyond its mandate.¹⁴ The European Ombudsman however, despite recognising 'genuine concerns' over EASO's involvement in as well as the quality and procedural fairness of the fast-track border procedure, closed the inquiry in July 2018, and, after a request for review, confirmed her decision in April 2019.¹⁵

Practical implementation

Overall, the length of the procedure exceeds the legally foreseen time limits and depends, among other things, on the country of origin of the applicant. The procedure encapsulated in Art. 60 para. 4 of the Greek Asylum Law 4375/2016 is in practice only 'partially' conducted in the form of a 'fast-track border procedure'. The time limit for the administration - 28 days for the whole procedure from registration to decision on appeal - is in practice utopian, and not respected. By contrast, the restricted time limits for the applicants - for instance 24hrs to prepare for their interview or five days for the submission of an appeal - as well as the exemption of vulnerable cases and persons having the right to family reunification under the Dublin III Regulation are applied in practice. It is nevertheless legally untenable to only 'partially' apply Art. 60 para. 4 of Greek Asylum Law 4375/2016, i.e. applying some aspects while ignoring the time limits for the authorities.

Upon arrival on the shores of Chios and disembarka-

tion from the boat, persons arriving from the Turkish coasts are transferred to Vial directly by bus. The whole procedure is implemented in the administrative area of the EU Hotspot.

First, persons are 'pre-registered' by the Hellenic Police which is in this regard supported by Frontex. This means that personal data such as name, date of birth, family status and country of origin are 'pre-registered' directly after a perilous boat crossing. Obviously, not everybody is in a condition to give detailed and correct information in this situation, in particular given that the purpose of the 'pre-registration' is not clear to the newly arrived, given a lack of explanation and sometimes interpretation. Misspelled names, mistakes in the date of birth or even mistakes regarding the country of origin often occur. Yet, except for the nationality, it is later onwards impossible for applicants to correct the data of the pre-registration without an original identity document.¹⁶ During 'pre-registration' persons are given a date for their 'registration' with GAS, i.e. the so-called official lodging of the asylum application.¹⁷

Second, the official registration with GAS usually takes place a few weeks after arrival. The timeframe depends on number of arrivals, country of origin, availability of interpreters, and capacity of GAS staff. Upon completion of registration, persons are given the date for their interview with EASO. This date is however rarely accurate and applicants will see their interview being postponed in the vast majority of cases. If an applicant is considered vulnerable before his or her interview takes place, he or she will be excluded from the fast-track border procedure, referred to the

14 Danish Refugee Council, 'Fundamental Rights and the EU Hotspot Approach', October 2017, available online: <https://bit.ly/2NN5mPp> [last accessed: 14 November 2019].

15 European Ombudsman, Decision in case 735/2017/MDC on the European Asylum Support Office's (EASO) involvement in the decision-making process concerning admissibility of applications for international protection submitted in the Greek Hotspots, in particular shortcomings in admissibility interviews, available online: <https://www.ombudsman.europa.eu/en/decision/en/98711>. See also European Center for Constitutional and Human Rights, 'Greek hotspots: Complaint against European Asylum Support Office to the EU Ombudsperson', available online: <https://bit.ly/2qWFS91> [last accessed: 14 November 2019].

16 Greek Asylum Law 4375/2016, Art. 43 para. 3 and 4.

17 Therefore, from a legal perspective that the 'pre-registration' already constitutes the 'lodging' of the asylum application in the sense of Art. 20 para. 2 Dublin III Regulation, cf. European Court of Justice, judgement of 26 July 2017, C-670/16, Mengesteab, para. 75 et seq. In practice, this has the problematic consequence that the deadlines in the context of the Dublin III family reunion procedure already start as from this date. Applicants are however usually not aware of these deadlines, and not always informed about those during the 'pre-registration'.

standard procedure and directly have an interview with GAS (see below III.4).

Third, an initial interview has to take place. As of September 2019, those interviews are scheduled to take place after approximately five months. A medical screening has however to be conducted in the meantime, otherwise EASO will refuse to interview the applicant. Due to a strike of doctors protesting against the conditions in Vial end 2018, medical screenings were on hold for three weeks and numerous asylum seekers have consequently seen their interview being postponed for several months. The lack of medical staff remains a major issue in Vial (see below IV.4) and it seems that medical screenings are, at the time of writing, scheduled up to 10 months after arrival. In other words, if those screenings are not being pre-poned thanks to an increase in capacity, applicants who have not been found vulnerable will see their interview being postponed until after this period.

Until July 2019, the initial interview with EASO could be limited to a vulnerability assessment. After that in-

terview, the person could have to attend a subsequent first instance interview regarding admissibility and/or eligibility. Since July 2019, initial interviews are not limited to a vulnerability assessment anymore and admissibility and/or eligibility are dealt with during this first interview. GAS would then have the possibility to conduct another interview in cases of vulnerable individuals, should information regarding an applicant's eligibility be lacking to take a decision.

Once the first instance interview has been conducted, a first instance decision will have to be issued by GAS. This may take a few weeks in the best case to several months in most instances. It is unclear what exactly influences the length of a decision, although country of origin and staff capacity do likely play a role in that aspect. In case of a negative decision, an appeal can be lodged within five days. The Appeals Committees usually decide the case after another five to six months on average.

Furthermore, the multi-language environment and shortcomings in interpretation additionally compli-

The complexity of the procedure becomes apparent when looking at the following flowchart provided by the Greek Asylum Service to explain the procedure:

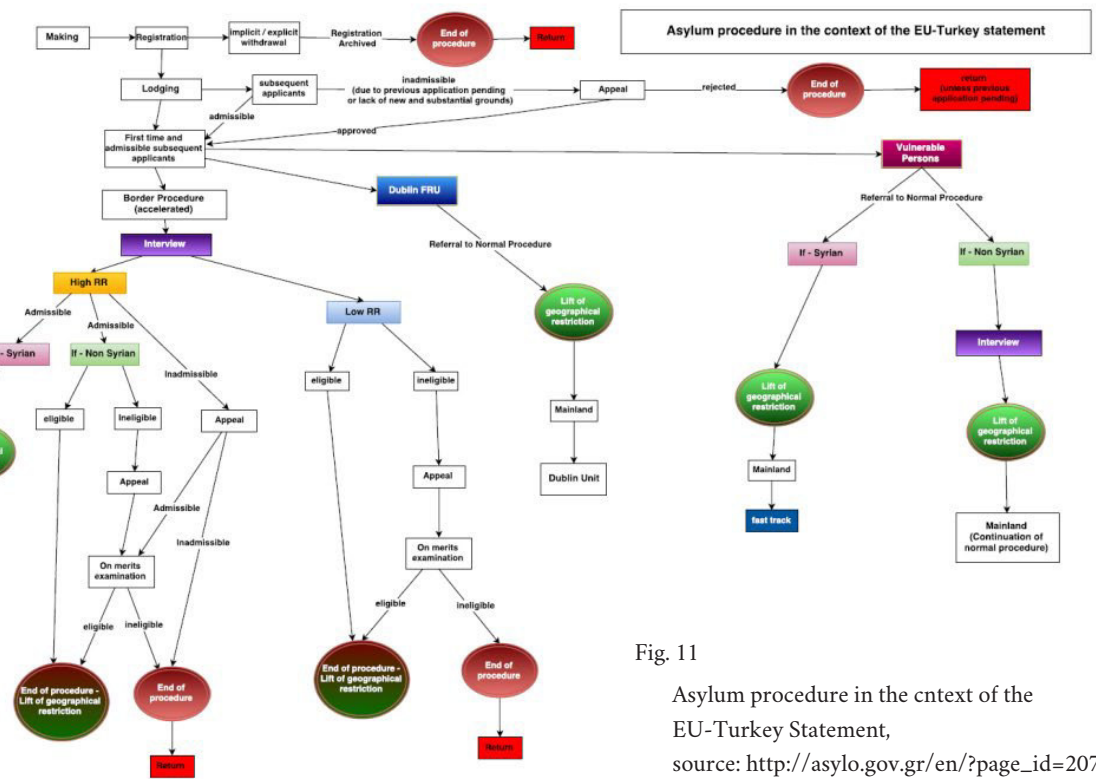


Fig. 11
 Asylum procedure in the context of the EU-Turkey Statement,
 source: http://asylo.gov.gr/en/?page_id=2074

cate the procedure. The official language of the asylum service is obviously Greek. However, EASO works in English – regardless of the country of origin of its currently deployed officers. Hence, GAS works in English and Greek – depending on the procedure, and the recipient of a certain document and/or decision. In addition, and more importantly, the asylum interview is conducted with the support of interpreters. These interpreters are sometimes hired by EASO directly, sometimes by other companies who then sub-contract to EASO, GAS and other actors. In cases of staff shortage, GAS and EASO work with NGO interpreters. Some languages are only available via phone, sometimes two interpreters have to be used (e.g. a first interpreter will translate from French to English and the second one then from English to Greek), female interpreters are rarely available, and

the quality of interpretation varies widely.

As will become clear in this report, the 'hotspot procedure' can be described as 'Kafkaesque' due to the complexity and flexibility of the legal and administrative framework and the often-differing practical implementation. Not only are asylum seekers themselves confused by nearly all aspects of the procedure, but experienced Greek asylum lawyers confirm that the procedure is not foreseeable and depends heavily on individual circumstances, the responsible caseworker, and opaque administrative guidelines which – similarly to the legal framework – are frequently amended. To put it in the words of an experienced Greek asylum lawyer working on the island of Chios: 'Every procedure [in the EU Hotspot] is different.' Legal certainty is something else.



Fig 12, 13

EU Hotspot Vial, own photographs, July 2019

Case examples, testimonies and impressions

On the length to obtain an interview, a Congolese man testified: 'I am here with my family: my wife and my two children who are four and one year old. We have been staying here since January without having an interview. Seven months it took. I didn't understand. It was not good. I have a family but they just leave us like that. The interview finally took place in August. I hope I will not have to wait too long for the result.' Another man from DRC found himself in a similar situation: 'I find the procedure really strange. The date they gave me for my interview was postponed. It has now been eight months since I am here and I haven't had an interview. It's going to be nine months next week. They said I will have an interview with GAS in September. I don't know why it will be with GAS and not EASO but I heard it's a good thing.'

Regarding the short time to prepare for an interview and seek legal aid, Equal Rights has met several asylum seekers who were speaking very particular languages (e.g. Bambara or Fula) being notified having an interview less than 24hrs before

An Afghan family has been waiting for a disproportionate amount of time for the result of their first instance interview. The father stated: 'We have been waiting for our result for ten and a half months with my wife and three children.

I really don't feel good, because waiting is the hardest thing in the world. I am worried about the decision because it takes so long and hope it will still be positive. I went to the authorities several times but am always told to simply wait. Because we have been living in Vial for so long, we became sick both psychologically and physically because hygiene and the situation in Vial are awful. We asked UNHCR to be housed outside Vial considering we had been there for so long but they refused. We had to take a house in the city and are paying for it with our own money.'

2. Turkey – not a 'safe third country'

Basic legal framework and context

As has been explained, the central idea of the EU Hotspot procedure is to reject a claim for international protection as inadmissible and send the asylum seeker back to Turkey with the argument that Turkey is a 'first country of asylum' or a 'safe third country'.¹⁸ However: This does not work in practice because Turkey can – in the opinion of the responsible Greek authorities at least for the vast majority of applicants – not be considered a 'first country of asylum' or a 'safe third country'.

According to the law, a country 'shall be considered to be a *first country of asylum* for an applicant provided that he/she will be re-admitted to that country, if the applicant has been recognized as refugee in that country and can still enjoy of that protection or enjoys other effective protection in that country, including benefiting from the principle of non-refoulement.'¹⁹

The practically more important concept is the one of a '*safe third country*'. Simply put, a country can be considered as 'safe third country' if that country would provide protection upon return of the applicant. This requires that the third country respects the principle of refoulement under both refugee and human rights law and that the applicant can apply for international protection and receive protection. In the words of Greek Asylum Law 4375/2016, Art. 56: 'A country shall be considered as a safe third country for a specific applicant when all the following criteria are fulfilled: the applicant's life and liberty are not threatened for reasons of race, religion, nationality membership of a particular social group or political opinion; this coun-

18 This must be seen in the broader context of the aim of the EU Turkey Statement to create a 'protection space' in Turkey. Considerable financial support is provided by the EU for this purpose.

19 Greek Asylum Law 4375/2016, Art. 55; Asylum Procedures Directive, Art. 35.

try respects the principle of non-refoulement, in accordance with the Refugee Convention;²⁰ the applicant is in no risk of suffering serious harm [...] [i.e. death penalty or execution, torture or inhuman or degrading treatment or punishment, or serious and individual threat to a civilian's life in situations of armed conflict, cf. Art. 15 Qualification Directive]; the country prohibits the removal of an applicant to a country where he/she risks to be subject to torture or cruel, inhuman or degrading treatment or punishment, as defined in international law; the possibility to apply for refugee status exists and, if the applicant is recognized as a refugee, to receive protection in accordance with the Refugee Convention; and the applicant has a connection with that country under which it would be reasonable for the applicant to move to it.²¹ Importantly, it must be examined 'for each individual case and applicant separately' whether Turkey fulfils these criteria.

The question whether Turkey can be considered as a 'safe third country' has been disputed since the entry into force of the EU-Turkey Statement. Examining this question in detail goes beyond the scope of this report. However, a few aspects are helpful in order to get a clearer idea about the main issues. First, the legal interpretation of the concept is disputed. In particular, the term 'protection in accordance with the Refugee Convention' and the 'connection criterion' are subject to legal debate. Second, the factual situation in Turkey is disputed. In particular, it is subject to debate which sources are credible – while the Greek Council of State in its judgement of September 2017 relied on information provided by Turkish diplomats in letters to the European Commission,²² much more speaks in

favour of relying on independent research carried out by journalists, NGOs and scholars.²³

It should be kept in mind that Turkey currently 'hosts' about 4 million refugees out of which 3.6 million of Syrian origin.²⁴ Turkey is thus currently the country hosting the largest number of refugees registered by UNHCR world-wide. Turkey has only ratified the 1951 Refugee Convention with regard to refugees from Europe. With regard to the 4 million refugees staying in Turkey, it is thus not bound by the Refugee Convention. In 2013, Turkey has adopted the 'Law on Foreigners and International Protection' – its first asylum law. In 2014, Turkey has adopted the 'Temporary Protection Regulation'. The Turkish legal regime thus differentiates between 'temporary protection' for persons of Syrian nationality, and 'international protection' for persons of all other nationalities.²⁵

In the context of the state of emergency which was announced in the aftermath of the attempted coup of July 2016, several emergency decrees have been adopted. In particular, the possibility to detain and deport foreigners for reasons of 'public order' was introduced by an emergency decree and incorporated into the relevant law.²⁶ In practice, this extremely broad provision leads to arbitrary arrest and detention. Push-backs at the Eastern border are as regularly carried out by Turkish authorities as pull-backs on the Western border, and instances of so-called 'forced voluntary return' are not seldom²⁷. Recently, deporta-

20 1951 Convention and 1967 Protocol Relating to the Status of Refugees [hereinafter referred to as: *Geneva Convention*].

21 See also Asylum Procedures Directive, Art. 38.

22 Clara Anne Büniger and Robert Nestler, 'From first reception center to pre-removal facilities – Supreme Administrative Court of Greece decides that Turkey is a safe third country', 13 December 2017, available online: <https://www.juwiss.de/135-2017/>; Rainer Hofmann and Adela Schmidt, 'Ist die Türkei für Antragsteller ein sicherer Drittstaat? – Das Urteil des Hellenischen Staatsrats vom 22.9.2017' (2018) 38 *Zeitschrift für Ausländerrecht und Ausländerpolitik*, p. 1 et seq.

23 Such as in particular: Orcun Ulusoy and Hemme Battjes, 'Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement' (2017) Migration Law Series VU Amsterdam.

24 UNHCR, 'Operational Update', June 2019, available online: <https://bit.ly/2qenEzT> [last accessed: 14 November 2019].

25 See on the Turkish legal framework: European Council on Refugees and Exiles (ECRE), Asylum Information Database (AIDA), 'National Country Report: Turkey', Update March 2019, available online: <https://www.asylumineurope.org/reports/country/turkey>; Meltem Ineli-Ciger, 'Protecting Syrians in Turkey: A Legal Analysis' (2017) 29 *International Journal of Refugee Law*, p. 555 et seq.

26 In particular, emergency decree No. 676 of October 2016, available online: <http://www.resmigazete.gov.tr/eskiler/2016/10/20161029-5.htm>.

27 Washington Post, 'Turkey has deported hundreds of Syrian

tions of Syrians to their home country, are carried out at large scale, as has been well documented.²⁸

Partly due to high number of refugees in Turkey, there are difficulties with registration, difficulties with access to any kind of services such as medical care or education. Discrimination on the labour market is part of daily life leading to exploitation in many cases. Access to legal remedies is practically often not possible due to a lack of information or financial resources. Pressure on NGOs, lawyers and scholars working on refugee rights is rising continuously since 2016 to an extent leading to self-censorship or even cessation of activities.²⁹

Practical implementation

While neither Greece nor the European Commission have officially recognized the above-mentioned facts as established by independent reports, the responsible Greek authorities in most cases still come to the conclusion that Turkey cannot be considered as 'safe third country'. While GAS in many cases decides that Turkey can be considered as 'safe', especially with regard to Syrian applicants, many of these decisions are overturned by the Appeals Committees.³⁰ According to our experience, this administrative practice has not substantially changed after an amendment of the composition of the Appeals Committees in June 2016.

In September 2017, the Greek Council of State has found in two individual cases that Turkey could be considered as safe for the concerned persons, all of Syrian nationality.³¹ The Council of State refused by a majority of thirteen to twelve judges to refer a preliminary question to the European Court of Justice on the interpretation of the 'safe third country' concept – which is a question of EU secondary law as the concept is established by Art. 38 Asylum Procedures Directive. The judgement was thus made despite the disagreement on the definition of the 'safe third country' concept among judges and the concerns raised by one judge for the human rights situation in Turkey.³² The judgements by the Council of State is however not binding upon GAS and the Appeals Committees. Every case must be assessed individually.³³ The Appeals Committees in many cases decide that Turkey cannot be considered as 'safe' for the concerned applicant.³⁴

Indeed, the number of returns from the Aegean islands to Turkey since March 2016 amounts to only

migrants, advocates and refugees say', 22 July 2019, available online: <https://wapo.st/2NMVoh1> [last accessed: 14 November 2019]; Human Rights Watch, 'Turkey Forcibly Returning Syrians to Danger', July 2019, available online: <https://bit.ly/2plXJWK>; The New Humanitarian, 'An Open Secret: Refugee pushbacks across the Turkey-Greece border', 8 October 2019, available online: <https://bit.ly/2CGQoUD> [both links last accessed: 14 November 2019].

- 28 The New Humanitarian, 'For Syrians in Istanbul, fears rise as deportations begin', 23 July 2019, available online: <https://bit.ly/2KjfpzM> [last accessed: 15 November 2019]; The Guardian, 'It's not legal: UN stands by as Turkey deports vulnerable Syrians', 23 August 2019, available online: <https://bit.ly/32NcVtF> [last accessed: 15 November 2019].
- 29 Human Rights Watch, 'Turkey: State of Emergency Ends, but Not Repression. New System Expands President's Power', Januar 2019, available online: <https://bit.ly/375RUOf> [last accessed: 15 November 2019]; Council of Europe, Commissioner for Human Rights, 'Country Visit: Turkey needs to put an end to arbitrariness in the judiciary and to protect human rights defenders', July 2019, available online: <https://bit.ly/374mgAI> [last accessed: 15 November 2019]; ECRE, Turkey: Lawyers Arbitrarily Detained in Izmir Removal Centre, 31 May 2019, abrufbar unter: <https://bit.ly/2QkGQGL> [last accessed: 15 November 2019].

- 30 Surprisingly, it is difficult to obtain reliable data on the number of successful appeals against inadmissibility decisions in the border procedure. However, cf. AIDA country report Greece (Fn. 26), p. 50 et seq.
- 31 Asylum in Europe, 'Greece: The Ruling of the Council of State on the Asylum Procedure Post-EU Turkey Deal', 4 Oct 2017, available online at: <https://bit.ly/374mCY4> [last accessed: 15 November 2019], accessed 12 March 2019.
- 32 AIDA country report Greece (Fn. 26), p.156.
- 33 Greek Asylum Law 4375/2016, Art. 56 para. 2.
- 34 Cf. Fn. 86 and Fn. 87.

about 2,400 persons.³⁵ In addition, about 3,400 persons have returned ‘voluntarily’ from the EU Hotspots directly – forming part of a total of 17,000 ‘voluntary returns’ from Greece in general.³⁶ The numbers provided by the European Commission differ from those provided by UNHCR.³⁷ According to UNHCR data, as of 30 June 2019, the total number of men, children and women deported from Greece to Turkey in the framework of the EU Turkey Statement amounts to 1885 persons. Of those returned to Turkey, 45% did not intend to apply for asylum in Greece, withdrew their will to apply for asylum, or withdrew their asylum application. A further 41% received negative decisions at second instance. Of the Syrians returned to Turkey, only 38 individuals were returned to Turkey on the basis that their asylum applications were found to be inadmissible at second instance. For non-Syrian nationals from countries with a high recognition rate, no individual had been found to be inadmissible.³⁸

The EU-Turkey Statement has been widely criticized as a violation of international and EU law.³⁹ Yet, cases

taken to the EU General Court contesting the legality of the EU Turkey Statement were rejected by the Court as inadmissible. The Court stated that ‘the EU Turkey Statement cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union’ and that ‘the Court does not have jurisdiction to rule on the lawfulness of an international agreement concluded by the Member States’.⁴⁰ As the appeals to the European Court of Justice were not successful, these cases went unheard.⁴¹

To conclude, the EU-Turkey Statement aims at ending irregular migration from Turkey to the EU. The return policy cannot effectively be implemented due to international, EU and Greek asylum law. What has worked effectively is the reduction of the numbers of arrivals. As regularly emphasized and understood as ‘success’ by EU institutions, the EU-Turkey Statement reduced the numbers of spontaneous arrivals immediately, effectively, and sustainably.⁴² This is *inter alia* ‘achieved’ through the forcible prevention of border-crossings by the Turkish coastguard,⁴³ a practice

35 European Commission, Factsheet ‘EU-Turkey Statement. Three years on’, March 2019, available online:

<https://bit.ly/2qR2IPD> [last accessed: 15 November 2019].

36 Cf. Fn. 92, IOM, ‘Nearly 17,000 migrants returned voluntarily from Greece in the past 3 years’, 8 September 2019, available online: <https://www.iom.int/news/nearly-17000-migrants-returned-voluntarily-greece-past-3-years>.

37 European Commission, Operational implementation of the EU-Turkey Statement as of 5 December 2018, available online at: <https://bit.ly/2jjPFQr> 8 Feb 2019

38 UNHCR, ‘Returns from Greece to Turkey’, 30 June 2019, available online: <https://data2.unhcr.org/en/documents/download/70127>.

39 UNHCR, Note on Legal Considerations for Cooperation between the European Union and Turkey on the Return of Asylum Seekers and Migrants, 10 March 2016, available online: <https://bit.ly/2qb29zW> [last accessed: 15 November 2019]; Maybritt Jill Alpes, Sevda Tunaboyleu, and Ilse Van Liempt, ‘Human rights violations by design: EU-Turkey statement prioritises returns from Greece over access to asylum (2017) 29 Migration Policy Brief’, available online: <https://cadmus.eui.eu/handle/1814/48904>; Enzo Cannizzaro, ‘Denialism as the Supreme Expression of Realism. A Quick Comment on NF v. European Council’ (2017) 2 European Papers, 1 European Forum, available online: <https://bit.ly/2rBKDoT> [last accessed: 15 November 2019], p. 251. See however Daniel Thym, ‘Why the EU-Turkey Deal

is Legal and a Step in the Right Direction’, 9 March 2019, Verfassungsblog, available online: <http://verfassungsblog.de/why-the-eu-turkey-deal-is-legal-and-a-step-in-the-right-direction/>.

40 General Court of the European Union, Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM v. European Council, Order of 28 February 2017, press release available at: <http://bit.ly/2lWZPrr>.

41 European Court of Justice, order of 12 Sept 2018, Joined Cases C-208/17 P to C-210/17 P, NF and Others v European Council.

42 European Commission, Factsheet ‘EU-Turkey Statement. Three years on’, March 2019, available online: https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information_en.

43 Cf. European Commission, Sixth Report on the Progress made in the implementation of the EU-Turkey Statement, 13 July 2017, COM(2017) 323 final, p 4: ‘On its side, the Turkish Coast Guard has continued active patrolling and prevention of departures from Turkey.’ [emphasis added]. See for more detailed documentation: Alarmphone, ‘Aegean Regional Analysis; June 2019, available online: <https://alarmphone.org/en/2019/06/28/alarm-phone-aegean-report/>; Conaction Conference, 2nd to 3rd October 2017, Berlin, Germany, Documentation for Participants, available online: <https://cutt.ly/eeizqan>, p. 6 et seq.; Sarobmed, ‘Refugee Rescue: Pull back by Turkish Coast Guard in Hellenic waters’, available

which is in violation of international human rights law.⁴⁴ The result is that the EU Hotspots are transformed into return centres functioning as sites of containment and deterrence.

3. Geographical restriction and lack of housing – a de facto obligation to stay in the camp

Basic legal framework and context

Immediately upon the entry into force of the EU-Turkey Statement, applicants for international protection were detained for twenty-eight days upon arrival in the EU Hotspots. This systematic detention policy was in violation of the human right to liberty as laid down in Art. 5 para. 1 of the European Convention on Human Rights (ECHR), at least because the indiscriminate detention was not proportionate.⁴⁵ In its *J.R. & Others v Greece* judgment, the European Court of Human Rights (ECtHR) however did not find a violation of Art. 5 para. 1 ECHR, but only of para. 2 of that provision i.e. the obligation to inform about the reasons for arrest. The proportionality of the detention scheme was only shortly addressed by the ECtHR and not reviewed in detail.⁴⁶

In May 2017, the policy of general detention was replaced by the general imposition of a geographical re-

online: <https://bit.ly/2KosPV0> [last accessed: 14 November 2019].

44 Nora Markard, 'The Rights to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 *The European Journal of International Law* 3, p. 591 et seq.

45 Catharina Ziebritzki and Robert Nestler (Fn.1), p. 34 et seq.; Maria Pichou, 'Reception or Detention Centres? The detention of migrants and the EU 'Hotspot' Approach in light of the European Convention on Human Rights (2016) 99 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, p. 114 et seq.

46 ECtHR – *J.R. and others v. Greece* (application no. 22696/16) [Articles 3, 5(1), 5(2), 34 ECHR], 25 January 2018, summary available here: <https://bit.ly/32HSJJH> [last accessed: 14 November 2019].

striction. The geographical restriction is based on Art. 41 lit. 2 sub. iii of the Greek Asylum Law 4375/2016 in conjunction with the relevant administrative decision. The latter was annulled by the Greek Council of State on 17 April 2018 due to procedural flaws. A new administrative decision was soon adopted on 20 April 2018. This latter constitutes the legal basis of the imposition of the geographical restriction since. Technically, the geographical restriction is a restriction of the freedom of movement to the respective island. The legality of the geographical restriction is doubtful in light of Art. 7 para. 2 Reception Conditions Directive⁴⁷ and Art. 31 para. 2 of the Refugee Convention.⁴⁸

Practical implementation

In practice, the geographical restriction amounts to a residence requirement. For the vast majority of persons who are subject to the restriction of movement to the island of Chios, there is no other option than staying in Vial.

Apart from financial constraints and landlords' reluctance to rent, asylum seekers' access to material reception conditions, i.e. food, medical and other services, are conditional upon their residence in Vial. Moreover, any kind of information on stages of individuals' procedures e.g. changes of dates of interviews as well as calls for notifications about a decision, is only announced in the EU Hotspot, namely on a paper pinned to a board next to the 'info point' which is updated regularly. Failure to comply with a notification date may be considered as an implicit withdrawal of application.⁴⁹ In sum, despite the lack of an explicit prohibition of applicants renting private property outside the camp, the legal-administrative framework and

47 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [hereinafter: *Reception Conditions Directive*].

48 Catharina Ziebritzki and Robert Nestler, 'Implementation of the EU-Turkey Statement: EU Hotspots and restriction of asylum seekers' freedom of movement', 22 June 2018, *eumigrationlawblog*, available online: <https://bit.ly/36YB7fX> [last accessed: 14 November 2019].

49 Greek Asylum Law 4375/2016, Art. 47 para. 2 and 3.



Fig 14, 15

Extracts from a video provided to Equal Rights by an asylum seeker in which the Turkish coastguard turns around a boat of persons trying to reach the Greek islands in order to apply for asylum, aiming at destabilizing the boat, March 2019

practical implementation of the EU Hotspot scheme amounts to just that.

In practice, the only opportunity to leave the camp is to be assigned an apartment through the ‘accommodation scheme’.⁵⁰ This scheme is administered by UNHCR and financed by the EU Commission through the Asylum, Migration and Integration Fund. The capacity of this scheme has been reduced and currently amounts to 279 places in Chios.⁵¹ Considering the living conditions in Vial – which are detailed below (see IV.) – it could be argued that every single person staying in the camp is simply in urgent need of accommodation. The eligibility criterion applied by UNHCR is that a person must be ‘very vulnerable’. There is no

written definition of this criterion, and UNHCR staff on the island is not able or willing to explain this nebulous criterion in more detail. It seems that most is left to the discretion of the UNHCR staff in charge of implementing the accommodation scheme. Cases are identified by UNHCR and can be referred to them by state authorities and NGOs. Most cases are obviously not considered ‘very vulnerable’. Even if a person or a family is considered eligible and thus ‘put on the housing list’, the waiting time for an apartment still usually amounts to a few months. In practice, a negligent proportion of persons benefit from the ‘accommodation scheme’, due to a seemingly chronic backlog in processing of accommodation referrals and shortage of appropriate infrastructure.

50 UNHCR, ‘ESTIA (Emergency Support to Integration and Accommodation) – A new chapter in the lives of refugees in Greece’, available online: <http://estia.unhcr.gr/en/home/> [last accessed: 14 November 2019].

51 UNHCR, ‘Greece Accommodation Update’, July 2019, available online: <https://bit.ly/34XDOWr> [last accessed: 14 November 2019].



Fig 16, 17

EU Hotspot Vial, own photographs, July 2019

Case examples, testimonies and impressions

A single woman from DRC expresses the difficulty to be accommodated outside Vial: 'I am here on my own with my son, who was born in Turkey. He is only six months old. Life is too difficult for me and my child in Vial. I am living in a container with five other persons. Because of the heat, they always want to blast the A/C. I cannot prevent them from doing so, but my son gets feverish because of that. I then have to give him paracetamol on a regular basis. Hygiene in Vial is very bad as well. The toilets for instance are in a horrible state. My son cannot grow up like that. I asked UNHCR to be transferred to a flat outside the camp a few months ago, but they always tell me to wait. They never say how long it can take and I have nowhere else to go.'⁵²

A man evenly from DRC reported to find himself in an odd situation: 'Me and my wife we got separated on our way out of Congo. My wife and children arrived in Greece a year before me. They were then transferred to Athens. I asked to join my family when I arrived, but I was not allowed to go to Athens. That's what I don't understand. I've been in Chios for eight months but cannot go to Athens. I am obliged to stay in Chios. My wife can move but she cannot come here.

I don't want her to live in Vial. With the children it's not a good thing. My family visited me only once since I am here. The boat cost them some 80 euros. I could not welcome them in Vial when they visited, because there was simply no space. I asked UNHCR for some help to welcome them or some place to stay with them just for a few days but they refused. Here in Vial I feel like in prison. When I left Congo I was in prison, it's the same here, I'm in prison on Chios.'⁵³

With regard to the high risk of sexual and gender based violence in the camp and the lack of capacity of the UNHCR accommodation scheme even in those cases, we refer to below (IV.4).

⁵² Interview with a female applicant from DRC, conducted in September 2019.

⁵³ Interview with a male applicant from DRC, conducted in August 2019.

4. *Vulnerable groups – legal exemption and lack of implementation*

Basic legal framework and context

Vulnerable individuals as well as persons eligible for family reunification under the ‘Dublin III Regulation’ i.e. persons who have close family members in other EU member states⁵⁴ are exempted from the fast-track border procedure.⁵⁵ They are further excluded from the geographical restriction on the island of Chios and are not subject to readmission to Turkey under the EU-Turkey Statement. The ‘Dublin III family reunion’ is not further dealt with in this report,⁵⁶ which focuses on the issues arising with regard to vulnerability.

According to Greek asylum law, a vulnerable groups shall be considered: unaccompanied minors; persons who have a disability or suffering from an incurable or serious illness; the elderly; women in pregnancy or having recently given birth; single parents with minor children; victims of torture, rape or other serious forms of psychological, physical or sexual violence or exploitation; persons with a post-traumatic disorder, in particularly survivors and relatives of victims of ship-wrecks; and victims of human trafficking.⁵⁷ The identification of a vulnerability leads to the exemption from the fast-track border procedure at any stage of the procedure.

Under Greek Law, RIS and GAS are responsible for

54 Under EU Regulation No 604/2013 (‘the Dublin III Regulation’), persons who apply for asylum in a EU country could under certain conditions be reunited with their family in a different EU country who would then process their application.

55 Greek Asylum Law 4375/2016, Art. 60 para. 4 lit. 4.

56 But see in more detail: Equal Rights Beyond Borders (under the former name of ‘refugee law clinics abroad’), Family Reunion in Germany under the Dublin III Regulation, February 2018, available online: <https://bit.ly/3775nFd> [last accessed: 14 November 2019].

57 Greek Asylum Law 8 Law 4375/2016, Art. 14 para. 8. Defined in more detail in the SOP Border Procedure in the context of the EU Turkey Statement (Fn. 59), p. 4 et seq, p. 11 et seq, p. 13 et seq.

identifying vulnerable persons.⁵⁸ Even though under the EASO Regulation, the competence of EASO regarding the identification of vulnerable cases is limited to training activities for the national asylum service with regard to issues related to the handling of asylum applications from and reception conditions for vulnerable persons,⁵⁹ according to the current Operating Plan, EASO ‘vulnerability experts’ shall provide ‘support [including] vulnerability assessments’.⁶⁰

The ‘recognition’ of a person as vulnerable takes place by way of a vulnerability decision through a so-called ‘referral to the regular procedure’ which entails an exemption from the geographical restriction which further means in practice that people can, and since October 2019 should, be transferred to the mainland.

Practical implementation

In practice, two main issues arise with regard to the ‘vulnerability exemption’. First, vulnerability assessments face significant delays and are sometimes inadequate due to a lack of medical services for asylum seekers staying in Vial (see below IV.3). The overall lack of medical services in Vial is extremely alarming and, in combination with the fact that EASO will not interview any applicant without prior medical assessment, causes further delays in the whole asylum procedure. Second, even asylum seekers who are ‘recognized’ as vulnerable are usually only transferred to the mainland months after the referral to the regular procedure. These circumstances result in a large majority of confused vulnerable applicants spending prolonged periods under extremely distressing conditions on the island while waiting to be transferred.

The vulnerability assessment obviously slightly differs depending on the nature of the vulnerability. In case of vulnerability based on any medical conditions – as in most cases – the vulnerability assessment depends on a medical report. This concerns both physical and

58 Greek Asylum Law 4375/2016, Art. 8 para. 2 lit. a, Art. 51 para. 6 lit. a, and Art. 60 para. 4 lit. f.

59 EASO Regulation, Art. 6 para. 4, and Art. 14.

60 EASO Operating Plan to Greece 2019 (Fn. 46), p. 14.

psychological health. In case of vulnerability based on minor age, an age assessment is required. Only medical reports and age assessment reports provided by Greek state services – i.e. KEELPNO operating in Vial or the local hospital – are accepted as ‘proof’ for any kind of vulnerability. Medical reports provided by doctors working for international NGOs on the island, be they of registered in Greece or abroad, are not accepted as sufficient ‘proof’. Reports from private Greek doctors are further not given the same ‘probative value’ either. Due to the lack of medical services (see below III.3), providing the sufficient proof for a vulnerability assessment thus becomes extremely difficult in practice.

The vulnerability assessment can be carried out by different actors and at different stages in the procedure.⁶¹ The initial stage in which the vulnerability could be assessed, is during preregistration.⁶² This however hardly ever happens due to the lack of resources and time during preregistration – however, in some cases, not even obvious vulnerabilities such as e.g. blindness or amputated legs have been taken into account already at this stage. The next stage in which vulnerability then should be assessed is during the ‘official registration’ with GAS in the context of which a standard medical screening should take place.⁶³ This standard medical assessment, which is supposed to take place prior to the interview, mainly entails the filling in of a so-called ‘Foreigners Medical Card’ form by KEELPNO in which the medical issues stated by the applicant are written down. The physical assessment of the applicant is minimal. In addition, despite requests, many asylum seekers are unable to be assessed by a psychologist due to an extreme shortage of staff in this regard – even though it is legally required that a ‘psychosocial support unit shall refer persons belonging to vulnerable groups to the competent social support and pro-

tection institution.’⁶⁴ As the position of the KEELPNO doctor in Vial has been vacant for a few months as from August 2018 and is vacant since August 2019 again, interviews are currently postponed until an unknown time in the future when the position would be filled again. This obviously prolongs the unnecessary suffering that applicants are subjected to in Vial. These delays go to the detriment of the very purpose of the deployment of the EASO asylum support team – namely, to support the national administration and accelerate the asylum procedure⁶⁵ – and undermine the standards foreseen by the Asylum Procedures Directive.

