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Opinion on the Greek Act of legislative content from 2 March 2020 on the suspension of the submission of asylum applications

Prepared by the Special Representative of the Secretary General on migration and refugees

I. Introduction

1. On 2 March 2020 the President of the Hellenic Republic enacted under Article 44 (1) of the Greek Constitution, the Act of legislative content “On the suspension of the submissions of asylum applications”, with effect as of 1 March 2020.¹ On 11 March 2020, the Secretary General of the Council of Europe tasked the Special Representative on Migration and Refugees to provide an opinion on the decree as to its compliance with the standards stemming from the European Convention on Human Rights and other relevant Council of Europe instruments.
2. The present opinion is based on the English translation of the decree, provided publicly by the Odysseus Academic Network (attached hereto).
3. The Special Representative of the Secretary General remains at the disposal of the Greek authorities should they require any assistance as to the questions raised in the present opinion.

II. The context of the decree

4. The provisions of the European Convention on Human Rights (“ECHR”) and its case law are of particular importance, along with other treaties which Greece has ratified and broader standards and recommendations of the Council of Europe and the UNHCR in the field of migration. Greece has signed and ratified the ECHR and Protocol No. 7 to the Convention, which provides for procedural safeguards related to the expulsion of aliens. It has not signed and therefore is not bound by Protocol No. 4 to the Convention, which prohibits the collective expulsion of aliens. Greece has also signed and ratified the 1951 Convention and 1967 Protocol relating to the Status of Refugees.
5. The Presidential decree was enacted in the wake of Turkey opening its borders on 28 February 2020, letting refugees and migrants from its territory to leave for Greece. The measures introduced by the decree are twofold: (i) suspend the submission of asylum applications by “individuals who enter the country illegally” from the enactment of the decree, and (ii) return “these individuals”, “without registration, to the country of departure or the country of origin”. The measures are set out for one month, unless the Ministerial Council decides to shorten the duration of their validity. At the time when this opinion is issued, no decision intervened to shorten the duration or to cease the application of the decree.
6. In its preamble the decree invokes “extraordinary urgent and unforeseeable necessity to confront an asymmetrical threat to the security of the country, which goes beyond the justification basis for applying the rules of EU law and international law” on asylum procedures. It also notes the “absolutely objective inability of the country to examine, within a reasonable period of time, asylum applications that would result as a consequence of the massive illegal entry into the country.”

III. Preliminary remarks

7. According to UNHCR, “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”.²

¹ Government Official Journal No 45/A/02.03.2020. For the purpose of this legal opinion, the Act of legislative content will be further referred to as “the decree”.

² UNHCR, [Statement](#) on the situation at the Turkey-EU border, 2 March 2020.

8. In addition, Article 31(1) of the 1951 Refugee Convention provides for the non-penalization of “illegal entry or presence” of refugees, who have come directly from territories where their life or freedom is threatened, “provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”. For Article 31(1) to be effective, it must apply to any person who is or claims to be in need of international protection, and it must only cease to apply once a decision-maker issues a final decision, after following a fair procedure, holding otherwise.³ Therefore, Article 31(1) does not apply to “rejected asylum-seekers” after having been issued a final decision following a fair procedure. In circumstances described in the decree, without any assessment or decision on the international protection needs of those crossing the border, the automatic penalization for “illegal border crossing” seems to contradict Article 31(1) of the 1951 Refugee Convention.

9. While it is true that mass inflows usually make individual refugee status determination impracticable, there is nothing in the 1951 Refugee Convention to make it inapplicable to such situations. The UNHCR has addressed the matter on several occasions,⁴ noting the traditional response of *prima facie* determination or acceptance on a group basis because of the obvious refugee character of the individuals concerned, without going into any formal, individual determinations. States faced with large numbers of arrivals have also adopted the device of “temporary protection”, which allows them to extend protection and assistance to the group without initially going into individual status determinations.

