

ASYLUM IN GREECE: A SITUATION BEYOND JUDICIAL CONTROL?

**ECRE'S ASSESSMENT OF OPPORTUNITIES FOR AND OBSTACLES TO
THE USE OF LEGAL CHALLENGES TO SUPPORT COMPLIANCE WITH EU
ASYLUM LAW IN GREECE.**

ACKNOWLEDGMENTS

This Legal Note was written by Stavros Papageorgopoulos, Legal Officer at ECRE, with contributions from Catherine Woollard and Julia Zelvenska at ECRE. Information on specific litigation activities was kindly provided by Greek members of the ELENA Network.

TABLE OF CONTENTS

I. INTRODUCTION	4
II. LEGAL FRAMEWORK	5
1. EU law	5
2. Domestic law	6
3. The EU-Turkey Statement.....	6
III. ANALYSIS	8
1. Asylum Procedures	8
1.1. Legal Concerns	8
1.1.1. Inconsistent transposition of EU law	9
1.1.2. Failure to meet obligations under EU law in practice	10
1.1.3. Policies that undermine law.....	11
1.2. Legal Challenges	12
1.2.1. Domestic legal action	12
1.2.2. Council of Europe	16
1.2.3. EU legal avenues	18
1.2.4. International legal avenues	19
2. Unlawful returns	20
2.1. Legal Concerns	20
2.2. Legal Challenges	21
2.2.1. Domestic legal action	21
2.2.2. Council of Europe.....	23
2.2.3. EU legal avenues	24
2.2.4. International legal avenues	27
3. Detention	29
3.1. Legal Concerns	29
3.1.1. Deprivation of liberty: general issues	29
3.1.2. Deprivation of liberty in hotspots	29
3.1.3. Deprivation of liberty since 2019	30
3.2. Legal Challenges	31
3.2.1. Domestic legal action	31
3.2.2. Council of Europe.....	32
3.2.3. EU legal avenues	33
3.2.4. International legal avenues	34
4. Reception Conditions	35
4.1. Legal Concerns	35
4.1.1. Reception conditions in the Eastern Aegean islands since 2016 (hotspots).....	35
4.1.2. Reception conditions in the Eastern Aegean islands since March 2020.....	35
4.2. Legal Challenges	36
4.2.1. Domestic legal action	36
4.2.2. Council of Europe	36
4.2.3. EU legal avenues	39
4.2.4. International legal avenues	40
IV. CONCLUSIONS	41

I. INTRODUCTION

The context

Over the last ten years, Greece has been criticised from many sides. Those advocating for the right to asylum in Europe and the fundamental rights of asylum-seekers and refugees have raised concerns about the situation. Asylum-seekers and refugees themselves, in Greece or having crossed it, have been vocal about their experience, from poor living standards and arbitrary detention to excessively long procedures and uncertainty. Separately, and for diverse reasons, the European Commission and other EU Member States, including those supporting a restrictive approach to asylum, have also criticised the conditions in Greece, believing that they contribute to onward movement and the failure of the EU-Turkey Statement. Greece's lack of implementation of the Statement and of the EU asylum acquis thus becomes a key policy concern in other Member States and for the EU institutions.

Given the common interests in improvement of standards in Greece, the question arises as to why legal challenges at national, European and international level are either not deployed more often or do not lead to significant practical improvements. Similarly, the strong reiterations of respect towards fundamental human rights and the 1951 Geneva Convention in the EU asylum acquis, do not correspond with the reality which is rather characterised by a combination of harsh deterrence policies and incorrect implementation of EU law, including interpretation that disregards human rights standards.¹

The EU-Turkey deal, a political decision taken by all EU Heads of States, has greatly affected the situation in Greece. Moreover, the political stance of different Member States is also affected by their geographical position in combination with the system of responsibility sharing established under Dublin III. The increased arrivals of people in 2015/2016 created a situation that exposed the longstanding problems that stem from inadequate asylum and migration management in the continent. This sort of poor management does little to stop the perpetuation of ineffective policies, inadequate legislation and implementation gaps.

It should be noted that ECRE extensively documents and comments on problems in compliance that arise across the EU, not only in Greece.² However, Greece is one of the countries that provides a revealing picture of the political reality described above and its effects on asylum applicants, not least because it lies at the beginning of one of the main migration routes within the EU and shares land and sea borders with Turkey. The Greek context lends itself to a useful examination of many problems in implementation of the asylum acquis but it is far from the only Member State which fails to properly implement the CEAS. This paper is intended as a detailed study of one among the many countries where problems arise.

The purpose of this legal note is to examine the opportunities for and the obstacles to legal challenges aiming for greater compliance with EU law in the Greek asylum system. The note is divided in three sections:

- » **Section II** provides brief references to the legal framework and an overview of the EU-Turkey Statement.
- » **Section III** will discuss in detail four important areas of EU asylum law where there are longstanding problems of implementation in Greece, especially in connection with recent developments. For each area, the legal concerns are described followed by an analysis of the ongoing, complete or potential legal challenges. The note does not intend to repeat existing analysis of concerns with violations of EU law, which are well-documented. The focus is practical and the analysis explores actions in a situation of persisting legal concerns, where litigation and other legal efforts struggle to achieve meaningful outcomes, i.e., the compliance with binding and enforceable EU law on asylum.
- » **Section IV** summarises the main points of the analysis and presents the combination of factors that create a paradox consisting of modest practical results despite extensive action.

Areas of analysis

The reality in Greece illustrates weaknesses in the implementation of the CEAS, from access to territory and border management, to reception standards and asylum procedures. Some of these challenges are not new and they have already been the subject of domestic or international litigation and advocacy, with varying degrees of success. Others concern practices that arose in the course of the past two years, prompted by recent legislative changes, geopolitical developments between Greece and Turkey, and the COVID-19

1. ECRE, 'Making the CEAS work, starting today', 2019, available at: <https://bit.ly/33RQJSH>
2. ECRE, Publications, available at: <https://bit.ly/39uTFHm>

pandemic. The analysis of all possible structural flaws and legal issues in Greece is outside the scope of the note; some have been the subject of extensive monitoring attempts by a variety of organisations, while a detailed analysis from those working on the ground can be found in the annual AIDA reports.³

The note will instead focus on the following four areas: a) asylum procedures, b) unlawful returns, c) detention, and d) reception conditions. These areas were chosen on account of the situation of flagrant violation of human rights that they create and the potential for legal challenges they present. The prominence of these issues in the political debate at the EU level is also a reason for their relevance to this analysis, both due to the increased scrutiny of recent practices of unlawful returns, as well as due to the importance of all four issues in policy deliberations in the recent proposals of the Commission.⁴ Each topic will be discussed separately starting with the description of the issue, which will include an overview of the practices and relevant legal concerns. Where possible, the concerns will be analysed using different categories depending on the different situations that they create, or the group of rights/guarantees that they relate to.

The overview will be followed by a discussion of ongoing, completed or potential legal challenges and the limits thereto. The note will also include certain other forms of legal action that, although they do not constitute litigation, are either aimed at building the basis for litigation, or may otherwise directly influence litigation. The legal challenges will be separated into four different categories: domestic litigation, Council of Europe action, EU legal avenues and other international legal avenues.

Although ECRE takes note of the precarity of the situation of migrant and refugee children in Greece, as well as recent challenges in the field of search and rescue/civil society operations, these topics will not form part of the present analysis but will be referred to where relevant. Concerns with the implementation of the Dublin III Regulation in Greece will also not be covered in detail.⁵

II. LEGAL FRAMEWORK

1. EU LAW

Article 78 of the Treaty on the Functioning of the European Union⁶ (TFEU) foresees the development of a joint policy and a common legislative framework on international protection in accordance with international refugee law, as established by the 1951 Geneva Convention.⁷ The Common European Asylum System (CEAS) is the practical expression of the Union's goal to develop minimum guarantees and standards and to harmonise procedures across the continent.

The Charter of Fundamental Rights of the EU⁸ (CFREU or "the Charter") establishes the protection of fundamental rights for all individuals in the EU. When Member States apply EU law, they are bound by the provisions of the Charter.⁹ Consequently, in their implementation of the CEAS, Member States are bound to uphold the rights enshrined in the Charter.

The CEAS includes five legislative instruments that regulate asylum in Europe. The (recast) Reception Conditions Directive¹⁰ (RCD) foresees a set of common standards regarding the reception of asylum applicants, including accommodation, food, healthcare, education and employment, and the protection of vulnerable individuals. The (recast) Asylum Procedures Directive (APD)¹¹ provides conditions and

3. ECRE, AIDA Country Reports, available at: <https://bit.ly/350slz0>

4. European Commission, New Pact on Migration and Asylum, available at: <https://bit.ly/3m7mmPK>.

5. ECRE is consistently monitoring the implementation of Regulation 604/2013 at the EU level through its publication of regular Dublin updates on the AIDA website, available here: <https://bit.ly/2IHsMW9>. For an in-depth analysis of Dublin procedures in specific Member States, you can consult the relevant chapters of each AIDA country report.

6. Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390, available at: <https://bit.ly/34NePhi>.

7. UNHCR, 1951 Convention and 1967 Protocol Relating to the Status of Refugees, available at: <https://bit.ly/3fhg9Pm>.

8. Charter of Fundamental Rights of the European Union, available at: <https://bit.ly/3vOh4fT>.

9. Article 51, CFREU.

10. 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 (recast), available at: <https://bit.ly/3aYqqO3>.

11. 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, available at: <https://bit.ly/3eRpagU>.

guarantees for fair asylum procedures, including the interview of applicants, legal aid provision and guarantees for vulnerable individuals. The (recast) Qualification Directive¹² (QD) sets out the framework for decision-making and granting of international protection, as well as the content of protection.¹³ Lastly, the Dublin Regulation III¹⁴ (Dublin III) foresees procedures for the determination of the Member State responsible for examining an application of international protection, while the EUODAC Regulation¹⁵ establishes a fingerprint database to support the application of the Dublin Regulation III.

In September 2020, the European Commission communicated its most recent proposals on the reform of the CEAS under its New Pact on Migration and Asylum.¹⁶ The proposals include a new Regulation on asylum and migration management, which will replace Dublin Regulation III, a Regulation for the screening of third country nationals at the external borders and a Regulation addressing crisis situations. It also includes amendments to the 2016 proposals for a new Asylum Procedures Regulation and a recast EUODAC Regulation. The Pact does not include any amendments to the Commission's 2016 proposals on the recast RCD and a new Qualification Regulation. ECRE has published extensive legal analysis of the 2016 proposals and the Pact communication.¹⁷

2. DOMESTIC LAW

Asylum is domestically regulated by the International Protection Act¹⁸ (IPA), which was introduced in November 2019 and transposes the RCD, the APD and the QD. The legislation amended the previous legal framework on asylum that had been established by Law 4375/2016 (Asylum Act).¹⁹ The IPA was further amended by Law 4686/2020²⁰ in May 2020.

The amendments will be analysed in more detail in Section III.1 and Section III.3. Specialised legislation, legislative acts and administrative decisions will be discussed in each relevant section.

3. THE EU-TURKEY STATEMENT

In addition to the existing legal framework, the reception and asylum procedures in Greece cannot be analysed without reference to the 2016 EU-Turkey Statement.²¹ The Statement was concluded in March 2016 between the EU and Turkey in order to address the increased arrivals of people along the Eastern Mediterranean route. According to one of the Statement's provisions, all third-country nationals arriving to Greece through the Greek islands would be returned to Turkey.

12. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), available at: <https://bit.ly/3ei7vzC>.
13. Implementation of the CEAS Directives became obligatory for Greece at different times: for the RD, the transposition deadline was July 20, 2015 (Article 31 RD), for the QD the transposition deadline was December 21, 2013 (Article 39 QD). The APD foresees the 20th of July, 2015, as the deadline for the transposition of the majority of provisions (Article 51 APD); Articles 31(3), (4) and (5) were to be given effect by 20 July 2018.
14. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, available at: <https://bit.ly/2Sr8qp8>.
15. Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, available at: <https://bit.ly/2Ro0RPq>.
16. European Commission, Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020, available at: <https://bit.ly/3nQv3Pb>.
17. ECRE Publications, Comments Papers, available at: <https://bit.ly/3nOiwf8>.
18. Law 4636/2019 "on international protection and other provisions" (IPA), Gazette 169/A/1-11-2019, available at: <https://bit.ly/2Q9VnFk>.
19. Law 4375 of 2016 "on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC, Gov. Gazette A'51/3.4.2016, available at: <https://bit.ly/3z4eHaU>
20. Law 4686/2020 "Improvement of the migration legislation, amendment of L. 4636/2019 (A' 169), 4375/2016 (A' 51), 4251/2014 (A' 80) and other provisions", Gov. Gazette A' 96 /12-5-2020, available at: <https://bit.ly/2LGoOvI>.
21. European Council, EU-Turkey Statement, 18 March 2016, available at: <https://bit.ly/3eaQEii>.

To implement this provision, all refugees and migrants arriving to Greece through the Eastern Aegean islands after March 20, 2016, were confined to the territory of the island of arrival. At its initial stage of application, the measure also entailed mandatory short-term detention of applicants in the islands' Reception and Identification Centres (the "hotspots") for registration purposes.²² The centres are part of the European Union's "hotspot approach", the implementation of which was considered "closely linked" with the EU-Turkey Joint Statement.²³ In line with the high arrival numbers, the "Moria hotspot" of Lesbos was designed to be the largest hotspot with a nominal capacity of 3,500 people²⁴.

Gradually, the hotspots were reclassified as semi-open facilities where the applicants had to reside until the completion of the asylum procedure, including any appellate proceedings at second and third instance. In the same context, an exceptionally expedited procedure (fast-track border procedure) was introduced,²⁵ in principle as a tool to manage extraordinary numbers of arrivals but it was also "visibly connected to the EU-Turkey Statement".²⁶ The sole exceptions to the restriction of freedom of movement and the expedited procedure are vulnerable individuals and applicants falling under the Dublin III Regulation.

In addition, a new policy emerged in the Statement-related fast-track border procedures that concerned applications submitted by Syrian nationals.²⁷ All applications that are not exempted from the border procedure are dismissed on the basis that Turkey is a safe third country. The practice continues until today and is based on template decisions that include identical information regarding the sources that indicate the situation in Turkey.

As the following sections will discuss in detail, the measures taken to implement the Statement have severely impacted the quality of asylum procedures for the past five years, exacerbated living conditions for applicants on the islands, and are being increasingly linked with practices of illegal returns to Turkey. The resulting situation has attracted significant litigation both in support of individual cases of asylum applicants and as part of strategic action to address general problems with the so-called hotspot approach.²⁸ The strategic importance of such action is also linked to the proposed border procedures under the new Pact on Migration and Asylum,²⁹ which closely resemble the hotspot reality in Greece.

Litigation against the EU-Turkey Statement

In addition to attempts to litigate against the effects of the EU-Turkey Statement, which will be analysed throughout this note, legal action for annulment was also launched directly against the Statement before the General Court of the EU (GC).³⁰ The action was taken a month after the entry into force of the Statement. The Court was called to rule on the lawfulness of the EU-Turkey Statement as an agreement between the European Council and the Republic of Turkey. The General Court decided it did not have jurisdiction to review the Statement as it was an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister.³¹ An appeal against this order was also dismissed by the CJEU in September 2018.³²

The Court's dismissal of the action in two instances underlines the highly political nature of the case; similar limits of litigation against separate elements that support the Statement and the hotspot approach will be discussed in detail in the relevant sections. The impossibility of directly challenging the Statement could be the result of planning and the use of legal fictions. The Statement is indeed an agreement with a date of

22. European Council on Refugees and Exiles (ECRE), The implementation of the hotspots in Italy and Greece: A study, 5 December 2016, p. 38, available at: <https://bit.ly/3vWbE2I>.
23. European Parliament, Hotspots at EU external borders: State of play, Briefing, 25 September 2020, available at: <https://bit.ly/34Mxgme>.
24. ECRE, AIDA Country Report: Greece, 2016 update, pp. 100-101, available at: <https://bit.ly/2TxJKf2>.
25. Article 60 (4), L. 4375/2016.
26. ECRE, AIDA Country Report: Greece, 2016 update, pp. 58-65, available at: <https://bit.ly/2TxJKf2>.
27. ECRE, AIDA Country Report: Greece, 2019 update, p. 128, available at: <https://bit.ly/3xP9Idx>.
28. European Parliamentary Research Service, Hotspot at EU External Borders: state of play, June 2018, available at: <https://bit.ly/34fGpUI>.
29. ECRE, Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded, 6 October 2020, available at: <https://bit.ly/2T8MUCq>.
30. General Court, T-192/16, NF v. European Council, Action of 22 April 2016, available at: <https://bit.ly/3vSKSID>; T-193/16, NG v European Council, Action of 22 April 2016, Case T-193/16, available at: <https://bit.ly/3i4OSSn>; T-257/16, NM v European Council, Action of 19 May 2016, available at: <https://bit.ly/3w3PU5f>.
31. General Court, Judgment of 28 February 2017, NF v. European Council, T-192/16, not published, EU:T:2017:129, available at: <https://bit.ly/3unFJXk>.
32. Court of Justice of the EU, Judgment of 12 September 2018, NF and Others v European Council, Joined Cases C-208/17 P to C-210/17, EU:C:2018:705, available at: <https://bit.ly/3jgn5v5>.

entry into force, a numbering structure that resembles contractual provisions and with certain legal effects. In fact, in *J.R. and others v. Greece*, the European Court of Human Rights (ECtHR) partly relied on the implementation of the EU-Turkey Statement to conclude that the contested detention measure had a legal basis in domestic law.³³ Despite the apparent nature of the agreement, it was nonetheless issued as a “Joint Statement” in a press release by the European Council, making it an informal political declaration that cannot be subject to judicial review or parliamentary scrutiny. The agreement was concluded by the European Council, which is not one of the EU’s legislative institutions that are competent to conclude agreements and legally bind the Union.³⁴

Although the appellate proceedings were dismissed on technicalities, the General Court’s reasoning reflect these points. The General Court found that the statement was not “[...] a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, [...]”.³⁵ It further clarified that, even if the Statement had indeed been concluded as an informal international agreement, that agreement would have been between the Heads of State of EU Member States and the Turkish Prime Minister and would, thus, be outside the Court’s judicial competence.³⁶

These findings reveal that the design of the agreement affected its justiciability. It is unclear what the CJEU’s and the General Court’s conclusions would have been if the cases had actually been argued by the applicants, or how the content of argumentation may have affected the GC and CJEU reasoning. In addition, the technical nature of the General Court’s mandate may have limited the political pressure on the cases, as it does not deal with human rights cases. Regardless of the potential for different outcomes, the political drive behind the Statement’s design is an undeniable limiting factor. In addition, it is important to note that the appellants were ordered to pay all judicial costs, including those of the European Council. Arguably, the outcome may have had a chilling effect on other attempts to launch similar actions for annulment against the Statement.