If vulnerability is not recognized based on the minimal information stated in the ‘Foreigners Medical Card’ but if the responsible caseworker of EASO, based on the interview itself, comes to the conclusion that there is a need for further medical assessment,⁶⁶ the caseworker could theoretically refer the applicant to KEELPNO. However, this is not always possible, as the position of the KEELPNO doctor has for instance been vacant as from August 2018 for a few months, and is vacant again since August 2019. Practically, no referral to KEELPNO can be made, and hence the asylum procedure is in those instances somehow ‘paused’ until the vacant position would be filled. The only possibility left is that the applicant tries to get access to medical services which are able to write a medical report which will be recognized, i.e. through a referral from GAS to the local hospital or by consulting a private doctor. The latter option is problematic considering the costs of a private consultation, language barriers, and the lack of consideration of GAS for reports by private practitioners. Access to the local hospital is evenly problematic. It is indeed difficult for asylum seekers to obtain a timely appointment when approaching the hospital. A social security number (‘AMKA’ number) is further required to do so, and the

61 Cf. SOP Border Procedure in the context of the EU Turkey Statement (Fn. 59), p. 39, Appendix 2: ‘Flowchart: Vulnerability’.

62 Cf. SOP Border Procedure in the context of the EU Turkey Statement (Fn. 59), p. 11.

63 Cf. SOP Border Procedure in the context of the EU Turkey Statement (Fn. 59), p. 13.

64 Greek Asylum Law 4375/2016, Art. 14 para. 8.

65 Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, Art. 2.

66 Cf. SOP Border Procedure in the context of the EU Turkey Statement (Fn. 59) p. 25 et seq.

issuance of these has been frozen since July 2019 (see below IV.3). The ‘official’ way for asylum seekers to get an appointment at the hospital is through referral by KEELPNO – however, this is also difficult because appointments are often scheduled a few weeks, sometimes even months after the person has requested to get an appointment.

Victims of torture in particular face serious difficulties in being recognized as such, and therefore as vulnerable. The reason is that the staff permanently available in Vial does not conduct so-called ‘torture assessments’ having no expertise to do so, despite Greek law requiring the medical staff to be trained on such assessments.⁶⁷ In some cases, the responsible GAS or EASO caseworker would, simply based on the statement of the applicant during the interview, come to the conclusion that the person is a victim of torture. In most cases however, victims of torture are only recognized as such if they can provide a ‘certificate of an assessment as victim of torture’. This ‘certificate’ is only provided by the Greek NGO METAdrasi which has a mobile unit consisting of lawyers and psychologists who conduct ‘victim of torture assessments’. However, this mobile unit due to lack of funding and a shortage of staff is not very regularly present in Chios, but rather passes by every few months. As a result, victims of torture are not being recognized quickly enough, and in some cases, they are not being recognized at all.

Similar difficulties arise with regard to the recognition as vulnerable of asylum seekers who have suffered serious forms of psychological, physical or sexual violence or exploitation. These cases are not always identified for different reasons such as the lack of female interpreters and caseworkers, the lack of psychologists, and a lack of awareness among applicants that such incidents should be mentioned during the interview (see below IV.5).

In case of an age assessment, the procedure is similarly cumbersome: Several issues arise because of wrongly registered data during the registration (see above). If

an applicant claims to be a minor during registration and if there are doubts regarding the claimed age, the asylum seeker is referred to the local hospital for an age assessment. Ministerial Decision 92490/2013 establishes that an examination by a paediatrician should first occur. If not conclusive, the applicant should then consult the psychological staff of KEELPNO. As last resort, an x-ray analysis of the person’s wrist or jawbone can be conducted. In practice, individuals in Chios whose age is being doubted are directly being sent to the local hospital for an x-ray analysis. Besides that the technique is intrusive, its accuracy to determine a person’s age is further scientifically debated. If an applicant is age assessed as an adult, he or she can theoretically appeal that decision to RIC within ten days. In practice, it seems however that those appeals are rarely examined.

Considering the abovementioned practical issues, finding an applicant vulnerable usually requires several months, and in some cases – in particular those where vulnerability is based on non-purely-physical issues – vulnerable applicants are not recognized as such at all. This in particular seems to concern asylum seekers who attempt suicide or self-harm. These cases are only very rarely recognized as vulnerable because GAS argues that the recognition of such cases as vulnerable would lead to largescale suicide attempts or incidents of self-harming, and therefore requires a very high standard of proof regarding the psychological state of the applicant i.e. an extensive medical report which is usually not available. Even though this assumption is not far-fetched – there have been e.g. numerous incidents of serious self-harming among unaccompanied minors, possibly for this reason – the argument of GAS goes to the detriment of the vulnerability assessment and leads to unreasonably high standard of proof.

In addition, the vast majority of asylum seekers who are declared vulnerable will have to remain in the camp for a few months before being actually transferred to the mainland. While the geographical restriction does not apply to those persons and they can theoretically travel to the mainland at their own ex-

⁶⁷ Greek Asylum Law 4375/2016, Art. 11 para. 10.

penses, they will however in practice have to wait for their case to be ‘officially transferred’. The reason is that the ‘official transfer’ is a pre-condition for being assigned a place in a camp or in UNHCR accommodation on the mainland. If a person nevertheless decides to travel at his or her own expenses before, he or she further faces the risk of being excluded from the cash assistance system, as it is assumed that the person can afford living conditions and expenses autonomously.

Responsibility to carry out official transfers lies with RIS together with the Ministry of Migration, and UNHCR has hereby an assisting role. RIS is responsible for sending lists of vulnerable asylum seekers to the Ministry of Migration which will then match the applicants from all islands with the reception capacity on the mainland. According to information by RIS, this matching exercise depends on the nationality of the applicant as well as on the seriousness of the vulnerability and waiting time of the applicant. In practice, it cannot be understood from the perspective of the applicants staying on the island neither from the perspective of their lawyers, why a certain person is ‘called for the transfer’ a few months or weeks earlier than another one.

A major problem is the lack of capacity in the reception facilities on the Greek mainland. As about 60,000 applicants are staying on the Greek mainland, the reception facilities – in practice mostly camps, some of which are not better in terms of living conditions than the EU Hotspots – are almost fully occupied.⁶⁸

Therefore, ‘official transfers’ sometimes take place every few weeks, sometimes only every few months –

depending on movements in the reception facilities on the Greek mainland. Police surveys conducted at Vial confirm this situation. In May 2018 for example, 470 of the at that time 1,468 individuals staying in the camp were found to not be subject to the geographical restriction as they were entitled to hold a refugee status or to be recognised as vulnerable, yet remained trapped in the EU Hotspot due to an alleged ‘lack of space’ at mainland facilities.⁶⁹ During autumn 2018/19 no transfers took place during a period of about three months. It was not before mid-December 2018 that transfers were slowly resumed due to rising criticism over the lack of winterization in Vial camp.⁷⁰

Due to all these practical issues, the majority of persons who have been recognized vulnerable still have to wait a few weeks to a few months before their transfer to the Greek mainland effectively takes place.

⁶⁸ UNHCR, ‘Greece’, available online:

<https://www.unhcr.org/greece.html>; IOM, UNHCR et al, ‘Protection Monitoring Tool. Open Reception Facilities (sites) in the Mainland’, September 2019, available online: <https://bit.ly/2TdBoHA>., Refugee Support Aegean, ‘Reception Crisis in Greece: The malignancy of Attica’s refugee camps’, August 2018, available online: <https://rsaegean.org/en/reception-crisis-in-greece/>; Council of Europe, Report of the Commissioner for Human Rights of the Council of Europe Dunja Mijatović following her visit to Greece from 25 to 29 June 2018, available online: <https://bit.ly/32IVwC7> [all links last accessed: 15 November 2019].

⁶⁹ Ekathimerini News, ‘Police conduct survey at Vial hotspot on Chios’, 23 May 2018, available online: <https://bit.ly/32M-zUF8> [last accessed: 14 November 2019].

⁷⁰ According to UNHCR, 255 individuals were transferred to the mainland in December 2018, <https://bit.ly/2q3wINE> [last accessed: 14 November 2019].



Fig 18, 19
EU Hotspot Vial, own photographs, December 2018

Case examples, testimonies and impressions

Equal Rights has been in contact with numerous clients who were in the possession of medical reports attesting severe mental health issues which they had submitted to GAS. Those clients were however still subjected to geographical restriction and therefore not recognized vulnerable.

Regarding the time it takes to be transferred, a woman from Syria stated: 'I arrived with my husband in December 2018. It is now September 2019. I have problems with my spine making it difficult for me to walk but there is no suitable medical treatment in Chios for me the doctor said. For my husband it is worse. He needs specific surgery for his eye otherwise there is a risk that he will become blind. We have to be transferred to the mainland but months have elapsed since we were declared vulnerable.'⁷¹

⁷¹ Interview with a female applicant from Syria, conducted in September 2019.

5. Lack of access to information and legal aid

Basic legal framework and context

According to Greek law, applicants 'shall be informed, in a language which they understand, on the procedure to be followed, their rights and obligations [...]'.⁷² In addition, 'applicants, following a relevant request [...] shall be provided with legal and procedural information free of charge on the procedure concerning their case.'⁷³ EU law provides further that 'Member States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care.'⁷⁴ In case of a negative decision on an ap-

⁷² Greek Asylum Law 4375/2016, Art. 41 para. 1 lit. a. See also Asylum Procedures Directive, Art. 12.

⁷³ Greek Asylum Law 4375/2016, Art. 44 para. 2.

⁷⁴ Reception Conditions Directive, Art. 5 para. 1 lit 2.

plication at first instance, ‘applicants, following a relevant request, shall be provided with a specific updating on the reasons for such decision and the possibility to appeal against it.’⁷⁵

In addition, applicants have a right to free legal aid in procedures before the Appeals Authority ‘under the terms and conditions set out in the [relevant] ministerial decision.’⁷⁶ Similarly, in case of an application in front of a Court, asylum seekers can receive free legal assistance ‘under the conditions set out in [Greek] Law 3226/2004.’⁷⁷ This assistance is in practice hardly ever granted, as most applicants cannot afford a Court procedure. Whether these provisions are in line with the requirements of the Asylum Procedures Directive will not be further discussed here.

It should further be noted that an applicant must be informed prior to his interview of the date on which the interview will take place and shall be given ‘a reasonable amount of time in order to sufficiently prepare and to consult a legal or other counsellor.’⁷⁸ In the fast-track border procedure this ‘reasonable amount of time’ is limited to a single day.⁷⁹

Practical implementation

In practice, the persons staying in Vial face widespread uncertainty and are left largely to ‘navigate the complex asylum system on their own, without sufficient information’.⁸⁰ The complete lack of information creates an environment of rumours, fear and insecurity.

The one place where applicants are supposed to access any information in Vial is the so-called ‘info point’ or ‘kiosk’ – a container with a barred window. The metal grid has been installed after an attempted knife attack

of an applicant who had been told bad news at the info point. Through this barred window, staff of EASO, GAS or UNHCR – depending on the shift – are supposed to give information to applicants for international protection on their individual asylum procedure. This is also the supposed way for applicants to submit any information relevant to their asylum procedure. Urgent information – such as e.g. interview dates, or calls for notification about decisions – are displayed on a single ‘info board’ next to the ‘kiosk’.

On a daily basis, applicants are forced to crowd in the mud and cold in winter and killing heat in summer from the early morning for hours, having to shout to catch the staff’s attention in an attempt to receive information on their case or gain access to the administrative area for interviews. Still, applicants are often sent away without getting the information they ask for. This lack of access to information in particular concerns applicants who are physically not strong enough to push and shout in front in the info point. However, access to information is usually possible if a legal counsellor – or any other person who is in the eyes of the staff ‘not-applicant-like-looking’ – accompanies the applicant to the info point. In case of such an accompaniment, it is usually possible to get the required information. This was however not the point of establishing an ‘info point’.

Having gone through this wholly unnecessary ordeal, persons however often receive confusing, contradictory and sometimes even wrong information, not least due to the multiplicity of actors involved and the unclear division of their responsibilities. Moreover, sudden changes to individuals’ procedures are left unexplained. Documents submitted by an applicant through the info point in many cases never reach the relevant casefile which creates further confusion as the applicant, duly having submitted the documents, usually rightfully assumes that the submitted information is taken into account by the administration. Information which is only given orally is simply not taken into account at all.

Needless to say that it is practically impossible to give

⁷⁵ Greek Asylum Law 4375/2016, Art. 44 para. 2.

⁷⁶ Greek Asylum Law 4375/2016, Art. 44 para. 3.

⁷⁷ Greek Asylum Law 4375/2016, Art. 44 para. 3.

⁷⁸ Greek Asylum Law 4375/2016, Art. 52 para. 5.

⁷⁹ Greek Asylum Law 4375/2016, Ar. 60 para. 4, lit c.

⁸⁰ Greek Council for Refugees, ‘Provision of Information on the Procedure’, available online: <https://bit.ly/2qPecTE> [last accessed: 14 November 2019].

or ask for any private information regarding the asylum procedure concerning e.g. certain sexual orientation or certain diseases without risking to be harassed in the camp. However, the info point is the only official way to e.g. submit information regarding any kind of disease, or to ask for female interpreter which has to be explained by referring to experience of an SGBV incident. It is obvious that applicants in these cases prefer to not even attempt to give or ask for information in order to not risk their physical and/or psychological integrity in the camp (see below IV.4).

The constant lack of translators exacerbates these circumstances. In winter 2018/19 for instance, EASO lacked an interpreter for Lingala, the first language of the vast majority of persons originating from DRC. As a result, the interviews of all concerned persons were simply 'cancelled until further notice' which was announced on the 'info board' without giving any further explanation. Such information without any explanation obviously, after having waited for months in the dire camp during winter counting the days until the date of the interview, leads to further anxiety, rumours, confusion and obvious frustration among the applicants.

Concerning legal aid, the situation for the applicants staying in Vial is as follows. In the first instance procedure i.e. before a decision on the claim has been issued by GAS, access to legal information and legal aid depends on the ability of the applicant for international protection to inform him- or herself and to get access to a legal aid actor present on the island. The main of these actors are: The Greek Council for Refugees, which has reduced its programme from previously two to now only one lawyer in Chios; METAdrasi which has a team of between three and five lawyers in Chios; Refugee Support Aegean, which is present with one lawyer in Chios; Advocates Abroad which are present irregularly with one or two foreign legal counsellors at a time; and Equal Rights Beyond Borders, which are present with three to four foreign legal counsellors and one Greek lawyer. All of the mentioned actors provide legal assistance in the first

instance procedure according to their respective capacity.

In the second instance procedure i.e. after an appeal has been lodged and before a second decision has been issued by the Appeals Committees, legal aid is provided by the Greek lawyers of the mentioned actors, again, depending on capacity and on the chances of success of the Appeal which is assessed by the NGO lawyers individually. In addition, since the end of 2017, there is one so-called 'registry lawyer' who is financed directly by the Greek state, and who takes up a maximum of 17 appeals per month, independently of the chances of success. In practice, the first 17 appeals per month are referred to the 'registry lawyer', unless the concerned applicant already has a lawyer representing him or her in the first instance procedure. In light of the lack of legal assistance, asylum seekers have sometimes turned towards 'private' lawyers in Chios which they then pay. The latter have oftentimes no experience in asylum law.



Fig 20, 21, 22

EU Hotspot Vial, own photographs, December 2018

Case examples, testimonies and impressions

Equal Rights frequently spoke to applicants who felt that their statements had not been adequately or accurately translated by interpreters, or subsequently misunderstood and wrongly recorded by caseworkers.

On the short delay to prepare for an interview and consult a lawyer, a 24-years old Congolese woman said: '[EASO] called me on the phone to come for an interview on the very same day. They did not announce my interview the Friday before as it should be, because they made a mistake in calling my number. I was not in Vial, but in the city centre when they called me.

When I finally arrived, I went inside the interview room, but because there was a lack of time to conduct the interview, they told me to come back three days later. I fortunately managed to see my lawyer who informed me about the asylum procedure in the meantime.⁸¹

In a similar vein, Equal Rights met a man from Ghana who approached the info point in the morning asking for information about his file and was told to come for an interview in the afternoon. The interview of that person had not been announced beforehand and Equal Rights was not able to inform the person about the asylum procedure given the shorth notice.

A man from Cameroon spoke about the difficulties of obtaining information on his case: 'Going to the info point is never something good. It is stressful, there are too many people who shout and push. I cannot imagine being a woman in those instances. When I had to renew my [asylum registration] card last time, I went with my lawyer who had to go to GAS that day. I managed to obtain my new card on my own though that day, but I am sure it would have helped for him to be there.'⁸²

81 Interview with a female applicant from DRC, conducted in September 2019.

82 Interview with a male applicant from Cameroun, conducted in September 2019.

IV. RECEPTION CONDITIONS

in the EU Hotspot Vial

Reception conditions in the EU Hotspot Vial fall short of all legal standards. The camp is characterized in particular by a lack of shelter (1), a lack of adequate sanitary facilities (2), a lack of medical treatment despite widespread physical and mental health issues (3), a lack of security leading to sexual and gender-based violence on a daily basis (4), and a lack of access to education (5). At the same time, there is a lack of financial support and it is almost impossible for applications to access the labour market (6). Detentions conditions in the police station are sub-standard and persons staying in Vial are in some instances subject to arbitrary imprisonment (7).

In addition to the already inhumane conditions in the camp itself, the life of the persons applying for asylum at the EU external border is made even more difficult and the political disregard for any human needs of these persons is made even more clear by the remoteness of the camp.¹ For more than three years, numerous independent reports have highlighted that the ‘reception’ conditions in the EU Hotspots are alarming. Regarding the EU Hotspot Vial, these concerns have been raised several times by Equal Rights and other NGOs in joint letters to the European Commission.²

1. Lack of (adequate) shelter including for vulnerable groups and unaccompanied minors

Basic legal framework and context

Concerning the legal framework regarding shelter in the context of EU Hotspots, it does unfortunately seem necessary to start with Art. 3 ECHR: ‘No one shall be subject to [...] inhuman or degrading treatment [...].’ This basic standard is reiterated in Art. 4 EU Charter of Fundamental Rights as well as in Art. 7 of the Greek Constitution. A comprehensive analysis of the scope of the prohibition of inhuman or degrading treatment with regard to living conditions for asylum seekers obviously goes beyond the scope of this report. However, it should be kept in mind that the ECtHR has repeatedly affirmed that states are under an obligation to provide basic services and that a situation of extreme poverty can amount to a violation of Art. 3 ECHR.³ While a situation of extreme poverty is marked by ignorance or negligence from the state, the camp Vial is actually actively established by the state in cooperation with the EU as the place designated for persons who apply for international protection at the EU external border. It does thus not seem far-fetched to argue that the infrastructure of the camp in combination with the legal framework of the EU Hotspot procedure including the geographical restriction amount to an active measure of the state. Yet, as has been mentioned above, the ECtHR has so far come to the conclusion that reception conditions in the EU

1 Cf. Melina Antonakaki, Bernd Kasperek and Georgios Maniatis, ‘Counting heads and channeling bodies. the hotspot centre Vial in Chios, Greece’, June 2019, available online: <https://bit.ly/34ZPz5j> [last accessed: 12 November 2019].

2 All letters and responses from November 2017 to January 2019 are available here: <https://www.equal-rights.org/hotspots>.

3 See *Budina v Russia*, Application No. 45603/05, 18 June 2009, available online: <https://hudoc.echr.coe.int/eng?i=002-1453>; *M.S.S v Belgium*, Application No. 30696/09, 21 January 2011, available online: <https://bit.ly/2QiQz0h> [both links last accessed: 14 November 2019].

Hotspots did not amount to a violation of Art. 3 ECHR, and did not consider the argument suggested here.⁴

EU law provides that ‘Member States shall ensure that material reception conditions are available to applicants [...] [and] provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.’⁵ The EU Hotspot Vial provides for the opposite: an environment which severely affects the physical and mental health of applicants – as has been reported by numerous independent reports for more than three years now (see below IV.3).

The legal standards are specified in more detail in EU law – in particular Art. 18 et seq. Reception Conditions Directive –, which was transposed into Greek Law 4540/2018.

The ‘specific situation of vulnerable persons’ must be taken into account with regard to all aspects of reception conditions.⁶ In particular, ‘gender and age-specific concerns and the situation of vulnerable persons’ must be considered when providing accommodation.⁷ Regarding unaccompanied minors, Greek law provides that they should be placed in centres adapted for their special needs for the duration of their application procedure, or until they are placed with a foster family or in supervised lodgings.⁸

The reality is far from these legal standards in every possible regard – to an extent that it is not even possible to cover all aspects in this report. In the following, the attempt is to give an overview.

Practical implementation

On Chios, the vast majority of applicants for international protection have to stay in the camp of Vial. The majority of inhabitants of Vial are housed in tents and containers that surround the central administration building. Containers obviously offer better shelter

against weather conditions, in particular since most of the containers have a heating and/or A/C system. However, containers are overcrowded – up to three families share one – which means that it is not unusual for a family to have little personal space – according to our experience, currently about between 4 and 8 m² is the space usually available for about three to four persons (family or group of singles) –, and privacy simply does not exist in Vial. Throughout winter months, with heavy rains and low temperatures, the flimsy tents and crowded containers provide little reprieve from weather conditions. In summer, temperatures in the containers and camp exceed 30 degrees, creating difficulties in particular for younger children and elderly persons.

Whereas Vial has an official capacity of 1,014 persons, the total population of the camp as of September 2019 exceeds 3,300.⁹ In case of new arrivals surpassing the maximum capacity, asylum seekers are being told to look for a tent until a space in a container becomes available. While UNHCR has deployed some tents in the camp, those are evenly overcrowded, obliging numerous individuals to buy a camping tent to reside in. Needless to say that those people are even more exposed to weather conditions.

Due to the fact that one part of the ‘administrative building’ is used as waste processing plant, the camp is often covered in a stench of waste. The water running down the hill when it rains is certainly not clean, and might even be contaminated. Quite apart from the fact that processing waste in a refugee camp is a gesture of deep disrespect, the possible effect of the waste processing plant on the health of persons staying in this camp seems to be disregarded.

Vulnerable persons, including unaccompanied minors,¹⁰ are staying in Vial under the same conditions as

4 Cf. Fn. 103.

5 Reception Conditions Directive, Art. 17.

6 Reception Conditions Directive, Art. 21 et seq.

7 Reception Conditions Directive, Art. 18 para. 3, Greek Law 4540/201, Art. 18.

8 Greek Law 4540/2018, Art. 22.

9 Hellenic Ministry of Citizen Protection, ‘National situational picture regarding the islands at Eastern Aegean sea’, 18 September 2019, available online at: <https://bit.ly/350rmfd> [last accessed: 14 November 2019].

10 See for more detail on the situation of unaccompanied minors in Greece: Equal Rights Beyond Borders, ‘Unbegleitete minderjährige Flüchtlinge in Griechenland’ (publication in German), July 2019, published by the Federal Association of Unaccompanied Minor Refugees (BumF), available online:

everybody else. Vulnerable applicants are not provided with the shelter and accommodation as is required by law.¹¹ While UNHCR run an Accommodation Scheme on Chios for individuals considered to be ‘very vulnerable’, spaces in this accommodation is limited and the waiting lists are long (see above).

While some unaccompanied minors are accommodated in Chios town – a special shelter with 18 places is available for minors in Chios – approximately 110 unaccompanied and separated children were living in Vial as of September 2019. According to an NGO working with minors in Vial, the situation is the most challenging since early 2017.¹²

Unaccompanied boys above the age of 15 years are supposed to stay in the so-called ‘safe zone’, which is a group of containers fenced off from the rest of the camp. To put it in the words of the staff of the above-mentioned NGO: ‘The ‘safe zone’ is not safe.’¹³ A general lack of supervision of the area indeed leads to the frequent presence of unauthorized adults in the zone.

Female unaccompanied minors and male unaccompanied minors under the age of 15 years, as well as persons who are considered by RIS to be ‘under acute risk’¹⁴ are staying inside the ‘administrative building’ overnight. This means that they are staying in a space with wooden boxes – next to the then closed containers which are used as offices during the day. The ‘wooden boxes place’ is neither warm nor closed, it is certainly not private or safe, it does not have beds, although blankets are usually provided. Even so, it is considered to be the ‘safest’ place within Vial because the police is present at the entrance of the building. Persons allowed to stay in this place overnight must however leave it early in the morning – namely before the administration starts working at 8 am. It is

obvious that even though the ‘wooden boxes place’ is considered to be slightly safer than the camp itself, the space is not only not in line with legal standards, it is a degrading ‘accommodation’ for the most vulnerable, and cannot be named a personal space.

As of December 2018, the ‘safe zone’ started to become supervised by IOM staff and Greek police. Consequently, the director of Vial decided to transfer all girls and boys under 15 to the ‘safe zone’, not allowing them to stay overnight in the administrative building anymore. Yet, it is reported that unauthorized adults still regularly enter the zone, whereas children’s movements in and out of the area are apparently not genuinely monitored. With the increase in arrivals during the summer of 2019, the ‘safe zone’ was full and the more vulnerable cases were allowed to temporarily remain in the administrative building again.

The inhumane conditions in Vial are exacerbated through the remoteness of the camp. Vial is located about 8 km from Chios town and is not accessible by public transport. Buses from UNHCR are running a few times a day – however, a place in the bus is only given to persons who have a specific appointment in Chios town, such as e.g. an appointment at the local hospital.

UNHCR stopped operating those busses in February 2019. A taxi from Vial to Chios costs about 10 euros, which is obviously a significant amount given that each person receives a monthly allowance of 90 euro per month (see below IV.5).

<https://www.equal-rights.org/post/report-on-unaccompanied-minor-refugees-published>.

11 Greek Asylum Law 4375/2016, Art. 14 para. 8.

12 Interview with two employees of an NGO that works with minors on Chios, conducted in December 2018 and September 2019.

13 Ibid.

14 Which is not a clear-cut category and there is no clearly defined procedure for identifying such applicants.



Fig 23, 24, 25

EU Hotspot Vial, tents in which asylum seekers reside, own photographs, December 2018 and July 2019



Fig 26

EU Hotspot Vial, 'safe zone', own photograph,
September 2019

Case examples, testimonies and impressions

One Eritrean man who currently lives in a tent in Vial described the inadequacy of the conditions: 'I received my tent from a friend and not from UNHCR. The tent provides only space for one person and there is no light inside. Don't expect light. If it is hot, it is not possible to sleep properly inside due to the heat. And when it rains, water...runs inside the tent. Besides the coldness, a big problem in the winter is that the tent is always wet.'¹⁵

Similarly, another interviewee addressed the inadequacy of accommodation: 'I have to emphasize again the importance of closing the camp or at least not having tents in Vial: they're unhygienic, crawling with bugs and rodents. In addition to all this, it is very cold.'¹⁶

One man interviewed for this report described the difficulties faced by his cousin: 'My cousin was pregnant when we arrived. They put us in a tent for 15 days until they moved us into a caravan. Our tent was on a hill. It was raining and slippery, I fell trying to protect my cousin from slipping on our way to the bathroom.'¹⁷

In another interview, a Syrian man described the situation of an Iraqi woman: 'She has cancer and can't move her leg. They put her in a tent. How is she supposed to get up, get to the bathroom? She told me that she couldn't sleep because it's too low (on the floor).'¹⁸

One unaccompanied minor interviewed by Equal Rights in November 2018 described his experience in the 'safe zone' of Vial: 'I did not have any mattress beneath me, just one sleeping back for each of us, no cover or pillow. We did not have a heating in this caravan, there was air conditioning, but for all air conditioners in the caravan we had just one remote control and the remote control was with the police. So, when the police officers on shift were nice, we stayed in a warm place. When the police officers on shift were ugly, and they mostly were, it was cold. So, in winter, most of the time it was cold... Nobody informed us why we were staying in the camp and other minors in the shelter, in a house in the city. We thought that this was because we are the bad ones. From what we understood from the NGOs around in the camp it was because we are considered drug addicts or criminals.'¹⁹

Another unaccompanied child tells us about his experience: 'When I arrived in Chios in May 2017 I was put in a caravan in the safe zone. I stayed there until January 2018. When the arrivals increased we were up to thirteen in the caravan, all boys. We didn't have mattresses or pillow, just sleeping bags. There also was no heating in the caravan, just A/C. No one informed us why we were sleeping there and why other were living in the city. We thought we were the bad ones. From what we understood, it was because they thought we were drug addicts or criminals.'²⁰

A man from DRC testifies: 'When I arrived in Vial, I was surprised to see that there was no place to sleep. I arrived during the cold period in winter, police just gave me some blankets and they told us to find a place to stay. I had to build a tent for myself with some blankets to sleep. I stayed like this for two months before UNHCR provided me with a tent. We are a lot in that tent, 8 to 9 persons, and don't have electricity. There's no bed. You just put your blanket on the ground and sleep on it. That's where I am staying up to this day.'²¹

15 Interview with a male Eritrean applicant, conducted in December 2018.

16 Interview with a male, LGBT, Syrian applicant, conducted in December 2018.

17 Interview with male Syrian applicant, conducted in December 2018.

18 Interview with a male, LGBT, Syrian applicant, conducted in December 2018.

19 Interview with an unaccompanied minor who previously resided in Vial and now lives in Germany, conducted in November 2018.

20 Interview with an unaccompanied child applicant from Syria, conducted in December 2017. Full interview available online here: <https://bit.ly/2NKwtKU> [last accessed: 12 November 2019].

21 Interview with a male applicant from DRC, conducted in August 2019.

2. Lack of adequate sanitary facilities

risk of sexual harassment. One NGO in Chios, the Athena Women's Centre, provides a bathroom with one shower for women and girls only. This service is extremely important – but it is obvious that it is entirely insufficient to compensate the failure of the state to provide adequate sanitary facilities.

Basic legal framework and context

Neither EU law nor Greek law specify the requirements regarding sanitary facilities. However, both EU law and Greek law require reception conditions providing 'an adequate standard of living for applicants' which 'protect their physical and mental health'.²² This obviously implies adequate sanitary facilities.

Practical implementation

In Vial, sanitary facilities are wholly inadequate to meet the basic reception needs of applicants and ensure a dignified standard of living.

Bathroom facilities are severely limited, with only 36 showers and 53 toilets working as of September 2018.²³ As a reminder, more than 3,000 persons currently live in Vial. These toilets are moreover poorly maintained, the sewer mechanism is considered as insufficient, and in some sections of the camp, toilets overflow into the surrounding area.

Further, the sections have varying times for electricity and water supply, both of which are limited and tightly controlled. Due to the overpopulation, many asylum seekers have hence reported being simply unable to take a shower for days. Needless to say that those unsanitary and unhygienic conditions are conducive to the spread of disease.

In particular women and girls, applicants who identify as LGBTI, and victims of sexual and gender-based violence, consistently and continuously report fear of going to the bathrooms and showers because of the



Fig 27, 28, 29

EU Hotspots Vial, Bathrooms in one section of the camp, photographs by Iskandar Nicola, December 2018 and September 2019

22 Reception Conditions Directive, Art. 17(2); Greek Law 4540/2018, Art. 17(1).

23 UNHCR, 'Greece - Site Profiles', September 2018, available online at: <https://data2.unhcr.org/en/documents/download/66038> [last accessed: 12 November 2019].

Case examples, testimonies and impressions

One Eritrean man interviewed for this report described the inadequacy of sanitary facilities: 'In my block there are no decent showers, no toilets and bathroom and no hot water. Often not even running water or electricity. For sanitary reasons I need to go to the other blocks. Mostly, I defecate outside. The sanitary facilities are not cleaned regularly by the personnel of UNHCR. We have to clean it ourselves.'²⁴

An Afghani woman interviewed stated that the showers and toilets 'were the worst part' about Vial: 'First of all, they were so dirty. I don't know why, but in the night time, they cut off the water. We had no water in the night time. The bathroom in the morning... you can't even imagine how dirty it was. Also, there were not enough bathrooms and toilets....and they do not fix them.'²⁵

3. Lack of medical treatment despite widespread physical and mental health issues

Basic legal framework and context

Under EU law, 'Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders' – regarding vulnerable applicants, 'Member States shall provide necessary medical or other assistance [...] including appropriate mental health care where needed'.²⁶ These provisions are transposed in Art. 17 of Greek Law 4540/2018.

Furthermore, under Greek Law, all migrants, including applicants for international protection, have a

right to free access to public health facilities.²⁷

Practical implementation

The lack of medical services in Vial is critical. While the current medical facilities in Vial are inadequate to treat a population of individuals that has recently fled war and travelled long distances to arrive to Greece, the reception conditions in which these persons are forced to stay further actively worsens their physical and mental health. Health issues partly caused by the camp are in turn not being dealt with in most cases. Quite apart from the fact that this leads to a systemic failure to identify vulnerable applicants for international protection (see above III.4), the physical and mental health of applicants is at risk.

All this has been highlighted by independent reports for more than three years now. A recent research study conducted on the health situation of migrants in Greece stated that, 'as refugees stayed for prolonged periods in the camps, many stakeholders observed an increasing frequency of mental health disorders, including symptoms of depression, anxiety and post-traumatic stress disorder among some refugees.'²⁸ The research went on to state that the service providers they interviewed, 'reported an association between the lengthy and uncertain asylum process and poor living conditions and the decline in mental health among refugees.'²⁹ The European Commission for Human Rights during a recent visit to the Greek islands, again decried the lack of medical attention and the consequences this is having on the physical and mental health of applicants.³⁰ However, medical services have not substantially been improved until today.

To the contrary, medical services in Vial have even been reduced since mid-2018. The camp as of September 2019 only possesses two permanent doctors, who

²⁴ Interview with a male Eritrean applicant, conducted in December 2018.

²⁵ Interview with a female, Afghani applicant, conducted in December 2018.

²⁶ Reception Conditions Directive, Art. 19.

²⁷ Greek Law 4368/2016, Art. 33.

²⁸ Ibid., p 5.

²⁹ Ibid.,

³⁰ Council of Europe, Report of the Commissioner for Human Rights of the Council of Europe Dunja Mijatović following her visit to Greece from 25 to 29 June 2018 (Fn. 121).

are assisted by nurses, social workers, and psychologists. One doctor is working for KEELPNO and is solely responsible to conduct the medical screenings which are required by EASO to interview applicants. The second one is the doctor of the Hellenic army who follows up with patients with chronic illnesses and deals with emergencies. He is normally available for two to three hours every weekday in the morning and can refer cases to Chios General Hospital if needed. There are no doctors available at night or during weekends. At these times, the 'on call' medical assistance is an ambulance from the hospital. Nonetheless, those interviewed for this report and seen through our legal service, report that the ambulance is selective in what it responds to, with emergencies often going ignored.

Considering the pression under which those doctors, as well as the medical staff, have to operate, it is not unusual for the positions to remain vacant. This was for instance the case in August 2018 for numerous weeks, and, as of September 2019, there has not been a doctor in Vial since August 2019. Medical staff also went on strike for three weeks end 2018 to protest against their working conditions.

In light of this situation, NGOs have fortunately jumped in. MSF has for instance provided both medical and psychological support on the island. As of August 2019, the organization is however in search of a new doctor. SMH, an NGO from the Basque region, provides medical support to persons in Vial every afternoon of the week. Their staff comprises two doctors, nurses, and interpreters, which are competent for first aid and primary health care. The official camp administration is not providing SMH with medicine or medical equipment. Needless to say that the members of the organization are under huge pressure since a few months, considering they are currently the only ones providing medical assistance in Vial.

With regard to psychological support, KEELPNO did not have psychologists and social workers available from for an entire month in August 2019. As mentioned above, MSF has a few psychologists, while the International Rescue Committee (IRC) also provides psychological support to asylum seekers. IRC are lo-

cated in Chios town, but are organizing themselves to pick up patients from Vial by car. Their services are not available on a walk-in basis, but partner organizations have to send referrals to them. Confronted with an always increasing number of people requesting psychological assistance, IRC unfortunately stopped receiving mental health referrals in July 2019 up to this day. For a population of now over 3,000 persons, arriving from war-torn and traumatizing situations and staying in conditions which actively affect human health in a negative manner, this limited access to psychological support is not only wholly inadequate, it is truly alarming.

Numerous people hence find themselves obliged to turn towards private psychologist or psychiatrists, which in turn are of course not affordable for everyone. Moreover, while psychological problems are supposedly a ground for someone to be declared vulnerable³¹ and hence both be referred to the regular procedure and being able to leave Vial, the possibility for people to obtain medical certificates proving their condition is extremely limited. GAS has further admitted to give less importance to medical certificates issued by private medical practitioners when evaluating an applicant's vulnerability, this in gross violation of the Greek Code of Medical Ethics, whose Art. 5 stipulates that for any lawful use medical certificates issued by private and public practitioners have the same legal validity. Equal Rights has further met several clients who were simply refused to submit their medical certificates issued by private doctors to the info point.

The right of applicants for international protection to access public healthcare services is seriously restricted in practice. Regarding the local hospital, there are two ways of access: either through referral by KEELPNO or directly by the applicant him- or herself. However, applicants are faced with serious difficulties in both ways. Most of the issues have already been described above (see III.4).

In addition, applicants for international protection are faced with racial discrimination. During a few months at the end of 2018, the local hospital provided

31 Greek Law 4375/2016, Art. 14.

for two waiting lines – one for Greek citizens, and one for applicants for international protection. The effect of these two lines amounting to racial discrimination was shown by the experience that in practice, any person who according to the opinion of the staff of the hospital ‘looked like a refugee’ i.e. in particular any persons who has non-white skin-color, is upon arrival in the hospital asked to wait in the ‘line for refugees’. Only if the person then insisted and presented his or her identity card showing that he or she is not an applicant for international protection but e.g. an EU citizen, he or she was allowed to wait in the line for Greek citizens. According to the experience of Equal Rights, there seemed to be differences between the two lines both concerning the waiting duration as well as the quality of the medical service provided by the local hospital.

This practice of two lines has been abandoned in the meanwhile. Currently, applicants for international protection can only access medical treatment in the hospital upon referral from Vial. The only exception is an obvious medical urgency, in the case of which an asylum seeker can directly approach the hospital.

Since July 2018, asylum seekers are moreover unable to issue a social security number (‘AMKA’ number) through which they can consult doctors and obtain medication at an affordable price. The new government which took office in July 2018 has indeed decided to freeze the issuance of AMKA numbers for asy-

lum seekers.³²

Access to private doctors on the island is difficult for applicants for international protection for the reasons listed above (see III.4).