10. The Greek National Commission for Human Rights has called on the Greek government to lift the measures adopted by the decree, while providing for a legal access route to asylum in a coordinated manner.⁵

IV. Compliance with the standards stemming from the European Convention on Human Rights and other relevant Council of Europe instruments

11. In general, the European Court of Human Rights accepts that the principle of national sovereignty allows states to admit or exclude aliens from their territory.⁶ It is only in certain circumstances that exclusion from the territory or refusal of international protection would breach particular provisions of the ECHR and thus oblige states to admit aliens. In particular such circumstances are related to the principle of *non-refoulement*, which prohibits removing an individual to a destination country or turning away an individual at the border or elsewhere within a state’s jurisdiction and thereby putting the individual at risk to life or of torture or inhuman or degrading treatment or punishment (Article 2 and 3 of the ECHR).⁷

12. Non-nationals on the territory or otherwise under the jurisdiction of a state party will enjoy the protection of the rights of the ECHR. However, the ECHR does not guarantee the

³ UNHCR, Summary Conclusions on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee Convention, 15 March 2017.

⁴ UNHCR, “Protection of Refugees in Mass Influx Situations: Overall Protection Framework”, 19 February 2001, EC/GC/01/4; UNHCR, Guidelines on International Protection No. 11 : Prima Facie Recognition of Refugee Status, 24 June 2015, HCR/GIP/15/11.

⁵ GNCHR, Statement: Reviewing asylum and immigration policies and safeguarding human rights at the EU borders, 5 March 2020.

⁶ See for example, *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007.

⁷ The Court recently confirmed in *N.T. and N.D. v. Spain* [GC], nos. 8675/15 and 8697/15, §178, 13 February 2020, that the prohibition of *refoulement* includes the protection of asylum-seekers in cases of both non-admission and rejection at the border.

right of a non-national to enter or remain in the territory of a member State, nor the right of asylum.

13. In the event of expulsion, aliens lawfully resident in the territory of a State which has ratified Protocol No. 7 – like Greece – also benefit from the specific guarantees provided in its Article 1 of the ECHR.⁸ These include, in particular, the right to a decision reached in accordance with the law and the right to appeal against the removal decision and be represented in the course of appeal procedures. Exceptions from the right to appeal and be represented are possible when the expulsion is necessary in the interests of public order or is grounded on reasons of national security.

a. Suspension of submission of asylum applications

14. The decree has suspended the submission of asylum applications by “individuals who enter the country illegally”, arguing a derogation from the 1951 Refugee Convention due to “urgent and unforeseeable necessity” and “absolute and objective inability” to process applications in case of mass inflows.

15. In the absence of a substantive right to asylum, the ECHR does not have a bearing on the suspension itself and the Court is not competent to examine the application of the provisions of the 1951 Refugee Convention described above in paragraphs 8-9. At the same time, the Guidelines on human rights protection in the context of accelerated asylum procedures, adopted by the Committee of Ministers on 1 July 2009 note the asylum seekers right to have an individual and fair examination of their applications by the competent authorities. An analysis on the possibility of derogating from these provisions is provided below.

b. Returns

16. The decree orders the return of all individuals who “entered the country illegally”, without any registration, due process or procedural safeguards.

17. If a state opts for removal of an asylum seeker to a third safe country without examination of the asylum claims on the merits, it is the state’s duty to examine thoroughly whether that country’s asylum system could deal adequately with those claims. This duty requires from the national authorities applying the “safe third country” concept to conduct a thorough examination of the relevant conditions in the third country concerned and, in particular, the accessibility and reliability of its asylum system. The expelling State cannot merely assume that the asylum seeker will be treated in the receiving third country in conformity with the Convention standards.⁹

18. In the alternative, a state can proceed with the examination on the asylum claim on the merits and expel the individual after having dismissed unfounded asylum requests, where no relevant risks in the country of origin were established.¹⁰

19. Where the individual has an “arguable complaint” that his removal would expose him to treatment contrary to Article 2 or 3 of the Convention, he must have an effective remedy, in practice as well as in law, at the domestic level in accordance with Article 13 of the Convention,

⁸ *C.G. and Others v. Bulgaria*, no. 1365/07, § 70, 24 April 2008.

⁹ *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, §§ 138-141, 21 November 2019.

¹⁰ *Ibid.*, §§ 128- 138. For further details on the assessment of risks and burden of proof see *F.G. v. Sweden* ([GC], no. 43611/11, §§ 110-127, ECHR 2016) and *J.K. and Others v. Sweden* ([GC], no. 59166/12, §§ 77-105, ECHR 2016).

which imperatively requires, inter alia, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Articles 2 or 3 and automatic suspensive effect.¹¹ The scrutiny should include an assessment of vulnerability and needs of potential victims of human trafficking and of unaccompanied and separated children.