III. ANALYSIS

1. ASYLUM PROCEDURES

1.1. Legal Concerns

Issues with asylum procedures in Greece have been long monitored and extensively documented, either in terms of the quality and length of procedure, the standards of decision-making or regarding concerns over the authorities that are involved in the procedure.³⁷ In 2011, both the European Court of Human Rights (ECtHR) and the CJEU found that systemic deficiencies in the asylum procedure in Greece constituted violations of the European Convention on Human Rights (ECHR) and EU law respectively.³⁸ The unprecedented arrivals in 2015 and 2016³⁹ and the implementation of the “hotspot” approach on the Greek islands and the EU-Turkey Statement contributed to issues regarding the quality of asylum procedures. Long processing times, problems in the identification of vulnerabilities, lack of legal aid, weaker appeal procedures, and misapplication of the safe third country concept for Syrian nationals were persisting issues well into 2019.⁴⁰

33. EDAL, ECtHR – *J.R. and others v. Greece*, Application no. 22696/16, 25 January 2018, para. 112, available at: <https://bit.ly/3tjJsod>

34. Article 218 TFEU.

35. General Court, Judgment of 28 February 2017, *NF v. European Council*, T-192/16, not published, EU:T:2017:129, paragraphs 70-72, available at: <https://bit.ly/3unFJXk>.

36. Article 263, TFEU, available at: <https://bit.ly/2PJNHf8>.

37. UNHCR, Observations on Greece as a country of asylum, December 2009, available at: <https://www.refworld.org/docid/4b4b3fc82.html>.

38. ECtHR, *M.S.S. v Belgium and Greece [GC]*, Application No. 30696/09, 21 November 2011, available at: <https://bit.ly/2T7kXLz>; CJEU, judgments of 21 December 2011, *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, available at: <https://bit.ly/3kgRDOm>.

39. UNHCR, Greece: From refugee life vest to sleeping aid, 14 January 2016, available at: <https://bit.ly/3j4Fb3a>.

40. ECRE, AIDA Country Report: Greece, 2019 update, available at: <https://bit.ly/2SV177j>.

1.1.1. Inconsistent transposition of EU law

In addition to these long-standing issues, Greece's asylum legislation has been twice amended since 2019, as noted above. Each amendment further complicated the asylum framework and introduced new restrictions on the rights of asylum applicants and refugees. The IPA was voted on in November 2019 and significantly amended the previous L. 4375/2016, while L. 4686/2020 (the May 2020 reform) introduced further amendments to the IPA in May 2020.

The IPA was rushed to the Greek parliament through an extremely short public consultation that precluded civil society actors from adequately commenting on its complex content and the significant restrictions it introduced.⁴¹ Similarly, after only a few months of implementation of the IPA,⁴² the May 2020 reform attempted to improve the current framework but also foresaw changes that affected the quality of procedures. Among the restrictions introduced by the new legislative framework are the following:

- » **Procedures** – Shortened deadlines (IPA); expanded reasons for manifestly unfounded applications (IPA & May 2020 reform); new rules on the application of the safe third country concept (IPA); generalised use of fast-track procedures for islands (IPA); introduction of caseworker assistants (May 2020 reform);
- » **Appeals** – Shorter deadlines and additional admissibility requirements (IPA); no automatic suspensive effect for certain categories of appellants (IPA); fictitious service (IPA) and notification of decisions via email, online database or through public announcement at the RIC (May 2020 reform);
- » **Legal aid**⁴³ – Legal aid is currently regulated by a joint ministerial decision;⁴⁴ there are additional requirements for lawyers to prove the representation of their beneficiary (IPA);
- » **Vulnerability** – Generalised use of fast-track procedures (IPA); no more prioritised procedure for vulnerable applicants (May 2020 reform);

Although some of these provisions have been formulated on the basis of discretion permitted under the APD, the numerous additional requirements, provisions and exceptions create a fragmented legal framework that undermines the objective of the CEAS, i.e., the harmonisation of asylum law across the Union, and the principles of the APD, namely the establishment of fair and efficient asylum procedures in Member States. The approach followed raises issues of inconsistent transposition, as it has resulted in specific provisions that do not incorporate important guarantees of the APD, or that go far beyond what is reasonably allowed by the APD. In this process, important CJEU jurisprudence has also been ignored. The objectives of the APD were clarified by the EU Court of Justice in several cases and constitute an authoritative interpretation of the instrument that should inform transposition efforts and prevent fragmentation and arbitrariness. Moreover, where transposition is inconsistent, the EU law provision can be directly relied upon; however, the direct application of EU law is not very common in the Greek context,

More specifically, several provisions in the recent legislative amendments have been the result of incorrect transposition. Rules on the application of the safe third country concept⁴⁵ do not require an individual assessment where the third country is included in a list of nationally designated safe countries, despite the absence of such a possibility for derogation in the APD, and clear interpretation by the CJEU on the importance of the cumulative conditions found in Article 38 (1) to (4) APD.⁴⁶ The Court's case law has also been ignored in respect of the connection requirement, which cannot be based on the mere fact of transit through a third country.⁴⁷ Changes in the representation of applicants by lawyers,⁴⁸ and the content requirements for an appeal to be admissible⁴⁹ may indicate a transposition that, while staying true to the letter of the Directive, undermines the principles that underpin it, especially the Union principle of effective

41. UNHCR, UNHCR urges Greece to strengthen safeguards in draft asylum law, 24 October 2019, available at: <https://bit.ly/376U42y>; Greek Council for Refugees, Press release on the International Protection Act, 22 October 2019, available at: <https://bit.ly/350VPvi>.

42. Although voted in November 2019, the IPA only entered into force on 1 January 2020.

43. The term "legal aid" is used interchangeably to describe both the legal assistance offered by civil society organisations and the state-funded legal aid. Where reference to a specific form of legal aid is made (state-funded or NGO), it will be indicated.

44. Joint Ministerial Decision, 3449/2021 – Gov. Gazette, 1482/B/13-4-2021, available at: <https://bit.ly/3unwpDx>.

45. Article 86 (2), IPA.

46. CJEU, Judgment of 14 May 2020, FMS and Others, Joined Cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 153, available at: <https://bit.ly/2QSkJtD>; See also, Judgment of 19 March 2020, Bevándorlási és Menekültügyi Hivatal (Tompa), C-564/18, EU:C:2020:218, paragraph 40, available at: <https://bit.ly/3dt9v6w>.

47. CJEU, Judgment of 19 March 2020, Bevándorlási és Menekültügyi Hivatal (Tompa), C-564/18, EU:C:2020:218, paragraphs 49-50, available at: <https://bit.ly/3dt9v6w>.

48. Article 71, IPA.

49. Article 93, IPA.

remedy as guaranteed under Article 46 APD in conjunction with Recital 50 APD. A new reason for applying the accelerated procedure has also been added⁵⁰ without it being foreseen in Article 31 (8) APD.

1.1.2. Failure to meet obligations under EU law in practice

The complexity of the legislative amendments coupled with significant practical difficulties on the ground and the absence of a generally reliable asylum system raises serious concerns over the de facto possibility for compliance with EU law. At the same time, the new amendments exacerbate difficulties in procedures with certain provisions creating situations that fail to abide by the CEAS guarantees or the basic principles of the EU legal order.

More specifically, the amendment to exempt vulnerable applicants from the border procedure only where adequate support for special procedural guarantees cannot be provided in that context⁵¹ has weakened the protection of vulnerable individuals. The amendments do not simply change the way the cases of vulnerable applicants are handled but has restricted the very definition of a person with special procedural needs. Moreover, the well-documented inadequacy of vulnerability support on the Greek islands⁵² raises important questions on the provision's compliance with Article 24 (3) APD. These questions concern the possibility for systematic disregard of the needs of vulnerable applicants on the basis of the new provision and the consequences of the added difficulty in proving vulnerability and lack of sufficient support. Reports have already emerged on how this amendment can further exacerbate the applicants' state of health and procedural position by requiring them to stay on the islands and go through the procedure while being in a disadvantaged situation.⁵³

The stringent requirements for establishing legal representation and submitting admissible appeals, the expansion of possibilities for fictitious notice of decisions, the overall shorter deadlines and the removal of automatic suspensive effect should be viewed in light of the general absence of state-funded legal aid and assistance.⁵⁴ As of 31 December 2019, there were 37 registered lawyers in the state-funded legal aid programme managed by the Asylum Service.⁵⁵

The obligation to comply with complex and demanding procedures without legal assistance guarantees may engage responsibility under Articles 19, 20 and 21 APD while the abolition of automatic suspensive effect for the first appeal in certain cases in border procedures may violate Article 46 (7) APD in the absence of legal aid. Similarly, the new provision of fictitious notice of decisions under the IPA can also undermine the individual's right to an effective remedy, particularly in view of the shortened deadlines.⁵⁶

The general situation effectively precludes compliance with Article 47 of the Charter of Fundamental Rights of the EU. Recent clarification by the CJEU on the importance of effective judicial remedies is relevant in this respect, as the Court has found that Article 47 guarantees should be upheld regardless of whether domestic law actually foresees them. According to the Court, the principle of effective judicial protection can establish an obligation for domestic judges to disapply national legislation that violates Article 47 CFREU.⁵⁷

In addition to this, developments in the judicial and civil society context in Greece may also impede the effective enjoyment of Article 47 protection. The IPA transferred competence for the judicial review of first-instance asylum decisions from appellate administrative courts to administrative courts (first-instance).⁵⁸ As the Appeals Committees are composed of administrative judges of different levels,⁵⁹ an issue emerges where a first-instance administrative judge may be called on to judicially review the decision taken by an Appeals Committee composed of administrative judges of a higher level. The situation does not ensure judicial independence in asylum procedures, a requirement that is intrinsically connected with the rule

50. Article 83 (9) (k), IPA (application of accelerated procedure where the applicant does not comply with an obligation to submit fingerprints in accordance with domestic legislation).

51. Article 67 (3), IPA.

52. ECRE, AIDA Country Report: Greece, 2019 update, p. 157-160, available at: <https://bit.ly/2SVI77j>

53. RSA, Border procedures on the Greek islands violate asylum seekers' right to special procedural guarantees, 15 February 2021, available at: <https://bit.ly/3wvNVHv>

54. ECRE, AIDA Country Report: Greece, 2019 update, p. 20, available at: <https://bit.ly/2SVI77j>

55. ECRE, AIDA Country Report: Greece, 2020 update, Chapter: Asylum Procedure, Section C.1.4.2., available at: <https://bit.ly/3pm5WET>

56. Article 82 IPA, See also, ECRE, AIDA Country Report: Greece, 2019 update, p. 64, available at: <https://bit.ly/2SVI77j>

57. CJEU, Judgment of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tomba)*, C-564/18, EU:C:2020:218, paragraph 75, available at: <https://bit.ly/3dt9v6w>

58. Article 115, IPA.

59. Article 5, Asylum Act.

of law and the Union's fundamental principles.⁶⁰ Furthermore, the potential restriction of civil society activities, including legal aid provision, following recent government regulation of registration and reporting requirements for NGOs has increased uncertainty over the possibility to lawfully implement the recent amendments⁶¹ and attracted the scrutiny of the Council of Europe.⁶²

At the operational level, problems in the provision of interpretation services have reportedly affected the content of personal interviews.⁶³ In November 2019, 28 applicants for international protection were issued decisions rejecting their applications without any personal interview due to lack of interpretation.⁶⁴ The decisions raise concerns both in terms of the obligation to provide effective interpretation and the limitations in omitting the personal interview under the APD.⁶⁵

1.1.3. Policies that undermine law

Exceptional developments took place in early 2020, most notably in relation to the change in Turkey's stance on the management of the movement of people towards the EU, the chaotic events at the Evros border and the COVID-19 pandemic. These developments brought new challenges either by exacerbating old problems or by creating novel situations that further tested the limits of lawfulness.

As a response to the situation that followed after the "opening of borders" by Turkey,⁶⁶ Greek authorities suspended asylum procedures for all people arriving to the country and increased the use of force at the Evros border.⁶⁷ In mid-March, the authorities introduced measures to combat the spread of the coronavirus by imposing a 14-day quarantine on new arrivals and suspending access to the Asylum Service.⁶⁸ The suspension of asylum procedures is not foreseen under the provisions of the APD, nor is it possible under the 1951 Geneva Convention. People arriving during the suspension did not undergo any procedure of identification, were not allowed proper registration in accordance with EU law, and procedures commenced only after the suspension was lifted.⁶⁹ During the suspension, the enjoyment of guarantees under Article 12 APD was seriously impacted.⁷⁰

Even after the end of the suspension, access to asylum was impaired by COVID-19 measures suspending the operation of the Asylum Service until mid-May 2020.⁷¹ Following the resumed operation of the Service, the notification of a significant number of negative first-instance decisions that were decided during the suspensions created major problems in the applicants' right to an appeal.⁷² Due to limited availability, legal aid actors on the Greek islands struggled to keep up with the sudden increase in appeal cases.

These developments were neither unexpected nor uncontrollable but resulted from policy choices that undermine the established European and international legal framework and disregard reality. The March suspension of asylum procedures was claimed to be a response to an attack against the Greek state; in reality, the situation at the Evros border was related to long-known risks stemming from the political balances that support the EU-Turkey Statement. The Statement is a crucial and delicate feature of the border

60. CJEU, Judgment of 25 July 2018, LM, C-216/18, EU:C:2018:586, paragraphs 48-49, available at: <https://bit.ly/3wBH5q>

61. Amnesty International, Regulation of NGOs working on migration and asylum threatens civic space, 31 July 2020, available at: <https://bit.ly/2HaQ3PK>; See also additional restrictions introduced in September 2020, Refugee Support Aegean, Greece Further Restricts Civil Society Supporting Refugees and Migrants, 18 September 2020, available at: <https://bit.ly/3dxj5VQ>

62. Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, Opinion on the compatibility with European standards of recent and planned amendments to the Greek legislation on NGO registration, 2 July 2020, available at: <https://bit.ly/3K0AOHn>

63. ECRE, AIDA Country Report: Greece, 2019 update, pp. 59-60, available at: <https://bit.ly/2SVI77j>

64. Legal aid organizations express concerns regarding the unprecedented administrative practice of the Regional Asylum Office of Lesbos, which goes against Greek, European and International law, 22 November 2019, available at: <https://bit.ly/2TcreFR>

65. Article 14, APD.

66. The Guardian, Erdoğan says border will stay open as Greece tries to repel influx, 29 February 2020, available at: <https://bit.ly/3lNoT00>, The Guardian, Clashes as thousands gather at Turkish border to enter Greece, 1 March 2020, available at: <https://bit.ly/3dxjffD>

67. Amnesty International UK, Greece: inhumane asylum measures will put lives at risk, 2 March 2020, available at: <https://bit.ly/343tjKp>

68. ECRE, AIDA Country Report: Greece, 2019 update, p. 52, available at: <https://bit.ly/2SVI77j>

69. Idem, p. 45, available at: <https://bit.ly/2SVI77j>

70. 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 HIAS GREECE in the M.S.S. and Rahimi groups v. Greece (Applications No. 30696/09, 8687/08), pp. 7-8, available at: <https://bit.ly/2H58up9>

71. ECRE, AIDA Country Report: Greece, 2019 update, p. 45, available at: <https://bit.ly/2SVI77j>

72. HIAS Greece, The instructions for the resumption of the operation of the Asylum Service lead to violations of the fundamental rights of asylum seekers, 19 May 2020, available at: <https://bit.ly/2lBOgDY>

security regime and has affected political dynamics between Turkey and the EU.⁷³ In the same line, the blanket application of the safe third country concept to cases of Syrian nationals (described above), is also an element of a policy that aims to uphold and enforce the EU-Turkey Statement.⁷⁴ The use of “template decisions” to reject applications made by Syrians and the standardised assessment of Turkey as a safe third country based on minimal and often outdated information further testifies to a deliberate choice to apply the agreement at the cost of the correct application of EU and international law.

Lastly, the complete suspension of the Asylum Service’s functions during the first months of the pandemic, and the move to reopen and deliver asylum decisions en masse, highlights conscious official approaches that disregard the situation of the country’s asylum system and the threat that the pandemic posed to its functioning.

1.2. Legal Challenges

Procedures-related litigation in Greece has seen significant attempts to address restrictive and unlawful practices both through domestic and international avenues. Domestic litigation has relied on the use of Greek administrative law to challenge practices before the Council of State, or in order to provide immediate relief to cases of individual violations. General practices have also been the subject of direct litigation before the European Court of Human Rights, while the use of European Union-specific legal avenues has been more limited. In terms of international avenues, the UN periodic review system has been used to provide information on specific deficiencies of the asylum system.

The section on each legal avenue will analyse actions taken to address issues falling under the following categories: a) access to procedures, in particular regarding the suspension of procedures in March and the application of the safe third country concept, b) the quality of procedures, both in terms of operational arrangements and gaps and in respect of the availability of services and effective judicial protection, and c) vulnerability. As noted above, the issues and legal actions discussed here are not exhaustive; they have been included on the basis of publicly available information, inter alia.

1.2.1. Domestic legal action

Access to procedures since March 2020

Greece’s suspension of procedures in March 2020 resulted in an absolute inability to apply for asylum for people arriving to the country after March 1, a development that amounts to a violation of the APD (Article 6), the Charter of Fundamental Rights of the EU (Articles 4 and 18), and the European Convention on Human Rights (Articles 3 and 13). Domestic civil society responded immediately with a strong joint statement,⁷⁵ while the Commission replied by referring to the absence of a possibility for suspension of asylum procedures.⁷⁶

Domestic litigation against this suspension was also swift, taking the form of annulment action before the Greek Council of State on behalf of three Afghan women who were denied the possibility to apply for asylum; the Court granted an interim order precluding any form of forced return of two of these women.⁷⁷ Due to the short-lived nature of the administrative measure, litigation efforts to ensure access to asylum did not continue beyond April 2020; however, litigation on the detention-related issues that this suspension created is ongoing (see Section III.3.b).

Access to procedures following the EU-Turkey Statement

Long before the events of March 2020, concerns had been raised over the effective access to asylum procedures for applications made by Syrian nationals. As discussed in Section II.3, part of the Greek islands “hotspot” approach was supported by a policy of automatic inadmissibility decisions for Syrian nationals and residents who arrived to the Greek islands after March 2016. The reasoning of the decisions has been criticised for being almost identical in every case, for not being based on publicly available and reliable

73. ECRE, Weekly Editorial: EU-Turkey – Deconstructing the deal behind the statement, 16 March 2018, available at: <https://bit.ly/3maG513>

74. ECRE, AIDA Country Report: Greece, 2019 update, p. 130, available at: <https://bit.ly/2SVI77j>

75. Joint Statement: “Protect our laws and humanity!”, 6 March 2020, available at: <https://bit.ly/3jelEw5>

76. The Guardian, Greece warned by EU it must uphold the right to asylum, 12 March 2020, available at: <https://bit.ly/3dJmOzq>

77. ECRE, AIDA Country Report: Greece, 2019 update, p. 52, available at: <https://bit.ly/2SVI77j>

sources and for not including an extensive analysis of updated information.⁷⁸ The result was a safe third country assessment that did not comply with the standards that Article 38 APD foresees.