In particular, applicants for international protection face difficulties in seeing a specialist. This is partly so because the local hospital in Chios has limited capacity and therefore cannot cover all kind of issues. In many cases, specialists are only available on the Greek mainland. However, the geographical restriction is lifted only in cases of severe medical emergencies. Otherwise, the person has to wait for the finalization of the procedure on the island until he or she is able to see a specialist who can provide the required treatment. In particular, access to the psychiatrist in the local hospital – who is the only psychiatrist on the island – is extremely difficult for applicants of international protection because the psychiatrist in numerous cases refuses to give appointments to applicants, even in cases in which the person has been referred to the psychiatrist by KEELPNO in Vial.

To conclude: Applicants staying in Vial are left with inadequate medical attention for a considerable amount of time – usually at least a few months – which leads to a dangerous medical limbo.

³² This ‘freezing’ is based on the revocation by the health minister of a previous circular on the guidelines to obtain an AMKA for asylum seekers.



Fig 30

EU Hotspot Vial, own photograph, December 2018

Case examples, testimonies and impressions

A woman from DRC testified: 'I am a single woman here in Chios and have a baby who is two months old. I would like to vaccinate him, something very basic. Yet, I am not able to do so because I don't have an AMKA number. I went to the authorities and they told me that I could not get an AMKA number because the law had changed. I don't know what to do. I just hope my baby won't get sick.'³³

One man interviewed stated the following when asked about access to medical attention: 'Normally, I will need to go to the info point and they will say there is no doctor except a nurse. This means that in other words they won't help you. They will only give you an advice without a decent diagnosis. If someone has diarrhoea, he needs special treatment and medicine. I have a friend with diarrhoea and I went 6 times with him to get an appointment and the doctor couldn't give him any medication, only advice without treatment.'³⁴

One Iranian man interviewed described how, unable to obtain an appointment with a psychologist in Vial, he had to see a private psychologist: 'I went to a private psychologist twelve times. I paid for that myself. I also went to private psychiatrist.'³⁵

Another man from DRC describes the process to see a doctor: 'If you are sick, you have to go to the info point. This means that you have to in front of everyone to talk about your sickness. Sometimes a sickness can be secret. For instance, if someone is HIV positive. But you have to tell the man at the window what you suffer from in front of 50-100 people. Some people are ashamed of that and then will just say something else. On the other hand, sometimes you have to make things worse so that you will be able to see someone. I did it once personally. I had severe backpain because I have been sleeping on the ground for months. But if you say that they will simply give you painkillers. So, I said that I had a problem with my testicles so I could see a doctor. It was strange to say this in front of everyone. Why does a sick man has to suffer to see a doctor? This bothers me.'³⁶

An unaccompanied minor from Syria stated in December 2018: 'The situation in the camp was very stressful. [...] This is why many minors were using drugs. In the beginning without knowing, other refugees gave it to them, take this pill to be calm. After some time, they get used to it, and many take it on a daily basis. So, what they take is Marihuana, or Lyrica, Bobli, Xanax, or Tramadol, and other medication for epilepsy. Many of the minors also had razors, to cut themselves. This was also because many asked to see a psychologist but were denied. The procedure to see psychologist was this for minors: You cut yourself. After this, you are transferred to the hospital, to get stitches. Then, the police comes and puts you in jail for two or three days. After this, you can see a psychologist and they make many promises about transferring you and getting you out of the camp. But this does usually not happen, it is promises. There was one famous incident were all the minors got on the roofs of the containers, they demanded to be transferred or to get out of the camp. The police was very brutal with them, and then, they cut themselves. I have heard about some sexual exploitation of minors by other refugees in the camp. But not among the minors, I didn't hear anything like this. We could not talk to anybody else, no social worker, nobody. Many times we were given wrong information by the people from NGOs, about transfer dates or something like this. And promises.'³⁷ Concerning the access to medical services, the same unaccompanied minor stated: 'Whatever sickness you have, they will give you Panadol, pain killer. For everything, headache, fever, cancer, Panadol. There was no procedure to go to the hospital or see a doctor. The procedure was: Wait until the minor was close to die, then put him in a police bus to take him to the hospital. When you arrive to the hospital, they will treat you at some point. But it is very difficult alone. Sometimes, volunteers from an independent NGO would accompany us to the hospital, they always ended up fighting with the hospital so that we can see a doctor. It was very difficult. Of course, the Greek people would always be treated first, after the refugees, no matter how bad the condition would be. In the hospital, there is two different lines, one for refugees and one for Greek people. Some Greek people would feel disgusted by refugees, they avoid sitting next to refugees, and sometimes they even leave the room.'³⁸

33 Interview with a female applicant from DRC, conducted in September 2019.

34 Interview with a male applicant from Eritrea, conducted in December 2018.

35 Interview with a male applicant from Iran, conducted in January 2019.

36 Interview with a male applicant from DRC, conducted in Au

gust 2019.

37 Interview with an unaccompanied child applicant from Syria, conducted in December 2017. Full interview available online: <https://bit.ly/34XJg2n> [last accessed: 12 November 2019].

38 Ibid.

4. *Lack of security and extremely high risk of sexual and gender-based violence*

Basic legal framework and context

Both EU and Greek law require the state to provide safeguards against incidents of violence, in particular against incidents of sexual and gender-based violence – and at the same time requires the state to adequately deal with such incidents should they occur despite the safeguards. Art. 18 para. 4 of the Reception Conditions Directive for instance reads: ‘Member States shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres [...]’ This provision has been transposed into Art. 18(2) of Greek Law 4540/2018.

Furthermore, Member States shall ‘take into account the specific situation of vulnerable persons such as [...] persons who have been subjected to [...] rape or other serious forms of psychological, physical or sexual violence [...]’ by ensuring that they ‘receive the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care.’³⁹

Practical implementation

None of these provisions is implemented. To the contrary: the conditions in the camp create an environment which increases violence in all its forms, and the persons affected by this violence do usually not receive the necessary protection and treatment.

Sexual and gender-based violence, in particular, is part of the daily life in Vial. The level of violence and the lack of security in the camp is, objectively speaking, alarming. Even though persons of all ages and

genders are affected, women and girls, persons who identify as LGBTI as well as children are in particular affected.

As has been reported for more than three years now,⁴⁰ ‘sexual harassment and violence in the reception centres [EU Hotspots], including against men, continue[s] to be a major risk’.⁴¹ The repeated calls for change – including through joint open letters – have been left entirely unheard. In fact, the number of SGBV incidents in Vial seems to be increasing since mid-2018.⁴² Moreover, the opaque system of governance characterizing the EU Hotspot Approach creates a situation where actors continuously defer to one another (see above II.3) in a cynical bid to rid themselves of responsibility for violence and abuse in the camp. The result is a complete lack of accountability and apparent lawlessness in a camp where sexual harassment has become part of everyday life, leaving those most vulnerable without protection or safeguarding.

³⁹ Reception Conditions Directive, Art. 22 and 25; Greek Law 4540/2018, Art. 20.

⁴⁰ The Guardian, 17 June 2017, ‘Abandoned and abused: the forgotten Syrian refugee children in a Greek island detention camp’, available online: <https://bit.ly/370F7MN> [last accessed: 12 November 2019].

⁴¹ <https://bit.ly/2KjIKVw> [last accessed: 12 November 2019].

⁴² no empirical evidence, based on experience of Equal Rights legal counsellors.



Fig 31, 32

EU Hotspot Vial, own photographs, December 2018

Case examples, testimonies and impressions

An unaccompanied minor from Syria stated in December 2018: ‘Once, three adults from Afghanistan stormed into the safe zone for the minors, they beat us up. They were doing this under drugs, they were drunk and accidentally hit a minor who was walking around in the camp, and then they started fighting. The minor understood that they were drunk, so he returned to the minors zone. They followed him and stormed our place. We went to complain to the police, but nothing happened.’⁴³

The risk and fear of SGBV is currently so prevalent in Vial that female residents are often forced into the decision to relieve themselves next to their own container or tent in order to avoid the danger of walking to the toilet after dark.⁴⁴

LGBTIQ* individuals often hide their sexual identity in Vial. Those ‘exposed’ by other residents are con-

fronted with a high risk of severe violence by other camp residents. LGBTIQ* applicants reported police violence as well. In one case, a couple was bribed by another camp resident, who threatened to ‘spread the word’ about their sexual identity. Accommodation outside the camp was not available in the vast majority of those cases: Even an openly gay applicant, who was frequently beaten up by other residents, was only accommodated outside Vial upon intervention of the Greek Ombudsman.

Single women are at high risk of sexual harassment and sexual abuse in the camp. Even though single women are per definition eligible for the accommodation scheme managed by UNHCR, most of them are in fact not accommodated outside the camp due to capacity reasons. Equal Rights handled several cases of single women in the camp for whom, despite them having experienced sexual violence in the camp already, no alternative solution for accommodation could be found through the UNHCR program. In some cases, the concerned women were only accommodated outside the camp after having survived severe sexual violence by male residents, even though UNHCR had been made aware of the high risk of SGBV prior to that incident.

⁴³ Interview with an unaccompanied child applicant from Syria, conducted in December 2017. Full interview available online here: <https://bit.ly/2ph3HrJ> [last accessed: 14 November 2019].

⁴⁴ Due to the very nature of SGBV incidents, the following is based rather on summaries of the experience of Equal Rights staff working in Chios than on direct quotes from interviews.

5. *Lack of adequate financial support and lack of access to labour market*

Basic legal framework and context

Article 15 of the Reception Conditions Directive stipulates that Member States shall provide asylum seekers with an effective access to the labour market at the latest nine months after lodging an application for international protection. Greek Law in turn provides a more favourable standard, stating that asylum seekers who have completed registration and are in possession of an asylum seeker's card shall have access to salaried employment.⁴⁵

With regard to financial assistance, Art. 17(5) of the Reception Conditions Directive provides for the possibility for Member States to grant asylum seekers with financial allowances. The Greek authorities as such have not directly make use of this possibility. However, the European Commission has been funding the so-called 'ESTIA' programme through which asylum seekers in Greece are able to receive a monthly cash allowance. This programme is being implemented by UNHCR in close cooperation with the Greek Ministry of Migration Policy.⁴⁶

Practical implementation

It is overall extremely rare to find an asylum seeker on Chios who has managed to secure employment. Several reasons explain this situation.

Strongly hit by the 2008 economic crisis, unemployment in Greece still reaches 19,3% in 2019⁴⁷ and the

figures are evenly high in Chios with available statistics of end 2017 showing an unemployment rate of 25,19%.⁴⁸ Language constitutes an obvious additional barrier, with very few asylum seekers speaking Greek and/or a language that an employer in Chios would understand. Another practical hurdle is the location of the camp, 8km from the centre. Most people in Vial do further not project themselves living on Chios, and are constantly seeking ways to be declared vulnerable and leave the island. The fast-track border procedure moreover having been conceived to either send vulnerable applicants to the mainland, deport people back to Turkey, or deal with asylum cases swiftly, active measures to help asylum seekers to integrate and find employment in Chios are rare to non-existent. Due to the mentioned lack of information (see above III.5.), most asylum seekers are not even aware that they have the right to work.

Administrative obstacles to the right of work also exist. In order to work, Greek law requires a person to have both a tax registration number ('AFM' number) and a social security number ('AMKA' number), as well as an unemployment card, delivered by the Hellenic Manpower Employment Organization ('OAED'). Since the election of Prime Minister Mitsotakis in July 2019, obtaining these documents has become increasingly difficult.

With regard to the AFM number, delivered by the tax office and incidentally required to rent a place or open a bank account, applicants cannot issue them without justification anymore. In other words, if an asylum seeker wants to obtain an AFM number, he needs a document from his future employer stating the intention of the latter to hire him or her. For the AMKA number, as stated above, the new government has simply decided to stop issuing them for asylum seekers.⁴⁹

For applicants who arrived after July 2019, it is in-

45 Greek Law 4375/2016, Art. 71.

46 See in that regard Greek Ministry Decision 6382/19 on the establishment of an implementation framework for the ESTIA, available online at: <https://www.refworld.org/pdfid/5d47df274.pdf>.

47 OECD, 'Selected indicators for Greece', first quarter of 2019, available online at:

<https://data.oecd.org/unemp/unemployment-rate.htm> [last accessed: 14 November 2019].

48 EURES, 'Greece - Voreio Aigaio', July 2019, available online at: <https://bit.ly/2NJUd1J> [last accessed: 14 November 2019].

49 This "freezing" is based on the revocation by the health minister of a previous circular on the guidelines to obtain an AMKA for asylum seekers.



Fig 33

EU Hotspot Vial, people queuing for food distribution, own photograph, July 2019

deed simply not possible to issue an AMKA number anymore from the City Hall for now, and therefore to find employment. The unemployment card is perhaps the easiest document to obtain on Chios. Applicants must go to Vial's info point who will issue them a document with which they should obtain their card from the OAED office, situated in Lefkonion, about 6km from Vial.

With those difficulties to access the labour market, asylum seekers in Vial have to rely on their own means as well as on the monthly allowance they are provided. This allowance amounts to €90 for a single adult up to a maximum of €330 for families of seven members and more living in Vial.

For persons who UNHCR accommodated outside the camp and who have to additionally buy food, the allowance varies from €150 to €550. Comparing these amounts with the average monthly wage in Greece which is €2010,75⁵⁰ and the Greek minimum wage of €758,33⁵¹ helps understand in which situation asylum seekers find themselves.

50 OECD, 'Data – average wages', 2018, available online at: <https://data.oecd.org/earnwage/average-wages.htm> [last accessed: 14 November 2019].

51 Eurostat, 'Monthly minimum wage, bi-annual data', 29 July 2019, available online at: <https://bit.ly/2O532Sw> [last accessed: 14 November 2019].

Case examples, testimonies and impressions

A man from Cameroon testified on how difficult it is to survive with the monthly allowance: 'I am living outside Vial and receive €150 a month. I have to cover all costs with that and some months this is not possible. I have to pay for food, transport, household products, medication, sometimes clothes, furniture to study because I try to take English classes here, and so on. I live far away from Chios, some 5 or 6 km from town. There is a small supermarket where I live but prices are really expensive. To go to town, the bus costs €1,80 back and forth, so €3,60. In addition, my grandfather passed away this month and in our culture every family member has to pay a contribution for the funerals. They are pressuring me to do so and call me like five times a day. I have had to skip several meals over the past weeks for me to try to put some money on the side. When I am out of money towards the end of the month, I ask other people from Vial to lend me money which I then reimburse at the beginning of the next month. This is not a good system of course. I didn't try to work. I didn't know it was possible and I have never seen any asylum seeker being able to get a job in Chios.'⁵²

A Congolese man living in Vial states: 'Me I don't eat the food from Vial out of religious belief. I'm Rastafari and can only eat natural food normally. I have to organize myself with the money they give me, €90 per month, to try to eat. I usually simply don't eat lunch to save money. I don't have work. I don't speak Greek or English. I'm creative. I sometimes make sandals out of tires that I then try to sell for a few euros.'⁵³



Fig 34

EU Hotspot Vial, an improvised tent, own photograph, December 2018

6. Lack of access to education for minors

Basic legal framework and context

According to EU law, 'Member States shall grant to minor children of applicants and to applicants who are minors access to the education system under similar conditions as their own nationals [...]. Such education may be provided in accommodation centres. Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority. Access to the education system shall not be postponed for more than three months from the date on which the application for international was lodged [...]. Preparatory classes, including language classes, shall be provided to minors where it is necessary to facilitate their access to and participa-

52 Interview with a male applicant from Cameroon, conducted in September 2019.

53 Interview with a female applicant from DRC, conducted in August 2019.

tion in the education system [...]. Where access to the education system [...] is not possible due to the specific situation of the minor, the Member State concerned shall offer other education arrangements in accordance with its national law and practice.⁵⁴

This obligation has been transposed in Art. 13 of Greek Law 4540/2018. RIS is further responsible for developing and processing adequate access to education systems.⁵⁵

Practical implementation

Despite the legislation, important obstacles remain in practice for children to access education in Greece.

These obstacles can have significant impact on their long-term development and future. While under Greek law, enrolment in school is compulsory for all children aged between 6 and 15, the figures for asylum-seeking children demonstrate a widespread lack of attendance. During the 2017-2018 school year only an estimated 6500 to 7000 out of the 20,000 asylum-seeking and refugee children in Greece were formally enrolled in education.⁵⁶

Greece has implemented two key programmes within public schools for asylum-seeking children. The first of those programmes is a morning 'integration' program (ZEP/Zones of Educational Priorities) and the second is an afternoon 'reception' programme (DYEP) to support children who have little to no formal previous education. In 2016, these programmes were formally introduced to the Greek islands.⁵⁷ Nonetheless, it is on the islands in particular that these programmes have been limited in scope. Pursuing to Human Rights Watch, the only children who had been enrolled in lo-

cal schools on the islands had done so with the support of NGOs.⁵⁸

In Chios, minor applicants for international protection or children of applicants for international protection did not have access to the public school until autumn 2018. During the first two and a half years after the entry into force of the EU-Turkey Statement, the only possibility for children to attend any kind of education was the school set up by the NGO 'Action for Education'. However, due to limited capacity of that NGO, most children were only able to attend school a few days per week; and depending on the numbers of persons staying in Vial, the waiting list would be longer or shorter with waiting times of between a few days to a few weeks.

In autumn 2018, a measure introduced to integrate asylum-seeking children into the educational system was met with protests from local parents. A group of over 1000 parents signed a petition against the inclusion of children of applicants for international protection into the public school. While some parents retracted their support for the petition due to later xenophobic and politically driven language used within certain parent committees, the petition resulted in delays to the integration of these children into the educational system.⁵⁹ The measure was nevertheless implemented so that as from autumn 2018, children staying in Vial at least officially have the possibility to attend the public school in Chios. However, a significant obstacle to accessing education in practice is the requirement for vaccinations in order to enrol children to the public school. Again, medical certificates issued by NGOs are not accepted, and as the position of the KEELPNO doctor is vacant, most children are not able to provide the medical certificate required – and therefore not allowed to enrol.⁶⁰

Precise figures or statistics on the number of asy-

54 Reception Conditions Directive, Art. 14.

55 Greek Law 4375/2016, Art. 27 para. 2, lit b, sublit cc.

56 Refugee Support Aegean, 'Majority of refugee children in the Aegean Islands Hot Spots are excluded from education', 18 February 2018, available online at: <https://bit.ly/2QkWJgy> [last accessed: 14 November 2019].

57 Human Rights Watch, 'Without Education They Lose Their Future': Denial of Education to Child Asylum Seekers on the Greek Islands', July 2018.

58 Ibid.

59 Diakonie Deutschland and Churches' Commission for Migrants in Europe, 'Solidarity First. Reclaiming the Values of Europe', Report on the 15th European Conference on Asylum Law, Chios/Athens 15 -20 October 2018 (Fn. 50), p. 16.

60 Interview with two employees of an NGO that works with minors on Chios, conducted December 2018.

lum-seeking children who attended and attend school in Chios seem difficult to obtain. An August 2019 report by UNHCR states that more than three quarters of the children in the EU Hotspots do not attend school.⁶¹ What can be said is that during the school-year 2018-2019, the enrolment system for children between six and fourteen was working relatively well, with effective transportation provided from Vial to schools. As stated above, the main hurdle was vaccination. Children from fifteen to eighteen were however apparently not encouraged to join school. The fact that school is not compulsory for children over fifteen might be a reason for this. The educational program provided for that category consists solely of a vocational training taught mainly in Greek with no suitable accompanying structure for the needs of asylum-seeking children. No transportation was further organized for those children who registered for the program. As a reminder, Vial is located about 8 km from Chios centre and the nearest bus station is located 30min walking from the camp.

For the abovementioned reasons, non-formal education still plays a significant role in Chios. UNHCR and the European Commission are funding a space next to Vial for the purpose of education for minors. Currently, classes are run every morning by 'METAdrasi for children from six to fourteen, and jointly by METAdrasi and Action for Education in the afternoon for children from fifteen to eighteen. About 80 children were enrolled in those programmes during the 2018-2019 schoolyear.

As for the 2019-2020 schoolyear, all actors were on hold as of September 2019, waiting for announcements from the new government. Enrolments started, but three obstacles prevent the education programmes to operate for now. The absence of a refugee education coordinator appointed by the government who is kept accountable and should act as a point of contact between NGOs, the EU Hotspot, and the formal education system is the first one. The last coordinator indeed resigned in August 2019. A second problem is

the absence of a vaccination campaign for children in Vial, which has not yet been scheduled by KEELPNO. Lastly, suitable educational staff has not yet been assigned either.

If those issues are not quickly addressed, children would have to turn to the non-formal education system. This would however have grave consequence, as in no way do the NGOs have the required staff capacity and premises to fill the potential gap in education.



Fig 35, 36

Non-formal education premises next to Vial, own photographs, September 2019

⁶¹ UNHCR, 'Stepping up: Refugee Crisis in Action', August 2019, at 20, available online: <https://bit.ly/373JTcl> [last accessed: 14 November 2019].

Case examples, testimonies and impressions

A woman from DRC with five children exemplifies the situation on her own: 'My children are between four and twelve years old. Four of them are going to the school next to the camp. I want to send them to a better school in town but they tell me that they have to be vaccinated. I don't know when this will be. It's difficult to get information in Vial, they always tell you to come back. I was told that maybe in November I would be able to send my kids to school but that is far away and the schoolyear will already have started.'⁶²

An unaccompanied child who resided in Vial between May 2017 and November 2018 further tells us about his experience: 'I was going to school more than others, two days a week, plus one other day in a center organized by an independent NGO. As there are so many minors, not everybody can go every day. I was only allowed to go for two days a week. The other days, I had to stay in the camp because I did not have any means to leave the camp which is far from the city. The bus is organized by the NGO, and it is only to go to school. For the general UNHCR bus, there was no special arrangement for minors. So, you can only get a place in the bus if you are physically very strong in order to push. As I am not, I had to stay in Vial on the days that I did not go to school.'⁶³

A single woman from DRC with two children has faced different problems in the past: 'I was told that it would be possible for me to put my children in public school and was directed towards a certain school but it is too far away from the place where we live [the client was accommodated outside Vial] and no transportation is organized. I just hope to be able to leave the island and then put my children in school.'⁶⁴

62 Interview with a female applicant from DRC, conducted in September 2019.

63 Interview with an unaccompanied child applicant from Syria, conducted in December 2017. Full interview available online here: <https://bit.ly/2NPJ0wJ>.

64 Interview with a female applicant from DRC, conducted in September 2019.

7. Sub-standard detention conditions, arbitrary imprisonment and incidents of police violence

Basic legal framework and context

Upon arrival of a third-country national in Greece, police issue them a deportation decision under Greek laws 3907/2011 and 3386/2005. This decision is then suspended by lodging an application for international protection.

An asylum seeker can subsequently only be detained in 'exceptional circumstances' and as a last resort, if other administrative measures prove to be unsuitable.⁶⁵ Yet, according to the Greek Refugee Council and AITIMA, the detention of non-citizens is 'excessively and unjustifiably relied on by the authorities' in Greece.⁶⁶

65 Greek Law 3907/2011, Art. 46. See also Reception Conditions Directive, Recital 20.

66 Global Detention Project, "Immigration Detention in Greece," January 2018, <https://bit.ly/2CECjXV> [last accessed: 14 November 2019].

Practical implementation

In Chios, there are usually about five to 25 applicants held in detention at the police station.⁶⁷ The current capacity of the police station is nineteen, however, according to two Greek lawyers from NGOs on the island, the facility is frequently overcrowded. Those detained for administrative purposes are held alongside individuals detained for criminal reasons.

Detention conditions are sub-standard and not in line with legal requirements.⁶⁸ The police station has one main cell of about 30m² in which all detainees are locked in together, and one cell of about 6m² in which e.g. minor female applicants are detained. The ‘detention space’ in the police station is made for short-term imprisonment. The cell is dark, detainees usually are not let outside regularly. Further, there is no private space in which lawyers can give legal advice to their clients – lawyers must talk to their clients either inside the cell, or in the floor of the police station where police officers as well as persons attending the police station for other reasons are passing by.

Most of the applicants in the Chios police station are detained for administrative purposes. Unaccompanied minors may also be detained in what is called ‘protective custody’ – however, this practice is currently not applied anymore in Chios. In some instances, minors have are detained in the police station in the same cell and under the same conditions as adults.

In some instances, applicants for international protection are detained in an arbitrary manner for alleged criminal or administrative reasons which cannot always be identified by the responsible lawyer.

Police regularly proceeds to mass and arguably arbitrary

arrests of applicants following fights that erupt in Vial. Major fights have for instance taken place at night between communities in June and in September 2019. Asylum seekers involved in the fight of June were condemned by summary trial to prison sentences exceeding two years.

An emerging practice on Chios has also been to detain asylum seekers arriving from the mainland applying for asylum on Chios for several days. The reasons behind these arrests are difficult to understand, and in numerous cases lack a legal basis. Deterrence from coming to Chios – where the procedure, although not respecting legal deadlines, is nevertheless quicker than on the Greek mainland – seems to be the policy rationale, but is surely not a legal justification for detention.

Most of the applicants in the Chios police station are however detained for the purpose of removal. Upon a second instance negative decision which is not appealed against to an administrative Court, the applicant is detained in the Chios police station for a time of about a few days to a few weeks. Subsequently, the person is transferred to the ‘pre-removal section’ in Lesvos i.e. the detention centre in the EU Hotspot Moria, from where deportation to Izmir takes place (see above II.1 and 2).

Police violence perpetrated against camp residents – along with a complete lack of police protection when needed – is moreover frequent and ubiquitous.

67 Ministry of Digital Policy, Telecommunications and Information, ‘National Situational Picture Regarding the Islands at Eastern Aegean Sea (07/03/2019)’, 7 March 2019, available online at: <https://bit.ly/2qTerNk> [last accessed: 13 November 2019].

68 Interview with Greek Lawyer for an NGO on Chios, conducted in December 2018: ‘With regard to conditions in detention, one lawyer stated: ‘It is really dark inside and the cells were made for short term detention – for a few hours. Though most people are detained for several months.’



Fig 37, 38

EU Hotspot Vial, own photographs, December 2018

Case examples, testimonies and impressions

Describing his unwarranted arrest by police in Vial, a Yezidi man from Iraq stated: 'Three days ago, we passed by a fight on our way to our tents. The officers arrested me, handcuffed me and hit me... We had nothing to do with what was going on and we still received a beating. They took me inside the police station in Vial. I was telling them 'I'm sick, I'm sick. I need some air please give me some space'. All they did was continue to make fun of me and crowd me even more. They took me to interrogation, there I told them 'I will report you to UNHCR tomorrow'. The female officer said, 'I will take your Khartia and accuse you of hindering a police investigation if you report us'. They let me go after an hour of threats if I were to complain about this incident. I didn't have the guts to complain afterwards.'⁶⁹

A second lawyer interviewed stated that those detained in the police station 'don't have the possibility to go outside for a break. Some say there were able to go out once a week.'⁷⁰

An Iranian interviewee similarly explained, 'Sometimes the police beat refugees to the ground when there is a fight. They beat up everybody who is outside their caravan. They also come inside the caravans. You can't go to the police for problems because they don't really help. But we are refugees, we need help. We have a lot of problems. But when we ask for help in VIAL, no one helps.'⁷¹

Further, SGBV incidents are not always handled properly in the police station. In one instance, the female SGBV survivor wanted to report that she had been raped. The female interpreter provided by Equal Rights for this purpose was sent away by the responsible police officer, and replaced by male interpreters provided by the police, while a male police officer recorded the criminal complaint. He shouted at the woman, accused her of lying and threatened her, alleging that her lying would negatively affect her asylum procedure. After the medical examination was completed, the police brought the woman back to the camp. Frequently, applicants and also interpreters reported to Equal Rights that they had been affected by severe violence from the responsible officers in the police station in Chios.

⁶⁹ Interview with a male applicant from Iraq, conducted in autumn 2018.

⁷⁰ Interview with Greek Lawyer for an NGO on Chios, conducted in December 2018.

⁷¹ Interview with a male applicant from Iran, conducted in autumn 2018.

V. CONCLUSION

The aim to which the EU Hotspots were adapted upon entry into force of the EU-Turkey Statement – swift return to Turkey as ‘safe third country’ – cannot be achieved due to legal guarantees prohibiting return to the ‘non-safe’ country which Turkey is in fact. This means that the EU Hotspots are functioning as sites of containment and deterrence.

Although, according to the law, vulnerable groups shall be exempted from the geographical restriction, in practice the majority of vulnerable persons are not identified due to a lack of medical staff and other services, as well as unduly restrictive practice during asylum interviews. Even if vulnerable persons are identified as such, they are usually transferred to the mainland with massive delays due to a lack of capacity in the camps on the Greek mainland. This means that vulnerable groups are forced to stay in the EU Hotspot Vial in the same sub-standard conditions as everybody else.

Three years after the entry into force of the EU-Turkey Statement, reception conditions in the EU Hotspot Vial remain inhumane and far from complying with any requirements of EU or Greek law. The geographical restriction imposed on asylum seekers and legally obliging them to stay on the island of Chios amounts to a de facto obligation to stay in the containers or tents in the EU Hotspot Vial. The camp is still severely overcrowded. The most basic legal standards are still not met regarding shelter, sanitary facilities, medical treatment, security, and education. All this has severe repercussions on the physical and mental health of asylum seekers living in the Vial

What remains from the EU Hotspot Approach on the Greek Aegean islands? Inhumane camps at the EU external border causing continued and extreme human suffering in breach of basic legal standards. The situation has been broadly documented for the past three and a half years. And still, the situation remains the same. This leads us to the conclusion the inhumane living conditions are either intended, or at least effec-

tively met with indifference by the relevant political actors.

Who is responsible for the violation of the rights of thousands of asylum seekers? The answer to this question is not that simple. We come to the conclusion that from a political perspective, responsibility lies with the EU and its Member States. Finding an answer to the question of legal responsibility goes beyond the scope of this report.

What do the EU and its member states learn from the ‘hotspot experiment’?¹ Apparently, not much. In June 2018, the European Council came to the conclusion: ‘Since 2015 a number of measures have been put in place to achieve the effective control of the EU’s external borders. As a result, the number of detected illegal border crossings into the EU has been brought down by 95% from its peak in October 2015 [...] The European Council is determined to continue and reinforce this policy to prevent a return to the uncontrolled flows of 2015 and to further stem illegal migration on all existing and emerging routes. [...] As regards the Eastern Mediterranean Route, additional efforts are needed to fully implement the EU-Turkey Statement, prevent new crossings from Turkey and bring the flows to a halt.’²

1 Refugee Support Aegean (Fn. 12).

2 European Council, Conclusions, 28 to 29 June 2019, available online: <https://bit.ly/2OeSzUD> [last accessed: 14 November 2019]; European Commission, Factsheet ‘Migration: Regional Disembarkation Arrangements’, available online: https://europa.eu/rapid/press-release_IP-18-4629_en.htm. Furthermore, the European Council and the European Commission have even proposed to establish similar centres in third countries – the envisaged so-called ‘regional disembarkation platforms’.

In the same vein, several member states governments, in particular the German government, have repeatedly made clear their will to implement the EU-Turkey Statement and the EU Hotspot Approach.³

Instead of addressing the human rights violations at the EU external border, the focus of the EU political actors as well as of the member states clearly lies on the aim of reducing numbers of ‘irregular arrivals’. The EU Hotspots in Greece unequivocally show that such a policy of containment and return is only possible at the cost of gross violations of EU and national law as well as basic human rights. We therefore come to the conclusion that human rights as well as the rule of law dictate a fundamental shift in Europe’s asylum policy.

3 Aljazeera News, ‘EU calls on Turkey to speed up readmission of irregular migrants. Greece, Germany and the European Commission urge Turkey to fully implement its migration agreement with the EU’, 4 October 2019, available online: <https://bit.ly/34ZV6cg>; Hürriyet Daily News, ‘EU to discuss Turkey’s needs on refugee issue: Merkel’, 30 August 2019, available online: <https://bit.ly/2KmbbOQ> [all links last accessed: 15 November 2019].

EQUAL RIGHTS

Beyond Borders

is a non-governmental and non-profit organization, working for the rights of asylum seekers. Equal Rights Beyond Borders is registered in Berlin and Athens and has offices in Berlin, Athens and Chios. All offices work in close cooperation with partners in Greece, Germany and at EU level. In Athens and Chios, we offer free legal aid and representation in asylum procedures, detention and related issues. Both offices are specialized on family reunification procedures. In Berlin, we focus on research, advocacy and strategic litigation on further related illegal administrative practices in Germany. Equal Rights Beyond Borders conducts extensive litigation on the right to family reunion in the Dublin System, as well as in cases of illegal returns to Greece, before German administrative courts.

The work of the Equal Rights Beyond Borders Legal Team and our advocacy for asylum seekers and their human rights would not be possible without our supporters. For our legal aid project on Chios we want to thank in particular:



Evangelische Kirche Deutschland /
Protestant Church Germany



Brot für die Welt /
Bread for the World



UNO Flüchtlingshilfe /
UN Refugee Help

ENCLOSURE 2

Equal Rights Beyond Borders,

'Abandoned and Neglected. The Failure to Prepare for a Covid-19 Outbreak in the Vial Refugee Camp', May 2020, available at: <https://bit.ly/covid19invial> [last accessed: 07/08/2020];

EQUAL RIGHTS BEYOND BORDERS



REPORT

05/20

‘ABANDONED AND NEGLECTED’

THE FAILURE TO PREPARE FOR A COVID-19 OUTBREAK IN THE VIAL REFUGEE CAMP

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EXECUTIVE SUMMARY

In March 2020, Greece announced that it was taking a series of steps to prevent the spread of COVID-19 in the refugee camps throughout the country. These steps included restricting people from leaving the camps without official permission, informing camp residents about COVID-19, and disinfecting frequently used spaces.

Equal Rights Beyond Borders (Equal Rights) interviewed sixteen people living and three people working in the Vial refugee camp on Chios regarding the conditions there during the months of March, April, and May 2020. Residents interviewed by Equal Rights ranged in age from fifteen to fifty-five and three suffer from a chronic illness or serious medical condition.

Our interviews and research indicate that the current conditions in Vial do not meet even the most basic standards for preventing an outbreak and spread of COVID-19 in the camp. All of the residents interviewed by Equal Rights described massive overcrowding, long lines for basic services, intermittent access to tap water, a lack of personal protective equipment and hygiene products, and insufficient medical services. Our interviews also indicate that authorities have not devised an adequate plan for protecting elderly and medically vulnerable residents.

When this report was published, Greece had already begun to lift its most restrictive nationwide measures, allowing people to return to some sense of normalcy, but also opening the door for a potential second wave of the virus. At the same time, the state extended the lockdown measures in the refugee camps through at least June 7 without further explanation. Although countries across the world have relied on restrictions on freedom of movement to curb the virus, controlling refugee and asylum seekers' movement will not by itself contain an outbreak in the camps. Without further measures to address the conditions described in this report, an outbreak in Vial will be impossible to contain.

The inhumane conditions in the camp are the product of years of deliberate policy by Greece and the European Union. With the arrival of COVID-19, however, those policies must change. Greece and the European Union must take immediate steps to address the potential threat of a coronavirus outbreak in Vial and the other island refugee camps. This includes evacuating elderly and medically vulnerable residents from the camps, dramatically reducing overcrowding, increasing the available bathrooms and showers, and regularly providing soap, masks, and other hygiene materials to camp residents. Additionally, although some form of a lockdown may be necessary moving forward, the Greek authorities must nonetheless justify extending the lockdown in refugee camps while lifting it for the general public. Lockdown measures must also comply with domestic, European Union, and international human rights law.

Ultimately, even the best plan may not stop the virus from reaching the island camps. However, a humanitarian disaster is not inevitable. Greece and the European Union must act now, before it is too late.

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I. INTRODUCTION

COVID-19 has presented a public health crisis unprecedented in the modern era. Although the pandemic has brought countries across the world to a halt, it has wrought particular devastation on those communities already marked by inequities. For refugees and asylum seekers living in the notoriously overcrowded Greek island refugee camps, basic protective measures such as self-isolation, social distancing and frequent hand washing are impossible. With little access to healthcare, water, sanitary facilities, and basic information about the virus, people living in the camps have been left without any of the resources they need to protect themselves during the pandemic.

This report aims to document the conditions in the refugee camp of Vial on the island of Chios during the months of March, April, and May 2020, the height of the first outbreak of COVID-19 in Europe. The report, which is based on a series of interviews with residents and staff from Vial, highlights the difficulties residents faced in accessing basic necessities such as food, water, hygiene facilities, and medical services, even as restrictive measures by the state severely curtailed their ability to leave the camp.

It also raises concern about the lack of information provided by the state to camp residents, and failures to reduce crowd sizes or implement social distancing policies.

Although Greece managed to contain its first wave of COVID-19 cases, this should not be a reason for complacency. Experts expect a second wave of the virus once countries begin to reopen, and agree that COVID-19 will continue to pose a significant threat to global populations until there is a vaccine. Already, concerns about a second wave in Greek refugee camps have resurfaced after several newly arrived asylum seekers tested positive for the coronavirus on Lesbos.¹ As Greece begins to lift its strict lockdown measures, the inhumane conditions in Vial have set the stage for a public health disaster; an outbreak in the camp would be impossible to contain. Yet the measures enacted by the government thus far have failed to meaningfully address the potential crisis, and in many cases have only exacerbated existing ones. As Clarisse², a woman from the Democratic Republic of the Congo puts it, *“nothing has changed since the coronavirus emergency . . . we feel abandoned and neglected.”*

1 Ekhathimerini, ‘Two migrants in Lesbos test positive for coronavirus,’ 12 May 2020, available at: <https://bit.ly/36irmt3>. All links last accessed: 25/05/2020.

2 All names in this report have been changed to protect the identities of the speakers.

II. THE EU HOTSPOT VIAL

Background and Legal Context

Background on EU Hotspot Approach and the EU-Turkey Deal

Just over a million people arrived in Europe to seek refuge in 2015.³ While the figure seems derisory when viewed alongside the 500 million people living in the European Union⁴ or the 21 million refugees worldwide at that time,⁵ it constituted a sharp increase compared to the 200,000 individuals who arrived in the EU the year before.⁶ Confronted with this sudden inflow, the European Union reacted in May 2015 by introducing the “Hotspot Approach.”