20. Therefore, in the absence of registration, individual assessment of risks of *refoulement* and reasoned decision, any removal carried out under the decree would amount to a violation of Article 2 and/or 3 of the ECHR. The absence of any decision deprives individuals of any effective remedy, and in particular of a suspensive remedy, against such irregular removal, which would amount to a violation of Article 13 taken in conjunction with Article 2 or 3 of the ECHR.

c. Derogation

21. The decree has issued under Article 44 §1 of the Greek Constitution, which authorizes acts of legislative content enacted by the President in case of “extraordinary urgent and unforeseeable necessity”. Its effect is to derogate from international law on asylum and 1951 Refugee Convention. Although this derogation is not invoked in respect of the European Convention on Human Rights, it is important to address this matter too.

22. The International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts provides for six possible circumstances precluding wrongfulness: consent (art. 20), self-defence (art. 21), countermeasures (art. 22), *force majeure* (art. 23), distress (art. 24) and necessity (art. 25).¹² At the same time, Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law.

23. *Non-refoulement* under the 1951 Refugee Convention and the prohibition of torture, based on which the principle of *non-refoulement* was developed in international human rights law, are without a doubt peremptory norms of general international law, from which no derogation is possible.

24. A similar conclusion is reached through an analysis of Article 15 of the ECHR, which states the extraordinary circumstances in which a derogation could be temporarily allowed – time of war or other public emergency threatening the life of the nation – and if such measures are consistent with other obligations under international law and do not concern Articles 2 or 3 of the ECHR.

Even assuming that the derogation had been procedurally requested in accordance to Article 15 § 3 of the ECHR, the issues raised above in respect of *non-refoulement* under Articles 2 and 3 of the ECHR, would have made any derogation under the decree invalid.

¹¹ *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 288 and 291, ECHR 2011; for an overview of the Court’s case-law as to the requirements under Article 13 taken in conjunction with Articles 2 or 3 in removal cases, see, in particular, *ibid.*, §§ 286-322.

¹² International Law Commission, Draft Articles Responsibility of States for Internationally Wrongful Acts, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10), Yearbook of the International Law Commission, 2001.

V. Conclusions and recommendations

25. The decree was adopted in response to the risk of massive influx of individuals to Greece. Despite its intention to safeguard the asylum system and possibly the reception system in the country, the measures adopted by the decree appear to be contrary to several provisions of the ECHR and, according to UNHCR, to international and EU refugee law.¹³

26. It is recommended that alternative solutions be identified in order to secure respect for the principle of *non-refoulement* at the border, and for procedural safeguards for returns, including protection from arbitrary deprivation of liberty. It is also recommended that a decision-making process be incorporated under the law including explicitly the obligation to assess claims under Article 2 and 3, of the ECHR, to provide reasons for decisions taken and to allow for appeals against such decisions. Clarity and detail on the procedural safeguards and protections for vulnerable persons is needed, in particular in respect of victims of trafficking and accompanied and unaccompanied children.

¹³ See also similar positions expressed by the [ICJ](#) (3 March 2020), [ECRE](#) (3 March 2020).

Appendix: Translation in English

Act of Legislative Content

Suspension of the submission of asylum applications

The President of the Hellenic Republic,

Taking into consideration:

1. Paragraph 1 of Article 44 of the Constitution
2. The extraordinary urgent and unforeseeable necessity to confront an asymmetrical threat to the security of the country, which goes beyond the justification basis for applying the rules of EU law and international law for the procedure to grant asylum in conjunction with the absolutely objective inability to examine, within a reasonable time, asylum applications that would result as a consequence of the massive illegal entry into the country;
3. The sovereign right and the constitutional obligation of the Hellenic Republic to safeguard its integrity, and its right to adopt any measure to this effect;
4. The relevant proposal of the Ministerial Council,

We decide:

First Article - Suspension of the submission of asylum applications

1. The submission of asylum applications by individuals who enter the country illegally from the time the current Act takes effect is suspended. These individuals will be returned, without registration, to the country of departure or to the country of origin.
2. Paragraph 1 shall remain in force for one (1) month.
3. The duration of the provision of paragraph 2 may be shortened by an Act of the Ministerial Council.

Second Article - Entry into force

The validity of the present Act, which will be ratified by law according to Article 44 paragraph 1 of the Constitution, takes effect as of 1 March 2020.

Athens, 2 March 2020

The President of the Hellenic Republic

The Prime Minister

The Members of the Ministerial Council