This issue was part of major domestic litigation before the country's Council of State. In September 2017, Greece's highest administrative court decided to uphold the procedural arrangements in place and rejected the applicants' arguments against the legality of the fast-track border procedure, including the application of the safe third country concept regarding Turkey – inter alia, in respect of the nature of the connection when transiting Turkey, as regulated by Article 38 (2) –, the right to appeal, and the involvement of EASO.⁷⁹ The judgment was a blow to domestic attempts to reverse the situation and also limited the prospects of EU litigation, as the judges refrained from submitting a preliminary question to the CJEU, despite a strong minority of twelve judges supporting the referral.

The number of judges that considered the referral certainly points to a lack of clarity in a provision of EU law and the need for interpretation by the CJEU, the only competent court to do so. Moreover, the fact that the issue was raised before Greece's highest court indicates a situation of potentially compulsory preliminary referral according to Article 267 of the Treaty on the Functioning of the European Union (TFEU). Such situations are currently governed by the *Cilfit* case-law, which clarifies exceptions from the obligation to refer a question to the CJEU, including where the correct application of EU law is so obvious that it leaves no scope for any reasonable doubt.⁸⁰ It should be noted that the nature and extent of mandatory preliminary referrals to the CJEU by national Supreme Courts is the subject of a pending case before the CJEU and may lead to a revision of the *Cilfit* criteria.⁸¹

These elements were not sufficient to convince the majority to refer, potentially due to the highly politicised nature of the case. The reluctance of the domestic judicial system to accept that authoritative interpretation of the safe third country concept by the CJEU was necessary, and that Greece's approach on the concept could merit further judicial review, may reflect the political pressure – both domestically and at the European level – to refrain from delegitimising, or otherwise weakening, the EU-Turkey Statement.

The refusal to refer could also be related to reasons pertaining to domestic judicial reality. The low number of preliminary referrals by Greek courts⁸² could indicate a general reluctance to make use of the CJEU machinery. The reluctance may be even more present in cases concerning asylum; in recent years, none of the references made in the area of asylum and migration came from Greece.⁸³ Moreover, issues with the Council of State's effectiveness in the harmonisation of domestic law have been examined by the European Court of Human Rights.⁸⁴ Although it is unclear whether the case related to systemic issues, the Strasbourg court condemned the legal uncertainty that continued over several years despite the different Sections' attempts to resolve the dispute. A combination of internal inefficiencies within the Greek Supreme Court and political sensitivity may have contributed to the outcome.

It is important to note that the CJEU has recently ruled on the specific inadmissibility provision of the APD in cases that are not affected by the Greek-Turkish context. The Court's judgments in *C-564/18*⁸⁵ and *Joined Cases C-924/19 and C-925/19 PPU*⁸⁶ are relevant to domestic litigation, as parts focus on the connection requirement of Article 38 APD and provide guidance on applying the safe third country concept. Litigation on this development in the Court's jurisprudence on Article 38 APD is currently ongoing before the Council of State. The strategy intends to capitalise on the need for a reassessment of the application of the safe third country concept by the Council of State and is part of a pilot procedure prompted

78. RSA, Legal Opinion on the case law of the Greek Appeals Committees and Administrative Courts with regard to the application of the "safe third country" concept, 19 December 2019, available at: <https://bit.ly/2R1YMbR>

79. AIDA/ECRE, The ruling of the Council of State on the asylum procedure post EU-Turkey Deal, 4 October 2017, available at: <https://bit.ly/3dG4cR3>

80. CJEU, Judgment of the Court of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Case 283/81, EU:C:1982:335, available at: <https://bit.ly/3ihkjsz>

81. CJEU, Case C-561/19, Request for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 23 July 2019 — *Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA*, available at: <https://bit.ly/3nNk6xS>

82. Court of Justice of the EU, Annual Report 2019, D – Statistics concerning the judicial activity of the Court of Justice, p. 182, available at: <https://bit.ly/3ekzgl3>

83. ECRE/ELENA, Asylum judgments and pending preliminary references of the CJEU, 20 August 2020, available at: <https://bit.ly/3feYgkh>

84. ECtHR, *Sine Tsaggarakis A.E.E. v. Greece*, Application no. 17257/13, 23 May 2019, paras. 56-60, available at: <https://bit.ly/33fvid8>

85. CJEU, CJEU, Judgment of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompá)*, C-564/18, EU:C:2020:218, paragraphs 47-49, available at: <https://bit.ly/3dt9v6w>

86. CJEU, Judgment of 14 May 2020, *FMS and Others, Joined Cases C-924/19 PPU and C-925/19 PPU*, EU:C:2020:367, paragraphs 183-198, available at: <https://bit.ly/2QSKJtD>

by annulment applications that challenge different legal issues.⁸⁷ Although the applications are pending, these cases underline the importance of flexibility and adaptability in strategic litigation, in particular where political balances are fragile and direct legal confrontation is not ideal.

Vulnerability

The issue of vulnerability has emerged as an important element of fast-track border procedures on the islands, not only because it can exempt vulnerable applicants from the border procedure,⁸⁸ but also due to the consequences that border regimes can have on the health of vulnerable individuals and the potentially negative impact on their asylum cases.

Since 2018, numerous legal actions have been successfully brought before the Administrative Court of Piraeus challenging decisions of Appeals Committees that did not exempt vulnerable applicants from the island procedure.⁸⁹ Despite the positive judgments of 2018, Appeal Committees continue to issue decisions disregarding guarantees for vulnerable applicants and thus prompting the continuation of this form of litigation in 2020. Currently, ongoing vulnerability-related litigation includes legal actions challenging rejection at first and second instance following the disregard of particular circumstances linked to the applicant's vulnerability (past violence or age).⁹⁰ In this line, the disregard of vulnerability has been found to constitute serious and irreparable procedural harm, as it deprives applicants of their right to properly prepare their case and find appropriate support during the interview.⁹¹

In principle, the centrality of this element in litigation strategies can be understood as necessary for the protection of applicants that are most in need. Vulnerabilities are a crucial consideration in the context of asylum procedures as they can impair a person's ability to present their story and may reveal important information relating to the reasons of flight. The European Court of Human Rights (ECtHR) has confirmed that asylum applicants are particularly vulnerable solely on account of their situation of migration and the trauma of flight.⁹² It is an inherent vulnerability that does not depend on specific conditions and circumstances.

Despite this confirmation, the concept continues to be distorted in domestic practices where the inherent vulnerability of asylum applicants as a group is disregarded and a focus on additional vulnerabilities seems to sideline the Member States' general obligations to all asylum applicants. The distortion is not just the product of restrictive domestic policies but is connected to the notion of vulnerability in the CEAS. In principle, the emphasis on the need to protect vulnerable individuals in the CEAS Directives relates to the need for certain individuals to be offered special guarantees in order to properly access the rights that the CEAS foresees for all applicants. However well-intended, the CEAS concept differs significantly from the all-encompassing notion of vulnerability in ECHR jurisprudence and adds possibilities for considering that certain asylum applicants will be resilient enough to navigate reception systems without support, or that curtailed procedures will not violate their rights.

The language of the Directives does not help establish a coherent system of vulnerability guarantees that are neither exclusionary nor strictly linked with the purpose and implementation of each Directive. The fact that vulnerability is defined differently under the RCD and the APD⁹³, partly because it is defined for the purposes of each Directive, underlines the operational aspects of the concept. The absence of a comprehensive protective approach, such as the one that the ECtHR has recognised, provides a basis for Member States to specify vulnerability and additional guarantees at their discretion. As a result, national practices emerge where the additional obligations for vulnerable individuals are confounded with the general obligations towards all asylum applicants and deprive asylum applicants that are not "officially" recognised as vulnerable of the protection they are entitled to.

87. RSA, The Council of State pilot procedure on judicial review in the asylum procedure, 1 February 2021, available at: <https://bit.ly/3wtyMX7>

88. A general exception was foreseen under the Asylum Act but was amended by the IPA to introduce specific conditions.

89. ECRE, AIDA Country Report: Greece, 2019 update, p. 91, available at: <https://bit.ly/2SVI77j>

90. ECRE, AIDA Country Report: Greece, 2019 update, p. 117-118, available at: <https://bit.ly/2SVI77j>

91. ActionAid Hellas, ARSIS – Association for the Social Support of Youth, Danish Refugee Council (DRC), CRWI Diotima, Equal Rights Beyond Borders, Fenix – Humanitarian Legal Aid, Greek Council for Refugees (GCR), HIAS Greece, HumanRights360, Legal Centre Lesvos, Network for Children's Rights, Refugee Support Aegean (RSA), New Pact on Migration and Asylum: Interpretation of relevant provisions in the case law of the Greek administrative courts, 22 April 2021, p. 2, available at: <https://bit.ly/3uYkgo8>

92. M.S.S. v. Belgium and Greece, para. 232.

93. For example, compare Recital 29 and Article 24 APD with Recital 14 and Article 21 RCD.

The concept will continue to be important in the reform of the CEAS and for that reason remains a constant reference in legal debates and actions. The Pact amendments to the Commission's 2016 Proposal for an Asylum Procedures Regulation move in the same direction that the Greek legislation has followed. The absence of a clear exemption of vulnerable individuals in border procedures is poised to further complicate their situation at the borders,⁹⁴ a development that would certainly perpetuate vulnerability-focused litigation, in addition to compounding the approach that only the vulnerable can (potentially) access procedural rights which should be available to all.

In the Greek context, the focus of litigation on vulnerability is not only the result of a reasonable assessment of the risks of being vulnerable at the border but is also related to the role of the concept in the implementation of the EU-Turkey statement. A formal recognition of a specific vulnerability can in certain cases equal asylum, with vulnerable Syrian nationals being admitted to the regular procedure and non-vulnerable Syrian nationals being rejected as inadmissible and eligible for return to Turkey. At the same time, vulnerability has also been used as a screening tool to guide management of hotspot populations on the island. For example, the description of vulnerabilities as high and medium, a template classification of severity that was introduced in 2017, underlines the restriction of the concept in a way that emphasises operational efficiency in hotspots over protection and support.⁹⁵

Similarly, vulnerability findings seem to fluctuate depending on the circumstances on the islands at any given time reflecting a highly operationalised concept.⁹⁶ Consequently, the work of lawyers on the field is often consumed by efforts to secure the applicants' right to leave the islands, or at least to remain on Greek territory, through vulnerability-related action. Although domestic legal actors have taken action to address the lack of protection for certain applicants (e.g., young single men), the operationalisation of vulnerability in the island context leaves little room for such initiatives. The choices are also affected by the low number of legal aid actors as support to the most vulnerable is prioritised to prevent immediate risks.

Legal professionals working on the ground understand the perils of focusing on vulnerability when the case concerns more general issues but the distortion of the notion and its purpose in asylum procedures inevitably affects litigation choices. Legal action in Greece has therefore focused on visible and undoubted vulnerabilities to ensure case success even when the main element of injustice has not been vulnerability-related. In addition to the aforementioned consideration, the choice will also depend on the nature of the risk assessment that each case involves. For example, the assessment of the ECtHR on living and reception conditions aims to establish whether there is a minimum level of severity, a minimum that the Court considers to be relative (e.g., to personal or other circumstances, including vulnerability).⁹⁷ Similar considerations will be less prominent when the case concerns issues with access to asylum.

Although the choice of vulnerability-related cases may be deliberate, to minimise the risk that political questions derail the case, and may ultimately target a specific practice or policy, the prevalence of such strategies can create significant gaps in the protection and legal representation of groups of asylum seekers that are not readily perceived as specifically vulnerable. Moreover, the ensuing distraction can result in the redirection of litigation efforts away from other systemic aspects that also truly affect vulnerable individuals, e.g., the so-called "vicious cycle" of overcrowded hotspots and transfers to mainland.⁹⁸ The Greek context described above makes it difficult to evade both the consequences of political misuse of vulnerability and the limitations that regional political pressures pose.

Procedural guarantees: interpretation, effective remedy and legal aid

In November 2019, 28 applicants for international protection were issued decisions rejecting their applications without any personal interview due to lack of interpretation.⁹⁹ Litigation before the Appeals Committees was successful in reversing several decisions,¹⁰⁰ while the European Commission noted in its

94. ECRE, Comments on the Amended Proposal for an Asylum Procedures Regulation COM (2020) 611, December 2020, available at: <https://bit.ly/2R9POcs>

95. ECRE, AIDA Country Report: Greece, 2019 update, p. 109-110, available at: <https://bit.ly/2SVI77j>

96. Evie Papada (2021): Engaging the Geopolitics of Asylum Seeking: The Care/control Function of Vulnerability Assessments in the Context of the EU-Turkey Agreement, *Geopolitics*, p. 16, available at: <https://bit.ly/3ms0EJm>

97. M.S.S. v. Belgium and Greece, paras. 249-251; See also, the "extreme" vulnerability of migrant children in, ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, 4 November 2014, available at: <https://bit.ly/3wwxbyO>

98. GCR/Oxfam Briefing, *Diminished, Derogated, Denied: How the right to asylum in Greece is undermined by the lack of EU responsibility sharing*, July 2020, available at: <https://bit.ly/2POwL7I>

99. Legal aid organizations express concerns regarding the unprecedented administrative practice of the Regional Asylum Office of Lesbos, which goes against Greek, European and International law, 22 November 2019, available at: <https://bit.ly/2TcreFR>

100. ECRE, AIDA Country Report: Greece, 2019 update, p. 96, available at: <https://bit.ly/2SVI77j>

answer to a parliamentary priority question the “limited exceptions” to the conduct of a personal interview and emphasised that the “[...] Directive provides that the communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly.”¹⁰¹ However, arbitrary actions regarding interpretation during personal interviews were also reported in early 2020.¹⁰² It should be noted that the issue may not only be the result of a domestic flaw in the procedure but is linked to the APD text, where the use of a language that the applicants “are reasonably supposed to understand” is permitted in information provision.¹⁰³

As discussed above, the right to an effective remedy may be compromised both on account of the limited availability of legal aid and due to issues relating to the complexity and increased requirements of the new legal framework. More specifically, there is no state-funded free legal aid at first instance and no obligation to provide it exists under national law. The provision of legal aid in appeal procedures is very limited due to lack of resources and a variety of practical obstacles.¹⁰⁴

Flaws in the provision of guarantees are addressed in individual legal actions depending on the circumstances of each case. However, it is worth noting two important legal challenges brought in response to the reorganisation of judicial competence for asylum cases and the absence of legal aid.

First, the competence of the administrative courts to judicially review decisions made by judges of a higher level has been brought before the Council of State and is the subject of a pilot procedure.¹⁰⁵ Although the case is still pending, the outcome will certainly clarify issues of constitutionality and confirm – or reject – the organisational structure that the IPA introduced. Second, in terms of lack of legal aid, the absence of a sufficient number of lawyers in the official registry of the Asylum Service may amount to a violation of the applicants’ right to legal aid under the recast APD, as well as their right to an effective remedy under Article 47 CFREU. Although this unlawful situation forms the basis of argumentation in the submissions of lawyers litigating a variety of cases domestically, there have been no major initiatives to directly litigate the issue in Greece. However, litigation in the Netherlands managed to secure a positive judgment by the Council of State, which blocked returns to Greece on account of impaired access to effective remedies.¹⁰⁶ According to the judgment, returns to Greece cannot take place unless legal aid can be guaranteed to asylum applicants, or unless there are individual guarantees that asylum applicants will be appointed legal representation upon return. The decision is not part of Greek-centred litigation but the fact that the judgment came from The Netherlands’ highest court can be used to support legal aid-related argumentation in a variety of Greek cases, including in domestic courts and the European Court of Human Rights.

1.2.2. Council of Europe

Access to asylum and procedural guarantees

The role of the ECtHR in securing access to asylum mainly concerns the procedural guarantees under Articles 3 and 13 of the Convention. In *M.S.S. v. Belgium and Greece*, the Court ruled on the unlawful nature of several aspects of the Greek asylum system, especially regarding structural deficiencies that lead to failure to properly identify and assess arguable claims.¹⁰⁷ Lack of communication and information, gaps in interpretation and legal aid, lengthy procedures, and low quality of refugee status determination procedures are some of the elements that led to a finding of violations under Article 3 in conjunction with Article 13. The landmark ruling has been consistently cited by the Court in its Greek-related jurisprudence: in 2014, the Court repeated that the majority of the shortcomings that were identified in the *M.S.S.* judgment continue to characterise the Greek asylum system.¹⁰⁸ Subsequent judgments confirm persisting issues in the registration of asylum applications,¹⁰⁹ the disregard of arguable claims and the possibility to lodge asylum requests,¹¹⁰

101. Parliamentary questions, Answer given by Ms Johansson on behalf of the European Commission, Question Reference: P-004017/2019 (ASW), 5 February 2020, available at: <https://bit.ly/3kh76y0>

102. ECRE, AIDA Country Report: Greece, 2019 update, p. 96-97, available at: <https://bit.ly/2SVI77j>

103. Article 12, APD.

104. ECRE, AIDA Country Report: Greece, 2020 update, Chapter: Asylum Procedure, Section C.1.4.2., available at: <https://bit.ly/3pm5WET>

105. RSA, The Council of State pilot procedure on judicial review in the asylum procedure, 1 February 2021, available at: <https://bit.ly/3wtyMX7>

106. Dutch Council of State, Decision no. 201904035/1/V/3, 23 October 2019, available at: <https://bit.ly/3dKEDyd> (in Dutch)

107. EDAL, ECtHR - *M.S.S. v Belgium and Greece* [GC], Application No. 30696/09, 21 January 2011, available at: <https://bit.ly/3tjtkTV>

108. EDAL, ECtHR - *Sharifi and Others v Italy and Greece*, Application No. 16643/09, available at: <https://bit.ly/3ee0e3Y>

109. EDAL, ECtHR – *E.A. v. Greece*, Application No. 74308/10, 30 July 2015, available at: <https://bit.ly/3hdLxQv>

110. EDAL, ECtHR – *A.E.A. v Greece*, Application no. 39034/12, 15 March 2018, available at: <https://bit.ly/3ehERi5>

and excessively lengthy asylum procedures.¹¹¹

Several communicated cases since 2018 have addressed deficiencies in the asylum procedure. The cases include complaints against shortcomings in the handling of the asylum application,¹¹² lack of in-merit assessment and issues with accessing the procedure,¹¹³ and revocation of refugee status.¹¹⁴ Domestic actors, however, are currently exploring litigation before the European Court of Human Rights on the lack of an effective remedy under Article 13 to complain of the potential violation of Article 3 during the suspension of asylum applications in March 2020.¹¹⁵ Regarding the most recent developments on access to asylum at land and sea borders, litigation efforts before the Strasbourg court will be discussed in Section III.2.b.