“EU hotspot” facilities or camps for initial reception, identification and registration of asylum seekers were created in Italy and Greece, with European agencies deployed to support national authorities. At the same time, the EU hotspots were intended as a temporary mechanism to implement the European Relocation Program, which was meant to alleviate the migratory pressure on Greece and Italy by relocating asylum seekers to other EU states. Vial is one of the EU hotspots that was set up in Greece, alongside those on the Greek islands of Lesbos, Samos, Leros and Kos.

Despite their conception as initial reception facilities, Greece has seen an increasing number of asylum seekers who remain trapped in the EU hotspots in appalling conditions. This critical situation is mainly the product of a flawed asylum policy.

The European Union’s policy on asylum is regulated by a number of texts. Among those, the “Dublin III Regulation” is likely the best known, but also of particular relevance to the Greek situation. This regulation, schematically, obliges a person to apply for

asylum in the first European country s/he lays foot on. With Balkan countries having decided in early 2016 to increase controls at their borders, Greece stopped serving as a transit country and instead became the main destination for persons coming from Turkey to apply for asylum.

On March 18, 2016, the EU moreover signed an agreement regarding migration with Turkey, known since as the EU-Turkey Statement.⁷ Several measures are contained in that agreement, but the active prevention of illegal crossings and return of migrants who arrived on the Greek islands to Turkey (after 20 March 2016) is of particular importance.

The day after the Statement entered into force, the purpose of the EU hotspots was completely overhauled. They were no longer conceived as facilities to optimise the asylum procedure and the EU Relocation Program. Instead, they were transformed into detention centres to implement a return policy to Turkey. The decision to detain asylum seekers was however heavily criticised, and having large numbers of individuals locked up generated practical difficulties. The detention scheme was therefore soon replaced by an obligation for all asylum seekers entering the Greek islands to remain on the island on which they arrived.

Up to this day, the EU hotspots are conceived as return centres. The asylum procedure is thus designed with the aim of return; a first decision is made in every case regarding the suitability of returning an asylum seeker to Turkey. Yet, in practice, returns to Turkey cannot be implemented effectively, leaving many people trapped on the islands and for significant periods. According to UNHCR figures, as of March 31, 2020⁸,

3 1,032,428 according to the United Nations Refugee Agency (UNHCR) (UNHCR, *Data portal: Mediterranean situation*, available at: <https://bit.ly/2APVOPo>).

4 Eurostat, ‘La population de l’UE en hausse à 508,2 millions au 1er Janvier 2015,’ 10 July 2015, available at: <https://bit.ly/2XsjxNg>.

5 World Bank, *Refugee population by country of territory of origin*, available at: <https://bit.ly/3edidok>.

6 UNHCR, *Data portal: Mediterranean situation*, available at: <https://bit.ly/2APW6ps>.

7 The EU-Turkey Statement was published as Press Release on 18 March 2016 and entered into force on 20 March 2016, available at: <https://bit.ly/2TAWpPY>.

8 UNHCR, *Returns from Greece to Turkey*, 31 March 2020, available at: <https://bit.ly/3d1wcNL>; UNHCR, *Mediterranean situation*, 3

only 44 Syrian nationals have been returned by Greece to Turkey on the basis that Turkey is a country of first asylum or safe third country. In total, the Greek authorities have deported only 2,140 people to Turkey (many of whom were never able to register as asylum seekers and so did not actually have their asylum claims examined). In 2019, 195 people were readmitted to Turkey, while over 120,000 people arrived on the East Aegean islands that year.⁹ In this context, the islands have become a dead end for many people.

Pre-COVID Reception Conditions

With the EU and Greek government implementing a “containment policy”, the vast majority of people who arrive on Chios are forced to remain in Vial until a decision is made on their asylum application.¹⁰ The dire and deteriorating living conditions that exist in Vial have been highlighted in numerous news articles and reports, including in an extensive analysis published by Equal Rights in 2019.¹¹ It is not the purpose of this report to discuss those conditions in detail, but some elements must be recalled for context.

As of May 2020, over 5,000 people were residing in Vial, which has an official capacity of one thousand.¹² This severe overcrowding inevitably has consequences for access to essential services and to the most rudimentary accommodation. The official camp housing is composed of containers and UNHCR tents, but the increasing number of arrivals has resulted in a serious shortage of the former. Thus, new arrivals are simply told to find themselves a place to sleep, with many sleeping in camping tents and makeshift shelters.

Sanitary facilities are wholly inadequate in the camp.

In the latest “Site Profile” published by UNHCR, it was reported that the camp is only equipped with 53 toilets and 36 showers.¹³ Assuming they all function, that averages to 139 people per shower, and 94 people per toilet. The camp is further divided into three official sections and the water supply for each section is limited per day, rendering it even more difficult to access clean, running water.

Given these dire conditions, and that many have fled traumatic situations from their countries of origin, the need for medical care cannot be overstated. Yet, there are only three doctors available for over 5,000 people. The Greek government funds three doctors and six nurses, however one doctor is tasked solely with medical screenings of newly arrived asylum seekers. In addition, Salvamento Marítimo Humanitario, a Spanish NGO, has a doctor on site who provides medical services in the afternoon, bringing the total number of doctors to four, since Médecins Sans Frontières (MSF) closed their mission in 2019. Based on reports from our clients, the overwhelming majority have stated that their physical and mental health has deteriorated since entering the camp.

A word, lastly, on the length of the asylum procedure. It takes on average four to five months for a person to complete her registration with the Greek Asylum Service. After registration, she has to wait for another six to eight months before having an asylum interview, during which the Greek authorities will evaluate whether it is relevant to return them to Turkey or whether they should instead be granted international protection. These two evaluations may take place in two separate interviews, with results taking an average of nine months. All in all, the procedure takes about a year and a half from start to finish, that is if an

May 2020, available at: <https://bit.ly/3cYNFq1>. Note that due to the COVID-19 crisis returns to Greece have been frozen since March 2020 and arrivals have been extremely low.

9 Cf. UNHCR, *Mediterranean Situation*, available at: <https://bit.ly/3bWeM3L>.

10 Particularly vulnerable individuals can potentially be accommodated outside the camp, but still on the island.

11 Equal Rights Beyond Borders, *The lived reality of deterrence measures: Inhumane camps at Europe’s external borders*, December 2019, available at: <https://www.equal-rights.org/post/vial-report>.

12 Hellenic Ministry of Citizen Protection, *National situational picture regarding the islands of Eastern Aegean Sea*, 5 May 2020, available at: <https://bit.ly/3bY9d4Z>.

13 UNHCR, *Greece – Site Profiles, September 2018*, available at: <https://bit.ly/2TBACTR>.

appeal is not required, which would add an additional three or four months to the length of the time the person is expected to remain in the camp.

Note that a new asylum law was enacted in January 2020 by the recently elected Greek government. Once this law entered into force, people arriving in 2020 were prioritised and their procedures were oftentimes concluded in two or three months.

This was at the expense of all the people who arrived before 2020, including those with serious vulnerabilities. In terms of numbers, 577¹⁴ of the 5,013 persons residing in Vial have gone through this expedited procedure.



Fig. 1
The EU Hotspot Vial from outside

14 UNHCR, *Aegean Islands Monthly Snapshot – January*, 20 February 2020, available at: <https://bit.ly/2LUOyEj> and UNHCR, *Aegean Islands Monthly Snapshot – February*, 20 March 2020, available at: <https://bit.ly/2zhh40k> For March, Greece at first froze the registration of asylum seekers because due to Turkey’s reluctance to stop crossings to Greece at that time (see Reuters, ‘Turkey will no longer stop Syrian migrant flow to Europe: Turkish official,’ 27 February 2020, available at: <https://reut.rs/2WX6G6D>). The COVID-19 crisis thereafter erupted and all registrations and interviews were frozen in Vial until end May.

III. THE THREAT OF COVID-19

In the EU Hotspot Vial

On February 26, 2020, Greece confirmed its first case of COVID-19. As of May 21, 2020, 2,850 people had been infected in Greece, and 166 had died. Worldwide at that time 5,034,458 people had been infected and 329,186 people had died.¹⁵ These numbers are increasing every day and are likely to continue to grow in the absence of a vaccine or cure.¹⁶

COVID-19 is a highly contagious virus. One study found that the virus can survive up to four hours on copper, 24 hours on cardboard, and up to two or three days on plastic. The same study also found that the virus can survive in air droplets for up to three hours.¹⁷ Recently researchers found that people may transmit the virus simply by talking in close proximity to each other.¹⁸ No one is immune to COVID-19. However, older adults and people with underlying medical conditions and compromised immune systems are significantly more likely to develop serious complications or die from the virus.¹⁹

People who live in crowded “collective sites” such as refugee camps are extremely vulnerable to contracting COVID-19 because of the health risks that are

associated with factors such as overcrowding, inadequate shelter, and poor nutrition and health.²⁰ In fact, the highest known person-to-person transmission rates for COVID-19 have already taken place in settings where people were in close proximity to each other without the ability to practice self-isolation and social distancing: in nursing homes, on cruise ships, and in prisons and detention centres.²¹ An analysis recently released by the International Rescue Committee, concluded that an outbreak in refugee camps like Moria on Lesbos would spread fast and devastate the communities living there.²²

The only known methods to reduce the risk of contracting the coronavirus is to prevent infection in the first place through social distancing and improved hygiene, including frequent hand washing with soap and water.²³ Given that conditions in the camp make this impossible, calls to decongest the islands and evacuate the camps have increased in frequency since the threat of COVID-19 emerged, recognizing that, as the IOM’s Director General bluntly stated, “the arrival of COVID-19 in camps is an *inevitability*, not a possibi-

15 CNN, ‘Tracing Coronavirus’ Global Spread,’ available at: <https://cnn.it/2LU69wf>.

16 Equal Rights is not a medical organisation and does not employ medical professionals. For the purpose of this report we consulted the most up to date available information, relying on a range of accredited medical and public health sources to inform our analysis and conclusions. At the same time, much about COVID-19 remains unknown; particularly with respect to how the virus is transmitted and how long it can survive on surfaces and in air droplets. As doctors and researchers learn more about the virus, we recognise that guidelines for how to respond to it are also changing. However, at the time this report was published, the best information available suggests that it would be nearly impossible to contain an outbreak of COVID-19 in a refugee camps like the EU Vial Hotspot.

17 Harvard Medical School: Coronavirus Resource Center, As Coronavirus Spreads, Many Questions and Some Answers, available at: <https://bit.ly/2Zz16JE>.

18 The N.Y. Times, ‘Talking can Generate Coronavirus Droplets that Linger Up to 14 Minutes,’ 14 May 2020, available at: <https://nyti.ms/3d0jmsz>.

19 Ibid.

20 IASC, *Interim Guidance: Scaling-Up COVID-19 Outbreak Readiness and Response Operations in Humanitarian Situations*, March 2020, p. 3., available at: <https://bit.ly/3bPEqYa>.

21 See e.g., The N.Y. Times, 17 April 2020, “‘They’re Death Pits:’ Virus Claims at Least 7,000 Lives in U.S. Nursing Homes,’ available at: <https://nyti.ms/3gi6pDc>, The Guardian, ‘Inside the Cruise Ship that Became a Coronavirus Breeding Ground,’ 6 March 2020, available at: <https://bit.ly/2Tr9VB8>.

22 UNHCR, *Returns from Greece to Turkey, 31 March 2020*, available at: <https://bit.ly/3eiIrWD>. IRC, *New IRC analysis reveals that coronavirus transmission rates in Moria, Al Hol, and Cox’s Bazaar refugee camps could outpace those seen on the Diamond cruise ship*, 1 April 2020, available at: <https://bit.ly/3cPLOUB>.

23 Ibid.

lity.”²⁴ In March 2020 MSF issued an urgent call to evacuate the camps, concluding that “on the Greek island camps people have no option but to live in close proximity [...] COVID-19 may be just the latest threat that people face here, but the conditions they live in make them more vulnerable than the rest of the population.”²⁵ Other NGOs and human rights organisations quickly followed suit.²⁶ On April 16th 2020, the EU Commission issued a Guidance recommending that “Member States’ full reception capacity [be] utilised to provide, to the extent possible, sufficient social distancing between applicants, while isolating those at risk. These measures could serve both as a preventive action, as well as a reactive measure in relation to those tested positive, with particular attention to vulnerable groups, including applicants with disabilities, the elderly or residents with existing health concerns.”²⁷

Government Measures to Prevent the Spread of Covid-19 in Vial

As soon as it became clear that COVID-19 would spread across Europe, Greece and the EU came under pressure to address the potential public health crisis in the overcrowded EU hotspots. However, the majority of the measures that the state has implemented in response to COVID-19 have focused on restrictions on freedom of movement, rather than reducing crowds and preparing for a crisis within the camps themselves.

On March 21, 2020, shortly after Greece reported its

first case, the government with a Joint Ministerial Decision issued a plan restricting freedom of movement in and out of refugee camps and reception centres across the country.²⁸ The operational plan, which the government refers to as the “AGNODIKI” plan in a letter to the European Court of Human Rights (ECtHR), limits entry to staff and residents of the camps and restricts residents from leaving except for a limited list of essential reasons. The government’s plan also called for individual camps to post daily information about virus prevention, clean “indoor common areas” and “doorknobs” daily with disinfectant, and shut down any indoor activities.²⁹ Notably, asylum seekers and refugees do not have free access to the enclosed space in the camp used by the asylum service and medical teams. Cleaning doorknobs is also not relevant to the vast majority of residents who live in tents or other makeshift structures.

In a submission to the European Court of Human Rights on April 1, 2020, in a case filed by Equal Rights, the government also laid out specific steps that it had already taken to prevent the spread of the virus inside Vial specifically. These steps included (1) distributing personal hygiene materials to Vial residents (2) creating four special housing units to hospitalise and/or isolate recovering coronavirus patients and (3) informing residents about restrictions on freedom of movement.³⁰ The government also noted in a separate submission to the ECtHR on April 21, 2020 that the Greek Army is continuing to provide residents of Vial with two bottles of water a day.³¹ Neither the March

24 IOM, *COVID-19 Pandemic Poses Grave Risk to Communities in Displacement Camps*, 04 March 2020, available at: <https://bit.ly/2WO-AhPV>.

25 Medecins Sans Frontieres, *Evacuation of Squalid Greek Camps more Urgent than ever Over COVID-19 Fears*, 19 March 2020, available at: <https://bit.ly/2Xrkvti>.

26 Cf. Human Rights Watch, *Greece: Islands not Prepared for Covid-19, 22 April 2020*, available online: <https://bit.ly/2A3pDeY>. See also Kayvan Bozorgmehr et. al., *Evacuate Moria Now*, available at: <https://www.evacuate-moria.com/>.

27 EU Commission, *Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement*, 16 April 2020, C(2020) 2516 final, p 11, available at: <https://bit.ly/2TAoGll>.

28 Ministerial Decision no 2000/30/21-3-2020 (ΦΕΚ 985/Β/22-3-2020), *Measures against the appearance and spread of COVID-19 in Reception and Identification Centers through the territory, from 21-3-2020 to 21-4-2020*.

29 01/04/2020 Submission of the Greek Government in the case *M.A., v Greece*, Reference, application no. 15192/20, obtained by Equal Rights as a representing party of the procedure.

30 01/04/2020 Submission of the Greek Government in the case *M.A., v Greece*, Reference, application no. 15192/20, obtained by Equal Rights as a representing party of the procedure.

31 21/04/2020 Submission of the Greek Government in the case *M.A., v Greece*, Reference, application no. 15782/20, obtained by

21 ministerial decision nor the government's submissions to the ECtHR offered any serious plans to reduce crowding in the camp, protect vulnerable residents, or implement social distancing measures.

On March 24, 2020 the EU joined the call to evacuate the camps, asking the Greek government to move those most at risk of contracting the virus to accommodation on the Greek mainland.³² Greece initially maintained that there was no room for asylum seekers on the mainland, with Minister for Migration and Asylum Notis Mitarakis insisting that the state has "taken extraordinary measures of health protection and cleanliness in reception structures."³³ However, on April 17, the government announced a scheme in partnership with the IOM and UNHCR to evacuate approximately 2,000 vulnerable asylum seekers from the island EU hotspots to hotels and apartments on the mainland.³⁴ The full transfer was later put on hold because of protest from locals and town officials.³⁵

However, Human Rights Watch concluded that the plan would not have significantly relieved the severe overcrowding in the camps and failed to address the continued gaps in access to water, sanitation, hygiene products, and healthcare.³⁶

On May 4, Greece began lifting some of its COVID-19 measures.³⁷ However, even as Greece began to lift restrictions on movement for the general population, it extended the restrictions on the EU hotspots first through May 21 and then again through June 7.³⁸ Equal Rights is concerned that the government's decision to extend the coronavirus lockdown only for refugee camps was issued without any clear reasoning or legal basis. In particular, we are concerned that the government will continue to rely on the pandemic to implement its broader goals of replacing the island hotspots with closed reception centres.³⁹

Equal Rights as a representing party of the procedure.

32 NPR, 'Greece Records First Coronavirus Cases Among Refugees, Imposes Quarantine on Camp,' 2 April 2020, available at: <https://n.pr/2Zx6fll>.

33 Notis Mitarachi, Minister of Migration & Asylum, 25 March 2020, available at: <https://bit.ly/2ATETLS>.

34 Greek City Times, 'More than 2,000 asylum applicants will be moved from Greek islands due to pandemic fears,' April 2020, available at: <https://bit.ly/2W99CLT>.

35 Amnesty International, *Greece: with Camps on Fire, Transfer of Vulnerable Asylum-Seekers to Mainland Must Urgently Resume*, 27 April 2020, available at: <https://bit.ly/2T1cf1R>.

36 Human Rights Watch, *Greece: Islands not Prepared for Covid-19*, 22 April 2020, available online: <https://bit.ly/2A3pDeY>.

37 Reuters, 'Greece Plans Gradual Relaxation of Lockdown Measures,' 28 April 2020, available at: <https://reut.rs/3dnvOZR>

Migration Greece Info, Facebook (10 May 2020) <https://bit.ly/3cqrX7N>.

38 Migration Greece Info, Facebook (10 May 2020) <https://bit.ly/3cqrX7N>.

39 European Council on Refugees and Exiles (ECRE), *Greece: Return to Plans for Detention Centres on the Islands*, 22 November 2019, available at: <https://bit.ly/3c16Qy8>.

IV. LIFE IN VIAL

During the COVID-19 Crisis

Our reporting indicates that the measures taken to address COVID-19 in Vial did not adequately prepare the camp for an outbreak of the virus. They additionally diverged significantly from the measures announced by the Greek government. Critical shortages of necessary and lifesaving resources remain, and in some cases the measures actually exacerbated pre-existing problems such as overcrowding and a lack of water. Although measures restricting residents' freedom of movement outside of the camp were swiftly implemented and strictly enforced, authorities did not take similar steps to prepare for and prevent a spread within the camp itself.

Access to Information

The government's reported plans required camps to post daily information about the virus and to take preventative measures. However, our reporting found

that this did not happen. In fact, information about the virus seems to have been sparse and its distribution often chaotic.

One of the first pieces of information referring to the virus was a handwritten sign by camp officials informing residents that the hospital was closed because of the "emergency." The sign made no specific reference to the coronavirus, and was posted even before the first restrictive measures were announced. Although the sign was later removed, it is indicative of the haphazard way authorities have distributed information about the virus in Vial.

Every resident interviewed reported that they have obtained most of their information on the virus from Google, social media, and other Internet sites.

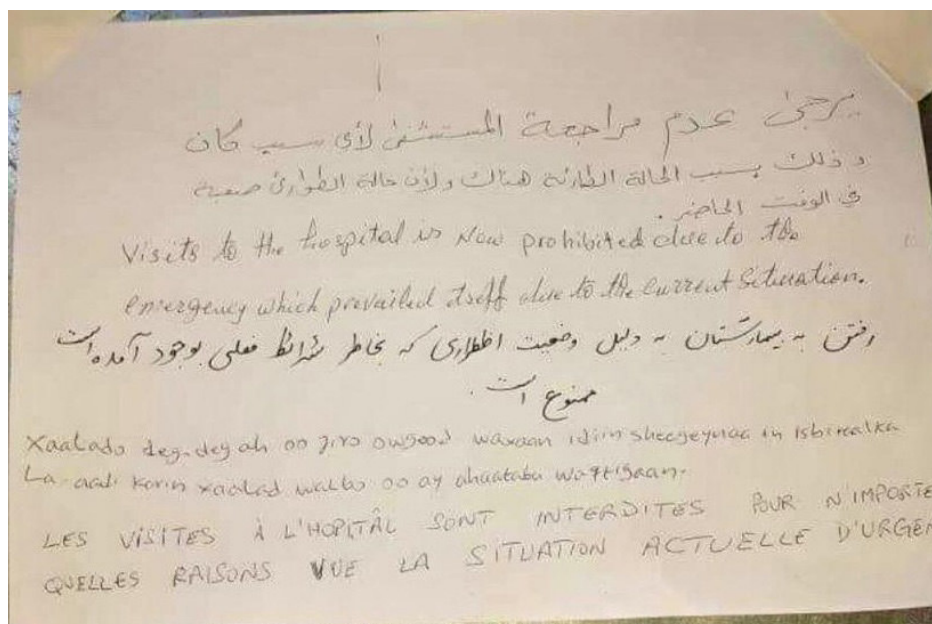


Fig. 2

Sign Informing Residents that Chios General Hospital was closed because of the Emergency



Fig. 3
Information Flyer posted
at the Info Point in Vial

According to residents we interviewed, since March 2020, camp authorities have posted two small flyers at the Info Point, a central area in the camp where residents go for information about their asylum cases, gather food, and access medical services. In some cases the flyers did not even mention COVID-19 or explain how the virus spreads. A picture obtained by Equal Rights shows one flyer that tells people simply to “avoid contacts with people who have fevers or are coughing, wash your hands frequently, and avoid touching your eyes, nose or mouth.” For those with disabilities or other vulnerabilities accessing the information is particularly difficult and puts them at higher risk of contracting the virus. Abdul, a Guinean man who cannot read, stated that he has had to rely on friends to share information with him because authorities have not shared any information orally throughout the camp. Internet and phone access is also an issue for many residents in the context of the

coronavirus. Because people need official permission to leave the camp, some people said they had to wait days before being able to refill their phone credit.

In the absence of coherent official information, rumors and conspiracy theories have taken hold instead, some with potentially disastrous consequences. For example, Amidou, a Togolese man, stated that he read on the Internet that the coronavirus does not infect Black people. As a result, he is not afraid of contracting the virus. In the end, most people we interviewed pointed out the obvious irony: with limited access to water and masks and no practical way to social distance, even the best information would ultimately be in vain.

Hygiene Materials & Sanitary Facilities

Disparate efforts were made throughout the lockdown to provide residents of Vial with hygiene material that would help protect themselves against coronavirus.

Testimonies confirm that soap was distributed at least once at the Info Point. Moreover, UNHCR seems to have handed out sanitary bags containing toothpaste, a toothbrush and soap, although most people we spoke with were not able to obtain a bag due to either a lack of information surrounding the distribution or the length of queues.

Some people interviewed for this report stated that they had not received any hygiene materials either from the Greek government or UNHCR. This included Hariwa and Esin, two minor sisters from Afghanistan, who reported feeling entirely abandoned by the authorities during the public health emergency. As Hariwa told us: *“We are aware that we need to wash ourselves regularly in this situation but no one provided us with soap or hygiene material. No one looked for us, no one provided us with anything, no one voluntarily gave us something.”* Prior to the pandemic, the girls were relying on money transfers from their adult brother living in Germany. However, COVID-related measures in both Greece and Germany made it impossible for him to continue sending money, cutting off their only access to vital financial support. As a result, they had to turn to other camp residents for essentials, including soap, promising they would repay them as soon as possible.

Almost all of the people we spoke with stated that no additional washing facilities were installed in the camp and that many existing facilities were out of service, while the cleanliness of those functioning was deplorable due to severe overcrowding. Some people reported that the authorities were not cleaning the bathrooms throughout the month of April, and that taking a shower was near to impossible because of the long lines, lack of water, and unclean facilities. Yannick, from Cameroon, stated that he had resorted to walking several kilometres to the nearest pond to

wash and bathe.

Our reports confirm that no gloves or sanitizing gel have been distributed in the camp. No central distribution of masks has taken place either. It is reported that an NGO or UNHCR distributed some masks to people in containers, meaning the overwhelming majority did not receive one, since they live in tents or makeshift shelters. Persons who were authorised to exit the camp for groceries report having been unable to purchase masks in pharmacies, while others who were able to do so complained about the price of masks considering their extremely limited resources. Regarding doorknobs and cleaning indoor common spaces as described by the government plans, none of the residents or staff members we spoke with were able to confirm that this did indeed take place.

Representatives of some organisations operating in the camp, which were able to re-open in May, confirm that there has not been a centralised provision of masks by the authorities, be it to staff or residents of the camp.



Fig. 4

Contents of a Hygiene Package handed out to Residents in Vial by UNHCR



Fig. 5 & 6

Dirty and unusable Bathroom and Shower Facilities

Access to Water

Residents interviewed reported that access to both drinking and tap water was insufficient, and in some cases nonexistent. Although it was extremely difficult to leave Vial during the period covered in this report, residents did not receive extra bottles of water. In fact, in most cases the amount of water people received per day actually decreased during the relevant period. Two of the residents we interviewed stated that they received two bottles of water per day.⁴⁰ However, the majority of people stated that since mid-March 2020, they were only receiving one bottle of water per day and occasionally none. Abdullahi, a man from Afghanistan, said that when he asked the police why the water distribution had been cut they told him that there was a water shortage.

All sixteen of the residents we interviewed also described waiting in long lines for water. Several also noted that the amount of water they received depended where they were in line, raising particular concern about access for vulnerable residents. An Afghan family interviewed in March 2020, towards the start of the lockdown, said that they had to begin standing in line at four-o'clock in the morning in order to secure two bottles of water. Oftentimes, they said that they had to stand in line until the early afternoon, even though the father suffers from a medical condition that makes it difficult for him to stand for long periods of time. Hariwa, one of the Afghan minor sisters we interviewed, stated that she did not receive any water on some days during the lockdown because she was standing at the back of the line.

Access to tap water was also a major issue. Even before the pandemic, tap water in Vial was available sporadically, and it does not appear to have increased in light of the coronavirus. One hundred percent of the people interviewed for this report stated that tap water was only available during certain, limited hours of the day, and in general residents described it as “hard

to get,” “unstable,” “not enough,” and “not constant.” Ali, a Syrian man living in the camp said that people living in “the jungle”⁴¹ had begun digging wells to find water for bathing and washing their clothes. The NGO Europe Must Act confirmed the well’s existence in a Facebook post from April 12, 2020.⁴² Even though experts agree that hand washing is one of the most effective ways people can protect themselves from the virus, for people living in Vial frequent hand washing is simply not an option.⁴³

Needless to say, a lack of running water has had a direct impact on the sufficiency of people’s drinking water supply; because people cannot easily access tap water, they often rely on their one or two bottles of water for drinking, cooking, and washing. As Ibrahim from Sierra Leone described the situation: “*drinking one bottle of water for the rest of the day is not sufficient [not to mention using] the same water to wash your hands frequently.*” As summer approaches and with temperatures already surpassing thirty degrees, the state’s failure to provide an adequate water supply takes on new urgency.

Social Distancing & Overcrowding

Because people who are asymptomatic can spread the virus, overcrowding in the camp poses one of the greatest challenges to containing a potential outbreak of COVID-19 in Vial. Social distancing, one of the best tools for curbing the spread of the virus, is simply impossible in the camp.

Residents can only access camp services by queuing. Ibrahim, above, stated that “*it is hard to avoid the crowd. We queue in a very close bodily contact. When we are in the queue people will cough, sneeze, spit.*” Even camp officials acknowledged that social distancing is not possible in the camp. During an April 2020 meeting with humanitarian actors working in Vial, a camp official admit-

40 One person clarified that the bottles were 1.5 liters in size.

41 The Jungle, as residents refer to it, is an area of the camp outside the official parameters of Vial where people live mainly in tents and other unofficial structures.

42 Europe Must Act, Facebook (12 May 2020) <https://bit.ly/36vJX4P>.

43 European Centre for Disease Prevention and Control, Q&A on COVID-19, available at: <https://bit.ly/2yrC4ki>.

ted that preventing close gatherings “*is something that has to be done but for the time being it is not done. This fact is quite alarming. Especially during food and water distribution.*”

As confirmed by residents and people working in the camp, food distributions during the relevant period took place twice a day, as opposed to three times, as was the case prior to the pandemic. Distribution is characterised by long queues, often lasting for hours. Likewise, there are long waiting times in order to use toilets and other sanitary facilities. Additionally, sometime at the beginning of April 2020, officials installed an ATM machine inside of Vial. Residents reported that there was always a large queue to withdraw money. Living and sleeping areas are also close to one

another and overcrowded. Ibrahim from Sierra Leone, expressed his concern, noting that up to eight people may live in close proximity in a single tent or caravan. All of the residents that we interviewed reported that it is impossible to avoid crowds in the camp. Abdul from Guinea mentioned that one of the reasons why it is so difficult to practice social distancing in line is that people do not want to risk losing their spot. In fact, the only way to avoid crowds is to avoid using camp services all together. This is an impossible solution when people cannot leave the camp without official permission, which, as explained below, is difficult to obtain. Yannick, the Cameroonian man we interviewed, stated that he has stopped eating dinner in order to minimise his potential exposure to the virus.



Fig. 7 & 8

No Space for Social Distancing: Crowds of People waiting for Food and other Essential Services

The majority of residents stated that while officials have cautioned people to stand apart from each other in line, in reality there is no official to enforce distancing among refugees and asylum seekers. In one instance however, Hariwa, one of the Afghan minors interviewed, reported that authorities broke up a fight by citing social distancing rules. At the same time, social distancing measures did appear to apply to camp officials and other people working in the camp. Authorities allowed only two residents per service into the camp's enclosed office and medical centre at any given time, and employees were required to keep distance from camp residents at all times.

The fear that if even one person contracted the virus it would spread throughout the camp is omnipresent. Residents feel powerless when faced with the overcrowding and lack of protective resources. As Mohammad, an asylum seeker from Syria, stated: *"People are afraid but they have nothing to do. We live together and in our tents, we visit each other and eat with each other."* Ibrahim, from Sierra Leone expressed his fear in graver terms: *"if this virus enters this camp it will be a genocide."*

Access to Cash, Restrictions of Movement into the City

Although Greece instituted a nationwide lockdown during March and April 2020, it imposed a different set of rules and restrictions on residents of the EU hotspots. During lockdown, all persons in Greece were required to obtain express permission from the Greek authorities - via SMS - in order to leave their homes. People who texted the SMS number received approval to leave their homes within minutes of sending the message. Permission was also not expressly limited to any specific time period or duration, although in practice people could not rely on an approval they received in the morning to then leave again in the evening. However, if a person needed to leave their home twice in one day, they were able to do so by sending another request to the SMS number.

The measure, which was announced nationally and also through a text message sent to every Greek SIM card, was not applicable to people living in Vial. While

some people did venture outside the camp after receiving permission through SMS, they were nonetheless fined €150 by the police.

Shortly after the national lockdown began, the government closed Vial and established police controls right outside the camp. Authorities then announced that people who wanted to leave the camp would need to obtain written permission directly from camp officials. Unlike for the general population, permission to leave the camp was difficult to obtain and given out on a limited basis. Permission slips were distributed from 9AM onwards at the Info Point. To secure an authorization, people reported that they began queuing at five or six o'clock in the morning. The number of authorisations granted per day seems to have varied from thirty to fifty, according to testimonies we received. Permission to leave the camp was also only valid for a set time period of time and limited in duration. However, these restrictions seem to have been unclear and confusing for most residents. Only one person interviewed was aware of the specific hours during which he was allowed to remain outside of the camp. Multiple people also complained that they received fines from the police despite having the required authorisation to leave.

Although essential services such as food, water, and medical services exist in theory inside the camp, those services are limited at best, and in some cases practically non-existent. As a result, even before the pandemic, residents of Vial supplemented camp services with items obtained from the city centre. Yet the lockdown made it difficult for most people to leave the camp at all. As a result, lines for accessing these services also increased drastically. This had the largest impact on elderly residents and people living with disabilities and chronic illnesses, many who struggled to wait in the long lines even before the lockdown. Minors also found it challenging to leave the camp during the lockdown. Hariwa and Esin, the two Afghan sisters we interviewed, had heard that it was very hard for minors to obtain permission to go into the city so did not even try. At the same time, essential services did not increase significantly in Vial during the lockdown, and, as noted elsewhere in this report,

in some cases actually decreased.

However, even for the few people who were able to obtain official permission, the limited duration of the permission slip proved incredibly onerous for people given that Vial is located 8km from the city centre. Residents can, in theory, call a taxi, but COVID-19 measures have restricted drivers to carrying one person per ride, and in general taxis charge a minimum fee of €10, incredibly expensive for someone with limited financial resources. Omar, a Syrian man living with a chronic illness had to walk on at least one occasion to get to the hospital because he could not afford to pay for a taxi. Residents in Vial receive monthly cash assistance from UNHCR, but did not receive it in cash during April, rendering it extra difficult to travel to town. A single ATM was eventually placed in the camp, however the lines for it were long.

People living in Vial may be particularly vulnerable to the virus because of the health risks associated with living in a refugee camp. In theory, this should have led to a significant increase in medical services, but in practice this did not happen.

Access to Medical Care

In a letter submitted to the European Court of Human Rights on May 6, 2020, in a case regarding an applicant represented by Equal Rights, the Greek government reported the following medical services at Vial: “an infirmary of the National Public Health Organization (EODY), staffed with three doctors and six nurses, provides primary medical care. The NGO Salvamento Marítimo Humanitario, staffed with one doctor and one nurse, provides for complementary services in the afternoon. The infirmary is in contact with the Chios General Hospital by making referrals in case of cases which cannot be dealt with on the spot.” The Greek government further explained that the Chios General Hospital suspended its regular operations in order to prevent the spread of COVID-19. Beginning on March 16, the hospital only accepted emergencies referred to them directly by Vial’s medical unit. One

camp employee explained the situation in the following way: “*we have to minimise referrals and transports to the hospital unless it’s extremely urgent and necessary.*”

Residents we interviewed emphasised having to wait in long lines to see a doctor and in many cases being unable to see one at all. During the lockdown a “triage” system was put in place for people waiting to see the doctor. Camp staff took people’s temperatures and those who had a fever or other relevant symptoms were generally able to see a doctor. Everyone else was sent away without clear information about when they would be able to see a doctor. The system also seems to have been arbitrary. Abdul, a Guinean man, explained that “*you can try, but it’s very difficult to see a doctor. You can go to the gate but it’s random [who gets to see a doctor]*”, others described being “pushed back” by the police when they tried to see a doctor. Clarisse from the Democratic Republic of the Congo told us that she spent a month trying to see a doctor for her eight-year-old son who was sick.

As for isolating sick and vulnerable people, information gathered from camp officials indicates that an “emergency clinic” was installed at the beginning of April 2020. The clinic consisted of four containers and was staffed with one doctor and four nurses. Although important, the clinic’s actual function was unclear to both residents and even some people working in the camp. Only one person mentioned that he was aware of the fact that people with high fevers could be isolated in special containers. Additionally, the clinic sparked widespread fear in the camp after an Iraqi woman died while quarantining in one of its containers in late April 2020.⁴⁴ Overall though the clinic did not seem to serve more generally as a way of isolating elderly and medically vulnerable residents.

With regards to testing, none of the residents interviewed for this report were aware of any testing taking place inside Vial. In March 2020, Salvamento Marítimo Humanitario reported on its Facebook page that they were monitoring cases of individuals exhibiting symptoms associated with COVID-19, but that tests

⁴⁴ The Guardian, ‘Fire wrecks Greek refugee camp after unrest over woman’s death,’ 19 April 2020, available at: <https://bit.ly/3glWvAf>.

were not available in the camp at the time.⁴⁵

The critical lack of medical care becomes even starker in the context of the general situation at Chios General Hospital. According to one source, Medical grade masks are in short supply.⁴⁶ The hospital is reportedly operating with 50% of the staff needed, and requested forty-four nurses and other staff during the first months of the pandemic, although received only eight in response. The hospital also does not have enough anesthesiologists, needed for putting people on ventilators. There are seven ICU beds in the hospital, however only three were operational at the time because of a lack of staff and logistical infrastructure.⁴⁷

18 April Fire & Protests

Late on April 18, 2020, a fire broke out in Vial during protests following the death of a 47-year-old Iraqi woman earlier that day. The woman had been taken to the hospital with a fever where she was tested for COVID-19 and then brought to one of the clinic containers outside of Vial. Ultimately she tested negative for the coronavirus, however in the interim there were rumors that she had in fact died from it.⁴⁸ Some people reported hearing her ask for medical help and screaming to be let out from the container, although Equal Rights was unable to independently verify this. The authorities have promised to do an autopsy, however an official cause of death is still pending at the time of writing.

The woman's death caused immense fear and panic in the camp. Police intervened, using tear gas to break up the protests, and some younger residents of Vial retaliated by reportedly throwing stones. At some point a fire broke out in the camp. Police maintained that people living in the camp started the fires; however, others, including residents we spoke with, maintain that the police caused the fire. According to local media, at least twelve people

have been arrested since the April 18th incident.⁴⁹ Hari-wa from Afghanistan, described the following experience that night: *"The night of the fire I went to the toilet. Police saw me and shouted at me to go back inside. I had no idea what was going on. I really needed the toilet and I tried to explain to them. They kicked me on my hand and forced me to go back to the tent. I had bruises for one week after that."* She and her sister are still afraid to leave their tents. *"Since the fire we got very scared and we hardly go out of our tent anymore"*.

Since the protests the police have reportedly become much more aggressive towards people living in Vial. In fact, it was extraordinarily difficult to find people willing to give interviews for this report. Many of the people we reached out to refused to speak to us because they feared reprisal from the police and authorities in the camp. People who had been previously willing to provide information about conditions in the camp were no longer willing to speak, despite a guarantee of anonymity.

The fire caused significant damage to structures in the camp. It destroyed a large part of the camp's administrative offices, the facilities of European Asylum Support Office, a canteen, warehouse tents, housing containers, a food-selling truck and several cars.⁵⁰ Several hundred people also lost their shelter and personal belongings. Zakaria, a resident from Gambia, stated that he has had to sleep outside after losing his tent in the fire. Yannick from Cameroon had been sleeping in a squalid building for about one week. New tents were eventually supplied to residents who lost their shelter, but they are small, temporary tents that are unlikely to withstand a rainstorm or hot summer temperatures.