Litigation on the deficiencies of the Greek asylum system has been abundant and it proved successful in many instances. Despite the success in securing strong judgments by the Court, the situation on the ground remains challenging. The accelerated procedures on the islands and the recent amendments in the national asylum legislation do not create the circumstances that would allow the Greek asylum system to address the long-standing deficiencies. A constant concern over this legal avenue focuses on the execution of the Court's judgment and the ultimate effectiveness of the Convention.

Given the lack of resolution of the legal issues that have already been adjudicated, the monitoring of the execution of major ECtHR judgments is important in the Greek context. In the last meeting of the Council of Europe Committee of Ministers (CoM), which discussed the status of execution of the *M.S.S. and Rahimi groups v. Greece*, a significant number of Greece-based organisations submitted extensive communications detailing the current situation in Greece and the connection of present challenges with the long-term structural deficiencies that these judgments have identified since 2011, especially regarding the problem of legal aid.¹¹⁶

On 1 October 2020, the CoM issued a decision noting persisting problems in the asylum procedure, which is still characterised by delays and gaps in legal aid provision and requested measures and information.¹¹⁷ The Greek Government was asked to submit reports on the measures taken to address these problems by March 2021. The information submitted by the Greek government focuses on providing numbers without any contextual clarification.¹¹⁸ The submission describes the average duration of processing times of applications and appeals, as well as the number of people who requested and were granted legal assistance. The lack of contextualisation and of reference to deficiencies that are extensively documented by Greek and non-Greek NGOs participating in the monitoring procedure undermines the execution of judgments.

Execution of judgments

As discussed above, the CoM conclusions do not stimulate improvements in practice. The long-term monitoring of the *M.S.S.* and *Rahimi* groups of cases underlines the delays in compliance and practical implementation of the Committee's decisions. It is possible, however, that by achieving strong conclusions from the Committee litigants can significantly reinforce future litigation before Strasbourg on cases concerning similar issues, since the Court heavily relies on findings made by other Council of Europe bodies when examining cases.

Despite the use of CoM decisions as a reinforcement tool, the longstanding issue of the effective implementation of the Court's judgments remains. It is not the purpose of this paper to analyse this issue, which has been extensively discussed elsewhere,¹¹⁹ including in respect of possible reasons behind

111. EDAL, ECtHR – *B.A.C. v. Greece*, Application no. 11981/15, 13 October 2016, available at: <https://bit.ly/3vJsxwS>

112. ECtHR, *T.S. and M.S. v. Greece*, Application no. 15008/19, Communicated on 20 March 2019, available at: <https://bit.ly/3eVECsf>; *W.S. v. Greece*, Application no. 65275/19, Communicated on 17 January 2020, available at: <https://bit.ly/3ull5Hd>;

113. ECtHR, *A.I. and others v. Greece*, Communicated on 3 September 2019, available at: <https://bit.ly/3aYZPQX>; ECtHR, *Esraa Al Beid and others v. Greece*, Application no. 36423/16, Communicated on 10 September 2019, available at: <https://bit.ly/3nRouw8>

114. ECtHR, *A.J. v. Greece*, Application no. 34298/18, Communicated on 5 November 2018, available at: <https://bit.ly/3ugEbiF>

115. Information obtained from the ELENA Network.

116. See for example, the Communications by Refugee Support Aegean – Foundation PRO ASYL, HIAS Greece, Equal Rights Beyond Borders, Amnesty International, the Greek Council for Refugees, all available at: <https://bit.ly/3psfGxa>

117. Council of Europe, Committee of Ministers, CM/Del/Dec(2020)1383/H46-7, 1383rd meeting, 29 September – 1 October 2020 (DH), available at: <https://bit.ly/2HtO6xC>

118. Council of Europe, Committee of Ministers, DH-DD(2021)363, Rule 8.2a Communication from the authorities (16/03/2021) concerning the cases of *M.S.S. v. Belgium and Greece* and *RAHIMI v. Greece* (Applications No. 30696/09, 8687/08), available at: <https://bit.ly/3nUGDZJ>

119. George Stafford, *The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part 2: The Hole in the Roof*, EJIL:Talk!, 8 October 2019, available at: <https://bit.ly/3taWk0Y>; Lucy Moxham, *Implementation of ECtHR judgments – What do the latest statistics tell us?*, Strasbourg Observers, 27 July 2018, available at: <https://bit.ly/31WSzAa>

Greece's particularly negative performance.¹²⁰ In any case, a valid question emerges as to the value of directing resources to cases before the Strasbourg institutions. The usefulness of this litigation avenue must be assessed before launching a case.

Nonetheless, for many asylum applicants in Greece, the Court represents the last and only opportunity for remedy and protection. The implementation of ECtHR judgments will be the number one strategic priority for the Council of Europe according to its strategy for 2021-2024.¹²¹ It is unclear how this priority will lead to actions and results but the commitment remains important and civil society actors could respond to this commitment by seeking increased participation in the process.

1.2.3. EU legal avenues

Access to asylum following the EU-Turkey Statement

As noted above, domestic litigation did not result in a preliminary referral by the Greek Council of State regarding the concept of safe third country. However, the inadmissibility provisions of the APD were subsequently interpreted in litigation brought before the courts of Hungary in respect of national legislation that establishes an inadmissibility ground where an applicant has arrived in Hungary via a safe country. In C-564/18, the Court clarified that the fact of transit cannot alone establish a reasonable basis for an applicant's return to the country of transit.¹²² Moreover, in Joined Cases C-924/19 and C-925/19 PPU, the Court also clarified the consequences and procedure following an inadmissibility decision that was issued on a ground that was subsequently found to be unlawful under EU law.¹²³

The judgments are relevant to domestic litigation in Greece, as parts of them focus on the connection requirement of Article 38 APD and provide guidance for applying the safe third concept in line with EU law. Litigation on the basis of the more recent CJEU jurisprudence on Article 38 APD is currently pending before the Greek Council of State (see above).

Access to asylum and procedural guarantees

The general situation of the Greek asylum system has been the subject of several complaints submitted to the Commission. The note will focus on a recent initiative on behalf of Oxfam and WeMove Europe concerning infringements of EU law by Greece, as it is publicly available.¹²⁴ The complaint provides an extensive overview of the actions of Greek authorities affecting access to asylum, the quality of procedures and the protection of vulnerable individuals, with the aim of triggering infringement proceedings by the European Commission. At the time of writing, no such proceedings have been initiated by the Commission. Following the successful outcome of infringement proceedings by the Commission against Poland, Hungary and the Czech Republic on the 2015 Relocation Decisions,¹²⁵ the organisations' attempt to use this particular legal avenue against Greece is an interesting development to monitor.

Nonetheless, when addressing complaints to EU institutions narrower litigation goals may be required. The Commission follows a certain strategy¹²⁶ when deciding which individual complaints will lead to an infringement procedure; a complaint, however well-substantiated, may not yield results if it does not reflect the Commission's enforcement priorities.

Enforcement action by the Commission will focus on the "most important breaches of EU law" with one of the main priorities being state conduct that undermines EU law or policy objectives, either by incorrect

120. Dia Anagnostou, Alina Mungiu-Pippidi, Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter, *European Journal of International Law*, Volume 25, Issue 1, February 2014, Pages 205–227, available at: <https://doi.org/10.1093/ejil/chu001>

121. European Implementation Network, Change for the Implementation of Judgments of the European Court of Human Rights, 20 April 2021, available at: <https://bit.ly/3b36NnV>

122. EDAL, CJEU, Judgment of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompá)*, C-564/18, EU:C:2020:218, paragraphs 47-49, available at: <https://bit.ly/3dt9v6w>

123. EDAL, CJEU, Judgment of 14 May 2020, *FMS and Others*, Joined Cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 183-198, available at: <https://bit.ly/2QSkJtD>

124. Complaint to the European Commission concerning infringements of EU law by Greece on behalf of WeMove Europe and Oxfam, 22 September 2020, available at: <https://bit.ly/2HkApBE>

125. EDAL, Judgment of the Court (Third Chamber) of 2 April 2020, *European Commission v Republic of Poland and Others*, Joined Cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257, available at: <https://bit.ly/3ocvnaO>

126. Communication from the Commission — EU law: Better results through better application, C/2016/8600, 19 January 2017, available at: <https://bit.ly/3sc8PYR>

transposition of legislation or due to persistent failure to apply EU law correctly. The complaint will need to be substantiated through a description of the EU law violations, the national measures concerned and the details of the body that is responsible for the violation, as well as facts and evidence that support the claims. The high level of detail required can make it difficult for the Commission to initiate proceedings where the practice complained of is not easily defined, or even identifiable. The case may be stronger where legislation has been established and its provisions violate outright EU secondary legislation or where there is a stated policy that undermines the Union's laws. In addition, as the Member States have the main responsibility for the application of EU law, there is a degree of subsidiarity which can lead the Commission to prioritise cases where domestic attempts to remedy the evidently unlawful measures have been clearly rejected by national authorities and courts.

The legal issues with Greece's practices and legislation are sufficiently arguable. However, it is important to consider the country's domestic approach on access to asylum and the border situation as part of the Union's overall policy on containing people at its borders. It may be difficult to direct the Commission's enforcement tools against what is both a core element of its own policy on asylum and at the heart of an ambitious plan for reform: the new border procedures and the Screening Regulation proposed by the Committee in the Pact share a lot of similarities with the Greek model.¹²⁷ Moreover, as discussed above, the fact that such litigation inevitably includes elements that relate to the EU-Turkey Statement limits the willingness to challenge Greece's policies and practices. The potential for Commission action regarding specific parts of the complaint (unlawful returns, detention and reception conditions) will be analysed separately in the respective sections of the note.

1.2.4. International legal avenues

Access to asylum

In 2019, several organisations submitted information to the United Nations Committee Against Torture (CAT) on the rights of asylum applicants, refugees and migrants in Greece in the context of the country's seventh periodic review.¹²⁸ In its concluding observations of September 2019, the Committee "[...] notes with concern that the implementation of the European Union-Turkey statement of March 2016 instituted an accelerated border procedure on the Greek islands, on the presumption that Turkey qualified as a safe third country" and urged authorities to reinforce the capacity of the Asylum Service in order to also tackle problems in accessing procedures on the mainland.¹²⁹

Following information submitted to the Special Rapporteur on the human rights of migrants, the latter communicated an urgent appeal to the Greek government in March 2020 expressing concerns over the human rights of migrants and asylum seekers at the Turkey-Greece border and requesting information on how the measure suspending asylum procedures complies with international human rights law.¹³⁰

Despite the positive elements of the concluding observations, Greece's compliance with the follow-up procedure of UN Mechanisms is far from guaranteed. In October 2020, the Rapporteur for Follow-up to Concluding Observations of the Committee against Torture addressed a letter to Greece raising concerns over the lack of information about domestic plans to implement the observations.¹³¹ Moreover, in its reply to the Special Rapporteur's appeal, the Greek government relied on the extraordinary situation at the border and a shared position on the issue with the EU¹³² to justify its suspension of the reception of asylum applications.¹³³ The reply fails to identify any points of compliance of the measure with international human rights law according to the Special Rapporteur's request.

127. RSA, The Workings of the Screening Regulation: Juxtaposing proposed EU rules with the Greek reception and identification procedure, January 2021, available at: <https://bit.ly/2QahRla>

128. For more information on the information provided by civil society, see the Committee's page on its 67th Session (22 Jul 2019 - 09 Aug 2019), available at: <https://bit.ly/3dNIXwH>

129. Committee Against Torture, Concluding observations on the seventh periodic report of Greece, paras. 18 and 9, available at: <https://bit.ly/2TetkF4>

130. Special Rapporteur on the Human Rights of Migrants, Information received concerning the deteriorating human rights situation of migrants and asylum seekers and refugees at the Turkey - EU border, particular the Turkey - Greece border, UA GRC 1/2020, available at: <https://bit.ly/3xnSILn>

131. CAT, Request for further clarification, 15 October 2020, available at: <https://bit.ly/3t49tsD>

132. The Greek government's cites the common understanding of the situation at EU's external borders with Turkey, as formed and agreed in March 2020: Council of the EU, Statement on the situation at the EU's external borders, 4 March 2020, available at: <https://bit.ly/3gsGRpkD>; Council of the EU, Statement of the Foreign Affairs Council, 6 March 2020, available at: <https://bit.ly/3xtsgQr>

133. The Minister of Foreign Affairs, Reply of the Greek government to the urgent appeal sent by the Special Rapporteur on the Human Rights of Migrants, 11 May 2020, available at: <https://bit.ly/3aldawL>

Even though enforcement and improvements in practice are not guaranteed when engaging UN mechanisms, the authoritative information in UN observations can be used to reinforce argumentation in domestic, EU and ECtHR litigation. Moreover, as discussed below, the individual communications procedures of the UN Treaty bodies are largely unexplored. It is unclear whether any finding of an individual violation by a UN treaty body will result in compliance but it is important to increase awareness of the potential of this litigation. Regardless of enforcement results, the international expertise that the engagement with UN bodies offers is an important benefit and can reinforce other forms of litigation.

2. UNLAWFUL RETURNS

2.1. Legal Concerns

Discussions about Greece's border management have included multiple concerns over immediate returns of third-country nationals in violation of international and European law. The longstanding practice of unlawful returns ("pushbacks") in Greece has been extensively monitored and documented over the past decade.¹³⁴ In its 2019 submissions to the Committee of Ministers in the context of execution monitoring in M.S.S. and Rahimi cases, UNHCR expressed its concerns over allegations of forced returns "which appear to affect hundreds of third-country nationals summarily returned without an effective opportunity to access procedures or seek asylum."¹³⁵ The issue concerns both the country's land border with Turkey at Evros and its sea frontiers (Eastern Aegean).

Incidents of unlawful returns seemed to reach new levels of frequency and severity throughout the first half of 2020, following the opening of the Turkish border and the arrival of thousands of persons in Evros, with use of force against persons trying to cross the border being reported.¹³⁶ The use of secret sites to facilitate summary returns, as well as incidents of lethal force have also been reported.¹³⁷ Greek border forces were reinforced during that period and the situation in Evros escalated into violent clashes; reports of assaults and forced returns by unidentified officers were made.¹³⁸ Incidents of refoulement were also reported in cases of people residing irregularly in mainland Greece, possibly in the chaos that the COVID-19 pandemic provoked.¹³⁹

The tension at the land border was accompanied by reports of similar practices of forced returns at the maritime frontiers of Greece with Turkey. As with land border returns, interception and returns in the Aegean Sea have also been reported by numerous sources in the past decade, including in relation to the danger of shipwrecks and incidents with casualties.¹⁴⁰

Last year saw multiple reports, both in the context of the spring 2020 developments and due to a general increase in the scrutiny of sea operations, including in respect of the role of the EU's border agency, Frontex, in incidents at sea. In early March 2020, the Council of Europe Commissioner for Human Rights expressed her alarm over reports that "some people in distress have not been rescued, while others have been pushed back or endangered."¹⁴¹ A Danish patrol boat reportedly refused to obey orders to return persons it had rescued,¹⁴² reports of aggressive behaviour of the Greek Coast Guard increased and audiovisual material

134. Human Rights Watch, *Stuck in a Revolving Door*, November 26 2008, available at: <https://bit.ly/3dRvDY4>, PROASYL, *Pushed back: Systematic human rights violations against refugees in the Aegean sea and at the Greek-Turkish land border*, 7 November 2013, available at: <https://bit.ly/2IZaFeD>; See also every AIDA report on Greece published since 2013, available at: <https://bit.ly/2IYSqpC>

135. UNHCR, *Recommendations by the Office of the United Nations High Commissioner for Refugees (UNHCR) concerning the execution of judgments by the European Court of Human Rights (ECtHR) in the cases of M.S.S. v. Belgium and Greece (Application No. 30696/09, Grand Chamber judgment of 21 January 2011) and of Rahimi v. Greece (Application No. 8687/08, Chamber judgment of 05 April 2011)*, 15 May 2019, available at: <https://bit.ly/37yA2hx>

136. ECRE, *AIDA Country Report: Greece, 2019 update*, p. 35, available at: <https://bit.ly/2SVI77j>

137. The New York Times, 'We Are Like Animals': Inside Greece's Secret Site for Migrants, 10 March 2020, available at: <https://nyti.ms/2Hu657r>

138. Human Rights Watch, *Greece: Violence Against Asylum Seekers at Border*, 17 March 2020, available at: <https://bit.ly/37zc71y>

139. ECRE, *AIDA Country Report: Greece, 2020 update*, Chapter: *Asylum Procedure*, Section B.1, available at: <https://bit.ly/3in1ZhT>

140. HRW, *Greece: Investigate Pushbacks, Summary Expulsions*, 30 January 2014, available at: <https://bit.ly/32eGzu4>; See also every AIDA report on Greece published since 2013, available at: <https://bit.ly/2IYSqpC>

141. Council of Europe, Commissioner for Human Rights, *Time to immediately act and to address humanitarian and protection needs of people trapped between Turkey and Greece*, 3 March 2020, available at: <https://bit.ly/3jhLwrW>

142. Politico, *Danish boat in Aegean refused order to push back rescued migrants*, 6 March 2020, available at: <https://politico.com/3m8vfhA>

recorded unlawful and dangerous deterrence practices.¹⁴³ UNHCR has been issuing increasingly strong statements condemning returns at land and sea borders, expressing particular concerns over the latter.¹⁴⁴ The practice of the Greek Coast Guard seems to have continued at least until the end of 2020.¹⁴⁵

In October 2020, media reports suggested Frontex involvement in unlawful returns at sea in Greece. According to the reports, the EU Border Agency is aware of the practices of the Greek Coast Guard and has at times actively participated in illegal sea returns.¹⁴⁶ In response, Frontex launched its own internal inquiry into incidents of complicity in unlawful returns at sea in October 2020.¹⁴⁷ Several incidents were investigated but a conclusive assessment of Frontex's role was not achieved, mostly on account of insufficient information.¹⁴⁸ The report referred to "deficits and need for improvement" in the agency's internal reporting and monitoring mechanisms, which were considered to be the reason behind the inability to substantiate the allegations.

2.2. Legal challenges

Unlawful returns have been litigated both domestically and at the Council of Europe level. The endeavours have sought to challenge unlawful summary returns, as well as criminal acts under national law committed by border officials. The issue is also a subject of the infringement complaint to the Commission by Oxfam and WeMove Europe and was included in NGO reports submitted to the periodic review of Greece before the Committee against Torture.

2.2.1. Domestic legal action

In terms of domestic litigation, a report was submitted to the Prosecutor of the Supreme Court of Greece in June 2019 containing detailed accounts of irregular and violent returns of refugees at the region of Evros without any form of prior assessment. At the same time, three criminal complaints were submitted to the First Instance Prosecutor of Athens regarding the unlawful return of six refugees back to Turkey; litigation following these complaints is ongoing.¹⁴⁹ In 2020, reports was submitted to the Prosecutors of the Supreme Court and the Piraeus Naval Court Prosecutor for illegal returns conducted at sea in the months between March and December 2020.¹⁵⁰ This legal action is also currently ongoing.¹⁵¹ Lastly, a 2018 report by civil society actors also led to the initiation of an investigation by the Public Prosecutor of Orestiada in the Evros region but there is no information on the status of procedures as of May 2021.¹⁵²

Individual case support and local litigation efforts were also important in the context of the Evros events, where refugees who managed to cross the border were prosecuted for illegal entry. Legal action by NGOs on the ground ensured that certain applicants were able to secure their right to appeal against unreasonably harsh criminal sentences that were handed down following what has been described as unfair trials, including by the Council of Europe.¹⁵³ The unusually severe sentences and the fact that authorities did not refrain from prosecution, as international refugee law foresees in cases of irregular entry,¹⁵⁴ indicate wider obstacles to domestic litigation that go beyond the mere issues of scarce legal aid and concern a hostile

143. Refugee Support Aegean, Alarm over increase of reported push-backs at sea and risks for the lives of those seeking protection 20 May 2020, available at: <https://bit.ly/34kdUp9>, UNHCR concerned by pushback reports, calls for protection of refugees and asylum-seekers 21 August 2020, available at: <https://bit.ly/2TkoHcw>

144. UNHCR, UNHCR calls on Greece to investigate pushbacks at sea and land borders with Turkey, 12 June 2020, available at: <https://bit.ly/31z1qe4>

145. RSA, Push backs and violations of human rights at sea: a timeline, 29 December 2020, available at: <https://bit.ly/3e5m4oX>

146. SPIEGEL International, EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign, 23 October 2020, available at: <https://bit.ly/3a9SUUm>

147. Frontex, Frontex launches internal inquiry into incidents recently reported by media, 27 October 2020, available at: <https://bit.ly/3g84iUP>

148. Frontex, Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea Final Report of the Frontex Management Board Working Group, 1 March 2021, available at: <https://bit.ly/3didpAp>

149. Greek Council for Refugees, GCR initiated legal action following allegations of pushbacks in Evros, 19 June 2019, available at: <https://bit.ly/35y7phY>

150. Greek Helsinki Monitor, Criminal complaint for repeated illegal returns of third-country nationals March – July 2020, 27 August 2020, available at: <https://bit.ly/3jxcv2G>; Greek Helsinki Monitor, Criminal complaint for the investigation of 147 incidents of violent, racist refoulement or deportation of 7000+ third-country nationals between March – December 2020, 4 May 2021, available at: <https://bit.ly/3vSMxxB>

151. Greek Helsinki Monitor (GHM), 15 Prosecutorial services investigate complaints by GHM of 147 deportations and the refoulement of 7000+ third-country nationals, 4 June 2021, available at: <https://bit.ly/3z1WY44>

152. ECRE, AIDA Country Report: Greece, 2019 update, p. 34, available at: <https://bit.ly/2SVI77j>

153. ECRE, AIDA Country Report: Greece, 2020 update, Chapter: Asylum Procedure, Section B.1, available at: <https://bit.ly/3in1ZhT>

154. See Article 31 (1), 1951 Geneva Convention.

systemic approach against migration.

Moreover, despite the consistent use of national criminal law by domestic legal actors, these procedures do not sufficiently address refoulement practices mainly due to the limits of judicial competence. Criminal law does not serve to protect against refoulement, and criminal procedures do not offer appropriate remedies to stop people from being returned to countries where they face risks of ill-treatment. In addition, any effectiveness of criminal procedures in Greece is hampered by the excessively long delays in handling complaints and conducting appellate procedures, an issue that has been described as a systemic problem by the European Court of Human Rights.¹⁵⁵ Impediments inherent to the culture and practice of Greek authorities in dealing with accusations of refoulement can also affect the possibilities of bringing complaints: disregard of claims of refoulement incidents is prevalent, including in the context of asylum procedures, and risks of retaliatory charges against persons reporting unlawful returns remains a concern.¹⁵⁶ Lastly, the use of regular judicial procedures incurs costs that the individuals involved are often not in a position to cover and that the legal assistance available cannot always undertake.

Criminal justice has a place in refoulement litigation, not least where use of force is employed, as it enhances accountability and secures public order. This form of justice ensures that the rule of law will not be eroded by general circumstances of impunity and establishes the foundations for a functional human rights system. Criminal accountability, however, is not sufficient on its own; the practical obstacles mentioned above underline the importance of specialised, effective and accessible mechanisms to prevent refoulement. The absence of such mechanisms is a general problem and a significant obstacle to obtaining supporting material for a case or enforcing prevention through a complaints system. For the moment, domestic human rights bodies in Greece have an oversight role but no enforcement capacity. Consequently, the use of these avenues could only serve to complement direct litigation. Significant changes would however be required for domestic human rights bodies to contribute to national preventive frameworks.

More specifically, a National Mechanism for the Investigation of Arbitrary Incidents by Law Enforcement and Prison Officers has been established under the Greek Ombudsman services.¹⁵⁷ In 2017, multiple allegations of summary returns at the Evros border prompted an ex officio investigation by the Greek Ombudsman. An interim report was published in April 2021 with several conclusions regarding, inter alia, the general lack of investigation of unlawful border incidents and the role of non-state actors in these.¹⁵⁸ A final report is pending. Although the length of this investigation is an issue in itself, with speed being one of the main requirements for a national preventive mechanism, the limits of the institution's power also relate to its structure and functions. In a 2019 report on Greece, the Committee for the Prevention of Torture expressed concerns over the mechanism's effectiveness, describing its disciplinary-related competence, lack of enforcement powers, and scarce resources as the main problems.¹⁵⁹

In June 2020, the National Commission of Human Rights (GNCHR) held a hearing with the participation of authorities and civil society. The Commission noted the high number of reports of unlawful returns in the submissions and evidence provided by civil society during the hearing and concluded that the practice has reached the level of systematic occurrence.¹⁶⁰ Recommendations mostly focused on the establishment of mechanisms to monitor reports of irregular returns, but no such action has been taken by the Greek authorities. Lack of compliance with the GNCHR's recommendations relate back to the state's general failure to comply with Council of Europe findings, as discussed elsewhere and also to structural and functional weaknesses akin to those that characterise the Greek Ombudsman mechanism. In March 2021, the Commission's legal foundation was the subject of a legislative amendment which officially recognised it as a National Human Rights Institution and conferred legal personality, functional independence and financial autonomy.¹⁶¹

155. ECtHR, *Firat v. Greece*, App. No. 46005/11, 9 November 2017, available at: <https://bit.ly/3gkiZ7d>; *Michelioudakis v. Greece*, App. No. 5447/10, 3 April 2012, available at: <https://bit.ly/3sorznN>; *Vassilios Athanasiou and others v. Greece*, App. No. 50973/08, 21 December 2010, available at: <https://bit.ly/32m7F28>

156. Arsis, Greek Council for Refugees, Hellenic League for Human Rights, HIAS Greece, Human Rights 360, RSA, Joint Statement on push backs practises in Greece, 1 February 2021, pp. 6-7, available at: <https://bit.ly/3x0EEYc>

157. Article 56, L. 4443/2016, Gov. Gazette A' 232/9.12.2016, available at: <https://bit.ly/3toCO15>

158. The Greek Ombudsman, Own initiative investigation by the Greek Ombudsman on alleged pushbacks to Turkey of foreign nationals who had arrived in Greece seeking international protection, 28 April 2021, available at: <https://bit.ly/3chKCem>

159. CPT, Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 28 March to 9 April 2019, p. 53, available at: <https://bit.ly/3dph22>

160. National Commission for Human Rights, Statement on reported practices of pushbacks (in Greek), 9 July 2020, available at: <https://bit.ly/2RDne3B>

161. L. 4780/2021, Gov. Gazette 30/A/27.2.2021, available at: <https://bit.ly/3ti0fYR>

It is unclear whether and how these changes will increase the compliance of authorities with the body's recommendations. Nonetheless, the GNCHR's recommendations are generally included in legal submissions by lawyers as authoritative pieces of domestic scrutiny. Most notably, the Commission has recommended its inclusion in the procedure establishing an independent border mechanism to monitor complaint against unlawful returns and has noted its previous experience in the operation of the nationwide Racist Violence Recording Network.¹⁶² The recommendation could create a realistic role for the GNCHR in supporting the state to create a methodology for recording unlawful border incidents.

2.2.2. Council of Europe

Regarding the events of 2020, several cases are being assessed in view of a complaint to the European Court of Human Rights, regarding the responsibility of authorities during their conduct at sea, including loss of life and ill-treatment.¹⁶³ As the situations where the alleged violations occurred are new and the Court has not yet had time to decide, this litigation avenue is a choice to be monitored and assessed in the future.

Two cases regarding unlawful returns at the Evros border have already been communicated by the Strasbourg court: in L.A. and others and A.A. against Greece the applicants complain that their immediate return to Turkey and the manner of return violated Articles 3, 5 and 13 of the European Convention on Human Rights.¹⁶⁴ At the end of 2020, another case of an unlawful return of a Turkish national to Turkey was communicated by the ECtHR.¹⁶⁵ Although the incident dates from 2014 and is not directly related to the recent increases of illegal returns, it is nonetheless relevant as it concerns return in the form of enforced disappearance. Litigation against this obscure practice can be challenging because the collection of evidence is difficult.¹⁶⁶ The Court's examination of the facts of the case and the available evidence may provide guidance on how to deal with difficulties in substantiating such cases.

In terms of returns at sea, several complaints were filed to the ECtHR by different legal actors in 2020; however, not all of them have been communicated by the Court and public information on the nature of the cases is scarce at this point.¹⁶⁷ One of the complaints, submitted in May 2020, concerns the violent interception of a migrant and his return to Turkish waters by the Greek Coast Guard near the island of Samos.¹⁶⁸ In January 2021, an application was submitted to the Court alleging violent interception and return at sea of a family with three children.¹⁶⁹ More recently, a complaint was filed on behalf of 11 Syrian nationals who claim that they were violently returned to Turkey from the Aegean region.¹⁷⁰ The applicants were travelling with a group of almost 200 migrants who were caught in a storm near Crete. The cases will not be decided any time soon, as they have only just been filed, but the submission of numerous complaints of similar cases is certainly an opportunity for the Court to address methods of interception and return that could indicate a pattern amounting to state policy.

Another case concerning sea arrivals was communicated by the Court at the beginning of 2021 regarding events that occurred in 2015.¹⁷¹ The case concerns an operation that involved the deadly use of force by the Greek authorities in an incident that also involved a Frontex boat. A similar case has been pending since 2016.¹⁷² The two cases do not concern unlawful returns but the Court's judgment could shed light on Article 2 and 3 standards involving violent interceptions at sea, most importantly on safety protocols in maritime operations, use of force, and obligations to investigate. The issues are all relevant to situations of unlawful returns under similar circumstances and can be useful material for future litigation, including domestic

162. Greek National Commission for Human Rights, Reference Report on the Refugee and Migrant Issue, Part B, September 2020, p. 13, available at: <https://bit.ly/32Lm6xb>

163. Information obtained from the ELENA network.

164. ECtHR, L.A. and Others against Greece and A.A. against Greece, Applications nos. 12237/20 and 12736/20, lodged on 5 March 2020 and 7 March 2020 respectively, available at: <https://bit.ly/2TsZBbs>

165. ECtHR, B.Y. v. Greece, Application no. 60990/14, Communicated on 18 November 2020, available at: <https://bit.ly/3e8NLxh>

166. This is often due to practical obstacles, e.g., lack of access to the borders, inability to locate individuals, absence of border monitoring activities.

167. Legal Centre Lesbos, Crimes against Humanity in the Aegean Sea, 1 February 2021, p. 32, available at: <https://bit.ly/2Qwepby>

168. Irish Centre for Human Rights, Press Release; New Complaint at the European Court of Human Rights, 18 November 2020, available at: <https://bit.ly/3nn3ZHb>

169. Legal Centre Lesbos, Quarterly Newsletter, January – March 2021, p. 5, available at: <https://bit.ly/3aBOdTx>

170. Legal Centre Lesbos, New case filed against Greece in European Court, for massive pushback operation of over 180 migrants caught in storm near Crete, 26 April 2021, available at: <https://bit.ly/3aX5oiX>

171. ECtHR, Mohammed Hussein Hasan Al Mukhlas & Huda Hadi Kareem Al-Maliki, Communicated on 27 January 2021, available at: <https://bit.ly/3mOwM7j>

172. ECtHR, Safi and others v. Greece, App. no. 5418/15, Communicated on 22 February 2016, available at: <https://bit.ly/3g71GrE>

litigation following shipwrecks.¹⁷³

Another Council of Europe body, the Committee for the Prevention of Torture (CPT), also reacted to the events of spring 2020. The severity of the reports prompted a rapid visit of the Committee to a number of border police stations in the Evros region.¹⁷⁴ According to the report on the visit, the Committee considers evidence presented in respect of unlawful returns at the Evros border as credible.¹⁷⁵ The Committee referred to numerous credible descriptions of unlawful state conduct, including the complete absence of written records of detention of people before return. Regarding returns at sea, the CPT expressed serious concerns over credible allegations of dangerous and unlawful acts by the Greek Coast Guard with the purpose of preventing entry of boats carrying migrants.¹⁷⁶ The Committee requested information on the official operating instructions given to the Greek Coast Guard and also noted that human rights monitors have not been included in border surveillance activities that Frontex is supporting in the area (Operation Poseidon). Although the CPT is not a body which can support or to which legal recourse can be made, its report will have weight in legal challenges, in particular, in relation to its assessment of the credibility of testimony evidence, often a point of contention in litigation procedures.

Although the information that the Committee requested was indeed provided by the Greek government in its response to the report, compliance is not guaranteed given the government's denial of every refoulement-related allegation.¹⁷⁷ It is interesting to note that the government relies, inter alia, on the records kept by Frontex to claim that the absence of any reported incident precludes the possibility of unlawful conduct. As discussed in the following sub-section, the very absence of monitoring and reporting mechanisms is a central issue in the Frontex investigations and a lacuna which impedes litigation against returns.

The report, however, is not without value to Greek litigation. The Committee notes that there was a large-scale entry of third-country nationals into Greece and that this entry was actively encouraged by the Turkish authorities. The fact that Turkish authorities promoted the entry has already contributed to the Greek government's claims of an attack at Greece's borders. However, the Committee confirmed that, "[r]egardless of their number, the men, women and children crossing into Greek territory are individuals who must be treated with dignity and respect and in accordance with European norms."¹⁷⁸

In this sense, the importance of the newly-submitted complaints on the matter before the ECtHR is evident. Despite the restrictive approach in N.D. and N.T.,¹⁷⁹ Greek litigation might still provide a chance for the Court to reiterate its Article 3 principles regarding unlawful returns at Europe's land borders, especially since Greece has not ratified Protocol 4 to the ECHR, which was at the core of the N.D. and N.T. complaint. The sheer number of the complaints in 2020 also create circumstances that could affect the Court's reasoning, as far as the revelation of a policy is concerned.

2.2.3. EU legal avenues

At EU level, legal action includes the infringement complaint by Oxfam and WeMove Europe mentioned above; other forms of legal and policy action may also provoke (re)actions, with varied consequences.

An important part of the complaint to the European Commission regarding Greece's infringements of EU law covers illegal returns and alleges violations of the EU asylum *acquis* and the Charter of Fundamental Rights of the EU.¹⁸⁰ The complaint includes specific allegations concerning the unlawful return of six individuals from mainland Greece. As noted above, no infringement procedure has been initiated by the European

173. A similar case from 2018 is currently pending domestically. See, RSA, #AgathonisiShipwreck: The case file, 26 June 2018, available at: <https://bit.ly/2Q8Ukrs>

174. Council of Europe, Anti-torture Committee undertakes rapid reaction visit to Greece to examine treatment of migrants, 17 March 2020, available at: <https://bit.ly/2Huvu0V>

175. CPT, Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 17 March 2020, 19 November 2020, pp. 25-26, available at: <https://bit.ly/3aav8l6>

176. CPT, Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 17 March 2020, 19 November 2020, p. 27, available at: <https://bit.ly/3aav8l6>

177. CPT, Response of the Greek Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Greece from 13 to 17 March 2020, 19 November 2020, pp. 19-21, available at: <https://bit.ly/3gqcb0T>

178. See supra, note 176, CPT Report, p. 4, available at: <https://bit.ly/3aav8l6>

179. EDAL, ECtHR - N.D. and N.T. v. Spain [GC], nos. 8675/15 and 8697/15, 13 February 2020, available at: <https://bit.ly/3imhbM8>

180. Complaint to the European Commission concerning infringements of EU law by Greece on behalf of WeMove Europe and Oxfam, 22 September 2020, available at: <https://bit.ly/2HkApBE>

Commission as of May 2021. The previous analysis of the limits of infringement-related litigation also applies here. For several reasons, however, this part of the complaint is even less likely to trigger infringement action by the Commission.

First, the stance of EU officials during March 2020 was not as strong as that of the Council of Europe bodies discussed above. Responses ranged from reluctance to condemn the reported practices to outright support during the visit of the European Commission President to Evros, during which Greece was praised as the “shield of Europe”.¹⁸¹ During a June visit to Greece, the EU High Representative for Foreign Affairs confirmed that the Union will continue to help Greece defend its borders.¹⁸² In addition, in response to a parliamentary question submitted in March,¹⁸³ the Commission gave an ambiguous answer where it reiterated the right to apply for international protection and the obligation to conduct returns in accordance with fundamental rights but also referred to its commitment to the implementation of the Statement and collaboration with Turkey “despite ongoing challenges.”¹⁸⁴ More recent statements have demonstrated some scrutiny of Greece’s measures but the general stance does not suggest enforcement.¹⁸⁵

Second, despite multiple reports by the media and calls from within the Union for action against Greece on refoulement incidents, the Commission has consistently avoided discussing infringement procedures or other enforcement action. More specifically, with the help of investigative journalism,¹⁸⁶ forensic reporting¹⁸⁷ and targeted advocacy by civil society, strong political mobilisation at the EU-level followed the spring events. On 12 May, more than 100 Members of the European Parliament joined a call urging the European Commission to investigate shootings at the Greek-Turkish border and to answer concrete questions on evidence of the participation of officials – including Frontex – in the incidents.¹⁸⁸ In September 2020, a parliamentary question sought to receive an answer from the Commission on whether infringement procedures against Greece are being considered.¹⁸⁹

In its answer, the Commission made no mention of infringement action but referred to the responsibility of Member States to apply EU law correctly and the monitoring mechanisms that are included in the Pact proposals.¹⁹⁰ Similarly, the European Commissioner for Home Affairs noted in July 2020 that there is a need for a new mechanism to monitor unlawful returns.¹⁹¹ The references concern Article 7 of the new Regulation introducing the screening of third country nationals at the external borders which foresees the establishment of independent monitoring mechanisms to oversee, inter alia, compliance with non-refoulement.¹⁹² This article reflects a much-awaited clarification of the Commission’s position on the matter and a recognition of a persisting problem that needs independent scrutiny. However, its effectiveness is undermined by the aforementioned approach of referring to Member State responsibility rather than assume a more active role. The vagueness of the concept and the fact that monitoring arrangements are left entirely to the Member States’ discretion raises questions of efficacy.