The problems caused by the fire extend beyond its immediate consequences. In the midst of a pandemic, the fire caused an additional strain on resources in Vial. The fire also shed light on the extreme lack of medical resources in the camp and its lack of capacity to handle emergency

45 Salvamento Marítimo Humanitario, Facebook post, 02/04/2020, available at: <https://bit.ly/2UVcxqY>.

46 Εfsyn, 'Όργη νοσηλευτών: Μένουμε στη μάχη αλλά χωρίς όπλα,' 1 April 2020, available at: <https://tinyurl.com/ycxjxaym>.

47 Ibid.

48 Zeit Online, 'Ausschreitungen in Flüchtlingslager auf Insel Chios,' 19 April 2020, available at: <https://bit.ly/2LXn4xY>.

49 Ekathimerini, 'Ten arrested in Chios migrant camp violence,' 21 April 2020, available at:

<https://bit.ly/3edWrkf>; Ekathimerini, 'Two more suspects arrested over migrant camp riot,' 11 May 2020, available at: <https://bit.ly/2LWhQ5C>.

50 The Guardian, 'Fire wrecks Greek refugee camp after unrest over woman's death,' 19 April 2020, available at: <https://bit.ly/3cZ2Fo7>.

medical situations. With administrative offices and some of the few actual shelters largely destroyed, a

potential COVID-19 outbreak in the camp would be that much more difficult to contain moving forward.



Fig. 9 & 10

Residents walking through destroyed Structures after the Fire on April 18, 2020



V. LEGAL IMPLICATIONS

The conditions in Vial, as described above, raise several serious concerns from a legal perspective. This section aims at providing a brief legal assessment of the situation, taking into account Greek, EU, and international law.

A crucial legal framework to assess Greece's response to the COVID-19 crisis is human rights law. The pandemic does indeed show its tangible effect on human beings and it is a state's binding legal duty to protect people on its territory from events or entities that may harm them. In particular, individuals' right to health and life are the most immediately endangered by the existence of the pandemic.

The right to health is enshrined in Art. 5(5) of the Greek Constitution and, internationally, in Art. 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is defined as an inclusive right extending not only to appropriate health care – the right to which is specifically recognised in EU Law by Art. 35 of the EU Charter of Fundamental Rights (the Charter) and, in the refugee context, Art. 19 of the EU Reception Conditions Directive – but also to the underlying determinants of health, such as access to water, adequate sanitation, food and housing.⁵¹ Art. 3 of the European Convention on Human Rights—the right to be free from inhuman or degrading treatment—does not create an explicit right to health but may imply one in certain situations, particularly when a person is deprived of her liberty.⁵² This report has once more highlighted that the living conditions in Vial do not allow its residents to benefit from the

se aspects of the right to health. Even worse, the pandemic has exacerbated these conditions. The persons who we spoke to reported that the authorities decreased the number of water bottles distributed daily, that the hygiene conditions of the sanitary installations were particularly neglected, and that buying food outside the camp was a significant challenge.

According to Art. 12.2(c) ICESCR, the positive obligations of states to realise the right to health shall include “the prevention, treatment and control of epidemic diseases.”⁵³ This requires “the establishment of prevention and education programmes for behaviour-related health concerns.”⁵⁴ Properly informing individuals, and adopting and enforcing social distancing and containment policies are thus not only a medical necessity, but also a legal obligation in order to protect individuals' health from the risk posed by contact with infected persons. Based on the reports we received, neither of these obligations seems to be fulfilled with regard to Vial. The distribution of information on the disease was limited, endangering camp residents and leading to the spread of rumours, which could further jeopardise safety. Social distancing, albeit recommended, is neither enforced nor possible in practice considering the reigning proximity resulting from the overcrowded camp.

Access to health care requires in turn the “creation of conditions which would assure to all medical service and medical attention in the event of sickness.”⁵⁵ It presupposes, at the very least, to put in place an effective system of urgent medical care which could cope

51 CESCR, *General Comment No. 14: The right to the highest attainable standard of health (Art. 12)*, 11 August 2000, at §11, available at: <https://www.refworld.org/pdfile/4538838d0.pdf>.

52 In *Elefteriadis v Romania*, the European Court of Human Rights held that Art. 3 required the state to protect a prisoner with a serious lung condition from secondhand smoke. ECtHR, 25 January 2011, at § 47, available at: <https://bit.ly/3d48RuU>. The Court also found that fact that the prison was overcrowded or in poor condition did not absolve the state of its obligations under Art. 3 of the ECHR. *Ibid.*, at § 50.

53 Art. 17(2) of the EU Reception Conditions Directive (2013/33/EU) also uses active language: “Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.”

54 *Ibid* (footnote 51), § 16.

55 ICESCR, Art. 12.2(d).

with life-threatening situations such as COVID-19. We remain doubtful that the three doctors present in Vial and the creation of an isolation zone consisting of four containers would suffice in the case of an outbreak of the coronavirus in Vial.

The fundamental right to life is guaranteed by Art. 5(2) of the Greek Constitution to all persons living on Greek territory, Art. 2 of the EU Charter and Art. 6 of the International Covenant on Civil and Political Rights. A state's acts or omissions with regard to health care policy may well constitute a breach of the right to life,⁵⁶ so that states have a positive duty to protect and ensure this right. This should be done by adopting the necessary measures to safeguard the life of people under its jurisdiction and thus to do all they can to prevent lives from being "avoidably put at risk."⁵⁷ States are also responsible under Art. 2 for adequately informing the public about a potentially life-threatening emergency.⁵⁸

Moreover, the Human Rights Committee confirmed that states' duty to protect life requires them to adopt "appropriate measures to address the general conditions in society that may give rise to direct threats to life"⁵⁹, including life-threatening diseases. Measures of this kind include guaranteeing access to food, water, medicines and other objects indispensable to survival, but also "providing for effective emergency health services, engaging in emergency response operations and organizing contingency and emergency management plans."⁶⁰

In other words, the duty to protect the right to life involves advanced planning, adequately informing civilians, and implementing immediate responses to prevent, stop or mitigate the spread of a life-threatening diseases such as COVID-19. The Greek authorities' actions in Vial appear wholly insufficient in light of this standard.

56 ECtHR, *Hristozov et al v Bulgaria*, 13 November 2012, at §106, available at: <https://bit.ly/2WYkbDd>. Note that the rights of the European Convention on Human Rights as interpreted by the European Court of Human Rights constitute, at least, general principles of EU law pursuant to Art. 6 of the Treaty on European Union. The EU Charter also expressly states in Art. 52 that in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

57 ECtHR, *L.C.B. v UK*, 9 June 1998, at §36, available at: <https://bit.ly/36q4JCW>.

58 ECtHR, *Budayeva and Others v. Russia*, 20 March 2008, at §§ 131, 152, available at: <https://bit.ly/3edY55p>.

59 Human Rights Committee, General Comment No. 36, 30 October 2018, at §26.

60 Ibid. See also ECtHR, *G.N. et al v Italy*, 1 December 2009, at §79, available at: <https://bit.ly/2XpYXNt>.

VI. CONCLUSION

On May 20, 2020 Greece announced that it would open the country to tourism beginning in June.⁶¹ Although the government has made clear that it reserves the right to re-impose the lockdown measures at any time, the country's decisions to open its international borders brings with it a renewed risk of a COVID-19 outbreak in Vial and the other EU hotspots. Yet as this report makes clear, Greek authorities are not prepared for an outbreak in Vial. Critical shortages of water, sanitary facilities, and medical services remain; elderly and immunocompromised individuals continue to live in the camp without proper areas to isolate; and overcrowding makes social distancing impossible.

As Greece prepares to open the country to domestic and international tourists, important questions about how the state plans to protect people seeking asylum remain: will evacuations of vulnerable people resume? Will a second lockdown look the same as the first? Will newly arrived asylum seekers be tested? Will more isolation units be built?

And, how will water shortages be addressed? With summer quickly approaching and temperatures already reaching thirty degrees, answering these questions becomes all the more urgent. Without air conditioning and limited water in the camp, restricting residents' access to the sea and city centre would have human rights consequences well beyond the ones described in this report.

Like many other countries, Greece was not prepared for the coronavirus. But while the EU and Greece may not have planned for a pandemic, EU hotspots like Vial are the product of a deliberate policy. For the past four years, thousands of people have been forced to live in overcrowded and poorly maintained refugee camps under the guise of the EU-Turkey deal. Now, with COVID-19, that policy threatens the life of every single person living in the island camps. Greece and the EU should take immediate steps to reduce crowding in the hotspots and address the shortage of necessary and life-saving resources.

61 BBC, 'Coronavirus: Greece to reopen to tourism season in June, PM says, 20 May 2020, available at: <https://bbc.in/2TzwXpP>.

METHODOLOGY

In preparing this report, Equal Rights collected testimonies from sixteen people living in Vial between March 18 and May 13, 2020, and three people working in Vial during the relevant period. The interviews began at the start of the lockdown in Greece and continued as new policies were implemented and developed. Equal Rights has had a presence in Chios since 2016, and relied on our contacts in Vial to identify interview subjects. Equal Rights obtained consent from every person interviewed to use their statements in this report, and explained to them that the report would not contain any names or other identifying information. Subjects did not receive any payment or services in exchange for their participation in the interviews.

Because of measures in place restricting movement in and outside of the camp, Equal Rights was unable to conduct in-person interviews. Instead, interviews were conducted over the phone and via WhatsApp. Interviews were conducted in Arabic, Farsi, and French, with the assistance of translators for Arabic and Farsi speakers. Interviews were conducted in subjects' native languages or a language in which they were proficient. Ten interviews with residents were

conducted over the phone, and six through WhatsApp messaging. Regarding employees working in Vial, two were conducted over the phone and one over WhatsApp. For phone interviews we relied on a standardised questionnaire and those interviewed were all asked the same set of questions. The interviews over WhatsApp also relied on a standard set of questions, however were shorter, and, in some cases, more open-ended than the phone interview questions.

The people we interviewed were from Afghanistan, Cameroon, Democratic Republic of the Congo, Gambia, Guinea, Iran, Sierra Leone, Syria, and Togo. Names were changed to protect the identities of the people interviewed. Subjects' average age skewed young—most were in the twenties and thirties—reflecting the population in Vial more generally. The oldest person included in this report is fifty-five and the youngest is fifteen. Three of the people interviewed have either a chronic illness or serious medical condition. Finally, we obtained and analyzed photographs and videos corroborating the conditions described during the various interviews. Several of those photographs are included in this report.

EQUAL RIGHTS BEYOND BORDERS

is a non-governmental and non-profit organization, working for the rights of asylum seekers. Equal Rights Beyond Borders is registered in Berlin and Athens and has offices in Berlin, Athens and Chios. All offices work in close cooperation with partners in Greece, Germany and at EU level. In Athens and Chios, we offer free legal aid and representation in asylum procedures, detention and related issues. Both offices are specialized on family reunification procedures. In Berlin, we focus on research, advocacy and strategic litigation on further related illegal administrative practices in Germany. Equal Rights Beyond Borders conducts extensive litigation on the right to family reunion in the Dublin System, as well as in cases of illegal returns to Greece, before German administrative courts.

The work of the Equal Rights Beyond Borders Legal Team and our advocacy for asylum seekers and their human rights would not be possible without our supporters.

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ENCLOSURE 3

Nora Markard/Robert Nestler/Vinzent Vogt/Catharina Ziebritzki,

'No State of Exception at the EU External Borders. The Implications of the Rule of Law in the Context of the Greek-Turkish Border Closure and the Temporary 'Suspension' of the Asylum Law in Greece', Expert Legal Opinion for the The Greens/EFA group in the European Parliament, March 2020, available at: <https://bit.ly/M.S.S.stateofexception> [last accessed: 07/08/2020].



No State of Exception at the EU External Borders

The Implications of the Rule of Law in the Context of the Greek-Turkish Border Closure and the Temporary 'Suspension' of the Asylum Law in Greece

Date: 30/03/2020

Expert Legal Opinion commissioned by Erik Marquardt MEP

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Executive Summary

This study assesses the measures taken by the Greek government and the European Union (EU) since the end of February 2020 in response to Turkey's decision to cease its non-departure measures for refugees and asylum-seekers. It analyses the recent closure of the Greek-Turkish border and the temporary 'suspension' of the asylum law in Greece from the perspective of EU law, the European Convention on Human Rights (ECHR), and international refugee law. The opinion concludes that pushbacks or deportations without an individual asylum procedure violate the prohibition of refoulement and the prohibition of collective expulsion. The excessive use of violence at the border constitutes a severe violation of basic human rights, including the right to life. The opinion presents several alternatives to these reactions: EU asylum law in particular provides for solidarity measures and adaptations of the asylum procedure, which are available as appropriate and legal reactions.

MAIN FINDINGS

Background to the current events

- In March 2016, the EU-Turkey Statement was concluded between the EU member states and Turkey.
- As a result, **for the past four years**, Turkey has **actively prevented** refugees from leaving towards Greece. Those non-departure measures violate the human right to leave any country.
- Turkey has become **host to the largest number of refugees in the world**. Currently, about 4.1 million refugees live in Turkey.
- At the end of February 2020, Turkey announced that it would 'open its borders' for refugees wishing to depart towards the EU, citing violations of the EU-Turkey Deal by the EU and its Member States as reason.

Measures taken by Greece since 1 March 2020

- On 1 March 2020, Greece has 'closed' the EU external border to Turkey.
- On 2 March 2020, Greece adopted a '**suspension of the asylum law**' for one month.
- **Violent pushbacks** are taking place at the Greek-Turkish border. Those are carried out by state forces and by private parties.
- Asylum seekers who arrived to Greece after 1 March 2020 are **to be deported without an individual asylum procedure**.

Legal assessment of the measures taken by Greece

The measures taken by Greece are incompatible with EU law and with international law. There are **no legal grounds for suspending asylum law, refusing to receive asylum applications, or returning persons without an individual examination of their protection needs**.

1. **States may not suspend asylum law or refuse to receive applications for asylum** because of unwelcome arrivals.

- EU member states are obliged by the EU Asylum Procedures Directive to carry out asylum procedures whenever an asylum claim is made. The fact that the applicant arrived in an irregular fashion does not affect this obligation.
 - Effective access to an asylum procedure is also a necessary means for states to guarantee compliance with their non-refoulement obligations and with the prohibition of collective expulsions under international law.
- 2. Pushbacks or deportations without an individual procedure violate EU and international law** in several respects.
- Specifically, they constitute **a violation of the non-refoulement obligation**, as laid down in:
 - Art. 33 of the Geneva Convention 1951, a **cornerstone of international refugee law**;
 - Art. 3 of the European Convention on Human Rights (ECHR), an **absolute, fundamental right**;
 - Art. 78 para 1 of the Treaty on the Functioning of the European Union (TFEU) and Art. 4, 18 and 19 of the Charter of Fundamental Rights (CFR), the **normative basis of the Common European Asylum System**.
 - Pushbacks or deportations without an individual procedure also **violate the prohibition of collective expulsion** as granted by Art. 19 para 1 CFR.
 - **Crucially, the oft-cited European Court of Human Rights judgment in the case N.D. & N.T. is not applicable to the situation at the Greek-Turkish border.**
 - In addition, **they violate the right to an effective remedy** as granted by Art. 13 ECHR and Art. 47 CFR.
 - Finally, those measures violate **EU asylum law**, and, in particular, the Asylum Procedures Directive.
- 3. Pushbacks or deportations without an individual procedure cannot be justified under EU law or European human rights law.** Specifically:
- The **public policy clause of Art. 72 TFEU cannot be used to justify** the violation of absolute fundamental rights.
 - The **emergency clause of Art. 78 para 3 TFEU cannot be invoked unilaterally by a member state**. Invoking it requires a specific procedure and the adoption of a Council decision.
 - Under EU law, there is **no possibility to derogate from fundamental rights**. EU law does not foresee a state of exception that could justify the ‘suspension’ of fundamental rights.
 - As an **absolute right**, Art. 3 ECHR does not allow for any justification of an infringement at all.
- 4. The current situation violates the foundational values of the Union, namely the rule of law and respect for human rights, as granted in Art. 2 TEU.**

Failure to act by the EU

- The legal responsibility for the administration of the Greek-Turkish border is shared between the Member States and Frontex, since it is part of the **external border of the EU**.
- The Commission is responsible for monitoring Greece's compliance with the **Common European Asylum System**, of which the Greek asylum system is part, and with the **foundational values of the Union** under Art. 2 TEU, namely the rule of law and respect for human rights.
- Despite its role as the guardian of the Treaties under Art. 17 para 1 TEU, the Commission has failed to react to the 'suspension' of the EU asylum law in Greece and to the illegal pushbacks at the EU border between Greece and Turkey.
- So far, the Commission has only announced enhanced financial support and increased Frontex support to Greece, thereby also signalling support for its policies.

Alternative measures available to the EU and its member states

There is a number of **alternative measures** available to the EU and its member states.

- EU law foresees **solidarity measures** in cases of particular stress to a member state's asylum system. In particular, the following measures are available:
 - The **European Asylum Support Office** (EASO), the EU agency with a mandate to support Greece in processing asylum claims, could increase its operational support to Greece.
 - The Council could adopt **Relocation Programme** under Art. 78 para 3 TFEU.
- In case that the EU for political reasons does not adopt the required solidarity measures, individual member states or groups of member states could **adopt bilateral solidarity measures** to support Greece.
- In particular, asylum applicants could be relocated from Greece to other member states.

A. The Background

I. The EU-Turkey Statement and the Border Closure by Turkey since March 2016

On 18 March 2016, the ‘EU-Turkey Statement’ (commonly known as the ‘EU-Turkey Deal’) was published as a press release by the European Council.¹ The Statement’s main objective was to ‘*end irregular migration from Turkey to the EU*’.² In order to achieve this goal, several measures were agreed upon, inter alia, the provision of considerable financial support to Turkey, and a return policy applying to asylum applicants who have entered the EU irregularly from Turkey via the Greek Aegean islands.³

Indeed, immediately upon the EU-Turkey Statement’s entry into force, the number of persons irregularly entering from Turkey to the EU in search of international protection *decreased substantially and sustainably*.⁴

The immediate decrease in the numbers of arrivals to the EU was, at least inter alia, owed to *measures taken by Turkey to prevent departures*, effectively closing its border with Greece for protection seekers wishing to cross into the EU. The European Commission in its regular reports on the EU-Turkey Deal acknowledged that the ‘Turkish Coast Guard has continued active patrolling and prevention of departures from Turkey.’⁵ The violation of the human right to leave any country was then at least tacitly accepted by the EU and Turkey.⁶

Also as an effect of this non-departure policy, Turkey has become host to the *largest number* of refugees worldwide with approximately 4.1 million refugees.⁷ Pressure on Turkey continues to be high: Over the course of the civil war, almost 1.5 million refugees fled from other regions of Syria to the Idlib region. Between December 2019 and February 2020, almost a million residents of Idlib have been internally displaced in the region.⁸ Meanwhile, the EU member states have still not set up a large-scale resettlement programme, as envisaged in the Statement once the numbers had stabilized.⁹ Within three years, only about 20,000 refugees have been resettled from Turkey to the EU under the so-called ‘1:1 scheme’ which was prominently provided for in the EU-Turkey Statement.¹⁰

¹ European Council, EU-Turkey statement, 18 March 2016, Press Release of 18 March 2016, available online: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> [hereinafter: *EU Turkey Statement*]. All online sources last accessed 19 March 2020.

² EU Turkey Statement (fn.1): ‘the EU and Turkey today decided to *end the irregular migration from Turkey to the EU*. In order to achieve this goal, they agreed on the following additional action points. [...]’ [emphasis added].

³ EU Turkey Statement (fn.1), point 1 and 6. The number of deportations from Greece to Turkey has remained low during the past four years, because Turkey can in most cases not be considered as safe third country.

⁴ see for numbers: European Commission, ‘Factsheet. The EU-Turkey Statement, Three years on’, March 2019, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information_en.

⁵ European Commission, ‘Sixth Report on the Progress made in the implementation of the EU-Turkey Statement’, 13 July 2017, COM (2017) 323 final, p. 4: ‘On its side, the Turkish Coast Guard has continued active patrolling and prevention of departures from Turkey.’ [emphasis added].

⁶ Cf for a similar constellation and the legal implication: Nora Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’, in *European Journal of International Law*, Volume 27 (2016) Issue 3, Pages 591–616; short summary online here: Nora Markard, ‘Is It a Violation of the Right to Leave to Prevent Migrants from Crossing the Border to Another State?’ (2016), available at: <https://lt.org/publication/it-violation-right-leave-prevent-migrants-crossing-border-another-state>.

⁷ United Nations High Commissioner for Refugees, ‘Operations, Turkey’ (2020), available at: <http://reporting.unhcr.org/node/2544>.

⁸ Florian Kriener, ‘Der Alptraum in Idlib. Die neusten Entwicklungen im syrischen Bürgerkrieg aus der Perspektive des jus contra bellum’, *Völkerrechtsblog*, 12 March 2020, available at: <https://voelkerrechtsblog.org/der-alptraum-in-idlib/>.

⁹ The so-called ‘Voluntary Humanitarian Admission Scheme’ (V-HAS) was to be activated once border-crossings from Turkey to Greece had substantially and sustainably decreased, see EU Turkey Statement (n.1), point 4. However, the V-HAS has not been activated until now.

¹⁰ EU Turkey Statement (n.1), point 2; European Commission, ‘Factsheet. The EU-Turkey Statement, Three years on’, March 2019, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information_en.

II. The End of Turkey's Non-Departure Policy in February 2020

During the past four years, Turkey has repeatedly announced plans to 'open its borders' to refugees as a way of exercising political pressure on the EU.¹¹ However, political negotiations have so far successfully prevented Turkey from following through.

This changed at the end of February 2020, when Turkey decided that it would no longer prevent refugees from departing the country towards the EU, and at the same time 'invited' refugees staying in Turkey to leave the country for Greece. President Recep Tayyip Erdogan explained: 'It's done. It's finished. The doors are now open. [...] Hundreds of thousands have crossed, soon it will be millions.'¹²

B. The Events and Measures Adopted by Greece Since 1 March 2020

In the hours following President Erdogan's announcement, the pressure at Greece's borders increased immensely. Aided by Turkey, thousands of people approached the land and sea borders of Greece in the regions of Evros and the Aegean islands.¹³

I. The Closure of the Greek-Turkish Border

Greece's initial reaction was to announce that it would close the borders to Turkey.¹⁴ This action was accompanied by several actions, including practical measures to prevent or obstruct border crossings, and pushbacks and deportations of those who had crossed the border into Greek territory. The border with Turkey was militarized and reinforcements were sent to protect the area. Further, Greece designated the entire border area as a site for military testing, allowing forces to shoot live ammunition.¹⁵ In addition, Greece just recently announced that it would expand its border fence from 12.5 to 36 km.¹⁶ The 'sealing' of the land border inevitably coincided with an increased pressure by individuals gathering on the Turkish side attempting to enter into Greek territory.

1. Denial of Entry to the Greek territory

The primary intended consequence of Greece's decision to 'seal' the land border was a general policy of denial of admission to the Greek territory. Not only was the border closed in a legal sense, Greek authorities also adopted proactive measures to violently prevent people from approaching and crossing it. These measures resulted in thousands of individuals being violently denied access to Greek territory.

¹¹ See for example: Ekatherimi, 'Erdogan threatens to flood Europe with some 5.5 million refugees', 09 September 2020, available at: <https://bit.ly/2vcFkP5>; Deutsche Welle, 'Erdogan threatens to open borders after European Parliament vote', 25 November 2016, available at: <https://bit.ly/2vZedXU>.

¹² Deutsche Welle, 'EU offers Greece migration support amid mounting refugee crisis', 3 March 2020, available at: <https://www.dw.com/en/eu-offers-greece-migration-support-amid-mounting-refugee-crisis/a-52623868>.

¹³ Ekathimerini, 'Tensions rise as more migrants reach Greek border', 29 March 2020, available at: <http://www.ekathimerini.com/250085/Art/ekathimerini/news/tensions-rise-as-more-migrants-reach-greek-border>; Al Jazeera, 'Greece on the defensive as Turkey opens border to refugees', 1 March 2020, available at: <https://www.aljazeera.com/news/2020/02/greece-defensive-turkey-opens-border-refugees-200229091808379.html>.

¹⁴ Ibid.

¹⁵ Ekathimerini, 'Greece conducts military exercises near Evros', 2 March 2020, available at: <http://www.ekathimerini.com/250100/Art/ekathimerini/news/greece-conducts-military-exercises-near-evros>. Immediately after the border was closed, the mentioned military exercise was announced.

¹⁶ Die Presse, 'Griechenland beginnt Ausbau von Grenzzaun', 09 March 2020, available at: <https://www.diepresse.com/5781926/griechenland-beginnt-ausbau-von-grenzzaun>.

This measure particularly concerns the official border crossing point between Edirne on the Turkish and Kastanies on the Greek side where at least several thousand persons were denied access.¹⁷ Lawyers from the Greek side had no means of meeting those persons in order to provide legal services – they were separated from them by a fence and line of armed forces. From the Turkish side, lawyers had access. The Istanbul Bar Association Human Rights Centre for Refugee Rights is regularly reporting on the situation.¹⁸ Refugees present at the border had often already crossed the customs office, meaning they could not easily return to wherever they were staying in Turkey, as Turkish border guards were blocking the entry to the customs office.¹⁹ In other words, they are trapped in a ‘no man’s land’ at the border.

In addition, persons have also tried to cross the land border between Greece and Turkey separated by the river Evros.

2. Pushbacks and Deportations without Individual Procedures

The relatively few persons who managed to enter Greek territory were swiftly pushed back to Turkey. They were not registered and thus prevented from having access to procedures for applying for international protection, in line with the provision of the Emergency Legislative Decree of 2 March 2020 (‘Suspension Act’, see B.II). In particular, the authorities did not conduct individual examinations in an appropriate and differentiated manner, and also prevented the individuals from putting forward arguments against the measure.²⁰

On the Aegean islands, the situation was similar. Since Turkey’s announcement that it would open its borders, the number of individuals arriving to the islands substantially increased. Following the adoption of the ‘Suspension Act’ (see B.II), authorities have denied new arrivals access to both asylum registration procedures and to the camps. Instead, new arrivals have been detained in unofficial and unequipped facilities (i.e. in Lesvos on a vessel anchored in the port and in Chios in a municipality building)²¹ awaiting their deportation first to mainland Greece and then from there to Turkey or their country of origin. Lawyers have been systematically denied access to the facilities where asylum seekers are being detained.²² Information on detention sites, destinations of deportations, and dates of transfers, has so far been absent or confusing, however alarming reports have emerged shedding some light on the situation.²³

¹⁷ Focus, ‘In Griechenland wächst Sorge über Entsendung von türkischen Spezialkräften’, February 2020, available at: https://www.focus.de/politik/ausland/focus-online-in-kastanies-fluechtlinge-eingekesselt-erdogan-schickt-1-000-polizisten-um-druck-auf-eu-zu-erhoehen_id_11743846.html.

¹⁸ See Istanbul Bar Association Human Rights Centre for Refugee Rights, ‘Report on Istanbul Bar Association Human Rights Center’s Visit to Pazarkule Checkpoint on 4-5 March 2020’, 8 March 2020, available at: <https://twitter.com/istbaroihm/status/1236757730637099012?s=20>.

¹⁹ According to the experience of Niki Georgiou, attorney at law, working with Equal Rights Beyond Borders.

²⁰ Al Jazeera, ‘Turkish police bolster Greek border to stop migrants’ return’, 5 March 2020, available at: <https://www.aljazeera.com/news/2020/03/turkish-police-bolster-greek-border-stop-migrants-return-200305114014230.html>; The Guardian, ‘Refugees told ‘Europe is closed’ as tensions rise at Greece-Turkey border’, 6 March 2020, available at: <https://www.theguardian.com/world/2020/mar/06/refugees-europe-closed-tensions-greece-turkey-border>.

²¹ Greek Reporter, ‘Greek Navy Ship Arrives in Mytilene to House Refugee, Migrant Families’, 04 March 2020, available at: <https://greece.greekreporter.com/2020/03/04/greek-navy-ship-arrives-in-mytilene-to-house-refugee-migrant-families/>; StonsiGr, ‘508 in the port’, 03 March 2020, available at: https://www.stonisi.gr/post/7345/508-sto-limani?fbclid=IwAR18VyvHPWIEQJ-fREdcVEq6klwq04_gU5xHSO6SSyBjrkvuuWEE6Gbh-rg#.Xl4LerttclI.facebook.

²² According to the experience of Niki Georgiou and Aliko Potamianou, attorneys at law, working with Equal Rights Beyond Borders.

²³ See New York Times, ‘We are Like Animals’: Inside Greece’s Secret Site for Migrants’, 10 March 2020, available at: <https://www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html>; Human Rights Watch, Greece/EU: ‘Allow New Arrivals to Claim Asylum’, 10 March 2020, <https://www.hrw.org/news/2020/03/10/greece/eu-allow-new-arrivals-claim-asylum>.

There have also been reports of criminal proceedings and charges against filed against persons who entered the country since 1 March 2020.²⁴

Although the number of people crossing the northern border and Aegean Sea has decreased over the past week,²⁵ these pushbacks are continuing and will continue as long as the legislative decree remains in place.

3. Violence Against Asylum Seekers at the Borders

Immediately following the State's adoption of the border closure, witnesses reported a disproportionate use of violence against persons trying to enter Greece. Greek border patrols repelled individuals attempting to cross by firing teargas, water cannons, stun grenades, and artillery directly towards them.²⁶ Different sources report the death of at least one person, a Syrian man, killed by bullets shot from the Greek side of the border. Greece, openly accused of causing the man's death by the Turkish foreign minister, denied its involvement in the casualty and referred to it as 'fake news.'²⁷

But the violence against asylum seekers goes far beyond preventing them from attempting to cross the border. Asylum seekers pushed back to the Turkish side reported that the Greek police had beaten them, confiscated their phones, money, documents and other belongings, and had forced them to return to Turkey in their underwear.²⁸ On 10 March 2020, the New York Times published a sweeping investigative report showing that the Greek government has been detaining asylum seekers in a 'secret extrajudicial location' before expelling them to Turkey.²⁹ The report noted that detainees have had no access to legal counsel and documented appalling conditions at the site.³⁰ On Lesbos, where over 450 asylum seekers are currently detained on a naval ship off the coast, Human Rights Watch has found that people do not have enough food

²⁴ Tagesschau, 'Missachtet Griechenland Migranten-Rechte?', 12 March 2020, available at: <https://www.tagesschau.de/investigativ/monitor/griechenland-fluechtlinge-schnellverfahren-101.html>; Urdupoint, 'Greece Notes Decrease In Number Of Illegal Border Crossing Attempts From Turkey - Reports', 04 March 2020, available at: <https://www.urdupoint.com/en/world/greece-notes-decrease-in-number-of-illegal-bo-855038.html>.

²⁵ See France 24, 'Erdogan Order Turkish Coastguard to Block Migrants Crossing Aegean Sea', 7 March 2020, available at: <https://www.france24.com/en/20200307-erdogan-orders-turkish-coastguard-to-block-migrants-crossing-aegean-sea>.

²⁶ Ekathimerini, 'Migrants, police clash again on Greek-Turkish border', 6 March 2020, available at: <http://www.ekathimerini.com/250298/Art/ekathimerini/news/migrants-police-clash-again-on-greek-turkish-border>; Ekathimerini, 'Thousands of migrants rush to cross Greek-Turkish border', 2 March 2020, available at: <http://www.ekathimerini.com/250111/Art/ekathimerini/news/thousands-of-migrants-rush-to-cross-greek-turkish-border>.

²⁷ The Guardian, 'Migration: EU praises Greece as 'shield' after Turkey opens border', 3 March 2020, available at: <https://www.theguardian.com/world/2020/mar/03/migration-eu-praises-greece-as-shield-after-turkey-opens-border>; Ekathimerini, 'Turkey deploys 1,000 police at Greek border to stem pushback of migrants', 5 March 2020, available at: <http://www.ekathimerini.com/250256/Art/ekathimerini/news/turkey-deploys-1000-police-at-greek-border-to-stem-pushback-of-migrants>; Ekathimerini, 'Greece calls 'fake news' on news of dead refugee', 2 March 2020, available at: <http://www.ekathimerini.com/250110/Art/ekathimerini/news/greece-calls-fake-news-on-news-of-dead-refugee>; Al Jazeera, 'Greece denies killing migrant attempting to cross from Turkey', 4 March 2020, available at: <https://www.aljazeera.com/news/2020/03/greece-denies-killing-migrant-attempting-cross-turkey-200304113034335.html>; for a reconstruction of the incident: Forensic Architecture, 'The Killing of Muhammad al-Arab', 5 March 2020, available at: <https://vimeo.com/395567226>, cf. Forensic Architecture, twitter, <https://mobile.twitter.com/ForensicArchi/status/1235325831607652352>

²⁸ Al Jazeera, 'Greece denies killing migrant attempting to cross from Turkey', 4 March 2020, <https://www.aljazeera.com/news/2020/03/greece-denies-killing-migrant-attempting-cross-turkey-200304113034335.html>; Sky News, "'They shot us with rifles': Migrants blame Greek authorities for border bloodshed", 5 March 2020, available at: <https://news.sky.com/story/they-shot-us-with-rifles-migrants-blame-greek-authorities-for-border-bloodshed-11949747>; Middle East Eye, "'They showed us no mercy": Greek border forces accused of stripping, beating refugees', 6 March 2020, available at: <https://www.middleeasteye.net/news/they-showed-us-no-mercy-greek-security-forces-accused-stripping-beating-refugees>.

²⁹ New York Times, "'We are Like Animals': Inside Greece's Secret Site for Migrants", 10 March 2020, available at: <https://www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html>.

³⁰ Ibid.

and that there are only ‘3 toilets for 451 people.’³¹ Human Rights Watch also reported that pregnant women and new mothers are among those currently on the ship.³²

The Istanbul Bar Association Human Rights Centre for Refugee Rights³³ reports several incidents of severe injuries, sexual harassment of women during pushbacks, and the separation of children from their families.

In addition to the military and police, groups of private individuals in the border region have joined forces with authorities to voluntarily patrol the area as ‘village guards’. Dressed in black clothes and military-style boots, these individuals have reportedly carried out violent ‘pushbacks’ on their own.³⁴ In some cases, they have even been armed.³⁵ Far from discouraging or preventing such actions, Greek Prime Minister Kiriakos Mitsotakis has actually thanked locals for helping to stop migrant crossings.³⁶

II. The Suspension of the Asylum Law in Greece

In addition to these practical measures, Greece on 02 March 2020 adopted an Emergency Legislative Act in response to the ‘asymmetrical threat’ posed by migration (hereafter: *Suspension Act*).³⁷ This emergency legislation suspends asylum applications for persons entering the country irregularly for a period of one month. These persons will be returned, without registration, to their country of origin or transit (i.e. Turkey). The emergency act applies retroactively as from 01 March 2020.³⁸

The UNHCR swiftly condemned the emergency act, stating that it violated international law.³⁹

III. The EU’s Reaction

On 3 March 2020, European Commission President von der Leyen, as well as the Presidents of the European Council and the European Parliament visited Greece.⁴⁰ At that point, there were already reports of several casualties, including a child who drowned when a dinghy capsized off the island of Lesbos.⁴¹

³¹ Human Rights Watch, ‘Greece/EU: Allow New Arrivals to Claim Asylum’, 10 March 2020, available at: <https://www.hrw.org/news/2020/03/10/greece/eu-allow-new-arrivals-claim-asylum>.

³² Ibid.

³³ See Istanbul Bar Association Human Rights Centre for Refugee Rights, ‘Report on Istanbul Bar Association Human Rights Center’s Visit to Pazarkule Checkpoint on 4-5 March 2020’, 8 March 2020, available at: <https://twitter.com/istbaroihm/status/1236757730637099012?s=20>.

³⁴ New York Times, ‘Vigilantes in Greece Say “No More” to Migrants’, 7 March 2020, available at: <https://www.nytimes.com/2020/03/07/world/europe/greece-turkey-migrants.html>.

³⁵ Ibid.

³⁶ Steffen Lüdke, ‘Live Ticker from the press conference of Kiriakos Mitsotakis and Ursula von der Leyen’, 3 March 2020, available at: <https://twitter.com/stluedke/status/1234831791732805638>: “He is thanking not only hellenic army but also civilians who have helped”.

³⁷ Greek Legislative Act ‘Suspension of Asylum Applications’, Government’s Gazette No 45/A/02.03.2020, available at: <https://bit.ly/legislativeact>. An unofficial English translation provided by the Odysseus Network, available at: <https://docs.google.com/document/d/1yA782Vi56KnIhs2yVehXgkMYQeCieaPq5coWNHqh6xs/edit>.

³⁸ Cf. Greek National Commission for Human Rights, ‘GNHCR Statement: reviewing asylum and immigration policies and safeguarding human rights at the EU borders’, 5 March 2020, available at: <https://ccdh.public.lu/dam-assets/fr/actualites/2020/GNCHR-STATEMENT-Borders.pdf>.

³⁹ UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’, 2 March 2020, available at: <https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>.

⁴⁰ See Euronews, ‘Greece is ‘Europe’s shield’ in migrant crisis, says EU chief von der Leyen on visit to Turkey border’, 4 March 2020, <https://www.euronews.com/2020/03/03/greece-migrant-crisis-is-an-attack-by-turkey-on-the-eu-austria>

⁴¹ The incident marks the first known such death since Turkey opened its borders to refugees; the boy, aged around 6 or 7, was among 48 refugees rescued from waters off Mytilene International Airport on the island of Lesbos, see Euronews, ‘Child dies off Greece as migrants rush from Turkey to Europe’, 2 March 2020, available at: <https://www.euronews.com/2020/03/02/greece-cancels-asylum-as-turkey-lets-migrants-travel-towards-europe>.