Third, possibly in that same line of Member State responsibility, the Commission reacted only after media reports suggested that an EU agency was involved. In October 2020, media reports around the complicity of

181. The Guardian, Migration: EU praises Greece as ‘shield’ after Turkey opens border, 3 March 2020, available at: <https://bit.ly/3dRCvoz>

182. Kathimerini, EU official vows to continue defending bloc’s ‘external border’, 24 June 2020, available at: <https://bit.ly/2Q0e1In>

183. Priority question for written answer P-001224/2020 to the Commission, Rule 138, Nikos Androulakis (S&D), 4 March 2020, available at: <https://bit.ly/3mOszRc>

184. Answer given by Ms Johansson on behalf of the European Commission, Question reference: P-001224/2020, 16 July 2020, available at: <https://bit.ly/3tdbu5E>

185. Reuters, EU official urges Greece to investigate reports of asylum-seeker pushbacks, 29 March 2021, available at: <https://reut.rs/2QYgHAr>

186. The New York Times, Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea, 14 August 2020, available at: <https://nyti.ms/3otOUUs>; The New York Times, ‘We Are Like Animals’: Inside Greece’s Secret Site for Migrants, available at: <https://nyti.ms/3jvVki3>

187. Forensic Architecture, Investigations into Evros Incidents, Investigation I.62, I.61, I.55, I.51 and I.50, available at: <https://bit.ly/2TqEHd9>

188. Twitter, Tineke Strik: “More than 100 Members of European Parliament joined my call on the European Commission to immediately investigate the shootings at the Greek-Turkish border. We cannot tolerate that these findings are simply ignored by the responsible authorities”, 12 May 2020, available at: <https://bit.ly/2HDgVla>

189. European Parliament, Question for written answer E-004816/2020, Systematic and coordinated push-backs by the Greek authorities, 3 September 2020, available at: <https://bit.ly/3oyzG0j>

190. European Parliament, Answer given by Ms Johansson on behalf of the European Commission, Question reference: E-004816/2020, 6 November 2020, available at: <https://bit.ly/3gbS6SY>

191. EUObserver, EU mulls new system to check illegal pushbacks of migrants, 8 July 2020, available at: <https://bit.ly/35H8dRL>

192. European Commission, Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM/2020/612 final, available at: <https://bit.ly/3e0Gyi7>

Frontex in operations of interception and return of migrants at sea¹⁹³ prompted the Commission to call for an extraordinary Frontex Management Board meeting to investigate reports of complicity.¹⁹⁴ More recently, the Commission took a strong critical stance on independence in the recruitment of fundamental rights officers¹⁹⁵ and clarified the legal obligations of Frontex in the context of non-refoulement.¹⁹⁶

It is clear that, despite events that clearly amount to violations of EU Law (including Articles 4, 18 and 19 of the CFREU) and the European Convention on Human Rights (Articles 3 and 13), the necessary support for enforcement of these rights by the Commission was not forthcoming.¹⁹⁷ Enforcement against unlawful returns should not be discussed only in respect of Greece but as part of a wider discussion of what seems to be a systematic practice for various Member States.¹⁹⁸ Concerted action to enforce the fundamental rights of migrants and refugees and to remedy systemic violations would also be conducive to the prevention of violations in the long term and to continuous respect for the rule of law in the Union. Most importantly, the Commission's actions can contribute to the reversal of the current distortion of asylum in Europe which normalises non-compliance with fundamental rights and replaces responsible policymaking with litigation.

That said, the Commission's role as the guardian of the treaties lies not only in its enforcement powers. Its role in the creation of EU law is crucial and litigation in Europe can also be influenced by poor choices in the drafting of legislation. The implementation of a border-focused approach to the management of migration has not been accompanied by the use of independent mechanisms to ensure human rights monitoring. Although a mechanism to monitor compliance with the CEAS had been included in the Commission's proposal for a new EU Asylum Agency,¹⁹⁹ there was no explicit and specific competence to monitor fundamental rights compliance at the border until the September 2020 Pact proposals.

In its proposal for a Screening Regulation,²⁰⁰ the Commission introduced a mechanism with a specialised mandate to monitor compliance with the principle of non-refoulement at the border. Although a positive development, the scope of the mechanism is narrow and the proposal may not ensure independence and enforcement powers. ECRE has noted the proposal's shortcomings and the role that the legislative text should play in designing mechanisms that lead to accountability and compliance.²⁰¹ Even where mechanisms and guarantees are included in a legislative text, this does not automatically translate into enforcement and compliance. The failure of Frontex mechanisms to ensure human rights-based conduct is a testament to the need for good and efficient legislation drafted with a view to compliance. Despite being included in the agency's Regulation, the reporting and monitoring mechanisms of Frontex failed to properly record serious incidents of unlawful returns and to actively engage the Fundamental Rights Officer.²⁰² These failures also impeded the investigation of the Management Board into the incidents. The overall absence of human rights monitors was also emphasised by the Committee for the Prevention of Torture.²⁰³ However, it is the absence of records that has allowed the Greek authorities to dismiss concerns about illegal returns.²⁰⁴

193. SPIEGEL International, EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign, 23 October 2020, available at: <https://bit.ly/3a9SUUm>

194. ECRE, Frontex: Commission Calls for Urgent Meeting over Complicity in Pushbacks, Critique of 100 Million Euro Investment in Drone Surveillance, 30 October 2020, available at: <https://bit.ly/3a7Q5Do>

195. Statewatch, EU: Pushbacks scandal: Internal letters shed light on Frontex's fundamental rights recruitment failures, 25 March 2021, available at: <https://bit.ly/3eiL0tl>;

196. European Commission, The nature and extent of Frontex's obligations in the context of its implementation of joint maritime operations at the Union's external sea borders, 3 March 2021, available as an Annex in: Frontex, Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea Final Report of the Frontex Management Board Working Group, 1 March 2021, available at: <https://bit.ly/3didpAp>

197. ECRE, Weekly Editorial: EU is Crossing the Red Line by Preventing Refugees from Crossing its Borders, 6 March 2020, available at: <https://bit.ly/3jur9YQ>

198. The Guardian, 'Black book' of thousands of illegal migrant pushbacks presented to EU, 23 December 2020, available at: <https://bit.ly/3e4Pwvn>

199. Article 13, Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM (2016) 271, available at: <https://bit.ly/3ttblev>

200. Article 7, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612, 23 September 2020, available at: <https://bit.ly/3gnC3Bo>

201. ECRE, Comments on the Commission Proposal for a Screening Regulation COM(2020) 612, November 2020, pp. 36-37, available at: <https://bit.ly/3ajvwUE>

202. Frontex, Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea Final Report of the Frontex Management Board Working Group, 1 March 2021, p. 16, available at: <https://bit.ly/3didpAp>

203. CPT, Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 17 March 2020, 19 November 2020, p. 27, available at: <https://bit.ly/3aav8l6>

204. CPT, Response of the Greek Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Greece from 13 to 17 March 2020, 19 November 2020, p. 19, available at: <https://bit.ly/3gqcboT>

The poor design and flawed implementation of monitoring provisions can limit the possibilities of litigation by impeding the establishment of facts and attribution, and undermining procedural guarantees. In the absence of a clear and robust legal framework, and despite its limitations, it is no surprise that litigation against illegal returns continues in Greece because it is the last available option to stop flagrant violations of the principle of non-refoulement. There is a clear need for independent mandates, for reports and investigations into individual incidents, and for enforcement of fundamental guarantees, but all this is currently mostly addressed through the work of legal professionals in civil society organisations on the ground.

Lastly, an interesting outcome has followed the mobilisation of other non-judicial actors. The European Ombudsman opened an inquiry into the effectiveness of the border agency's complaints mechanism.²⁰⁵ More recently, OLAF, the EU's anti-fraud agency, launched an investigation into Frontex complicity in returns²⁰⁶ while a new working group was launched in the European Parliament with a mandate to investigate issues of fundamental rights compliance, accountability and internal management.²⁰⁷ In addition, the Parliament recently voted to suspend the approval of Frontex's budget in light of the concerns about its involvement in illegal returns.²⁰⁸ This is an important example of an institution's use of oversight tools, especially given the border agency's significant budget while it is also subject to a fraud investigation.²⁰⁹ The outcome of these developments remain to be seen but the initial mobilisation is a welcome form of swift political action.

2.2.4. International legal avenues

International legal action against refoulement incidents has focused on the use of UN avenues, both in terms of review/oversight procedures, as well as the procedures established under the UN human rights treaties (UN Treaty Bodies) and the UN Charter (Working Group on Arbitrary Detention).

Working Group on Arbitrary Detention and the CAT

In December 2019, representatives from civil society provided information and assistance to the Working Group on Arbitrary Detention during its visit to Greece. The final report of the UN body included a recommendation for Greece, urging authorities "[...] to put an immediate end to pushbacks and to ensure that such practices, including any possible acts of violence or ill-treatment that has occurred during such incidents, are promptly and fully investigated." Submissions of civil society actors to the seventh periodic report of Greece at the Committee Against Torture (CAT) also helped the Committee emphasise the emergence of consistent reports of summary returns at the Evros border; the Committee also noted the Greek Ombudsman's and the Hellenic Police's ongoing investigation but expressed concerns over the quality and comprehensiveness of the investigative procedures.²¹⁰

The effectiveness of these procedures in addressing violations in practice is largely dependent on the state's will to comply. In the 2019 periodic review, the CAT noted that several recommendations from its 2012 examination remained unimplemented, or only partially implemented.²¹¹ Moreover, documents from the CAT's follow up procedure indicate that the government's involvement in the examination cycle is limited to the provision of general information and the denial of any reports of state misconduct at the border. The Greek government refers to the current legal framework and planned priorities regarding the management of asylum to support its view that the principle of non-refoulement is respected and reports of unlawful returns are not real.²¹² The observations do not reveal a willingness to effectively address the reports and engage with the Committee in a transparent and constructive way. In October 2020, the Committee's Rapporteur for

205. European Ombudsman, How the European Border and Coast Guard Agency (Frontex) deals with complaints about alleged fundamental rights breaches through its 'Complaints Mechanism', Case OI/5/2020/MHZ, 10 November 2020, available at: <https://bit.ly/3dXcfcG>

206. Kathimerini, OLAF raided EU border chief's office over migrant pushback claims, 14 January 2021, available at: <https://bit.ly/3gqYg1A>

207. European Parliament, Respect of fundamental rights by Frontex: European Parliament inquiry launched, 23 February 2021, available at: <https://bit.ly/2RyrW2y>

208. AlJazeera, EU refuses to approve Frontex's budget over human rights concerns, 23 March 2021, available at: <https://bit.ly/3tyfQEL>

209. Frontex, Budget 2021 VOB, available at: <https://bit.ly/3mYLBnM>; ECRE, MEPs Vote for Respect for Human Rights at the EU's External Borders Amid Continued Revelations and Increased Scrutiny of Frontex, 12 February 2021, available at: <https://bit.ly/3gooJg7>

210. Committee Against Torture, Concluding observations on the seventh periodic report of Greece, para. 16, available at: <https://bit.ly/2TetkF4>

211. Committee Against Torture, Concluding observations on the seventh periodic report of Greece, para. 9, available at: <https://bit.ly/2TetkF4>

212. CAT, Information received from Greece on follow-up to the concluding observations on its seventh periodic report, 24 August 2020, paras. 2-13, available at: <https://bit.ly/2PoLqWF>

Follow-Up to Concluding Observations noted Greece's follow-up information but emphasised more recent reports of unlawful returns at land and sea borders in 2020 and regretted the lack of information on any investigations into reports of abuse.²¹³

The Human Rights Committee

In November 2020, a complaint was submitted to the Human Rights Committee (CCPR), the body established to monitor the implementation of the International Covenant on Civil and Political Rights (ICCPR), regarding the enforced disappearance of a Syrian national, his return to Turkey and subsequent incidents of refoulement while he was trying to re-enter Greece.²¹⁴ The complaint claims that the Greek state's conduct resulted in the violation of several articles of the ICCPR, including the right to life, the prohibition of torture and ill-treatment, and the prohibition of collective expulsions.²¹⁵ The claim is supported by forensic reconstruction of the events at the border, analysed by Forensic Architecture, an investigative institute at the University of London.²¹⁶ The CCPR's views on the complaint and the implementation of its recommendations, should a violation be established, would indicate this avenue's effectiveness in the Greek context. The role of the forensic investigation in the Committee's assessment may also allow an understanding of how this sort of evidence can be used in cases where the circumstances are very unclear.

The Committee on Enforced Disappearances

The Committee on Enforced Disappearances (CED) is especially relevant when trying to litigate illegal returns across borders or where authorities are secretly involved. During its 19th Session, the Committee on Enforced Disappearances (CED) received information from civil society organisations on enforced disappearances committed in spring 2020 at the Evros border.²¹⁷ The Committee has not yet issued observations. The Working Group on Enforced or Involuntary Disappearances has also released a report on the phenomenon in the context of migration, including how state responsibility can be triggered by the way authorities respond to incidents at land and sea.²¹⁸ In addition, the Committee recently issued Guidelines highlighting the additional risks that COVID-19 has created for migrants, including as a result of border closures and suspended asylum procedures.²¹⁹ In the Guidelines, the Committee urges states to continue investigations into disappearances of migrants and to register all cases of detention.

Greece has not ratified Article 31 of the Convention for the Protection of All Persons from Enforced Disappearance regarding the acceptance of individual complaints procedures.²²⁰ However, Articles 30 and 33, which do not require specific acceptance by States parties, allow the Committee to receive information on enforced disappearances and take urgent action on individual cases or conduct urgent inquiry visits. As of 2020, 13 urgent actions by the Committee relate to cases of disappearance in the context of migration.²²¹ Given the Committee's interest in the matter, its expertise and an approach that takes into consideration specific risks of enforced disappearances at the border, it is a complementary avenue to explore.

The Special Rapporteur on the human rights of migrants

After receiving information on the unfolding events, the Special Rapporteur on the human rights of migrants communicated an urgent appeal to the Greek government in March 2020 expressing concerns over the human rights situation of migrants and asylum seekers at the Turkey-Greece border during the spring

213. CAT, Rapporteur for Follow-up to Concluding Observations of the Committee against Torture, Letter to the Permanent Mission of Greece to the United Nations Office at Geneva, 15 October 2020, available at: <https://bit.ly/3xj9I5o>

214. Global Legal Action Network, Enforced Disappearance & Expulsion at Greece's Evros Border, available at: <https://bit.ly/3nkRuMc>

215. Communication to the United Nations Human Rights Committee, FAJ against Greece, available at: <https://bit.ly/2QwgBzP>

216. Forensic Architecture, Pushbacks across the Evros/Meriç River: Situated Testimony, The Case of Fady, available at: <https://bit.ly/3ewmlBE>

217. Committee on Enforced Disappearances, 19th Online Session, 7 September 2020 – 25 November 2020, List of issues: Greece, available at: <https://bit.ly/2PS4UmC>

218. Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration, A/HRC/36/39/Add.2, 28 July 2017, paras. 44 – 45, available at: <https://bit.ly/3tiYyun>

219. CED, Key Guidelines on COVID-19 and Enforced Disappearances, paras. 23 and 24, available at: <https://bit.ly/3hbQSI1>

220. OHCHR, International Convention for the Protection of All Persons from Enforced Disappearance, available at: <https://bit.ly/3nK3erQ>

221. OHCHR, Committee on Enforced Disappearances Report on requests for urgent action submitted under article 30 of the Convention, CED/C/19/2, p. 4, available at: <https://bit.ly/2PR73PE>

events and requesting information on reported incidents.²²² The response of the Greek Government does not suggest cooperation with a view to compliance. The government refers to a “politically orchestrated” arrival of large numbers of third-country nationals, EU support²²³ and the existence of misinformation and fake news in an attempt to dispel concerns about unlawful state conduct at the border.²²⁴

It should be noted that legal actions in relation to other UN Treaty Bodies, including the Committee on the Rights of Persons with Disabilities, are currently explored. There is no publicly available information at the time of writing. Similarly, individual actions before different UN special procedures have been used in the past but, due to the absence of publicly available information, a conclusive analysis cannot be made.

3. DETENTION

3.1. Legal Concerns

This section will make only a brief reference to general detention-related problems as they are frequently reported; in particular, the annual AIDA reports offer a detailed overview of how detention practices and litigation have been shaped up in the past years in Greece.²²⁵ The aim here is to present the most recent challenges and litigation concerning detention practices, covering the unique context of the hotspot reality following the 2016 EU-Turkey Statement and additional developments since 2019.

3.1.1. Deprivation of liberty: general issues

Deprivation of liberty in the context of migration management has been the subject of numerous reports and is a key target of domestic and international litigation. The systematic and arbitrary use of detention measures has been well-documented over the past two decades and includes issues arising from the conditions and length of detention; the proportionality of the measure; and the possibilities to challenge detention orders.²²⁶ More specifically, issues have been identified in the form of arbitrary use of public grounds as a basis for detention, the routine disregard for vulnerable individuals, and the lack of access to remedies.²²⁷ The detention of persons applying for asylum and the detention of recognised refugees have both been reported.²²⁸ The obligation under EU law to provide information to detainees is also severely impaired.²²⁹

3.1.2. Deprivation of liberty in hotspots

The policy that accompanied the implementation of the EU-Turkey Statement (see Section II.3) has been characterised by increased use of generalised detention measures, most notably with the initial blanket application of detention to all persons arriving on the Eastern Aegean islands after March 2016.²³⁰ The measure was subsequently replaced by the imposition on all newly arrived people of a geographical restriction to one of the five Eastern Aegean islands, save for specific exceptions. Currently, the regime of geographical restriction to the islands continues to be the general rule for people arriving there. However, detention practices have emerged in different situations and on the basis of questionable legal grounds.