During a press conference in Greece, Commission President von der Leyen said that ‘we will work to ensure we deliver the support that is needed. The situation is not only Greece's issue to manage. It is the responsibility of Europe as a whole.’⁴²

With regard to the emergency act, the Commission stated that it ‘cannot comment’ on a decision by Greece to suspend asylum applications for one month.⁴³ The Commission was however able to comment on the country’s decision to close its borders. Namely, the Commission President praised Greece as ‘Europe’s shield’. She stated that ‘this border is not only a Greek border, it is also a European border (...) I thank Greece for being our European shield in these times.’⁴⁴ The President of the European Council Charles Michel commented on the situation in a similar manner.⁴⁵

On 4 March 2020, the European Commission, as a contribution to the extraordinary Justice and Home Affairs Council presented its ‘Action Plan’ of measures to be taken by the Union and the Member States.⁴⁶ The Vice-President for ‘Promoting our European Way of Life’, Margaritis Schinas stressed that ‘the first priority is to ensure order at our external border.’⁴⁷

In particular, the Commission has proposed the following measures:⁴⁸

First, increased Frontex operational support, namely two rapid border interventions and a new return programme. The Commission President also announced that Frontex will deploy a rapid deployment team along with several patrol vessels, aircraft, and 100 new border guards to Greece’s land and sea borders to support the more than 500 currently stationed guards there.⁴⁹

Second, the EU will provide up to 700 million Euros in financial assistance.⁵⁰ Half of that money will be immediately available, while the State could request the other half ‘as part of an amending budget’.⁵¹ This money could be used to support reception capacity, voluntary returns, and infrastructure to carry out screening procedures for security and health.

Third, member states were asked to respond to the Civil Protection Mechanism, which has been triggered by Greece, to provide medical equipment, shelters, tents, blankets etc.⁵² Further,

⁴² Deutsche Welle, ‘EU offers Greece migration support amid mounting refugee crisis’, 3 March 2020, available at: <https://www.dw.com/en/eu-offers-greece-migration-support-amid-mounting-refugee-crisis/a-52623868>.

⁴³ EU Observer, ‘Commission silent on Greece suspending asylum claims’, 4 March 2020, available at: <https://euobserver.com/migration/147621>.

⁴⁴ She said: “This border is not only a Greek border, it is also a European border ... I thank Greece for being our European aspidia in these times,” which was translated as ‘shield’, see The Irish Times, ‘EU praises Greece as “shield” after Turkey opens border’, 3 march 2020, available at: <https://www.irishtimes.com/news/world/europe/eu-praises-greece-as-shield-after-turkey-opens-border-1.4191933>.

⁴⁵ JURIST, ‘Greece suspends asylum applications after Turkey allows entry into Europe’, 3 March 2020, available at: <https://www.jurist.org/news/2020/03/greece-suspends-asylum-applications-after-turkey-allows-entry-into-europe/>

⁴⁶ European Commission, ‘Extraordinary Justice and Home Affairs Council: Commission presents Action Plan for immediate measures to support Greece’, 4 March 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_384.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Euronews, ‘Greece is ‘Europe’s shield’ in migrant crisis, says EU chief von der Leyen on visit to Turkey border’, 4 March 2020, available at: <https://www.euronews.com/2020/03/03/greece-migrant-crisis-is-an-attack-by-turkey-on-the-eu-austria>; Deutsche Welle, ‘EU offers Greece migration support amid mounting refugee crisis’, 3 March 2020, available at: <https://www.dw.com/en/eu-offers-greece-migration-support-amid-mounting-refugee-crisis/a-52623868>.

⁵⁰ Ibid.

⁵¹ Euronews, ‘Greece is ‘Europe’s shield’ in migrant crisis, says EU chief von der Leyen on visit to Turkey border’, 4 March 2020, available at: <https://www.euronews.com/2020/03/03/greece-migrant-crisis-is-an-attack-by-turkey-on-the-eu-austria>.

⁵² The Civil Protection Mechanism is a mechanism to strengthen cooperation between the EU member states and six participating states in the field of civil protection, with a view to improve prevention, preparedness and response to disasters. For a short explanation, see: European Commission, ‘Factsheet: European Civil Protection and Humanitarian Aid Operations’, 10 February 2020, available at: https://ec.europa.eu/echo/what/civil-protection/mechanism_en.

member states were also asked to respond to the call by the European Asylum Support Office (EASO) for 160 experts to be deployed to Greece.

C. The Illegality of the Measures under EU and International Law

I. Denial of Entry, Pushbacks and Forced Returns Without Individual Procedure

Denial of entry, pushbacks at the border as well as forced returns without individual procedure are subject to the same requirements under international and EU law. States are prohibited from pushing back or returning an alien without an *individual examination* as to whether the pushback or return violates:

1. the principle of non-refoulement laid down in international refugee law and EU law;
2. the principle of non-refoulement laid down in European human rights law;
3. the right to an effective remedy laid down in European human rights law;
4. the prohibition of collective expulsion laid down in Art. 19 para 1 CFR;
5. the obligation to conduct an individual asylum procedure under EU asylum law.

So-called ‘protection elsewhere clauses’ such as the ‘safe third country concept’ cannot justify the violation of those provisions. Therefore, as the following legal assessment will show, the current measures taken by the Greek government, described above, violate international and EU law.⁵³

1. The Prohibition of Refoulement under Refugee Law

a. The Principle of Non-Refoulement

Art. 33 of the Convention relating to the Status of Refugees (hereafter: Geneva Convention 1951),⁵⁴ inter alia, establishes the principle of non-refoulement – the *cornerstone* of international refugee law. From this also flows the right to an individual examination of all asylum applications. The principle of non-refoulement is also a norm of customary international law, even of *ius cogens*.⁵⁵

By virtue of this principle, any contracting state shall not ‘expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’. This obligation also covers ‘chain refoulement’, that is, the return to a country from which the refugee will then be deported to a threat of persecution.

⁵³ Cf. UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’, 2 March 2020, available at: <https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>; Matthew Scott, ‘Key issues arising from the decision of the Greek government to close its border with Turkey’, Raoul Wallenberg Institute, 6 March 2020, available at: <https://rwi.lu.se/2020/03/key-issues-arising-from-the-decision-of-the-greek-government-to-close-its-border-with-turkey/>.

⁵⁴ United Nations Convention relating to the Status of Refugees, adopted in 1951, together with the UN Protocol relating to the Status of Refugees, adopted in 1967.

⁵⁵ UNHCR and its Executive Committee have even argued that the principle of non-refoulement is progressively acquiring the character of *ius cogens*; see UNHCR Executive Committee, ‘Conclusion No. 25’, para. (b); UNHCR, ‘Note on international protection’ UN docs. A/AC.96/694 (1987), para 21.; UNHCR, ‘Note on international protection’ (23 July 1985), UN docs. A/AC.96/660 para. 17; UNHCR, ‘Note on international protection’ (9 August 1984), UN docs A/AC.96/643, para. 15; UNHCR, ‘Note on international protection’ (26 August 1982), UN docs. A/AC.96/609/Rev.1 para. 5.

In this regard it has to be stressed, that the term ‘refugee’ used by the Geneva Convention 1951 is merely declaratory in nature, meaning that formal recognition is not a precondition for being considered a refugee under the Convention. Hence, every person claiming asylum must be treated in accordance with the non-refoulement principle. Without this assumption, the principle of non-refoulement fails to provide any protection.⁵⁶ Given this assumption, states may not refool asylum seekers without an individual examination.

b. The Obligations under EU Primary Law

This obligation from international refugee law has been incorporated into EU law. Art. 78 para 1 TFEU obliges the European Union to develop ‘a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.’

Consequently, EU primary law commits the EU to respect the Geneva Convention 1951. The EU is thus obliged to comply with the Convention, even though it is not a party to it and is therefore not bound by international law *per se*.⁵⁷ The Geneva Convention 1951 hence has ‘constitutive significance in terms of EU law’.⁵⁸

Based on Art. 78 para 1 TFEU, the principles provided for in the Geneva Convention were also codified in Art. 18 CFR (right to asylum).⁵⁹

c. Refoulement in Case of Pushbacks by State Forces

The principle of non-refoulement applies at the border and within the concerned state’s territory.⁶⁰ As repeatedly stressed by the UNHCR, refoulement at the border is indeed a classic example of when states are required to comply with the principle of non-refoulement. In this regard, it is of no matter whether or not the persons concerned are physically present the territory; ‘in any manner whatsoever to the frontiers of territories’ means that states are bound to the principle of non-refoulement wherever they act.

Greece therefore is violating the principle of non-refoulement by denying access to asylum seekers at the border without conducting an individual asylum procedure.⁶¹

⁵⁶ See UNHCR Executive Committee, ‘Conclusion No. 6’, para (c).

⁵⁷ See Daniel Thym, ‘Art. 78 AEUV’, in Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (eds.), *Das Recht der Europäischen Union* (CH Beck, Munich 2014), para. 6 and 16 et seq.

⁵⁸ Wolfgang Weiß, ‘Art. 78 AEUV’, in Rudolf Streinz (ed.), *EUV/AEUV* (CH Beck, Munich 2018), para. 5; Jürgen Bast, ‘Vom subsidiären Schutz zum europäischen Flüchtlingsbegriff’, in *Zeitschrift für Ausländerrecht und Ausländerpolitik* (ZAR) 2020, p. 42 (43).

⁵⁹ ECJ Judgment of 17 June 2009 – C-31/09 – *Nawras Bolbol*, para. 36 et seq.

⁶⁰ *Ibid.*

⁶¹ UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’, 2 March 2020, available at: <https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>; ‘Neither the 1951 Convention Relating to the Status of Refugees nor EU refugee law provides any legal basis for the suspension of the reception of asylum applications.’; Similarly, Matthew Scott, ‘Key issues arising from the decision of the Greek government to close its border with Turkey’, Raoul Wallenberg Institute, 6 March 2020, available at: <https://rwi.lu.se/2020/03/key-issues-arising-from-the-decision-of-the-greek-government-to-close-its-border-with-turkey/>; ‘Consequently, a decision by an EU Member State to close its land borders and to refuse to accept applications for asylum clearly risks obligations under international as well as EU law.’

Regarding those who have already entered Greek territory, there is no doubt that Greece violates the principle of non-refoulement in cases where *representatives of the state* expel persons without an individual examination, as has been reported.

d. Refoulement in Case of ‘Pushbacks’ Carried Out by Private Individuals (‘Volunteer Border Guards’)

As mentioned, there have also been reports that *private citizens* have been involved with some of these ‘deportations’. According to the reports, these are often armed individuals, mostly from the region, who chase refugees to ‘push them back’ to Turkey. Prime Minister Mitsotakis went so far as to thank the ‘volunteers’ who have protected the borders.⁶²

Under certain circumstances, states can also be responsible, under international law, for the violent actions of private persons. This is the case if those actions are attributable to the state, or if the state had a duty to protect the victims against the violence inflicted by private parties.

Art. 33 para 1 Geneva Convention 1951 explicitly imposes an obligation on ‘contracting states’ not to refool persons within their jurisdiction (negative obligation to respect rights). Greece is not directly responsible for the actions of those private individuals under the Draft Articles on the Responsibility of States for Internationally Wrongful Acts,⁶³ as the border guards have no connection whatsoever with state structures and are not mandated to act in the strict sense,⁶⁴ and assessing indirect forms of attribution exceeds the scope of this legal opinion.

However, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.⁶⁵ Under domestic law and international human rights and refugee law, Greece is therefore obliged to protect persons from the unlawful conduct of third parties (positive obligation to protect rights), even if the wrongful act was committed by private parties, if the authorities know or ought to know of the existence of a real and immediate risk to the fundamental rights of specific individuals.⁶⁶ If Greece fails to do so, this is a violation of its international obligations. This applies undoubtedly to the human rights prohibition of refoulement under Art. 3 ECHR.⁶⁷ However, this also applies to the Geneva Convention 1951 as an instrument of international law. The principle of non-refoulement is the basic principle of refugee law and the central right within the framework of the Convention. By violently pushing persons away from the territory of the respective state, private actors commit, above this, regularly the criminal offences of coercion, bodily injury or deprivation of liberty. Under international customary law, the state is obliged to take reasonable measures to prevent the commission of foreseeable unlawful acts against

⁶² See B.I.

⁶³ International Law Commission, ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts’, 2001, available at: https://legal.un.org/ilc/texts/instruments/english/draft_Art.s/9_6_2001.pdf.

⁶⁴ Anja Seibert-Fohr, ‘Die völkerrechtliche Verantwortung des Staats für das Handeln von Privaten: Bedarf nach Neuorientierung?’ (2013) *ZaöRV* 73, 37, 42.

⁶⁵ See e.g. ECtHR Judgment of 09 June 2009 – Appl. no. 33401/12 – *Opuz.*, para 79 et seq; The Committee on the Elimination of Discrimination against Women, General Recommendation 19, para. 9.

⁶⁶ See ECHR, Guide on Article 2 of the European Convention on Human Rights: Right to Life, updated on 31 December 2019, para. 17–18, available at https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf; Seibert-Fohr, ‘Die völkerrechtliche Verantwortung des Staats für das Handeln von Privaten’, p. 43 et seq.; Sandra Stahl, *Schutzpflichten im Völkerrecht – Ansatz einer Dogmatik* (Springer Heidelberg 2010); cf. already General Claims Commission, *Janes Case* (Laura M. B. Janes et al. (U.S.A.) v. United Mexican States), UNRIIAA, vol. IV, 82-98 (16/11/1925).

⁶⁷ See for the obligation to protect ECtHR Judgment of 09 June 2009 – Appl. no. 33401/12 – *Opuz.*

another person's fundamental rights. If this duty of due diligence is neglected and states let violations happen, the state might, depending on the circumstances of the case, be fully responsible under international law.⁶⁸

In the case at hand, the Prime Minister of Greece clearly knows about 'volunteer border guards' conduct and has even expressed his gratitude towards them. Those factors at least suggest that the 'pushbacks' carried out by private individuals might be attributed to the state of Greece. This duty of protecting individuals from violent pushbacks is thus neglected and the Greek state is letting the violations happen by failing to exercise due diligence. This question however requires further and more detailed legal analysis in each individual case.

e. No Exclusion, Art. 33 para 2 Geneva Convention 1951

Exceptions from the principle of non-refoulement can only be made in cases where a refugee poses a national security threat, Art. 33 para 2 Geneva Convention 1951. The provision however requires an individual assessment of the person of the refugee, who himself or herself must be a threat to public security. This excludes any argument – which is inadmissible regardless – that the sheer number of refugees could be grounds for exempting states from the principle of non-refoulement under Art. 33 para 2 Geneva Convention 1951 across the board.

The individual grounds are identical to those of Art. 1 F Geneva Convention 1951.⁶⁹ There must be 'reasonable grounds' to exclude *an individual person* for the respective reasons. Hence, the burden of proof is, as a matter of course, with the contracting State; the State is not allowed to act arbitrarily and has to support its findings with evidence in a fair, individual procedure.⁷⁰

2. The Prohibition of Refoulement under European Human Rights Law

The prohibition of refoulement is also a fundamental principle of human rights law.

Most importantly, a prohibition of refoulement derives from Art. 3 ECHR, the prohibition of torture, inhumane or degrading treatment. The ECtHR first established this principle in its fundamental judgment in *Soering*.⁷¹ It has since developed a wide range of case law that emphasizes the absolute nature of Art. 3 ECHR, from which no derogation is possible, Art. 15 para. 2 ECHR.⁷² It has made clear that the non-refoulement guarantee implies a right to an individualized assessment of the risk, as well as a number of procedural rights (right to an interpreter, access to legal counsel, right to a legal remedy with suspensive effect). And it has clarified that Art. 3 ECHR also prohibits 'chain refoulement'.⁷³ The corresponding fundamental right is laid down in Art. 4 CFR, which according to Art. 52 para 3 CFR is

⁶⁸ In the so-called Tellini case, in which members of an international commission for the determination of the border between Greece and Albania died, a commission of lawyers appointed by the League of Nations found that responsibility for crimes committed by private individuals is founded in case appropriate measures to prevent and prosecute the crime were not taken. Especially the law 'on aliens' required special care in reference to foreigners. League of Nations, Tellini Case, Official Journal, 4th Year, No. 11, November 1923, 1349 et seq.

⁶⁹ Andreas Zimmermann/P. Wennholz, in: Andreas Zimmermann (ed.), 'The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol' (Oxford University Press, Oxford 2011), Art. 33 para 2, para 75 et seq.

⁷⁰ James Hathaway, 'The Rights of Refugees under International Law' (Cambridge University Press, Cambridge 2005), p. 345 with further findings.

⁷¹ ECtHR Judgment of 07 July 1989 – Appl. no. 14038/88 – *Soering*.

⁷² See e.g. ECtHR Judgment of 15 December 2016 – Appl. no. 16483/12 – *Khalifa et. al.*, para. 158.

⁷³ See e.g. ECtHR Judgment of 21 January 2011 – Appl. no. 30696/09 – *M.S.S.*, para. 286.

interpreted as having the same meaning and scope as Art. 3 ECHR. The prohibition of refoulement as deriving from Art. 3 ECHR is explicitly laid down in Art. 19 para 2 CFR.

a. Applicability of Art. 3 ECHR at the Border

According to the established case law of the European Court of Human Rights (hereafter: ECtHR) Art. 3 ECHR creates obligations for the Greek states not only for those already on the territory of Greece, but also with regards to individuals requesting entry to Greek territory at the Greek land border, irrespective of whether they set foot on Greek territory or not.

Whether or not a state is bound to the European Convention of Human Rights is to be determined according to Art. 1 ECHR, which secures to everyone within the contracting member states' jurisdiction the rights and freedoms defined in the Convention.

Although the ECHR does not provide a definition of 'jurisdiction', a long line of cases from the ECtHR has sought to clarify exactly who can come within a state's jurisdiction. The Court has found that the jurisdiction is primarily territorial, but that in exceptional cases a state can exercise its jurisdiction extraterritorially, including when the state exercises 'effective control' over an area outside its own territory (territorial mode of jurisdiction) or exercises 'effective control' over a person outside its territory, for example by intercepting or detaining that person (personal mode of jurisdiction).⁷⁴ The Court has made clear that 'Art. 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.⁷⁵

Determining when a state is responsible for persons outside its physical borders is ultimately a question of fact. Nonetheless, the Court has made clear that when a state exercises its control over an individual, she or he comes within its jurisdiction. As early as in its judgment *Soering*, the Court established that, 'in so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment'.⁷⁶ More recently the Court confirmed, that: 'It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Art. 1 to secure that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored.'⁷⁷ In other words, states can exercise their jurisdiction wherever their acts have the effect of violating an individual's rights, even if those individuals were never formally within the states' physical borders.

The ECtHR has already confirmed that the obligations under the convention apply to pushbacks of aliens on a vessel at the high sea.⁷⁸ Further, the ECtHR has recently confirmed that refusing entry at the border also falls within the scope of application of the ECHR since states exercise

⁷⁴ ECtHR Judgment of 12 December 2001 – Appl. no. 52207/99 – Banković et al, para. 61, 67-69; ECtHR Judgment of 07 July 2011 – Appl. no. 55721/07 – Al-Skeini et.al., para. 131 with references to earlier case law.

⁷⁵ ECtHR Judgment of 16 November 2004 – Appl. no. 31821/96 – Issa et.al, para. 71.

⁷⁶ ECtHR Judgment of 07 July 1989 – Appl. no. 14038/88 – *Soering*.

⁷⁷ ECtHR Judgment of 07 July 2011 – Appl. no. 55721/07 – Al-Skeini et.al., para. 137 emphasize added.

⁷⁸ ECHR, Judgment of 23 February 2012 – Appl. no. 27765/09 – Hirsi Jamaa et.al.

‘jurisdiction’ over the individuals they violently refuse entry to.⁷⁹ In this regard, it is irrelevant whether the border fence at which persons request entry is located on the territory of that state itself or on the territory of the neighbour state.⁸⁰ Moreover, the Greek authorities have undoubtedly been deploying force from within Greek territory and exercising control over those outside of it by using tear gas and other violent means against them.

Therefore, it is clear that in the current situation on the Greek-Turkish border, where Greek border guards have prevented access to official border crossing points by using coercive means such as tear gas, the state is exercising jurisdiction over the persons concerned, whether or not they have already crossed into Greek territory.

In summary, the jurisprudence of the ECtHR confirms clearly that, in addition to returns, Art. 3 ECHR is applicable to denials of entry. In order to assess whether the removal or denial of entry amounts to a real risk of a violation of Art. 3 ECHR, an *individual examination* must be carried out because such risk inevitably depends on individual circumstances.

b. Obligation to Conduct an Individual Examination

As mentioned, Art. 3 ECHR also gives rise to *procedural* obligations for signatory states when dealing with asylum seekers. These do not differ much between removal from the territory, transit zones, or pushbacks at the border.

When violations of Art. 3 ECHR are at issue, special requirements are imposed on states because of the irreversible damage that could occur when asylum seekers – a per se vulnerable group – are affected.⁸¹ Where evidence demonstrates that a real risk of an Art. 3 violation exists, it is then the Government’s burden to remove any doubt.⁸² Therefore, all foreseeable consequences of the individual’s return or denial of entry to the country of destination must be assessed by the state and ‘in the light of the general situation there as well as the applicant’s personal circumstances’.⁸³ The actual dangers that could occur as a result of a denial of entry or return must be carefully evaluated and based on the available current reports and opinions, including those by international and non-governmental organizations.⁸⁴

In principle, every state authority is obliged to take into account protection requests that signal a risk of a violation of Art. 3 ECHR. However, border guards and policeman are generally simply unable to assess such risks *ad hoc*. Further, EU law foresees that they merely register that a person wants to seek asylum, before referring them to the asylum service as the authority in charge of carrying out the individual examination. This means that individual assessments satisfying Art. 3 ECHR cannot be carried out by them.

⁷⁹ ECtHR Judgment of 13 February 2020 – Appl. nos. 8675/15, 8697/15 – N.D. & N.T.

⁸⁰ *Ibid.*, para. 90, 124.

⁸¹ ECtHR Judgment of 21 January 2011 – Appl. no. 30696/09 – M.S.S., para. 232.

⁸² ECtHR Judgment of 20 July 2010 – Appl. no. 23505/09 – N., para. 53; Judgment of 09 June 2010 – Appl. no. 41827/07 – R.C., para. 50.

⁸³ ECtHR Judgment of 28 June 2011 – Appl. nos. 8319/07, 11449/07 – Sufi and Elmi, para. 216.

⁸⁴ Cf. *ibid.*; ECJ, Judgment of 21 December 2011 – C-411/10, C-493/10 – N.S., Rec. 90 et seq.

c. The Implications of the ECHR Grand Chamber Judgment in N.D. & N.T.

This assessment is not affected by the recent Grand Chamber decision in *N.D. & N.T.*,⁸⁵ which specifically did *not deal with* any procedural guarantees under *Art. 3 ECHR* that might be violated by so-called ‘hot returns’ at the border.⁸⁶

The Court considered that a violation of *Art. 3 ECHR* had not been substantially argued by the applicants and therefore deemed that part of the application inadmissible at an early stage of the procedure.⁸⁷ Having in mind the absolute nature of *Art. 3 ECHR*, it is highly likely that the Court would have found a breach of *Art. 3 ECHR* where a pushback would have led to a risk of being exposed to torture, inhuman or degrading treatment, or chain refoulement. And unlike the prohibition of collective expulsion, which will be examined below (at C.I.4), the guarantee laid down in *Art. 3 ECHR* is in no case depending on a person’s ‘own conduct’.

Either way, the judgment in *N.D. & N.T.* can be explained by a procedural issue: The Court always has to assess the situation as it is at the time of the judgment. But the events in this case had overtaken the Court proceedings in time and facts. In retrospect, it was determined that there was no real risk of inhuman or degrading treatment upon deportation.⁸⁸ This was established retrospectively and taken into account in the proceedings per the procedural law of the ECtHR.⁸⁹ Following this explanation of the judgment, it is impossible to conclude that the judgment of the ECtHR was in essence based on an ‘exception’ to the prohibition of collective expulsion (see in more detail below C.1.4).

At the moment states refuse persons entry, there is no doubt that they are obliged to examine a potential violation of *Art. 3 ECHR*, and that the non-implementation of this requirement itself violates *Art. 3 ECHR*. However, it is impossible for border guards at the Turkish-Greek border to know whether a person needs international protection without assessing their individual needs. That is precisely why states are obliged to carry out individual examinations.

What is more, at the Greek-Turkish border, there are concrete indications that the denial of entry would lead to the real risk of a violation of *Art. 3 ECHR*, either due to the living conditions in Turkey or due to the danger of chain refoulement from Turkey to the country of origin (see C.I.6.b). As outlined below (at C.I.6.a), such risks have to be assessed in an individual procedure, before carrying out any denial of entry. Therefore, the pushbacks without such an individual assessment violate *Art. 3 ECHR*.

3. The Right to an Effective Remedy under European Human Rights Law

First and foremost, *Art. 13 ECHR* guarantees the right to an effective remedy before a national authority against violations of rights and freedoms laid down in the Convention. In case *Art. 3 ECHR* violations are at stake, the remedy must thoroughly and accurately examine such risks.⁹⁰ Whereas, generally, the procedure in which the remedy is granted can be accelerated, the

⁸⁵ ECtHR Judgment of 13 February 2020 – Appl. nos. 8675/15, 8697/15 – *N.D. & N.T.*,

⁸⁶ Rather, the judgment dealt with the prohibition of collective expulsion, see below C.I.4.

⁸⁷ ECtHR Decision of 07 July 2015 – Appl. nos. 8675/15, 8697/15 – *N.D. & N.T.*

⁸⁸ *Ibid.*

⁸⁹ Cf. Constantin Hruschka, ‘Hot Returns bleiben in der Praxis EMRK-widrig’, *Verfassungsblog* 21 February 2020, available at: <https://verfassungsblog.de/hot-returns-bleiben-in-der-praxis-emrk-widrig/>.

⁹⁰ ECtHR Judgment of 21 January 2011 – Appl. no. 30696/09 – *M.S.S.*, para. 387.

acceleration must not exclude the concerned person to submit relevant material supporting her or his claim.⁹¹

The right to an ‘effective remedy’ also requires factual access to such a remedy and an examination of the complaint, indeed before irreparable consequences can be brought about by the administration.⁹² Thus, if at the border or after entry into the East Aegean islands – where people are detained on boats and at the port – access to lawyers is structurally prevented or made impossible, there is already de facto no effective legal remedy. In such a case, it follows directly from the fundamental and human rights obligation to guarantee an effective remedy that, where necessary, a free legal advice infrastructure must be maintained. Legal advice must be accessible in fact and actually available.⁹³

In cases of forced returns, the ECHR has affirmed several times that the remedy can only be considered effective if it has suspensive effect.⁹⁴ From the current situation at the border and in the border area it is clear then that the persons subject to pushbacks and returns do not have access to any legal remedy, and the practice thus violates Art. 13 ECHR in conjunction with Art. 3 ECHR.

For the same reasons, the current practice violates Art. 47 CFR. Art. 47 CFR requires an effective *judicial* remedy against the violation not only of those rights laid down in the Charter of Fundamental Rights itself, but anywhere else in EU law, including EU secondary law. Art. 47 CFR therefore has a broader scope than Art. 13 ECHR.⁹⁵ Since applicants have no access to any legal remedy against their return or denial of entry, not only are their fundamental rights violated, but several of their rights under EU secondary law are as well (see below C.I.5). The absence of any judicial remedy constitutes is a clear violation of Art. 47 CFR.

4. The Prohibition of Collective Expulsion

The prohibition of collective expulsion is laid down in Art. 4 Protocol No. 4 of the ECHR, which prohibits states from refusing entry to large groups of asylum seekers at border checkpoints without individual examination. While Greece did not sign that protocol,⁹⁶ Greece is bound by Art. 19 para. 1 CFR, which contains the same prohibition of collective expulsion. ECtHR jurisprudence is relevant to the interpretation of Art. 19 para. 1 CFR due to the Art. 52 para. 3 CFR.

Member states are bound by the CFR when implementing EU law, cf. Art. 51 para 1 CFR (see above). When refusing entry to third country nationals at the external border, member states implement Art. 14 Regulation (EU) 2016/399 (Schengen Borders Code)⁹⁷ and are therefore

⁹¹ Ibid., para. 389.

⁹² Ibid., para. 288 et seq.

⁹³ Ibid., para. 319 et seq.

⁹⁴ Ibid., para. 293; ECtHR Judgment of 05 February 2002 – Appl. no. 51564/09 – Čonka, para. 81-83.

⁹⁵ Cf. Anna Lübke, ‘The Elephant in the Room’, *Verfassungsblog* 19 February 2020, available at: <https://verfassungsblog.de/the-elephant-in-the-room/>.

⁹⁶ Council of Europe, ‘Chart of signatures and ratifications of Treaty 046, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto’ (13 March 2020), available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/046/signatures?p_auth=DuU4mz42.

⁹⁷ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movements of persons across borders (Schengen Borders Code) (codification), hereafter: Schengen Borders Code.

clearly bound by the CFR. But member states also implement EU law – and are therefore bound by the CFR – when returning third country nationals from their territory, as such returns are governed by the Return Directive.⁹⁸

To begin with, the prohibition of collective expulsion also applies to situations of refused entry,⁹⁹ if the denial of entry concerns the ‘immediate and forcible return of aliens from a land border following an attempt by a large number of migrants to cross that border in an unauthorised manner and en masse’.¹⁰⁰ As this is arguably the case at the Greek-Turkish land border, the denial of entry to a large group of migrants without an individual examination constitutes a collective expulsion within the meaning of Art. 4 Protocol 4 ECHR, Art. 19 para. 1 CFR.¹⁰¹

However, in its recent decision *N.D. & N.T.* the ECtHR held that in instances of unlawful border crossings by large groups using force, it must also be taken into account whether the respective convention state provided *genuine and effective access to means of legal entry, in particular border procedures*.¹⁰² Importantly, a state’s efforts to pushback large groups trying to cross the border with force will comply with the prohibition of collective expulsion only if other legal pathways for requesting entry exist and are effectively accessible. Only in those cases, the ECtHR argued, shall the state’s denial of entry and the failure of conducting an individualized procedure be interpreted as a consequence of the individual’s own conduct.¹⁰³

Within the current political and media discourse, this judgment is often referred in order to justify the denial of entry currently taking place at the Greek-Turkish land border. Manfred Weber, chair of the EPP group in the European Parliament, states: ‘We have now recently received a ruling from the European Court of Human Rights in Strasbourg, which has just applied the same procedure as that applied by the Spanish authorities in Morocco and Ceuta, for example, that even if there are collective attacks on the border, it is then possible to repatriate collectively. This is now also being implemented in Greece.’¹⁰⁴

This reference to the judgment in order to justify the current measures in Greece is wrong and highly misleading. A close look at the judgment makes clear that the Court found that Spain had not breached the prohibition of collective expulsion because it provided alternative legal avenues for the applicants to ask for entry to Spanish territory, including the possibility of

⁹⁸ See C.I.5. on the Return Directive. The fact that member states are bound to the CFR when implementing directives follows from the well-established case law of ECJ, see e.g. ECJ Judgment of 17 April 2018 – C-414/16 – Egenberger, para. 49. The mere fact that Greece obviously does not implement the Return Directive and the Schengen Borders Code in a lawful way cannot circumvent the applicability of the CFR.

⁹⁹ ECtHR Judgment of 13 February 2020 – Appl. nos. 8675/15, 8697/15 – *N.D. & N.T.*, para. 90, 124.

¹⁰⁰ *Ibid.*, para. 166.

¹⁰¹ See in detail: *ibid.*, Rec. 164 et seqq.

¹⁰² *Ibid.*, Rec. 201.

¹⁰³ *Ibid.*, Rec. 231. See for the justified criticism of this argument: Anna Lübke, ‘The Elephant in the Room. Effective Guarantee of Non-Refoulement after ECtHR *N.D. and N.T.*’, 19 February 2020, available at: <https://verfassungsblog.de/the-elephant-in-the-room/>; Constantin Hruschka, ‘Hot Returns bleiben in der Praxis EMRK-widrig’, 21 February 2020, available at: <https://verfassungsblog.de/hot-returns-bleiben-in-der-praxis-emrk-widrig/>.

¹⁰⁴ Cf. Deutschlandfunk, ‘An der Außengrenze muss Recht und Ordnung durchgesetzt werden’, 2 March 2020, available at: https://www.deutschlandfunk.de/europaeische-fluechtlingspolitik-an-der-aussengrenze-muss.694.de.html?dram:Art_id=471420.

asking for asylum at official border crossing points.¹⁰⁵ (Showing that this was not actually the case and that the judgment has technical deficiencies¹⁰⁶ is not task of this opinion.)

As described above, several thousand asylum seekers are currently demanding entry to Greek territory at the official border crossing point of Greece's external border, Kastanies. There is *no legal procedure* for these asylum applicants to request entry to Greek territory or to submit asylum applications at the border. On the Greek-Turkish border, there has not been any legal procedure for asylum applicants to request entry to Greece, rather unlawful pushbacks have been in place over the last years.¹⁰⁷ This type of border management is clearly not in accordance with the Court's decision, which explicitly demands that states increase the legal ways for individuals to submit asylum applications at borders.¹⁰⁸

The ECHR has already tried to clarify this in its judgment in an obiter dictum: 'However, it should be specified that this finding does *not* call into question the broad consensus within the international community regarding the obligation and necessity for the Contracting States to protect its borders – either its own borders or the external borders of the Schengen area, as the case may be – in a manner which complies with the Convention guarantees, and in particular with the obligation of non-refoulement.'¹⁰⁹

Therefore, it is clear that the current measures at the Greek-Turkish land border violate the prohibition of collective expulsion laid down in Art. 19 para. 1 CFR.

5. The Obligation to Conduct a Procedure in Line with EU Secondary Law

Whether a person is entitled to benefit from the guarantees of the Common European Asylum System depends on the scope of the respective Directives and Regulations. For the Directives 2013/32/EU (Asylum Procedures Directive – APD), 2013/33/EU (Reception Conditions Directive), 2011/95/EU (Qualifications Directive) and for the Regulation (EU) 604/2013 (Dublin Regulation III) to apply, an asylum application would have to be lodged.¹¹⁰ Directive 2008/115/EC (Returns Directive), on the contrary, is only applicable in case a person is not residing legally in the respective country.

a. 'Asylum Application' as Triggering the Application of EU asylum law

The European asylum law is based on a wide and non-formal definition of an asylum application. All of these instruments¹¹¹ understand an 'asylum application' as 'a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of the Directive 2011/95/EU

¹⁰⁵ ECtHR Judgment of 13 February 2020 – Appl. nos. 8675/15, 8697/15 – N.D. & N.T., para. 213-220.

¹⁰⁶ Cf. Maximilian Pichl/ Dana Schmalz, 'Unlawful may not mean without rights', Verfassungsblog, 14 February 2020, available at: <https://verfassungsblog.de/unlawful-may-not-mean-rightless/>.

¹⁰⁷ Cf. Greek Council for Refugees/Arsis/ HumanRights360, 'The new normality: Continuous push-backs of third country nationals on the Evros river', 2019, available at: <https://www.gcr.gr/en/news/press-releases-announcements/item/1028-the-new-normality-continuous-push-backs-of-third-country-nationals-on-the-evros-river>.

¹⁰⁸ ECtHR Judgment of 13 February 2020 – Appl. nos. 8675/15, 8697/15 – N.D. & N.T., para. 232.

¹⁰⁹ Ibid (emphasis added).

¹¹⁰ Cf. Art. 3 Asylum Procedures Directive (APD), Art. 3 APD, Art. 3 Dublin Regulation III and the scope of Qualifications Directive to 'process asylum applications'.

¹¹¹ Cf. Art. 2 lit. b APD, Art. 2 lit. h Qualifications Directive, Art. 2 lit. a Reception Conditions Directive in conjunction with Art. 2 lit. h Qualifications Directive, Art. 2 lit. b Dublin Regulation III in conjunction with Art. 2 lit. h Qualifications Directive.

(Qualifications Directive), that can be applied for separately.’ As it is enough that the request ‘can be understood’ to be a request for international protection, no formal application is necessary in order for the EU asylum law to apply.

Therefore, individuals arriving by rubber boat on European shores and coming mainly from countries where there is a high risk of persecution, who do not explicitly articulate that they *are not* seeking asylum, have submitted an application for international protection within the meaning of EU law.¹¹² The same applies for persons who have entered the territory through a land border and get in contact with a national authority. This also extends to persons standing towards armed forces at the border fence trying to enter.

Nowhere do these instruments provide for the possibility that the Greek State can simply ‘abolish’ the submission of asylum applications. Quite the contrary: as soon as an application in the described sense is received, a duty arises to forward the application to the responsible authority as soon as possible, specifically within three working days (cf. Art. 3 para 1 APD).

Where the concerned protection seekers do not have contact with the Greek Asylum Service, every national authority is obliged to receive and to accordingly register asylum applications, cf. Art. 6 APD. This also applies to applications lodged at the border or in transit zones, Art. 3 para 1 APD. With a view to the situation at the Greek-Turkish border, applications have therefore been submitted in all conceivable scenarios (see B.I).

b. The Obligation to Ensure the Guarantees From the Asylum Procedures Directive

Given that an asylum application has been submitted, Greece is obliged to ensure the guarantees provided for in the APD. The Directive has been transposed into Greek Law.¹¹³

Outlining all guarantees of the Asylum Procedures Directive would go far beyond the scope of this legal opinion. It must however be emphasized in particular that the Directive provides for a right to stay in the territory during the processing of the asylum application as well as for comprehensive procedural rights, such as the right to a thorough examination of applications, the right to an interpreter, and the right to access to legal counsel.¹¹⁴

c. The Obligation to Initiate a Procedure under the Dublin Regulation III

Additionally, the unlawful exclusion of the respective persons from the scope of the European asylum law also makes the exercise of other rights impossible, e.g. the right to family unity arising from the Dublin Regulation III.