222. Special Rapporteur on the Human Rights of Migrants, Information received concerning the deteriorating human rights situation of migrants and asylum seekers and refugees at the Turkey - EU border, particular the Turkey – Greece border, UA GRC 1/2020, available at: <https://bit.ly/3xnSILn>

223. The Greek government cites the common understanding of the situation at EU’s external borders with Turkey, as formed and agreed in March 2020: Council of the EU, Statement on the situation at the EU’s external borders, 4 March 2020, available at: <https://bit.ly/3gGRpkD>; Council of the EU, Statement of the Foreign Affairs Council, 6 March 2020, available at: <https://bit.ly/3xtsgQr>

224. The Minister of Foreign Affairs, Reply of the Greek government to the urgent appeal sent by the Special Rapporteur on the Human Rights of Migrants, 11 May 2020, available at: <https://bit.ly/3aldawL>

225. ECRE, AIDA Country Reports: Greece, available at: <https://bit.ly/37O3d06>

226. PRO ASYL, The truth may be bitter, but it must be told: The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard, October 2007, available at: <https://bit.ly/3msifJC>; UNHCR, Observations on Greece as a country of asylum, December 2009, available at: <https://bit.ly/3jtqu9L>; Amnesty International, Greece: Irregular migrants and asylum-seekers routinely detained in substandard conditions, 27 July 2010, available at: <https://bit.ly/37KaMEZ>; Global Detention Project, Immigration Detention in Greece, April 2014, available at: <https://bit.ly/3otuZ85>

227. Greek Council for Refugees, Administrative detention in Greece: Findings from the field, 2018, available at: <https://bit.ly/37MyzEA>

228. ECRE, AIDA Country Report: Greece, 2020 update, Chapter: Detention, available at: <https://bit.ly/34NBFoU>

229. ECRE, AIDA Country Report: Greece, 2019 update, p. 50, available at: <https://bit.ly/2SVI77j>

230. ECRE, AIDA Country Report: Greece, 2016 update, p. 118, available at: <https://bit.ly/37KRbVt>

A new policy of transfer and detention in mainland facilities of people confined to the islands who are engaged in “law-breaking” conduct was initiated mid-2016. Since 2017, a “pilot” detention practice started being imposed to Syrian nationals immediately upon arrival to the islands (Lesvos and Chios), while applicants receiving second-instance rejections also faced detention on the islands.²³¹ A similar indiscriminate measure of detention is also applied to persons that have left the islands in breach of the geographical restriction.

The “pilot” detention project was subsequently rebranded as a “low-profile scheme” and detention was expanded to include nationals of countries with low recognition rates and continued to be implemented throughout 2018.²³² The practice continued in 2020 and expanded to all non-vulnerable applicants on the island of Kos, according to some reports.²³³ The legal concerns around it are multiple, most notably regarding the lack of legal basis, non-access to legal remedy, and ineffective judicial review.²³⁴ Currently, capacity issues following the pandemic seem to have affected its practical implementation. Most of the features of detention policies post-EU-Turkey Statement raise serious concerns over compliance with Article 8 RCD and Article 5 of the ECHR and have triggered litigation.

3.1.3. Deprivation of liberty since 2019

The legislative amendments of November 2019 as well as the May 2020 reform, laid the ground for expanded use of detention, which is no longer a measure of last resort. The new legislation introduced the possibility to detain asylum applicants who had applied before they were detained, extends the maximum time limits, and abolishes the requirement of a prior recommendation by the Asylum Service.²³⁵ The May 2020 reform further contributed to the generalised use of detention by reversing the previous legislative framework regarding detention pending returns and providing that detention is the rule and not a measure of last resort.²³⁶

Plans also foresee the construction of closed facilities both in the context of temporary reception and specifically for the pre-removal detention of persons on the islands.²³⁷ The legislative amendments since 2019 reflect an explicit policy shift towards blanket detention of asylum applicants that was announced by the Greek authorities in November 2019, along with the announcement of plans to increase capacity in detention centres on the islands.²³⁸ The new closed centres have not yet been constructed and it remains unclear how the plans will be implemented.

Detention practices also changed following the suspension of asylum procedures in March 2020. The publication of the Decree suspending the applications for asylum for March arrivals led to a new policy of automatic detention on the islands.²³⁹ More specifically, asylum applicants arriving on the islands during March were detained upon arrival in different unofficial facilities, only to be later transferred to the mainland, where they were also placed in newly established detention facilities. It is important to note that the detention was justified by reference to readmission procedures, despite the absence of any prospect of removal to Turkey following the suspension of returns due to the pandemic. The policy also attracted concerns regarding the conditions of detention and the inability to challenge the measures, issues that have frequently arisen.

Finally, throughout 2020, third-country nationals intercepted at the land border in Evros were detained before being unlawfully returned.²⁴⁰ Concerns have been raised over the lack of detention records, information provision and legal assistance.

231. ECRE, AIDA Country Report: Greece, 2017 update, p. 146, available at: <https://bit.ly/3owGagf>

232. ECRE, AIDA Country Report: Greece, 2018 update, pp. 147-148, available at: <https://bit.ly/3owGagf>

233. ECRE, AIDA Country Report: Greece, 2020 update, Chapter: Asylum Procedure, Section B.2.2.1., available at: <https://bit.ly/34NBFoU>

234. HIAS Greece, Locked up without rights: Nationality-based detention in the Moria refugee camp, Policy Brief, December 2019, available at: <https://bit.ly/3e2cuD5>

235. ECRE, AIDA Country Report: Greece, 2019 update, pp. 175-176, available at: <https://bit.ly/2SVI77j>

236. Article 51, Law 4686/2020, available at: <https://bit.ly/2SzwXZj> (in Greek)

237. ECRE, AIDA Country Report: Greece, 2020 update, Chapter: Asylum Procedure, Section B.2.2.1., available at: <https://bit.ly/34NBFoU>

238. GCR, The announcements of the Greek Authorities are contrary to Greek and international law on refugees”, 21 November 2019, available at: <https://bit.ly/2R07WWn> (in Greek).

239. RSA, Rights denied during Greek asylum procedure suspension, April 2020, available at: <https://bit.ly/3jwnXvv>

240. ECRE, AIDA Country Report: Greece, 2020 update, Chapter: Detention, Section B.1.2.4., available at: <https://bit.ly/34NBFoU>

3.2. Legal Challenges

3.2.1. Domestic legal action

Deprivation of liberty: General issues

Domestic litigation on the longstanding problems concerning detention in Greece remains case-specific and focuses on the use of objections to the detention measure before the locally competent Administrative Court of First Instance.²⁴¹ The decision on the objections is non-appealable. Several individual actions succeeded in securing release from detention in various cases of unlawful/arbitrary detention throughout 2020.²⁴² The reasons for release included the lack of an individual assessment of detention conditions and the arbitrary use of public grounds to justify detention. However, as discussed below, the remedy is far from effective.

Deprivation of liberty following the suspension of asylum procedures in March 2020

Regarding the imposition of detention in the context of the March decree, which suspended procedures, domestic litigation was swift but not successful. The general picture of domestic litigation against this specific detention practice seems rather bleak, with numerous decisions indicating an ineffective judicial review that does not examine the lawfulness or the conditions of detention, as well as disregarding the absence of a prospect of removal throughout 2020 due to the pandemic-related travel restrictions.²⁴³

Several attempts to administratively challenge the lawfulness of detention decisions taken on the basis of the March Decree were rejected by the police authorities, despite the involvement of the Ombudsman.²⁴⁴ Objections to detention filed before the Administrative Court of Athens were also rejected on account of the extraordinary necessity to respond to the events of March 2020.²⁴⁵ Moreover, rulings in cases brought before the Administrative Courts of Athens and Serres testify to the way the suspension of asylum procedures affected adjudication.²⁴⁶ The suspension of asylum procedures led to the application of legislation governing pre-removal detention and not the detention provisions of the RCD. As noted above, the extraordinary character of the “March crisis” informed the judges’ reasoning who considered that the entry of third-country nationals during that time constituted a public threat.

The problems with litigation against detention under Greek administrative law are neither new nor simple; as noted above, domestic justice often fails to properly address detention conditions and prioritises the right of the state to manage migration. The ineffectiveness of domestic litigation avenues can also be understood in the context of the automatic judicial review of detention decisions.²⁴⁷ According to available statistics by the Athens Administrative Court, there were no cases of rejection of a detention measure during the ex officio review of detention orders in 2020.²⁴⁸ The numbers may reflect a persisting absence of individualised guarantees in the review of detention orders and a normalisation of immigration detention in the country.

Systemic flaws that contribute to unsuccessful litigation against detention also relate to the lack of robust judicial procedures in the absence of adversarial proceedings and second-instance degrees of review. Moreover, the lack of records regarding the imposition of detention in different situations creates problems from the beginning of litigation actions. Lastly, when objections to the detention succeed, the applicant is often granted conditional release, e.g., the person is released but is required to engage in regular visits to the local police station.²⁴⁹ This practice can discourage litigation action especially since the conditional release will essentially prolong the individual’s restriction of movement.

241. Article 46(6) IPA, citing Article 76(3)-(4) L 3386/2005.

242. ECRE, AIDA Country Report: Greece, 2020 update, Chapter: Detention, Section D.1.2., available at: <https://bit.ly/34NBFoU>

243. RSA, Objections against detention of asylum applicants: Observations on the jurisprudence of administrative courts, 2020, available at: <https://bit.ly/2J9coxP>

244. RSA, Rights denied during Greek asylum procedure suspension, April 2020, p. 6, available at: <https://bit.ly/3jwnXvv>

245. Ibid.

246. ActionAid Hellas, ARSIS –Association for the Social Support of Youth, Danish Refugee Council(DRC), CRWI, Diotima, Equal Rights Beyond Borders, Fenix –Humanitarian Legal Aid, Greek Council for Refugees(GCR), HIAS Greece, HumanRights360, Legal Centre Lesvos, Network for Children’s Rights, Refugee Support Aegean(RSA), New Pact on Migration and Asylum, Interpretation of provisions in the case law of Greek administrative courts, 22 April 2021, p. 4, available at: <https://bit.ly/2QFNjPh>

247. Article 46 (5) b, IPA

248. ECRE, AIDA Country Report: Greece, 2020 update, Chapter: Detention, Section D.1.1., available at: <https://bit.ly/34NBFoU>

249. Greek Council for Refugees, Administrative detention in Greece: Findings from the field (2018), February 2019, available at: <https://bit.ly/3jxOfxH>

3.2.2. Council of Europe

Deprivation of liberty: General issues

Strasbourg litigation in detention cases against Greece has been rather positive in addressing concerns around the inhuman and degrading conditions of detention in inappropriate facilities, with the Court consistent in its finding of violations of Article 3 over the past decade.²⁵⁰ The routine detention of minors and the widespread use of protective custody has also been strongly condemned.²⁵¹ Finally, the Court has consistently condemned the inefficacy of the judicial review of detention in Greece, more specifically in respect of the provision of information on available remedies, and the efficacy of the remedy itself, i.e. the objections to detention.²⁵² In its most recent decision, in *E.K. v. Greece*,²⁵³ the Court lamented the lack of a thorough assessment of the applicant's claims regarding his detention conditions.

The fact that litigation on the issue continues with the same intensity despite the many judgments of the ECtHR indicates a worrying level of improper implementation by Greece. In 2010, Greece amended its legislation to comply with ECHR standards but the Court has subsequently found that the amendments did not result in substantial changes.²⁵⁴

Deprivation of liberty in hotspots

Litigation against the restrictions entailed by the EU-Turkey Statement started back in 2016. A complaint was submitted to the European Court of Human rights in the case of *J.R. and others v. Greece* concerning the detention of third-country nationals in the Greek hotspot on the island of Chios in the context of the Statement.²⁵⁵ The Court considered that the detention of the applicants for one month at the Vial hotspot did not constitute unlawful or arbitrary detention as it was imposed in the context of the implementation of the EU-Turkey Statement, for purposes of identification and registration, in accordance with Article 5 (1) f ECHR. The Court took into account the fact that the initially closed centre on Chios was subsequently converted into a semi-open facility and the detention time was limited to one month.

The Court's stance on this matter was further consolidated in 2019 with its identical reasoning in its judgment in *Kaak and others v. Greece*.²⁵⁶ Following these decisions, further litigation on similar issues will be challenging, in particular given the fact that ECHR jurisprudence on immigration detention is not informed by the same proportionality requirements that exist in international human rights law and EU law.²⁵⁷ This approach on immigration detention was also reflected in the Court's recent findings in *Ilias and Ahmed v. Hungary*, which cast further doubt over the effectiveness of Strasbourg litigation in the context of modern EU migration management, especially on the controversial use of measures restricting freedom of movement.²⁵⁸ It should be noted, however, that in the Greek cases mentioned here the Court found that Article 5 (2) (*J.R. and others*) and Article 5 (4) (*Kaak and others*) had been violated on account of improper information provision and lack of legal assistance.

Several cases concerning the lawfulness and the conditions of detention in different centres and police stations – both on Lesbos and the mainland – are currently pending, although they are not directly related to the implementation of the Statement.²⁵⁹ Similarly, some of the judgments of the past decade that ruled

250. EDAL, ECtHR - *R. T. v Greece*, Application No. 5124/11, 11 February 2016, available at: <https://bit.ly/3kBhVvdm>; EDAL, ECtHR - *E.A. v. Greece*, Application No. 74308/10, 30 July 2015, available at: <https://bit.ly/2TK0FrT>; EDAL, ECtHR - *F.H. v Greece*, Application No. 78456/11, 31 July 2014, available at: <https://bit.ly/2Twm7jR>; EDAL, ECtHR- *Mahmundi and others v. Greece*, 14902/10, 24 October 2012, available at: <https://bit.ly/3jBfyXR>; EDAL, ECtHR - *Tabesh v. Greece*, Application no. 8256/07, 26 November 2009, available at: <https://bit.ly/3kP1wDz>

251. EDAL, ECtHR - *Rahimi v. Greece*, Application No. 8687/08, 5 July 2011, available at: <https://bit.ly/2TuiDhR>; EDAL, ECtHR, H.A. and others v. Greece, 19951/16, 28 February 2019, available at: <https://bit.ly/3oyc6ko>

252. ECRE, AIDA Country Report: Greece, 2020 update, Chapter: Detention, Section D.1.2., available at: <https://bit.ly/34NBFoU>

253. ECtHR, *E.K. v. Greece*, Application no. 73700/13, 14 January 2021, available at: <https://bit.ly/2R4NDHI>

254. ECRE, AIDA Country Report: Greece, 2020 update, Chapter: Detention, Section D.1.2., available at: <https://bit.ly/34NBFoU>

255. EDAL, ECtHR, *J.R. and others v. Greece*, Application no. 22696/16, 25 January 2018, available at: <https://bit.ly/2HCOsSS>

256. ECtHR, *Kaak and others v. Greece*, Application no. 34215/16, 3 October 2019, available at: <https://bit.ly/31S4W0y>

257. Costello, C. (2012) 'Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law', *Indiana Journal of Global Legal Studies*, 19(1), pp. 257–303, at 287, doi: 10.2979/indjglolegstu.19.1.257.

258. EDAL, ECtHR - *Ilias and Ahmed v. Hungary*, Application No. 47287/15, 21 November 2019, available at: <https://bit.ly/381f8bh>

259. ECtHR, *M.A. v. Greece*, Application no. 14222/16, Communicated on 20 October 2019, available at: <https://bit.ly/3oAVuID>; ECtHR, *M.M. v. Greece*, Application no. 44408/18, Communicated on 12 November 2019, available at: <https://bit.ly/2G4JqxZ>; ECtHR, *Tseradze and Sow v. Greece*, Application nos. 11168/17 and 43338/18, Communicated on 3 October 2019, available at: <https://bit.ly/3oJTbTY>; *Artan Ago and others against Greece*, Application nos. 4407/18, 4411/18 and 4417/18, communicated on 8 September 2019, available at: <https://bit.ly/3ep048w>

in favour of the applicants, referred to in the previous paragraph, remain under the monitoring procedure of the Council of Europe's Committee of Ministers on their execution. It is important to note that the Greek Government submitted an Action Report in October 2020 requesting the closure of the execution monitoring procedure, claiming that Greece has complied with its obligations under the Convention.²⁶⁰ The need for execution-level litigation that was discussed in Section III.1.c is more than evident for this issue too.

Deprivation of liberty following the suspension of asylum procedures in March 2020

The Court has not had the time to assess and rule on detention cases that were connected to applicants who arrived during the March 2020 suspension of procedures. It will thus be important to monitor how the ECtHR rules on cases being submitted now, if the assessment goes on to cover the merits of the detention-related complaints. Individual requests for interim protection for minors who were detained following their arrival in March were submitted to the Court but failed to pressure the Greek government into fast and effective action.²⁶¹ The Court addressed several requests for explanation of measures taken to the Greek government but it ultimately relied on the government's commitment to ensure lawful treatment and did not grant the interim measures. The case has been communicated by the Court and is currently pending.²⁶² The effectiveness of Rule 39 procedures will be analysed in detail in the following section.

3.2.3. EU legal avenues

The complaint by Oxfam International and WeMove Europe that was submitted to the European Commission in September 2020 with a view to triggering an infringement procedure dedicates a section to violations of EU law arising from Greece's policy on detention.²⁶³ The complaint covers all the aforementioned issues, from the legal basis of detention and the incorrect assessment of cases to lack of legal aid/interpretation/information and detention conditions. The issue is presented both in respect of the general problems of immigration detention in the country and the situation that has developed since March 2020. As of May 2021, there has been no sign of infringement proceedings against the Greek government.

There is a well-defined basis for Commission involvement given that the detention-related concerns may amount to violations of Articles 8-11 RCD and Articles 15-18 of the RD, especially given the misapplication of detention grounds, the conditions of detention, the lack of information, inaccessible remedies, and the distortion of the principle of using detention as a measure of last resort. The general situation of immigration detention in Greece, both on the mainland and the islands, can also raise issues under the Charter, in particular under Articles 1, 3, 4 and 6.

In addition to the concerns previously discussed, the Commission's reluctance to initiate action may relate to the role that detention has in the Union's asylum management policies. The deprivation or restriction of liberty has an importance place in deterrence policies, most notably as it is implemented in the hotspot context and in return procedures. The Commission has at times recommended detention in order to make returns effective, including by encouraging the use of emergency provisions under Article 18 RD and by suggesting that detention capacity is brought in line with actual needs.²⁶⁴ The same encouragement seems more than relevant in Greece, a country where sea and land borders are of great importance to the Union and where the hotspot approach has been fully implemented since 2016.