According to Art. 3 para 1, Art. 20 para 1 Dublin Regulation III, Member States are obliged to conduct a procedure to appoint the Member State responsible for conducting the asylum procedure (hereafter: Dublin procedure) as soon as an asylum application is lodged in a Member State. This occurs irrespective of whether an asylum application has already been lodged in another Member State, i.e. irrespective of whether a take-charge procedure (Art. 21

¹¹² Nora Markard/ Helene Heuser, ‘Möglichkeiten und Grenzen einer menschenrechtskonformen Ausgestaltung von sogenannten „Hotspots“ an den europäischen Außengrenzen’, available at: <https://www.jura.uni-hamburg.de/media/ueber-die-fakultaet/personen/markard-nora/markard-heuser-hotspots-2016.pdf>, p. 27 et seq.

¹¹³ Since 01 January 2020 a new asylum law is in force, International Protection Act Law 4636/2019.

¹¹⁴ Art. 9 and 10 APD.

et seq.) or a take-back procedure (Art. 23 et seq.) is to be conducted.¹¹⁵ This applies even if the person concerned has already been returned under a Dublin procedure and again enters the Member State unlawfully.¹¹⁶

Applicants also have an individual right to the correct application of the provisions of the Dublin Regulation III, as it is established case-law of the European Court of Justice (hereafter: ECJ).¹¹⁷ The Greek authorities are also obliged to forward the informal asylum application to the responsible authority as soon as possible (Art. 6 APD).

Therefore, persons who have family members in another Member State are entitled to be reunited with them within the scope of Art. 8-10, Art. 16, Art. 17 para 2 Dublin Regulation III. Suspending asylum applications therefore also jeopardises the Dublin Regulation III and its target to ‘determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection’ (recital 5).

6. The ‘Protection Elsewhere’ Clauses

The obligations described above do not cease to apply when denials of entry or removals are carried out to a country which can supposedly be considered as a ‘safe third country’ or a ‘first country of asylum’.

To begin with, according to the majority opinion in legal scholarship, neither the Geneva Convention 1951 nor the ECHR generally prohibit states from applying so-called ‘protection elsewhere clauses’, i.e. returning asylum applicants to third countries considered ‘safe’ without examining the substance of their asylum applications.¹¹⁸

EU secondary asylum law defines the concept of protection elsewhere in two provisions of the Asylum Procedures Directive: Art. 38 APD concerns cases in which applicants have not yet received protection in Turkey (‘safe third country’). Art. 35 APD concerns those cases in which applicants were already granted protection in Turkey (‘first country of asylum’). Art. 38 para. 1 APD sets common minimum standards for the application of both, the safe third country as well as the first country of asylum concept.¹¹⁹ These standards require, inter alia, that the safe third country respects the principle of non-refoulement and provides for the possibility to request refugee status, and, in case refugee status is granted, to receive protection in accordance with the Geneva Convention 1951.

However, the concept of ‘protection elsewhere’ both under European human rights law as well as EU asylum law requires the examination of each individual case in order to determine whether the third state can actually be considered ‘safe’ for the specific applicant (C.I.6.a).

¹¹⁵ ECJ Judgment of 25 January 2018 – C-360/16 – Hasan, most recently ECJ Judgment of 2 April 2019 – C-582/17, C-582/17 – H. & R.

¹¹⁶ Ibid.

¹¹⁷ See for the first time ECJ Judgment of 7 June 2016 – C-63/15 – Ghezelbash; ECJ, Judgment of 7 June 2016 – C-155/15 – Karim; on the enforcement of formal criteria, see e.g. ECJ Judgment of 26 July 2017 – C-670/16 – Mengesteab; ECJ Judgment of 25 October 2017 – C-201/16 – Shiri.

¹¹⁸ Cf. Guy S. Goodwin-Gil and Jane McAdam, ‘The Refugee in International Law’ (Oxford University Press, 3rd edition, Oxford 2007), 390 et seq.; Cathryn Costello, ‘Safe Country? Says Who?’ International Journal of Refugee Law 28 (2016) 601 et seq.

¹¹⁹ Art. 35 last subpara reads, as if the application of the criteria of Art. 38 para. 1 would be mandatory when applying the first country of asylum concept (‘may take into account’). However, since Art. 38 para. 1 fully codifies criteria deriving from international human rights law, specifically the 1951 Convention and the ECHR, Art. 35 last subpara must be read in a way, that any *first country of asylum* must fulfill the requirements laid down in Art. 38 para. 1 APD; cf.: Jens Vedsted-Hansen, in: Kai Hailbronner/ Daniel Thym (eds.), ‘EU Immigration and Asylum Law’, 2nd edition (Nomos, Baden-Baden 2016), Part D IV, p. 1357.

What is more, Turkey can from the outset not be considered as ‘safe third country’ or ‘first country of asylum’ for the large majority of applicants (C.I.6.b).

a. The Obligation to Conduct an Individual Procedure

First, EU asylum law explicitly obliges states to carry out an individual examination that also includes the possibility to appeal their rejection and bring forwards reasons why the third country is not safe in the individual case, see Art. 35, Art. 38 para. 2, Art. 33 para. 2, Art. 46 para. 1 lit. a (ii) APD. The European Court of Justice has just confirmed that it has to be assessed in any individual case, whether the cumulative requirements laid down in Art. 35, 38 APD are fulfilled when rejecting asylum applications based on the assumption of safety in third country.¹²⁰ When applying Art. 35 ADP, it has to be assessed, whether the applicant received any kind of formalized protection in the third country, which he or she is still entitled to.¹²¹ When applying Art. 38 ADP, an individual connection between third state and applicant needs to be proven, for which it is reasonable to refer the applicant to protection in the third country; the mere transit is not sufficient.¹²² It is self-explanatory that the existence of these prerequisites can only be determined in an individual procedure.

Second, as shown above, the procedural dimension of the non-refoulement principle under refugee law and under human rights law obliges states to carry out an individual procedure. This obligation applies regardless of whether the pushback or deportations results in the applicant being returned to a ‘safe third country’ or ‘first country of asylum’, because it serves to ensure that no individual risks exist for the applicant in purportedly ‘safe’ countries.

However, as the returning country does not conduct an assessment as to the risk of a violation of Art. 3 ECHR with respect to the individual’s country of origin, the ‘safe third country’ concept applies only where, first, the individual will have access to an effective asylum procedure in that country and, second, is not at risk of being returned from that country either directly or indirectly to her or his home country or another state where she or he risks torture or inhuman or degrading treatment. The returning country must therefore take into account all available information about the safe third country’s asylum system and must give applicants the opportunity to demonstrate that the safe third country could not be considered as such due to the circumstances of their individual case.¹²³

Besides the real risk of indirect refoulement, the living conditions in the safe third country must also be in accordance with Art. 3 ECHR. Where asylum applicants are referred to protection in a third country, the living conditions in that country can as such constitute degrading or inhuman treatment. This is the case if the indifference of the authorities of third state towards the living conditions of the applicant, in the words of the ECtHR, ‘were to result in a person who is wholly dependent on public assistance finding himself, irrespective of his will and personal choices, in a situation of extreme material deprivation which did not enable him to satisfy his most basic needs, such as food, washing and housing, and which affected his

¹²⁰ ECJ Judgement of 19 March 2020 – C-564/18 – L.H., para. 28 et seqq., 35.

¹²¹ Ibid., para. 35.

¹²² Ibid., para. 45 et seqq.

¹²³ ECtHR Judgement of 21 November 2019 – Appl. no. 47287/15 – Ilias & Ahmed, para. 148.

physical or mental health'.¹²⁴ Whether precarious living conditions in a third country reach the threshold of a violation of Art. 3 ECHR also depends on the individual vulnerability of the asylum applicant.¹²⁵ Therefore, an individual examination is required also with regards to the material living conditions.

In sum, if Greece wants to refuse entry or return asylum seekers to Turkey on the grounds that Turkey is a safe third country, Greece must still carry out individual procedures in which applicants have the effective opportunity to rebut the presumption of security, either generally or with respect to their individual case. In the light of Art. 3 ECHR as well as EU asylum law, denial of entry as well as returns to Turkey without such individual examination are unlawful.

b. Turkey is not a Safe Third Country or a First Country of Asylum

When applying these standards to the situation of asylum-seekers in Turkey, it is clear that Turkey can by no means be regarded as generally safe.

Turkey already violates the basic minimum conditions provided for in Art. 38 para 1 APD. The example of Syrian citizens should illustrate the justified doubts about the presumption of security in Turkey: There have been several reports, particularly towards the end of 2019, about returns of Syrian nationals into the on-going war in Syria – this is a clear violation of the non-refoulement principle.¹²⁶ Further, Turkey collectively excludes all Syrian citizens from any individualized asylum procedure and therefore from requesting refugee status and enjoying the corresponding protection in accordance with the Geneva Convention 1951. Turkey rather collectively grants a *temporary protection* status to Syrians.¹²⁷ Returning any Syrian to Turkey based on the protection elsewhere clauses therefore clearly violates the requirements set forth in the Asylum Procedures Directive and is also contrary to international public law.¹²⁸

Notably, the above issues for Syrians are only two examples – it has been emphasized continuously over the last years by academics, NGOs and also courts, that Turkey cannot generally be considered as safe third country in light of EU and international law.¹²⁹

7. Conclusion

To conclude, breaches of several human and fundamental rights are currently taking place *en masse* at and around the Greek-Turkish border. In particular, Art. 3 and 13 ECHR as well as

¹²⁴ Established Jurisprudence of ECHR and ECJ since ECtHR Judgment of 21.01.2011 – Appl. no. 30696/09 – M.S.S., para. 263; cf. ECJ Decision of 13 November 2019 – C-540/17, C-541/17 – Hamed & Omar, para. 39.

¹²⁵ ECtHR Judgment of 04 November 2014 – Appl. no. 29217/12 – Tarakhel, para. 119; ECJ Judgment of 19 March 2019 – C-297/17, C-318/17, C-319/17, C-438/17 – Ibrahim et al., para. 93.

¹²⁶ See e.g. Amnesty International, 'Sent to a war zone, Turkey's illegal deportations of refugees to a war zone', October 2019, available at: <https://www.amnesty.org/download/Documents/EUR4411022019ENGLISH.pdf>.

¹²⁷ Cf. AIDA, 'Country Report Turkey', 2019, available at: <https://www.asylumineurope.org/reports/country/turkey/eligibility-criteria>.

¹²⁸ Cf. Anna Lübke, 'Deflection of Asylum Seekers to Ghettos in Third Countries?', *Verfassungsblog*, 4 May 2018, available at: <https://verfassungsblog.de/deflection-of-asylum-seekers-to-ghettos-in-third-countries/>.

¹²⁹ Cf. Catharina Ziebritzki/Robert Nestler, "'Hotspots' an der EU-Außengrenze. Eine rechtliche Bestandsaufnahme'. Arbeitspapier ('Hotspots' at the EU External Border. A Legal Survey) (July 28, 2017), Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper No. 2017-17, available at SSRN: <https://ssparacom/abstract=3028111>, p. 41 et seq.; Yiota Masouridou/ Evi Kyrioti, 'The EU-Turkey Statement and the Greek Hotspots, A failed European Pilot Project in Refugee Policy', June 2018, available at: <http://extranet.greens-efa-service.eu/public/media/file/1/5625>, p. 9 et. seq.; Administrative Court Munich Decision of 17 July 2019 – M 11 S 19.50722, M 11 S 19.50759, English summary available at: <https://www.equal-rights.org/post/court-of-munich-again-turkey-is-not-a-safe-third-country-is-the-eu-turkey-deal-dead>.

Art. 4, 19 and 47 CFR are violated on a broad scale by unlawful governmental measures. Further, the measures obviously violate EU asylum law.

II. Criminalisation of Asylum Seekers

According to reports, persons who have entered Greece irregularly are being prosecuted, arrested and face accusations of illegal entry with penalties up to 10,000 Euro and three years in prison.¹³⁰ As a matter of course, an asylum procedure would have to be conducted for those persons as well. In addition, the Geneva Convention 1951 also underlines that: ‘Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees, who, coming directly from a territory where their life or freedom was threatened in the sense of Art. 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.’ (Art. 31 para 1 Geneva Convention 1951).

The term ‘refugee’ under the Geneva Convention 1951 is declaratory in nature and includes asylum applicants or persons who have not had a chance to lodge an asylum claim. While one might argue that the persons concerned do not come ‘directly’ from the respective territory, this term is misleading. It is widely agreed in scholarly literature¹³¹ and case law¹³² that Art. 31 para 1 exempts all applicants for protection from criminal liability, in terms of penalties, for illegal residence or illegal entry. The clause, in line with the original version of the Convention, which was expanded in scope by the Protocol 1967, was only intended to prevent persons from seeking protection more than once in different States, thus extending the periods for which protection is granted beyond the extent actually provided for. Persons who have already found protection elsewhere and have settled there permanently should therefore be excluded.¹³³

Therefore, imposing general penalties for illegal entry is not in line with the Geneva Convention 1951.

III. Use of Force against and Degrading Treatment of Asylum Seekers at the Borders

Recently, there have been increased reports of various forms of physical violence against asylum seekers who are present at the border. The violent acts are carried out by private individuals or by the state itself.¹³⁴

¹³⁰ See above B.I.

¹³¹ Gregor Noll, in Andreas Zimmermann (ed.), ‘The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol’ (Oxford University Press, Oxford 2011), Art. 31, para 39 et seq with further findings.

¹³² Cf. only German Constitutional Court (Bundesverfassungsgericht) Judgment of 8 December 2014 – 2 BvR 450/11, para 25 et seq., 30 et seq.

¹³³ Cf. James Hathaway, ‘The Rights of Refugees under International Law’ (Cambridge University Press, Cambridge 2005), p. 400; Gregor Noll, in Andreas Zimmermann (ed.), ‘The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol’ (Oxford University Press, Oxford 2011), Art. 31, para 50 et seq.

¹³⁴ See above B.I.

1. Use of Live Ammunition by State Forces

Reports suggest that Greek state forces are using live ammunition, and that this has already caused at least one fatality.¹³⁵ Assumed that those reports are correct, this would amount to a violation by Greece of its obligations under Art. 2 ECHR.

Art. 2 para 1 sentence 1 ECHR provides: ‘Everyone’s right to life shall be protected by law.’ The ECtHR has stressed in several occasions that Art. 2 para 2 ECHR ‘does not primarily define the situations in which it is permissible to intentionally inflict death, but describes those in which it is possible to ‘use force’, which may lead to the *unintentional* infliction of death.’¹³⁶ Art. 2 para 2 ECHR establishes an exhaustive list of exceptions from the rule that the taking of life – no matter whether intentionally or unintentionally – is prohibited. This provision thus standardises the situations in which violence that could lead to death may exceptionally be used. The ECtHR has defined that only where the use of force is ‘absolutely necessary’ in order to achieve one of the listed purposes, a lethal use of force may be justified.¹³⁷ The use of force by state officials to achieve one of the objectives may be justified under this provision only where it is based on an honest belief and in good faith that one of the preconditions is met, even though it subsequently proves to be mistaken.¹³⁸

Further, Art. 2 ECHR obliges Convention States to plan a life-threatening operation ‘so as to minimize, to the greatest extent possible, recourse to lethal force’.¹³⁹ This includes the general selection and appropriate training of state officials.¹⁴⁰ This, as a matter of course, includes the planning and the controlling of the actual operation.¹⁴¹ It would have to be assessed in detail whether those conditions have been met by Greece’s planning of the deployment of its state forces to the border.

Finally, however, the conduct of the persons killed must also be taken into account in the assessment. In particular, where the killed persons constitute a danger to the life and physical integrity of the state forces or where they are themselves armed, the lethal use of force might be justified.¹⁴² While this would require an assessment of the individual case, it does seem highly improbable, based on the reports and to the best of the authors’ knowledge, that those conditions were met in the cases at hand.

2. Degrading Treatment Inflicted by State Forces

It is furthermore reported that persons have been pushed back half-naked¹⁴³ or have been sexually harassed before being pushed back,¹⁴⁴ and that persons’ mobile phones were

¹³⁵ As found by investigations by Forensic Architecture, see: Forensic Architecture, ‘Joint Statement on the ongoing Violence at the Greece-Turkey Border’, 5 March 2020, available at: <https://forensic-architecture.org/programme/news/joint-statement-on-the-ongoing-violence-at-the-greece-turkey-border>.

¹³⁶ See only: ECtHR Judgment of 12 March 2013 – Appl. no.16281/10 – Aydan, para. 64 (emphasis added).

¹³⁷ The criterion does hence not suggest that the death itself could be absolutely necessary, see ECtHR Judgment of 27 September 1995 – Appl. No. 18984/91 – McCann et al, para. 148.

¹³⁸ ECtHR Judgment of 12 March 2013 – Appl. no.16281/10 – Aydan, para. 64.

¹³⁹ ECtHR Judgment of 27 September 1995 – Appl. no 18984/91 – McCann et al, para. 194.

¹⁴⁰ ECtHR Judgment of 26 July 2005 – Appl. no. 35072/97 – Şimşek et al., para. 105, 109

¹⁴¹ ECtHR Judgment of 27 September 1995 – Appl. no 18984/91 – McCann et al, para. 194.

¹⁴² ECtHR Judgment of 6 July 2005 – Appl. no. 43577/98, 43579/98 – Natchova, para. 95, 107.

¹⁴³ See Human Rights Watch, Greece: Violence against Asylum Seekers at the Border, available at: <https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border>.

¹⁴⁴ See Istanbul Bar Association Human Rights Centre for Refugee Rights, ‘Report on Istanbul Bar Association Human Rights Center’s Visit to Pazarkule Checkpoint on 4-5 March 2020’, 8 March 2020, available at: <https://twitter.com/istbaroihm/status/1236757730637099012?s=20>.

confiscated to prevent them from making any calls.¹⁴⁵ If those reports are true, the treatment would also amount to inhumane and degrading treatment in the sense of Art. 3 ECHR. According to the case law of the ECtHR, a treatment is or conditions are degrading or inhumane if they are likely to arouse in her ‘feelings of fear, anguish, or inferiority capable of inducing desperation’.¹⁴⁶ A treatment is considered to be ‘degrading’ when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, and is capable of breaking an individual’s moral and physical resistance. It is sufficient if a victim is humiliated in his or her eyes, even if not in the eyes of others.¹⁴⁷

Being sexually harassed or pushed over a river half-naked shows a clear lack of respect for the individual and diminishes her or his human dignity. The persons are only used as sexual objects or to be made fun of.

3. Violence by Private Individuals (‘Volunteer Border Guards’)

There are also reports that ‘volunteer border guards’ are involved in pushbacks and are using armed force. The behaviour of those private ‘village guards’ cannot be *directly* attributed to the state of Greece.¹⁴⁸ However, this does *not* mean that Greece might not be responsible under international human rights law for the behaviour of those village guards, as will be shown in the following.

a. Obligation to Protect

The ECtHR describes the prohibition of torture, inhumane and degrading treatment and the right to life as *the most fundamental values in democratic societies* and as *closely bound up with respect for human dignity*.¹⁴⁹

Greece must not only abstain from inflicting such treatment upon asylum seekers through its state officials. Convention States are also obliged by Art. 2 and 3 ECHR to protect persons from mistreatment done by private parties. This explicitly applies for particularly vulnerable groups.¹⁵⁰

b. Criteria to Attribute Behaviour of Private Parties

In case States know or must know about a possible mistreatment, they have to take measures accordingly and can otherwise be held directly responsible.¹⁵¹ States can be held responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.¹⁵² Therefore, Greece also has a duty to protect asylum seekers from treatment that would amount to a violation of Art. 3 ECHR, such as severe

¹⁴⁵ See New York Times, “‘We are Like Animals’: Inside Greece’s Secret Site for Migrants”, 10 March 2020, available at: <https://www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html>.

¹⁴⁶ ECtHR Judgment of 21 January 2011 – Appl. no. 30696/09 – M.S.S, para 263.

¹⁴⁷ *Ibid.*, para. 220.

¹⁴⁸ The court once attributed responsibility to Turkey for the behaviour of ‘village guards’, those, however, were paid and advised by the state itself, cf. ECHR, Judgment of 24 May 2005 - Nos. 36088/97 and 38417/97 – Acar et al., §§ 80 et seq.

¹⁴⁹ See e.g. ECHR, Judgment 24 March 2008 – Appl. no. 23458/01 – Giuliani and Gaggio., para 174 et seq.

¹⁵⁰ Cf. ECHR, Judgment of 23 September 1998 – Appl. no. 25599/94 – A. v the United Kingdom, para 22

¹⁵¹ Cf. ECHR, Judgment of 28 March 2000 – Appl. no. 22535/93 – Kaya, para 116.

¹⁵² See e.g. ECtHR Judgment of 09 June 2009 – Appl. no. 33401/12 – Opuz., para 79 et seq.

mistreatment or refoulement when so-called volunteer border guards are involved. This applies when the state authorities know or should have known of the danger.¹⁵³

As has been shown, the Greek State is aware that volunteer border guards are ‘supporting’ official forces at Greek-Turkish land border.¹⁵⁴

c. Measures Attributed to the Greek State

In this respect, the push-backs carried out by non-governmental bodies have already been mentioned above, which, in the absence of an individual assessment, regularly constitute a violation of Art. 3 ECHR. Moreover, Art. 2 ECHR ‘covers not only situations where certain action or omission on the part of the State led to a death complained of, but also situations where, although an applicant survived, there clearly existed a risk to his or her life’.¹⁵⁵ The measures required to protect those who are attacked by private parties depend on the situation. However, not taking any measures in favour of the attacked is a clear failure to act with due diligence to prevent violations of rights, as the government knows or must know about the mistreatment and the actions carried out by ‘volunteer border guards’. By not taking any measures, the Greek government is therefore violating the obligation to protect persons against violations of Art. 2 and 3 ECHR. Yet, the Greek government has, to date, not taken any steps to prevent individuals from using force against protection seekers at the borders.

4. Deaths at Borders and The Obligation to Investigate under Art. 2 ECHR

According to well established case law of the ECtHR, Art. 2 ECHR also creates an obligation to investigate without delay, thoroughly and impartially, and ex officio – it must not depend on any form of application – and by an independent body, any deaths occurring in the course of interventions by public authorities.¹⁵⁶ The investigation must also be effective, i.e. it must produce a result that is sufficiently substantiated and justified by evidence. To this end, all reasonable steps must be taken, e.g. preservation, such as witness statements, trace analysis, autopsy.¹⁵⁷ For an examination to be independent it has to be independent in terms of hierarchy, practice and institutions, and hence cannot be conducted by officers of the same police station or soldiers of the same squad.¹⁵⁸ States therefore have to not only to reconstruct the causes of the event but also to find out the responsible persons.

After all, it does not have to be secured that the state itself was solely responsible for the death, on the contrary, investigations have to be conducted regarding every violent death, no matter whether it was caused by a state or not.¹⁵⁹ This is, according to the Court, because Art. 2 ECHR

¹⁵³ ECHR, Judgment of 28 October 1998 – Appl. no. 23452/94– Osman, §§ 115 et seq.; ECHR, Judgment of 8 November 2005 – Appl. no. 34056/02– Gongardze., para 164 et seq.

¹⁵⁴ See B.I.

¹⁵⁵ ECHR, Judgment of 15 May 2012 - Applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05– Kolyadenko et al., § 151

¹⁵⁶ Cf. inter alia ECtHR Judgment of 27 July 1998 – Appl. no. 21593/93– Güleç, para. 80 et seq; ECtHR Judgment of 4 May 2001 – Appl. no. 24764/94 – Jordan, para. 105; ECtHR Judgment of 24 April 2014 – Appl. no. 39583/05 – Perevedentyevy, para. 114 et seq; Overview: Ralf Alleweldt, in Oliver Dörr/ Rainer Grote/ Thilo Maurahn, GG/EMRK, Konkordanzkommentar (Mohr Siebeck Tübingen 2013), Chapter 10, para 106 et seq; Christoph Grabenwarter/ Katharina Pabel, ‚Europäische Menschenrechtskonvention‘, 6th Ed. (CH Beck, Munich 2016), § 20 para 31 et seq.

¹⁵⁷ ECtHR Judgment of 27 June 2000 – Appl. no. 21968/98 – Salman, para. 106.

¹⁵⁸ ECtHR Judgment of 28 May 2002 – Appl. no 43290/98 – McShane, para. 95; Judgment of 15 May 2007 – Appl. No. 52391/99 – Ramsahai, para. 324 et seq.

¹⁵⁹ ECtHR Judgment of 2 September 1998 Appl. no. 22495/93 Yaşa, para. 100; ECtHR Judgment of 14 May 2002 – Appl. no. 22876/93 – Semse Önen, para. 87.

would be without value, if in practice there would not be a procedure to evaluate the lawfulness of the killing – Convention States shall ‘secure human rights’.¹⁶⁰

Hence, Greece – and Turkey – are obliged under the ECHR to investigate the deaths at the border in the described manner.

D. No Justification of the Measures under EU or International Law

In the political and legal debate, in particular three arguments have been put forward in order to justify the measures at the Greek-Turkish border and the suspension of the asylum law in Greece, namely: the emergency clause of Art. 78 para 3 TFEU, the argument of an ‘instrumentalisation’ of EU asylum law, and the public policy clause of Art. 72 TFEU. Neither of those arguments is persuasive. In particular, EU law does not allow for a derogation of fundamental rights, let alone for a violation of the EU’s foundational values, during an extraordinary factual situation. In other words: There is no lawless state of exception under EU law.

I. The Emergency Measures Clause of Art. 78 para 3 TFEU

The Greek Prime Minister has invoked Art. 78 para 3 TFEU in order to support the decision to ‘suspend’ the asylum law for one month. In his words on Twitter: ‘Our national security council has taken the decision to increase the level of deterrence at our borders to the maximum. As of now we will not be accepting any new asylum applications for 1 month. We are invoking Art. 78.3 of the TFEU to ensure full European support.’¹⁶¹

This reference to Art. 78 para 3 TFEU is misleading and wrong. Neither the procedural nor the substantive requirements of that provision are fulfilled here. In any case, Art. 78 para 3 TFEU does not allow states to violate the non-refoulement principle as granted by EU and international law, something that has been correctly emphasized by the UNHCR.¹⁶²

Art. 78 para 3 TFEU provides that ‘in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.’

The clause has until now mainly been interpreted as a legal basis allowing for measures implementing the principle of solidarity.¹⁶³

In terms of procedural requirements, as becomes clear from the wording of Art. 78 para 3 TFEU already, the clause does *not* allow a member state to *unilaterally* take the measures which it considers appropriate. The provision rather prescribes the following procedure for a Council Decision: First, the Commission must propose a measure. Second, the European Parliament

¹⁶⁰ Cf. Art. 1 ECHR. See first in: ECtHR Judgment of 27 September 1995 – Appl. no 18984/91 – McCann et al, para. 161.

¹⁶¹ Prime Minister of Greece, ‘Statement via Twitter’, 1 March 2020, available at: <https://twitter.com/PrimeministerGR/status/1234192922813267976>.

¹⁶² UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’, 2 March 2020, available at: <https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>.

¹⁶³ European Parliamentary Research Service, ‘Emergency measures on migration: Art. 78(3) TFEU’, 6 March 2020, available at [https://www.europarl.europa.eu/thinktank/de/document.html?reference=EPRS_ATA\(2020\)649325](https://www.europarl.europa.eu/thinktank/de/document.html?reference=EPRS_ATA(2020)649325).

must be heard. Then, third, the Council may decide to adopt the measure. As has been clarified by the ECJ, the legislative procedure under Art. 289 para 3 TFEU does not apply, so that unanimity is not required in the Council, and it is sufficient that the Parliament is heard.¹⁶⁴

The substantive requirements have been clarified by the CJEU in regard to its two decisions establishing the so-called Relocation Programme adopted on the basis of Art. 78 para 3 TFEU.¹⁶⁵ The ECJ clarified that, in principle, a measure adopted under Art. 78 para 3 TFEU may provide for a deviation from secondary EU asylum law,¹⁶⁶ but that the deviation must be strictly temporarily limited, and that it must comply with the principle of proportionality.¹⁶⁷

However, Art. 78 para 3 TFEU does *not* allow for measures which would amount to a violation of EU primary law, including the CFR.¹⁶⁸ Otherwise, the Council could, in a procedure under Art. 78 para 3 TFEU deviate from – and hence de facto amend – the EU treaties. This would amount to a circumvention of the Treaty amendment procedure laid down in Art. 48 TEU.

Therefore, Art. 78 para 3 TFEU does not permit measures that violate the non-refoulement principle and rights granted by the CFR.

II. The Argument of an ‘Instrumentalisation’ of Asylum Law

Secondly, a general reference to a purported ‘instrumentalisation’ of asylum law cannot justify a deviation from binding EU and international law.

Greek politicians have argued that Turkey is ‘using desperate people to promote this geopolitical agenda’,¹⁶⁹ and that Turkey ‘is making use of innocent people in its efforts to destabilize Greece and Europe’,¹⁷⁰ or have even compared the movement of asylum seekers towards the EU to an ‘organized invasion from a foreign country’.¹⁷¹ Similarly, European Commission President has stated that ‘those who seek to test Europe’s unity will be disappointed. We will hold the line and we will prevail. Turkey is not an enemy and people are not just means to reach a goal.’¹⁷² The fact that those statements rhetorically refer to a situation of armed conflict seems so far-fetched from a legal perspective, that it does not seem necessary to further consider this line of argument in the following.

What does require some attention is the – almost equally far-fetched – argument that EU and international asylum law is not applicable to the situation at hand because it is not covered by

¹⁶⁴ ECJ Judgment of 6 September 2017 – C-643/15, C-647/15 – Slovakia and Hungary vs. Council.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid., para. 66.

¹⁶⁷ Ibid., para. 78.

¹⁶⁸ European Parliamentary Research Service, ‘Emergency measures on migration: Art. 78(3) TFEU’, 6 March 2020, available at: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649325/EPRS_ATA\(2020\)649325_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649325/EPRS_ATA(2020)649325_EN.pdf); ECRE, Statement on the Situation at the Greek Turkish Border, available at: <https://www.ecre.org/ecre-statement-on-the-situation-at-the-greek-turkish-border/>; UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’, 2 March 2020, available at: <https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>; Daniel Thym, ‘Deutschland macht eigentlich das Gleiche wie die Griechen’, 3 March 2020, available at <https://www.zeit.de/politik/ausland/2020-03/griechisch-tuerkische-grenze-fluechtlinge-tuerkei-griechenland-daniel-thym>.

¹⁶⁹ The Guardian, ‘Migration: EU praises Greece as ‘shield’ after Turkey opens border’, 3 March 2020, available at: <https://www.theguardian.com/world/2020/mar/03/migration-eu-praises-greece-as-shield-after-turkey-opens-border>.

¹⁷⁰ Deutsche Welle, ‘EU officials to visit Greek-Turkish border amid migrant surge’, 3 March 2020, available at: <https://www.dw.com/en/eu-officials-to-visit-greek-turkish-border-amid-migrant-surge/a-52617903>.

¹⁷¹ Ibid.

¹⁷² Deutsche Welle, ‘EU offers Greece migration support amid mounting refugee crisis’, 3 March 2020, available at: <https://www.dw.com/en/eu-offers-greece-migration-support-amid-mounting-refugee-crisis/a-52623868>.

the *telos* of asylum law. This is because the Greek Suspension Act refers to ‘the extraordinary circumstances of the urgent and unforeseeable necessity to confront an asymmetrical threat to the national security, which *prevails over the reasoning for applying the rules of EU law and international law on asylum procedures* [...]’.¹⁷³

To be sure, the argument that the rationale or the *telos* of a certain law does not cover a certain situation is, in principle, a valid legal argument.¹⁷⁴ Historical interpretation, referring to the origins of a certain international treaty, is, in principle, also a valid legal argument to support a specific reading or to clarify a clause that cannot be elucidated by wording, context, and *telos*.¹⁷⁵ And even EU primary law may, in principle, be subject to a constitutional transformation in the sense that where the practice of EU institutions continuously disregards a certain provision, that provision may have to be understood as *de facto* overturned.¹⁷⁶

However, neither of those arguments leads to the conclusion that the violation of EU and international law in the situation at hand may be somehow re-interpreted as ‘actually not amounting to a violation’. This becomes clear from the following three arguments.

First, a historical and teleological interpretation of the Geneva Convention 1951 leads to the conclusion that it covers the situation at hand. The Convention was adopted in order to address the situation in Europe after World War II.¹⁷⁷ In that historical context, refugees were forced to leave certain countries. It therefore follows *a fortiori* that the permission to leave Turkey – which is actually not an extraordinary situation, but rather complies with the human right to leave any country¹⁷⁸ – is covered by the *telos* of the Geneva Convention 1951.

Second, and more importantly, neither a teleological nor a historical interpretation of EU law may contradict the values enshrined in Art. 2 TEU. In other words: No method of interpretation may be invoked to justify an interpretation that amounts to a violation of the rule of law or fundamental rights. Such an outcome would be at odds with basic constitutional foundations of the EU.

Finally, and in any case, the EU, or its member states can hardly invoke the instrumentalisation of asylum law as an argument in situations where they, through a political agreement with a third state, put the latter in a position to ‘instrumentalise’ a large number of refugees in the first place. This is however exactly what the EU has done with the EU-Turkey Statement. What is more, the EU has previously instrumentalised the externalization of migration control in order to prevent people from reaching its borders and therefore being bound by an obligation to carry

¹⁷³ Suspension Act (fn. 37) preamble para 2 (emphasis added).

¹⁷⁴ Art. 31 para 1 of the Vienna Convention on the Law of Treaties (VCLT), UNTS 1155, 331: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

¹⁷⁵ Art. 32 VCLT: ‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation according to Art. 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.’

¹⁷⁶ Cf. Michalis Ioannidis, ‘Europe’s new Transformations: How the EU economic constitution changed during the Eurozone Crisis’, in: *Common Market Law Review* 53/5 (2016) pages 1237-1316.

¹⁷⁷ UNHCR, ‘The Refugee Convention, 1951. The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis’, available online: <https://www.refworld.org/docid/53e1dd114.html>, p. 2.

¹⁷⁸ Nora Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’, in *European Journal of International Law*, Volume 27 (2016) Issue 3, pages 591–616.

out individual asylum procedures and, in some instances, grant international protection to those trying to reach EU territory.

III. The Public Policy Clause of Art. 72 TFEU

The Suspension Act invokes ‘the extraordinary circumstances of the urgent and unforeseeable necessity to confront an asymmetrical *threat to the national security*’ and ‘the sovereign right and the constitutional obligation of the Hellenic Republic to safeguard its integrity, and its right to take any measure to this effect.’¹⁷⁹

As explained above, the ‘suspension of the asylum law’ and the ensuing deportations without individual procedure constitute a violation of EU and international law. They can also not be justified on the basis of the public policy clause of Art. 72 TFEU.¹⁸⁰

The public policy clause of Art. 72 TFEU allows the member states to derogate from EU law.¹⁸¹ In particular, it enables member states to *deviate* from EU asylum law, provided that the preconditions of that clause are met, and that the derogation does not exceed the scope it permits. Art. 72 TFEU provides that EU asylum law ‘shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.’

The provision must be interpreted in light of the principle of the national security clause enshrined in Art. 4 para 2 sentence 2 and 3 TEU.¹⁸² The competences of the European Court of Justice are restricted in that context, Art. 276 TFEU.¹⁸³ It is hence not surprising that the CJEU has not yet provided an interpretation of Art. 72 TFEU.

1. Preconditions for the application of the public policy clause of Art. 72 TFEU

As a precondition of invoking Art. 72 TFEU, the ‘law and order’ or the ‘internal security’ of the concerned member state must be endangered, and the concerned member state must provide a substantiated justification for invoking the public policy clause in case of a deviation from EU law.¹⁸⁴ Due to the autonomous interpretation principle of EU law, the terms ‘law and order’ and ‘internal security’ must be interpreted consistently throughout the Union; member state definitions are not dispositive.¹⁸⁵ Hence, not every instance in which a member state invokes the public policy clause is actually covered by it from the outset. At the same time, and in line with the limited competences of the CJEU to review an invocation of Art. 72 TFEU, there is

¹⁷⁹ Suspension Act (fn. 37), preamble para 2, 3 (emphasis added).

¹⁸⁰ See Daniel Thym, ‘Deutschland macht eigentlich das Gleiche wie die Griechen’, 3 March 2020, available at <https://www.zeit.de/politik/ausland/2020-03/griechisch-tuerkische-grenze-fluechtlinge-tuerkei-griechenland-daniel-thym>; Constantin Hruschka, ‘Was Griechenland an der Grenze zur Türkei tut, ist illegal’, 5 March 2020, available at: <https://www.nzz.ch/international/interview-mit-constantin-hruschka-ld.1544581>.

¹⁸¹ Matthias Rossi, ‘Art. 72 AEUV’ in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4th Ed. (CH Beck, Munich 2011), para. 5 with further references; Hans-Holger Herrfeld, ‘Art. 72 AEUV’, in: Jürgen Schwarze/ Ulrich Becker/Armin Hatje/Johann Schoo (eds.), EU-Kommentar (4th edition, Nomos, Baden-Baden 2019), para. 5.

¹⁸² Matthias Rossi, *ibid.*, para. 1.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*, para. 7; Wolfgang Weiß, ‘Art. 78 AEUV’, in Rudolf Streinz (ed.), EUV/AEUV (CH Beck, Munich 2018), para. 6.

¹⁸⁵ Matthias Rossi, ‘Art. 72 AEUV’ in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4th Ed. (CH Beck, Munich 2011) para 6. But see: Hans-Holger Herrfeld, ‘Art. 72 AEUV’, in: Jürgen Schwarze/ Ulrich Becker/Armin Hatje/Johann Schoo (eds.), EU-Kommentar (4th edition, Nomos, Baden-Baden 2019), para 8; Kai Hailbronner, in: EUV/EGV (Heymanns), Art. K, para 73.

some room for interpretation by the concerned member state to define whether a given situation qualifies as triggering the public order clause.¹⁸⁶

Some interpret the clause in line with the jurisprudence of the CJEU in the context of the internal market.¹⁸⁷ More convincingly, the term ‘law and order’ in Art. 72 TFEU stands in the international law tradition of the ‘ordre public’ and thus refers to fundamental characteristics of the national legal order.¹⁸⁸ The term ‘internal security’ refers to the essential institutions of the state including those tasks that are usually carried out by the police.¹⁸⁹ The threshold is quite high, such that Art. 72 TFEU was not even invoked in the context of the 2015 ‘refugee crisis’. Even the provisions in the Dublin Regulation III allowing for a deviation from the general rules were interpreted by the CJEU in a rather strict and narrow manner.¹⁹⁰ It is therefore highly doubtful whether the situation described above justifies an invocation of Art. 72 TFEU by Greece as a justification for its measures. Turkey’s decision to open its borders did not create a situation in which the fundamental characteristics of the national legal order were endangered, nor is it apparent that the spike in arrivals amounts to a threat to the internal security of Greece – certainly not when compared with the experience of 2015.

2. No justification of a violation of fundamental rights

Further, and regardless of the question whether the preconditions of Art. 72 TFEU are met, it is generally acknowledged that the public policy clause cannot be interpreted as allowing a deviation from *any* possible provision of EU law.

In particular, Art. 72 TFEU does *not* allow a violation of absolute fundamental rights.¹⁹¹ As measures based on Art. 72 TFEU fall within the scope of EU law, such measures must be in line with the CFR, Art. 51 para 1 CFR.¹⁹² The current measures implemented by Greece however do violate absolute fundamental rights, especially Art. 4 and Art. 19 CFR, as shown above.¹⁹³

The re-introduction of checks at the EU internal borders illustrates very well the kind of measures which might be justified under Art. 72 TFEU in conjunction with the respective secondary law provisions concretising the public order clause.¹⁹⁴ The measures in question are however of an entirely different nature: Those measures violate absolute fundamental rights as granted under EU and international law.

¹⁸⁶ Matthias Rossi, ‘Art. 72 AEUV’ in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4th Ed. (CH Beck, Munich 2011), para 7 with further references, para 9.

¹⁸⁷ Art. 45 para 3, Art. 52 para 1 TFEU.

¹⁸⁸ Matthias Rossi, ‘Art. 72 AEUV’, in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4th Ed. (CH Beck, Munich 2011), para 7.

¹⁸⁹ Ibid. with further references; Hans-Holger Herrfeld, ‘Art. 72 AEUV’, in: Jürgen Schwarze/Ulrich Becker/Armin Hatje/Johann Schoo (eds.), EU-Kommentar (4th edition, Nomos, Baden-Baden 2019), para 8; Wolfgang Weiß, ‘Art. 72 AEUV’, in Rudolf Streinz (ed.), EUV/AEUV (CH Beck, Munich 2018), para 6.

¹⁹⁰ Cf. ECJ Judgement of 26 July 2017 – C-646/16 – Jafari.

¹⁹¹ Daniel Thym, ‘Deutschland macht eigentlich das Gleiche wie die Griechen’, 3 March 2020, available at <https://www.zeit.de/politik/ausland/2020-03/griechisch-tuerkische-grenze-fluechtlinge-tuerkei-griechenland-daniel-thym>.

¹⁹² See only: Stephan Breitenmoser/Robert Weyeneth, ‘Art. 72 TFEU’, in: von der Groeben/Schwarze/Hatje (eds.), Europäisches Unionsrecht, 7th edition (Nomos, Baden-Baden 2015), para 25.

¹⁹³ See above C.

¹⁹⁴ Matthias Rossi, ‘Art. 72 AEUV’ in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4th Ed. (CH Beck, Munich 2011), para 8f; Art. 25 et seq. Schengen Borders Code.

The question of whether a temporary ‘suspension’ of the processing of asylum claims in the sense of a general *delay* in the procedures is compatible with Art. 72 TFEU or not,¹⁹⁵ is not relevant to the present opinion. The measures undertaken by Greece amount to a ‘suspension’ of the asylum law in the sense that the persons are being deported without access to an asylum procedure and are prevented from lodging an application and thus excluded from benefiting from the guarantees for asylum seekers – this is an entirely different situation.¹⁹⁶

IV. No Lawless ‘State of Exception’ under EU law

Finally, and rather for the sake of completeness of the argument, it is emphasized that neither Art. 72 TFEU, nor Art. 78 para 3 TFEU, nor any other EU law provision allows for a ‘suspension’ of the rule of law or even of fundamental rights. In other words, there is *no state of exception* under EU law. The rule of EU law, at least insofar as *the essence of fundamental rights* is concerned, cannot be suspended under any circumstances.

Both Art. 72 and Art. 78 para 3 TFEU allow for emergency measures to ensure that the member states retain sufficient flexibility to react to threats to the public order despite the transfer of the competences to the EU in the area of migration and asylum under Art. 78 para 1 and para 2 TFEU.¹⁹⁷ Beyond those provisions, deviations or suspensions of EU law are *not* permissible.

Moreover, it is not legally possible under EU law to ‘suspend’ fundamental rights. The Charter of Fundamental Rights does not provide for a derogation clause. Permissible infringements are conclusively governed by Art. 52 para 1 CFR, which provides that ‘*any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms*. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’¹⁹⁸ Thus, even though the Charter shall be interpreted in line with the ECHR (Art. 52 para 3 CFR), the derogation clause of Art. 15 ECHR cannot be applied to the Charter. And in any case, neither the substantial nor the procedural requirements of Art. 15 ECHR are met.¹⁹⁹

E. Accountability Avenues under EU Law for Illegal Measures at the Border

I. Infringement Procedures Against Member States

The European Commission is the ‘*guardian of the Treaties*’.²⁰⁰ As such, it ‘shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union’ (Art. 17 para 1 TFEU).

¹⁹⁵ Cf. on that question Daniel Thym, ‘Deutschland macht eigentlich das Gleiche wie die Griechen’, 3 March 2020, available at <https://www.zeit.de/politik/ausland/2020-03/griechisch-tuerkische-grenze-fluechtlinge-tuerkei-griechenland-daniel-thym>.

¹⁹⁶ Cf. Constantin Hruschka, ‘Was Griechenland an der Grenze zur Türkei tut, ist illegal’, 5 March 2020, available at: <https://www.nzz.ch/international/interview-mit-constantin-hruschka-ld.1544581>.

¹⁹⁷ Matthias Rossi, ‘Art. 72 AEUV’ in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4th Ed. (CH Beck, Munich 2011), para 1.

¹⁹⁸ Emphasis added.

¹⁹⁹ Cf. for an analysis of the preconditions: Robert Nestler, ‘Terrorismus als Ausnahmezustand’, (2018) Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, p. 23 et seq.

²⁰⁰ Art. 17 TEU.

With regard to e.g. the EU hotspot administration, the Commission carries out its supervisory obligations within the framework of the European Regional Task Force (EURTF). In the context of the administration of the Common European Asylum System and the EU external border, the Commission has several possibilities to ensure member state compliance with EU law. In particular, the Commission has the competence to initiate an *infringement procedure* under Art. 258 TFEU against a Member State which violates EU law.

The infringement procedure is in essence a *sanction mechanism*. As such, it stands in a certain contrast to the impetus of the solidarity measures,²⁰¹ which in essence amount to a support mechanism. In the Internal Market, the Commission routinely relies on infringement procedures against member states to enforce the rule of EU law. In the same vein, it relies on infringement procedures to enforce EU law in the Area of Freedom, Security and Justice, including in the Common European Asylum System.²⁰²

As shown above, the Greek measures are at least partly incompatible with EU law. Until now, however, the reaction of the Commission has been limited to praising the closure of the Greek-Turkish border and promising financial and operational support to ensure that the border remains closed.²⁰³ It has not shown any intention of initiating an infringement procedure against Greece.

The decision whether or not to initiate such a procedure lies, in principle, in the *political discretion* of the Commission.²⁰⁴ The question of whether there are *legal limits* to the political discretion of the Commission in the context of Art. 258 TFEU arises in particular where a violation of the values enshrined in Art. 2 TEU is at stake – and, as has been shown above, this is the case here. As EU law stands, however, there is little clarity over this question.²⁰⁵ On the one hand, the case law of the CJEU in the context of the Eurozone crisis, which in turn confirms earlier jurisprudence in the context of state aid and competition law, suggests that the Commission is under a positive obligation to do everything within its competences to ensure the compliance with EU law, wherever it is involved in the relevant procedures.²⁰⁶ On the other hand, it is not entirely clear what it is that the Commission is required to do, and which are the legal consequences of a failure of the Commission in this regard, in particular whether the Union would be liable in this case. Those questions require further legal analysis that go beyond the scope of this legal opinion. In conclusion, the Commission would be able to start infringement procedures against Greece, but it is not clearly obliged to do so.

II. Liability of the Union for Illegal Conduct by Frontex

The Union – namely the Commission and EU agencies – are closely involved in the administration of the Common European Asylum System and the EU external border in Greece. This raises the question whether the Union is liable in case the measures in question

²⁰¹ See below F.I.

²⁰² Cf. the pending infringement procedures due to an incorrect implementation of the EU asylum law such as: ECJ, C-808/18, *Commission v Hungary*; ECJ, C-757/17, *Commission v Poland*.

²⁰³ See above.

²⁰⁴ ECJ, T-47/96 – *SDDDA v Commission*, para 42.

²⁰⁵ Cf. Cremer, ‘Artikel 258 AEUV’, in: Calliess/Ruffert (eds.), *EUV/AEUV*, 5th edition (CH Beck 2016), para 40 et seq.

²⁰⁶ ECJ, Judgment of 20 September 2016 – C-8/15 P – *Ledra Advertising v Commission and ECB*; GC, Judgment of 13 July 2018 – T-786/14 – *Bourdouvali and Others v Council and Others*.

result in the violation of fundamental rights of asylum seekers.²⁰⁷ This section will focus on whether Frontex or the Union may be held liable in the case Frontex was involved in illegal administrative conduct such as e.g. pushbacks, deportations without individual procedure or an excessive use of force.

The Regulation (EU) 2019/1896 (Frontex Regulation) provides that ‘European integrated border management’ is ‘a *shared responsibility of the Agency (Frontex) and of the national authorities* responsible for border management’. Thus, the European integrated border management shall be implemented by Frontex, while the ‘member states shall retain primary responsibility for the management of their sections of the external borders’.²⁰⁸ During the past four years, Frontex has continuously provided extensive operational support to Greece. In reaction to the recent events, it has been announced that the Frontex support in particular at the Greek-Turkish land border would be further increased.²⁰⁹

In this context, it cannot be excluded from the outset that Frontex might be involved in illegal measures at the border. This is well illustrated by reports of Frontex ordering a Danish boat participating in the Operation Poseidon²¹⁰ to carry out a pushback at sea.²¹¹ Although, according to reports, the Danish boat in that case refused to carry out that order, which the Danish crew commander considered as ‘not justifiable’,²¹² it is possible that commands to carry out pushbacks are followed in other cases. In addition, the possibility that Frontex might also be involved in pushbacks or the excessive use of violence at the Greek-Turkish land border cannot be excluded from the outset.²¹³ The 2019 Frontex Regulation allows for the use of force by Frontex team members in certain circumstances²¹⁴ which increases the risk that Frontex team members will be involved in incidents that violate individual or even fundamental rights.

When implementing its tasks, Frontex is obviously obliged to respect the EU law, including fundamental rights and international refugee law. This follows from Art. 51 CFR and is explicitly laid down in, *inter alia*, Art. 1 and Art. 80 Frontex Regulation. The latter explicitly provides, in para 1, that Frontex ‘shall guarantee the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law, in particular the Charter, and relevant international law, including the 1951 Convention relating to the Status of Refugees, the 1967 Protocol thereto, the Convention on the Rights of the Child and obligations related to access to international protection, in particular the principle of non-refoulement.’

²⁰⁷ Catharina Ziebritzki, ‘Refugee Camps at EU External Borders, the Question of the Union’s Responsibility, and the Potential of EU Public Liability Law’, 5 February 2020, available at: <https://verfassungsblog.de/refugee-camps-at-eu-external-borders-the-question-of-the-unions-responsibility-and-the-potential-of-eu-public-liability-law/>.

²⁰⁸ Frontex Regulation, Art. 7.

²⁰⁹ See above.

²¹⁰ Frontex, ‘Operation Poseidon’, 2020, available at: <https://frontex.europa.eu/along-eu-borders/main-operations/operation-poseidon-greece/>.

²¹¹ Politico, ‘Danish boat in Aegean refused order to push back rescued migrants’, 6 March 2020, available at: <https://www.politico.eu/Art./danish-frontex-boat-refused-order-to-push-back-rescued-migrants-report/>.

²¹² Mads Korsager Nielsen, ‘Sådan foregår bevogtningen af EU's yderste grænser: Dansk patruljebåd beordret til at sætte flygtninge tilbage i vandet’, 5 March, available at: <https://www.dr.dk/nyheder/indland/saadan-foregaar-bevogtningen-af-eus-yderste-graenser-dansk-patruljebaad-beordret-til>.

²¹³ See C.I.

²¹⁴ See Annex V Frontex Regulation.

Where violations of these obligations are at issue, Frontex only provides for a *non-judicial internal accountability mechanism* to ensure that its actions comply with EU law and in particular with fundamental rights, Art. 111 Frontex Regulation. Such a mechanism does not fulfil the requirements of the right to an effective remedy before a ‘tribunal’ as granted by Art. 47 CFR.

However, where Frontex is closely involved in an incident amounting to a violation of individual rights granted by EU secondary law or the CFR, the concerned individual might file an *action for damages* before the European Court of Justice. Such an action for damages can be filed either against the agency under Art. 97 para 4 and Art. 98 Frontex Regulation, or against the Union under Art. 340 para 2 TFEU. To be sure, the conditions of the public liability of the Union as established by the ECJ must be met in order for such an action to be successful.²¹⁵ Further, there are several practical issues that seem to explain why no such action for damages based on illegal conduct of Frontex has been lodged yet.²¹⁶ In addition, member states might, under certain circumstances, be liable for illegal conduct of their state forces deployed to Greece as part of a Frontex team. Assessing all this in more detail would, however, go beyond the scope of this legal opinion.²¹⁷

F. Alternative, Legal Measures as Foreseen under EU Law

From the above it follows that, even with in increased migratory pressure at the external border of a certain member state, international human rights and refugee law continues to require an individual asylum procedure to be carried out before denials of entry or deportations can occur. Therefore, the first and most important measure in accordance with the legal obligation would be to:

- immediately revoke the suspension of the right to asylum;
- guarantee access to an asylum procedure to all asylum seekers at the border and to those who reached Greek territory already.

Such measures would of course increase the pressure on the asylum and reception system in Greece.

Therefore, *solidarity measures* could be activated by the EU (I.) and its member states (II.). in order to deal with the increased influx of asylum seekers at the EU external border to Turkey. In addition, EU law provides for legal ways in which Greece can respond to increased pressure on its asylum system, namely by modifying the asylum procedure (III.).

²¹⁵ Cf *ibid.*

²¹⁶ In particular, the lack of access to legal aid of those concerned.

²¹⁷ See in more detail: Melanie Fink, ‘EU liability for contributions to Member States’ breaches of EU law’ (2019) 56 *Common Market Law Review*, Issue 5, pp. 1227–1264; Melanie Fink, ‘Frontex and Human Rights, Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law’ (Oxford University Press, Oxford 2018). See also Melanie Fink, ‘The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable’, 21(3) *German Law Journal* 532 (2020), forthcoming at <https://www.cambridge.org/core/journals/german-law-journal/latest-issue>.

I. EU Solidarity Measures

1. The Directive 2001/55/EC on Temporary Protection in the Event of Mass Influx

While the Directive 2001/55/EG (Mass Influx Directive – MID) is designed specifically for situations of an increased influx of asylum seekers, it is unlikely to be helpful here.

The MID provides mechanisms for handling the situation of ‘*arrival of a large number of displaced persons*’ (Art. 2 lit. d MID). If such a situation is declared by the Council of the European Union by qualified majority (Art. 5 para. 1 MID), the Directive provides the possibility to grant a temporary protection status to a specific group of persons in the situation of mass influx, without individual examination in order to decrease and postpone the administrative efforts that would result from carrying out individual asylum procedures. Conversely, it *does not* provide for denial of status, unlawful pushbacks, or suspensions of asylum law in such situations. Rather, these situations should be handled by simplifying the procedures for granting protection.

However, the Directive has little potential for the current situation at the Greek-Turkish border for three reasons. First, it seems questionable whether the current situation is equivalent to a mass influx in purely numerical terms. Second, the MID has never been used yet, even in 2015, with far higher numbers of asylum seekers, making it unlikely that the EU Council will rely on it now. Third, the MID refers to an influx of applicants ‘*from a specific country or geographical area*’,²¹⁸ implying that the legal assessment of their protection claims will not vary much. By contrast, bearing in mind the current population of asylum seekers on the Greek islands,²¹⁹ the protection seekers at the Greek-Turkish land border may be rather diverse with regards to their nationality.

2. Relocation Decision under Art. 78 para 3 TFEU

Instead, the EU or the other member states should consider temporary *solidarity mechanisms* to assist Greece in managing the situation. In the event that the number of asylum procedures overburdens the country’s asylum system, the Council could adopt another relocation scheme as a provisional measure according to Art. 78 para. 3 TFEU – as it has already done in 2015 (Council Decisions 2015/1523 and 2015/1601).

The Council has broad discretion with regards to how it deals with ‘emergency situations’ as described in Art. 78 para. 3 TFEU.²²⁰ However, as the past relocation mechanism has shown, such mechanism will only be successful if member states are ready to implement it.²²¹ According to the 2015 relocation decisions, 66,400 applicants were to be relocated from Greece. Further 54,000 applicants were to be relocated from either Greece or Italy. However,

²¹⁸ Art. 2 lit. d MID.

²¹⁹ Which consists of Afghan, Syrian, Somalian citizens as well as other nationalities, cf. the data provided by UNHCR, ‘Operation Portal: Aegean Islands Weekly Snapshot 24 February - 01 March 2020’, 3 March 2020, available at: <https://data2.unhcr.org/en/documents/details/74359>.

²²⁰ ECJ Judgment of 06 September 2017 – C-643/15 & C-647/15, para. 246, 253.

²²¹ Cf. ECJ, Judgement of 26 July 2017 – C-646/16 – Jafari and C-490/16 – A.S.; ECJ, Judgement of 6 September 2017 – C-643/15, 647/17 – Slovakia and Hungary v Council; Nora Markard/Anuscheh Farahat, ‘Recht an der Grenze: Flüchtlingssteuerung und Schutzkooperation in Europa’, in: Juristenzeitung 22/2017, 1088 et seq.

less than 22,000 applicants were actually relocated from Greece.²²² This shows that, for a successful implementation of a relocation scheme, the willingness of the member states to implement the scheme fully is crucial.

3. Operational Support through EU Agencies

Operational administrative support, provided to Greece via EU agencies such as EASO and Frontex could be an additional solidarity measure.²²³

a. Operational Support by the European Asylum Support Office (EASO)

As has been shown, the main issue is the lack of the implementation of EU asylum law at the EU external border in Greece. Certainly, the Greek asylum system is under pressure – which is not a recent phenomenon, but has indeed been the case for the last decade.

The EU agency EASO was established in 2011 ‘in order to help to improve the implementation of the Common European Asylum System (the CEAS), to strengthen practical cooperation among Member States on asylum and to *provide and/or coordinate the provision of operational support to Member States subject to particular pressure on their asylum and reception systems*’ (Art. 1 Regulation (EU) 439/2010 – hereafter: ‘EASO Regulation’). In particular, EASO ‘shall *provide effective operational support to Member States subject to particular pressure on their asylum and reception systems, drawing upon all useful resources at its disposal* which may include the coordination of resources provided for by Member States under the conditions laid down in this Regulation’ (Art. 2 para. 2 EASO Regulation).

Indeed, EASO is providing substantial operational support to Greece already. Certainly, the operational support by EASO leads to several legal challenges. In case of enhanced EASO support, attention should be paid in particular to EASO acting within the limits of its competences, and in line with EU and national asylum law.²²⁴ Provided those conditions are met, operational administrative support through EASO could indeed contribute to maintaining a functioning asylum system in Greece despite increased numbers of asylum applications. The EASO Regulation also provides for an increase of involvement of EASO in cases of an increase of pressure on national asylum systems (cf. Art. 8, 10 lit. a, b EASO Regulation).

Most importantly, EASO may deploy *asylum support teams*.²²⁵ This may include coordination, technical assistance, and further kinds of operational administrative support. The deployment of further EASO asylum support staff would require the conclusion of an additional or the amendment of the existing Operational Plan between Greece and EASO. In the alternative, the current EASO Operational Plan could be amended with a view towards enhancing the number of staff and technical assistance provided to Greece.²²⁶

²²² Cf. the Greek Asylum Service Statistical Data: Greek Ministry of Migration and Asylum, ‘Statistical Data’, 2020, available at: asylo.gov.gr/en/?page_id=110.

²²³ Also Eurojust and Europol, but we do not consider those in the following.

²²⁴ Cf. on EASO overstepping its competences: European Ombudsman, ‘EASO’s involvement in applications for international protection submitted in the ‘hotspots’ in Greece’, CASE 735/2017/MDC, Decision of 5 July 2018, available at: <https://www.ombudsman.europa.eu/en/case/en/49987>.

²²⁵ Art. 10 lit c EASO Regulation in conjunction with Art. 13 et seq EASO Regulation.

²²⁶ See for the current operational plan: European Asylum Support Office, ‘Operational Plan’, 2020, available at: <https://easo.europa.eu/archive-of-operations>.

Enhanced operational EASO support could thus support the Greek asylum system, even in case of a situation of so-called ‘mass influx’. Dealing with these kinds of situations was one of the very reasons why EASO was established, and is indeed part of the very core of the mandate of the EU agency.

However, it should not be ignored that EASO according to the Regulation may only support member states, and ‘*shall have no powers in relation to the taking of decisions by Member States’ asylum authorities on individual applications for international protection.*’ (Art. 2 para 6 EASO Regulation). Within the current administrative framework on the Greek islands, however, EASO often conducts legal interviews and drafts the decision in form of a ‘legal opinion’. The Greek Asylum Service then decides upon the individual case only upon the interview protocol of the interview conducted by EASO and on the EASO legal opinion. Such procedure is clearly in violation of Art. 2 para 6 EASO Regulation and should clearly be avoided in any circumstance where EASO’s mission in Greece is expanded.²²⁷

b. Operational Support by Frontex

As has been mentioned above, the EU has so far announced increased Frontex support, as part of the shared responsibility for the administration of the EU’s external border.²²⁸

In particular, the Frontex staff provided in the context of an existing *joint operation* could be increased, or a *rapid border intervention* could be launched. While the purpose of the former is to provide technical and operational assistance,²²⁹ the latter is a form of intervention which is tailor-made to a situation ‘at the external borders of those Member States facing specific and disproportionate challenges, taking into account that some situations may involve humanitarian emergencies and rescue at sea in accordance with Union and international law’²³⁰.

With regard to the support provided by Frontex, it must however be emphasized that the mandate of Frontex is not limited to ‘blocking borders’ by coordinating pushbacks²³¹ or providing tear-gas. Rather, as set out above, the mandate of Frontex requires the agency to comply with EU and international refugee law.²³² This means that Frontex may also provide support for registering asylum claims or with similar administrative conduct related to the implementation of the EU asylum law.²³³

²²⁷ Catharina Ziebritzki/Robert Nestler, “‘Hotspots’ an der EU-Außengrenze. Eine rechtliche Bestandsaufnahme”. Arbeitspapier (‘Hotspots’ at the EU External Border. A Legal Survey) (July 28, 2017), Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper No. 2017-17, available at SSRN: <https://ssrn.com/abstract=3028111>, p. 48 et seq ; Evangelia (Lilian) Tsourdi, ‘Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?’, 21(3) German Law Journal (2020), forthcoming at <https://www.cambridge.org/core/journals/german-law-journal/latest-issue>.

²²⁸ See above B.III.

²²⁹ Art 10 lit g Frontex Regulation.

²³⁰ Art. 10 lit. h Frontex Regulation

²³¹ See on those reports above E. II.

²³² Art. 51 CFR, Art. 1 Frontex Regulation.

²³³ See in particular the mandate Frontex staff deployed as part of the migration management support teams, cf. Art. 40 Frontex Regulation. See on the details of the tasks of Frontex staff in Greece including registering asylum claims: Frontex, ‘Operation Poseidon’, 2020, available at: <https://frontex.europa.eu/along-eu-borders/main-operations/operation-poseidon-greece/>.

4. Financial Support

Finally, the EU could provide enhanced financial support to Greece. As has been mentioned above, this is indeed one of the solidarity measures that has been proposed by the European Commission.

The Union's financial support to Greece to better manage migration and borders is currently provided through three EU funds, including the AMIF, the Internal Security Fund (ISF) and the Emergency Support Instrument (ESI).²³⁴

The AMIF has been set up for the period 2014–20, with a total of 3.1 billion Euro for the seven years, in order to promote the efficient management of migration flows and the implementation, strengthening and development of a common Union approach to asylum and immigration.²³⁵ The ISF was set up for the period 2014–20, with a total of 3.8 billion Euro for the seven years. The Fund is supposed to promote the implementation of the Internal Security Strategy, law enforcement cooperation and the management of the Union's external borders.²³⁶ The aim of the ESI is close to that of the AMIF, it namely 'aims to preserve life, prevent and alleviate human suffering and maintain human dignity'. Through ESI, the EU can fund emergency humanitarian support for people in need within the EU territory in urgent and exceptional circumstances, such as the sudden influx of refugees in Europe.²³⁷

While assessing the funding possibilities in detail goes beyond the scope of this legal opinion, it must be stressed that enhanced financial support to Greece under the AMIF, ESI, or to a certain extent also under the ISF, could contribute to allowing the Greek national authorities to adequately process asylum applications in line with EU and international law. However, it must be ensured, that money allocated to the Greek asylum system, including the reception conditions, also leads to an improvement of the state of the asylum system. In the past, the European Court of Auditors has reported that there is room for improvement concerning the manner in which funds dedicated to the asylum system are being spent. Reception conditions in Greece have not significantly and sustainably increased, despite considerable financial aid by the EU.²³⁸

II. Bilateral Solidarity Measures: Admission of Asylum Seekers from Greece

Further, EU member states could establish bilateral solidarity mechanisms.

²³⁴ European Commission, 'Managing Migration: EU Financial Support to Greece', February 2020, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/202002_managing-migration-eu-financial-support-to-greece_en.pdf ;

²³⁵ Leonhard den Hertog, 'EU Budgetary Responses to the "Refugee Crisis": Reconfiguring the Funding Landscape', (May 2016) CEPS Paper in Liberty and Security in Europe No. 93, available at: <https://www.ceps.eu/system/files/LSE%20No%2093%20LdH%20on%20EU%20Budgetary%20Responses%20to%20the%20Refugee%20Crisis.pdf>.

²³⁶ European Commission, 'Internal Security Fund – Police', 2014-2020, available at: https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/internal-security-fund-police_en .

²³⁷ European Commission, 'Emergency support within the EU', 22 May 2019, available at: https://ec.europa.eu/echo/what-we-do/humanitarian-aid/emergency-support-within-eu_en .

²³⁸ European Court of Auditors, 'Special report No 24/2019: Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results', 13 November 2019, available at: <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=51988> .

1. No Exclusion under EU law

Such bilateral mechanisms especially are not excluded under EU law. To the contrary, EU law is based on the principle of solidarity among member states as expressed in Art. 3 para 3 subpara 3 TEU. The principle is specified for the Common European Asylum System in Art. 80 TFEU, which requires that asylum policies adapted by the European Union are aligned with the principle of solidarity and fair sharing of responsibility.

Art. 80 TFEU does stipulate concrete legal obligations for EU bodies and member states on how to implement an asylum policy that meets the principle of solidarity and fair sharing of responsibility. Thus, the responsible actors have broad discretion when implementing solidarity mechanisms.²³⁹ However, in cases of increased migratory pressure, the Council is obliged to undertake solidarity measures in favour of the effected member states.²⁴⁰ In case the Council does not – for whatever reason – sufficiently fulfil this obligation, member states cannot be prohibited from finding bilateral solutions. These bilateral solutions do not constitute any harm for other member state or the functioning of the European asylum system. Quite the contrary, they are tangible manifestations of the solidarity principle.

An exclusion of bilateral solidarity mechanisms also does not follow from the Dublin Regulation III. Rather, under Art. 17 Dublin Regulation III, member states have broad discretion to take responsibility for asylum procedures that they are not otherwise responsible for under the binding responsibility criteria of chapter III of the Dublin Regulation III. This discretion is specifically designed to allow states to derogate from the responsibility criteria for humanitarian reasons (recital 17 of the Regulation).

2. Practical Implementation

There are several different options for the implementation of bilateral solidarity mechanisms.

Firstly, asylum applicants from Greece can be admitted through the Dublin Regulation III.²⁴¹ This procedure has recently been applied by Italy and Ireland in order to admit small numbers of asylum seekers from Greece. It is further currently used to distribute responsibility for asylum seekers rescued at sea by Italy among other EU member states.²⁴²

Secondly, the bilateral mechanisms can be implemented under the domestic immigration law of the receiving state. The so-called ‘Dubs-Scheme’ in the United Kingdom, as established in Rule 67 of the Immigration Act 2016, is an example of this. Under this scheme, unaccompanied minor asylum applicants from France and Greece were relocated to the UK. Similarly, federal

²³⁹ Cf. ECJ Judgment of 06 September 2017 – C-643/15 & C-647/15, para. 246, 253.

²⁴⁰ Cf. ECJ Judgment of 06 September 2017 – C-643/15 & C-647/15, para. 252.

²⁴¹ Cf. for a description: ECRE, ‘Relying on Relocation’, 2019, available: <https://www.ecre.org/wp-content/uploads/2019/01/Policy-Papers-06.pdf>, p. 8 et seq.; Human Rights Watch et al., ‘NGOs’ Urgent Call to Action: EU Member States Should Commit to the Emergency Relocation of Unaccompanied Children from the Greek Islands’, 4 March 2020.

²⁴² See e.g. for Germany: Deutscher Bundestag, 19. Wahlperiode, ‘Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Gökay Akbulut, Dr. André Hahn, weiterer Abgeordneter und der Fraktion DIE LINKE – Drucksache 19/9146’, available at: <https://kleineanfragen.de/bundestag/19/9703-aufnahme-und-verteilung-aus-see-not-geretteter-schutzsuchender>.

states in Germany are currently trying to implement programs to admit unaccompanied minors from Greece under § 23 German Residency Act.²⁴³

Family reunification procedures are a third option for relief, which however is notoriously under-used, despite the fact that they secure individual rights. The Dublin Regulation III provides a right to family reunification if a person already has family members in another Member State.²⁴⁴ In this case, the Member State in which the family member is already present is responsible for conducting the asylum procedure.²⁴⁵ This affects quite a number of asylum seekers arriving in Greece. The rejection rates for take-charge requests sent by Greece for this category of persons are all high. For example, Germany rejects over 70 percent of those take-charge request.²⁴⁶ However, because the rejections are often unlawful, legal proceedings are successful in the majority of cases.²⁴⁷ Therefore, simply applying current EU law would give Greece considerable relief.

III. Modification of the Asylum Procedure in Greece: Border Procedures and Accelerated Procedures

As shown, there is no legal possibility for a member state to withdraw from the obligations arising from EU asylum law. This also means that the persons concerned must benefit from its guarantees. There are, however, opportunities to modify the procedures in order to adjust them to increased migratory pressure, which Greece may legally use.

Under the Asylum Procedures Directive (APD), the procedure can be accelerated and/or be carried out at the border. However, EU law provides strict guidelines for accelerating procedures, which the EU hotspots in Greece violate already.

According to Art. 43 para 1 APD, the applications of certain categories of persons (mentioned in Art. 31 para. 8 APD) may be examined under the *border procedure*. For these groups, a prior examination of the admissibility of the application – concerning ‘protection elsewhere’ (Art. 33 APD) – and the examination on the merits of asylum application of certain groups of persons can be conducted at the border.²⁴⁸ According to Art. 43 para. 2, the procedure must be concluded within four weeks; if not, applicants must be transferred to the normal procedure. Art. 43 para. 3 provides for an exception as to when the deadline can be extended. It can be assumed that Greece is systematically violating the formal requirements for the applicability of the border procedure by applying the EU hotspot approach.²⁴⁹

²⁴³ See Deutsche Welle, ‘German state considers bringing refugee children from Greece unilaterally’, March 2020, available at: <https://www.dw.com/en/german-state-considers-bringing-refugee-children-from-greece-unilaterally/a-51788588>.

²⁴⁴ Regarding the subjective right: Robert Nestler/Vinzent Vogt, ‘Dublin-III reversed – Ein Instrument zur Familienzusammenführung?’ *Zeitschrift für Ausländerrecht und Ausländerpolitik* (2017), p. 21 et seq.

²⁴⁵ See for the requirements and a broad overview Robert Nestler/Vinzent Vogt/Catharina Ziebritzki, ‘Family reunion in Germany under the Dublin III Regulation’, 2018, available at: https://www.diakonie.de/fileadmin/user_upload/Diakonie/PDFs/Diakonie-Texte_PDF/Family_Reunion_Dublin_III_advisory_guide_2018.pdf.

²⁴⁶ See Greek Asylum Service, ‘Statistical Data’, 2020, available at: http://asylo.gov.gr/en/wp-content/uploads/2020/02/Dublin-stats_January20EN.pdf.

²⁴⁷ See for an overview of cases: Equal Rights Beyond Borders, ‘Litigation on Family Reunion’, 2020, available at: <https://www.equal-rights.org/litigation-family-reunion>.

²⁴⁸ See above C.I.6.

²⁴⁹ Yiota Masouridou/Evi Kyprioti, ‘The EU-Turkey Statement and the Greek Hotspots, A failed European Pilot Project in Refugee Policy’, June 2018, available at: <http://extranet.greens-efa-service.eu/public/media/file/1/5625>.

According to Art. 31 para 8 APD, the border procedure may be '*accelerated*' for certain categories of persons. This concerns those whose asylum applications are considered to have little chance of being successful and are then rejected as 'manifestly unfounded', or those who violate mandatory cooperation obligations and, for example, refuse to give fingerprints to establish the Member State responsible.

When relying on these procedures, states must still comply with the guarantees contained in the second chapter of the APD (cf. Art. 31 para 8 APD) and in the Reception Conditions Directive. This applies to both human rights guarantees and protection obligations.

The EU hotspot approach adopted by the EU Turkey deal is an example of such an accelerated border procedure, but its three-year implementation also reveals the implied dangers. Analysis²⁵⁰ consistently shows that it structurally facilitates violations of EU law and human rights violations and leads to inhuman and degrading conditions often amounting to violations of Art. 3 ECHR / Art. 4 CFR.

In the words of EU fundamental rights experts: 'The approach of processing asylum claims at borders, particularly in relatively remote locations, creates fundamental rights challenges that appear almost unsurmountable.'²⁵¹

Moreover, a border procedure makes legal protection structurally impossible, especially in remote locations. If the European Union also sends agencies to support the respective Member State, a structural imbalance arises that is in tension with the principle of equality of arms based on the rule of law. Combined with the deliberately short deadlines, this regularly leads to violations of the right to an effective remedy under Art. 47 CFR and Art. 13 ECHR.

The right to an effective remedy requires effective access and scrutiny particularly *before* irreparable harm can be brought about by the administration. If necessary, a system for free legal advice must be maintained and information about it provided to asylum seekers. Legal advice must therefore also actually be accessible and available.²⁵² This requirement can be met neither in the EU hotspots nor at the land border with Turkey, particularly now that authorities are denying access to the persons concerned.²⁵³

G. Conclusion

The current escalation of the situation at the EU external border in Greece is truly worrying and violates EU law and international law.

First and foremost, the situation is alarming because the current measures *endanger the lives and the dignity* of those people who are attempting to cross the Greek-Turkish border. There is no lawless state of exception at the EU external borders. Tear-gas, ever-higher fences, and more

²⁵⁰ Catharina Ziebritzki/Robert Nestler, "'Hotspots' an der EU-Außengrenze. Eine rechtliche Bestandsaufnahme". Arbeitspapier ('Hotspots' at the EU External Border. A Legal Survey) (July 28, 2017), Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper No. 2017-17, available at SSRN: <https://ssrn.com/abstract=3028111>.

²⁵¹ Cf. European Union Agency for Fundamental Rights, 'Update of the 2016 Opinion of the FRA on fundamental rights in the "hotspots" set up in Greece and Italy', FRA Opinion – 3/2019, February 2019, 7 et seq. On 6 Nov 2019, the head of FRA has described the EU hotspot approach as implemented in Greece as 'the single most worrying fundamental rights issue that we are confronting anywhere in the European Union', see: <https://euobserver.com/migration/146541>.

²⁵² See ECtHR Judgment of 21 January 2011 – Appl. no. 30696/09 – M.S.S., para. 288 et seq.; 319 et seq.

²⁵³ See B.I.

physical violence cannot be the answer. The line between endangering lives and scarifying lives in the name of ‘European migration management’ is thin.

Second, the situation is dangerous because the *foundational values of the European Union* and the *regime of international refugee law* are put at risk. Greece is acting in clear violation of EU law and international law. And yet, neither EU institutions nor member states have clearly raised their voice in support of the rule of EU and international law. Quite to the contrary, EU institutions aggravate the situation by speaking in favour of those measures.

Certainly, it can be said that Turkey instrumentalises the refugees who have entered its territory in search of protection from persecution or other serious harm. However, if the EU gave into that kind of ‘political blackmailing’ by adopting the argument that the instrumentalised people are, because they are being instrumentalised, deprived of their individual rights, the EU would both betray its foundational values, and endanger the regime of international refugee law.

Europe had to learn the importance of human and refugee rights as well as the rule of law in the hardest way imaginable. It should not tap into the seductive trap of betraying its foundations by adopting the arguments against the rule of law and against human rights. The EU stands ready to sharply criticize Turkey whenever it violates the rule of law and human rights – and rightly so. The EU should hence have the courage and the strength to stand for its values, even where this might be perceived as being politically difficult. Anything else would be not only constitute a violation of EU constitutional law. It would also be hypocritical. And what is more, given the model role which the EU still is, it would have real and dangerous consequences in other parts of the world as well.

EU law provides for several *possibilities to support Greece in a spirit of solidarity*, while at the same time *ensuring the respect for EU law and international law*. In particular, operational and financial support should be provided, and the asylum seekers arriving to Greece should be relocated to other member states. Those are the options that the EU and the other member states should pursue.