Along these lines, the Commission's stance may indicate a lack of willingness to initiate action against Greece. More specifically, the Commission's reply to a parliamentary question on the existence of an extrajudicial detention centre in Greece indicates a worrying level of reliance on Greece's denial of the existence of such a centre.²⁶⁵ Instead of taking additional steps to request information, the Commission reiterates the effectiveness of detention in securing returns. In 2019, another question addressed the Greek

260. Council of Europe, Committee of Ministers, 1390th meeting (December 2020) (DH) - Action report (02/10/2020) - Communication from Greece concerning the case of S.D. v. Greece (Application No. 53541/07) and 19 other clone cases (12186/08, 14902/10, 2237/08, 22696/16, 26418/11, 31614/11, 33225/08, 33441/10, 34215/16, 37991/11, 39065/16, 41533/08, 46673/10, 48352/12, 50520/09, 5124/11, 53541/07, 58158/10, 58165/10, and 58387/11), available at: <https://bit.ly/3e6lyXt>

261. RSA, Rights denied during Greek asylum procedure suspension, April 2020, pp. 9-10, available at: <https://bit.ly/3jwnXvv>

262. R.H. and R.A. v. Greece, Application no. 515463/20 in the joined cases: M.Y. and others v. Greece, Application no. 51980/19, Communicated 20 October 2020, available at: <https://bit.ly/2QGWcYX>

263. Complaint to the European Commission concerning infringements of EU law by Greece on behalf of WeMove Europe and Oxfam, 22 September 2020, available at: <https://bit.ly/2HkApBE>

264. See Recital 16 and Recommendation 10 (c), Commission Recommendation on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C (2017) 7 March 2017, available at: <https://bit.ly/32ZdEdS>

265. European Parliament, Answer given by Ms Johansson on behalf of the European Commission, Question reference: E-001617/2020, 9 June 2020, available at: <https://bit.ly/3e1BHix>

government's plans to establish closed centres on the islands.²⁶⁶ The Commission replied that it had been informed of the country's plans and it was conducting an assessment of the plans' compliance with EU law.²⁶⁷

The recent Pact proposals include the use of closed centres at the borders of the EU as an important part of the CEAS reforms. The proposals include significant use of border asylum procedures and the screening of third-country nationals at the border. It is difficult to understand how these provisions can be implemented without resort to the use of detention measures and closed centres.²⁶⁸ Indeed, the provisions of the Screening Regulation reflect existing legislation and practice in Greece, specifically relating to the island procedures.²⁶⁹ Given the similarity in the two legal frameworks, the Commission's action against practices that are currently implemented in Greece - and are planned for the new CEAS - seems improbable.

3.2.4. International legal avenues

In an interesting development, the UN Working Group on Arbitrary Detention visited Greece at the end of 2019, where it received the "perspectives" of representatives of the civil society, among other stakeholders. In its preliminary findings, the UN body was quite strong in its assessment of Greece's use of detention in migration management: the findings mention serious problems stemming from arbitrary use of detention, lack of individual assessment, disregard of the principle of proportionality, lack of interpretation and legal aid, and absence of remedies.²⁷⁰ It expressed specific concerns about the policy of geographical restriction and the lack of awareness among asylum applicants over the consequences of breaching the restriction.

As discussed above, the immediate effectiveness of UN legal avenues is not a given, with Greece's lack of reaction a factor. In its 2013 periodic review, the CAT had already expressed its concerns about the situation of immigration detention in Greece, noting the generalised use of the measure, its duration, and the appalling conditions.²⁷¹ In 2019, the CAT noted that the 2013 recommendations on the issue had not been implemented.²⁷² In the 2020 follow-up procedure, the Greek government did not provide information on the widespread use of detention but resorted to a general reference to the provisions of national law and the increased arrivals of third-country nationals.²⁷³ Most notably, the information gives a distorted image of the geographical restriction to the Eastern Aegean islands by describing it as an alternative to detention "until the return to Turkey is achieved."²⁷⁴

Despite the lack of immediate action by Greece, securing a strong statement by the relevant bodies can be useful in the substantiation of complainants' arguments. This is especially relevant in individual litigation before the UN Treaty Bodies, where statements and recommendations by other UN agencies and bodies are often considered to be reliable.²⁷⁵ However, it is unclear how Greece would respond to a finding of a violation in the context of an individual communication procedure regarding arbitrary immigration detention. The recent complaint discussed above contains allegations of arbitrary arrest and detention under Article 9 ICCPR, including in unofficial detention facilities.²⁷⁶ It will be interesting to monitor Greece's response to this case in the event of a finding of a violation.

266. European Parliament, Question for written answer E-003977/2019, Subject: Conversion of open reception and identification centres into closed-type detention centres, 21 November 2019, available at: <https://bit.ly/330vQDU>

267. European Parliament, Answer given by Ms Johansson on behalf of the European Commission, Question reference: E-003977/2019, 21 February 2020, available at: <https://bit.ly/3u2OPth>

268. ECRE Comments: on the Commission Amended Proposal for an Asylum Procedures Regulation COM (2020) 611 Border Asylum Procedures and Border Return Procedures, pp. 17-21, available at: <https://bit.ly/3eJ0AhQ>; ECRE Comments: on the Commission Proposal for a Screening Regulation COM (2020) 612, pp. 3-4, available at: <https://bit.ly/3xlYebM>

269. RSA, HIAS Greece, Greek Council for Refugees, Legal Centre Lesvos, Danish Refugee Council, Fenix, Action Aid, Mobile Info Team, The Workings of the Screening Regulation: Juxtaposing proposed EU rules with the Greek reception and identification procedure, available at: <https://bit.ly/32X3aLI>

270. UN Working Group on Arbitrary Detention, Working Group on Arbitrary Detention: Preliminary Findings from its visit to Greece (2 - 13 December 2019), Part IV, available at: <https://bit.ly/35EibTT>

271. CAT, Concluding Observations of the Committee against Torture, 27 June 2012, para. 20, available at: <https://bit.ly/3eK09E6>

272. Committee Against Torture, Concluding observations on the seventh periodic report of Greece, September 2019 para. 9, available at: <https://bit.ly/2TetkF4>

273. CAT, Information received from Greece on follow-up to the concluding observations on its seventh periodic report, 24 August 2020, paras. 14-19, available at: <https://bit.ly/2PoLqWF>

274. *Idem*, para. 16.

275. ECRE/ELENA Legal Note on asylum and the UN Treaty system, March 2021, pp. 19-21, available at: <https://bit.ly/2QyGKOF>

276. Communication to the United Nations Human Rights Committee, FAJ against Greece, paras. 144-148, available at: <https://bit.ly/2QwgBzP>

4. RECEPTION CONDITIONS

4.1. Legal Concerns

Reception arrangements for migrants and asylum applicants have raised frequent and serious concerns regarding the substandard conditions of reception and accommodation centres; the lack of protection of vulnerable people; the limited access to healthcare; and the exposure of migrant children to significant risks.²⁷⁷ As noted above, both the European Court of Human Rights and the Court of Justice of the European Union have condemned Greece's reception system since 2011.²⁷⁸ This note does not aim to provide an extensive analysis of general reception-related legal concerns, despite well-documented gaps on the mainland;²⁷⁹ rather, this section will focus on the situation that has developed in the Eastern Aegean islands since the EU-Turkey Statement, including the extreme overcrowding of the last two years, and the consequences of the March 2020 developments, i.e., the coronavirus pandemic and the suspension of asylum procedures.

4.1.1. Reception conditions in the Eastern Aegean islands since 2016 (hotspots)

The restriction of freedom of movement of newly-arrived refugees and migrants on the islands of Lesbos, Chios, Samos, Kos, Leros and Rhodes is a measure taken on the basis of the EU-Turkey Joint Statement (see Section II.3).

The restriction to the islands has gained a prominent position in the continent's discourse on migration management, with international organisations monitoring and documenting the steady increase in numbers of people living on the islands and the significant deterioration of the living conditions since 2016. In 2019, both UNHCR and the Council of Europe Commissioner for Human Rights issued strong statements regarding the continued and dangerous overcrowding of reception facilities on the Eastern Aegean islands, which had led to substandard food provision, lack of sanitation and hygiene, and lack of medical care.²⁸⁰ Healthcare on the islands is not only affected by persisting overcrowding; understaffed reception centres and problems with the issuance of social security numbers have rendered access to essential care difficult.²⁸¹

The situation has remained extremely critical for all categories of vulnerable people, with the risks being described as "among the worst seen in refugee crises around the world".²⁸² The situation is further exacerbated by the restriction of possibilities to lift the geographical restriction for vulnerable applicants under the new IPA.

4.1.2. Reception conditions in the Eastern Aegean islands since March 2020

The suspension of the asylum procedures in March and the measures to tackle the spread of the coronavirus further exacerbated the living conditions on the islands throughout 2020. Makeshift accommodation on boats, inappropriate quarantine policies and facilities, inadequate sanitation, and a further increase in the number of people on the islands following the suspension of the procedures and the interruption of the functioning of the Asylum Service are some elements of an unprecedented situation.²⁸³ In late March 2020, civil society organisations urged the Greek government to decongest the islands in view of coronavirus-related lockdowns and the inability of locally active humanitarian actors to access reception centres and provide essential services.²⁸⁴

The island chaos continued throughout the summer of 2020, including by way of continuous lockdowns

277. For more information on the situation of the Greek reception system in the past years see ECRE, AIDA Country Reports: Greece, available at: <https://bit.ly/37O3d06>

278. EDAL, ECtHR, M.S.S. v Belgium and Greece [GC], Application No. 30696/09, 21 November 2011, available at: <https://bit.ly/2T7kXLz>; EDAL, CJEU, Judgment of 21 December 2011, N. S. and Others, C-411/10 and C-493/10, EU:C:2011:865, available at: <https://bit.ly/3kgRDOm>

279. ECRE, AIDA Country Report: Greece, 2019 update, pp. 154-157, available at: <https://bit.ly/2SVI77j>

280. Idem, pp. 157-159, available at: <https://bit.ly/2SVI77j>

281. Idem, p. 169, available at: <https://bit.ly/2SVI77j>

282. UNHCR, Act now to alleviate suffering at reception centres on Greek islands, 21 February 2020, available at: <https://bit.ly/35I7css>

283. ECRE, AIDA Country Report: Greece, 2019 update, p. 160-161, available at: <https://bit.ly/2SVI77j>

284. Greece: Move Asylum Seekers, Migrants to Safety, Press release, 24 March 2020, available at: <https://bit.ly/3kKc5HO>

that specifically targeted reception centres,²⁸⁵ and culminated into the September fires that completely destroyed the Moria Reception and Identification Centre leaving 12,000 people homeless.²⁸⁶ Complete lack of protection against the health risks created by the pandemic continued after the summer months with major deficiencies in healthcare in Reception and Identification Centres on the islands.²⁸⁷ At the same time, the construction of the “new Moria” camp has been followed by reports of inadequate accommodation and significant gaps in the provision of essential services.²⁸⁸ The forced evacuation in late October of the PIKPA self-organised housing centre, which reportedly ensured dignified living conditions, is set to further complicate access to material reception conditions and essential services on the island.²⁸⁹

4.2. Legal Challenges

Legal challenges against the living conditions of asylum applicants and refugees on the Greek islands have been brought before domestic Courts and Council of Europe bodies. The section will not provide an exhaustive description of all past and ongoing cases; the aim is to discuss the most typical reception-related cases that have been lodged in the past years and the developments generated and limitations faced.

4.2.1. Domestic legal action

Several domestic actions to annul the geographical restriction measure were launched before the Greek Council of State. The first one led to a positive decision of the Court in April 2018, annulling the measure on the basis of domestic administrative law, i.e. the lack of reasoning in the administrative decision imposing the measure prevented the possibility of judicial review in accordance with EU law and the 1951 Geneva Convention.²⁹⁰ Despite this positive development, new decisions imposing geographical restrictions were issued in an attempt to circumvent the judicial annulment and the competence for issuing such decisions was also modified following amendments to the relevant legislation. Litigation for the annulment of the latest geographical restriction is still pending as of June 2021.

Given the ineffectiveness of direct litigation against the geographical restriction itself, the focus of domestic legal actors has shifted to litigating individual cases where elements of vulnerability expose shortcomings in the country’s reception system. The reasons and concerns behind the litigation focus on cases with vulnerable elements has been discussed in Section III.1. b However, the introduction of the IPA limited the categories of individuals who can qualify for a lifting of the restriction due to vulnerability.²⁹¹

4.2.2. Council of Europe

Litigation against reception conditions since 2016 (hotspots)

Several actions have been undertaken before the European Court of Human Rights, although conclusions cannot yet be drawn due to the absence of judgments. The aforementioned focus on cases with elements of vulnerability has been even more prevalent in cases concerning reception.

In 2019, a case of multiple applicants regarding the reception conditions at the Moria camp on Lesbos was communicated by the Court. Although the case concerns the general situation of reception on the island and the threshold of Article 3, the complaint is based on the applicants’ particular situation as vulnerable individuals.²⁹² In 2020, a number of cases were submitted before the ECtHR concerning the living conditions for pregnant women on Samos.²⁹³ Similar actions have been brought in respect of the living conditions of

285. ECRE, Greece: 10,000 People Prevented Access, Lockdown Extended, Recognition Rate Increases, 4 September 2020, available at: <https://bit.ly/37ZAlwq>

286. RSA, Moria catastrophe – the aftermath, 11 September 2020, available at: <https://bit.ly/3oEqqrG>

287. RSA, Refugees on the Aegean islands: At the mercy of the pandemic, 18 September 2020, available at: <https://bit.ly/3p3pU6S>

288. GCR and Oxfam Briefing, Lesbos Bulletin, 21 October 2020, available at: <https://bit.ly/3mO5KLZ>

289. Press release from Greece-based organisations, Respect PIKPA spirit – Respect humanity and dignity, 30 October 2020, available at: <https://bit.ly/3jVgxCr>

290. EDAL, Greece - Council of State, Fourth Section, Decision 805/2018, 17 April 2018, available at: <https://bit.ly/3dM2UEe>

291. For more information on the issue, consult the dedicated chapter “Reception Conditions: A.4” in the AIDA Reports on Greece, available at: <https://bit.ly/3gPSZ3P>

292. ECtHR, *AI H. and others v. Greece*, Application nos. 4892/18 and 4920/18, Communicated on 26 February 2019, available at: <https://bit.ly/3nRnDeV>

293. ECtHR, *N.E. against Greece and 8 other applications* (see list appended), Application no. 8716/20, 5 May 2020, available at: <https://bit.ly/2l0mjp6>; See also *H.A. against Greece*, Application no. 59670/2019, 16 December 2019, available at: <https://bit.ly/3mLYxMA>

applicants with vulnerable circumstances – families with minor children and adults with serious health issues – on the mainland.²⁹⁴ Another group of cases concerning the substandard living conditions, the use of detention, and protection gaps for unaccompanied minors was also communicated in October 2020 (applications from 2019 and 2020).²⁹⁵ Cases communicated by the Court in late 2020/early 2021 testify to the ever-increasing caseload on vulnerability and reception on the islands: a large group of cases concerns applicants from different hotspots with different medical needs,²⁹⁶ while other cases focus exclusively on reception conditions for pregnant women.²⁹⁷ All actions are pending as of June 2021.

The vulnerability focus in reception-related litigation can be understood in the context of a high threshold set up by ECtHR jurisprudence in migration and asylum cases, not only regarding the personal circumstances of applicants but also migration management. The Court has increasingly relied on the vulnerable circumstances of applicants and has introduced considerations regarding the exceptional migratory pressure that the states have faced. Despite its absolute stance in *M.S.S. v. Belgium and Greece*, the Court has since accepted that extreme difficulties in the reception of applicants have to be considered when assessing a state's compliance with Article 3.²⁹⁸ In *H.A. and others v. Greece*, the context of "increased migratory flows and an unprecedented humanitarian crisis" was taken into account when ruling on violations of Article 3 in a case involving unaccompanied minors in the Diavata centre.²⁹⁹

However, in all cases the Court did not fail to reiterate the absolute nature of Article 3 and based its finding of no violation on the existence of exceptional circumstances. More recently, in a case against France, the Court found that the state had violated Article 3 in respect of the destitution of three single men who applied for asylum but did not have access to reception conditions. Although not strictly relevant to Greece, it is interesting that the applicants did not have additional vulnerabilities, apart from being asylum applicants, and the Court found that the increase in asylum applicants since 2007 did not constitute an exceptional situation of migratory pressure.³⁰⁰

Lastly, the issue of reception conditions can indeed create situations of imminent danger for applicants with certain characteristics. In the latter context, litigation has sought to make use of the possibility to request interim protection under Rule 39 of the Rules of the Court. Multiple requests for interim measures have been successfully pursued in cases involving vulnerable persons and unaccompanied minors on Samos and Lesvos.³⁰¹ Rule 39 litigation will be discussed in detail below regarding applications submitted since March 2020.

Litigation against reception conditions since 2020

In spring 2020, at least three Rule 39 cases concerned the need for immediate evacuation from the hotspots in connection with the additional risks created by the 2020 pandemic.³⁰² Recent interim measures have also been granted following the Greek authorities' failure to transfer applicants with a recognised exemption from the geographical restriction derived from their vulnerability.³⁰³ Similarly, the government's move to dismantle the self-organised housing centre of PIKPA has been met with Rule 39 litigation: on 20 October 2020, the Court requested that the Greek Government submit information regarding the arrangements following the evacuation of the centre, including whether a formal decision preceded the closure of the facility and whether the applicants could challenge it, as well as information on any alternative solutions.³⁰⁴ More recently, five

294. ECtHR, *Esraa AL BEID and others against Greece*, Application no. 36423/16, lodged on 14 July 2016, available at: <https://bit.ly/3jVib3k>

295. ECtHR, *M.Y. and others against Greece*, Application no. 51980/19 (see appended list of cases), Communicated 9 October 2020, available at: <https://bit.ly/32axGBR>

296. *A.R. and others v. Greece*, Application no. 59841, Communicated on 4 January 2021, available at: <https://bit.ly/3gWV3XQ>

297. *N.A. v. Greece (and 8 other applications)*, Application no. 11216/2020, Communicated on 4 January 2021, available at: <https://bit.ly/3vBfKwO>; *A.B. v. Greece*, Application no. 19614/20, Communicated on 5 December 2020, available at: <https://bit.ly/3e9geUR>; *Z.H. and M.M. v. Greece*, Application no. 63074/19, Communicated on 17 November 2020, available at: <https://bit.ly/3e9uU6A>

298. *EDAL, ECtHR - Khlaifia and Others v. Italy (GC)*, no. 16483/12, 15 December 2016, available at: <https://bit.ly/3vvTC6M>

299. For example, see the Court's reasoning regarding the conditions at the Diavata centre, paras. 171-176, in: *EDAL, ECtHR, H.A. and others v. Greece*, 19951/16, 28 February 2019, available at: <https://bit.ly/2QKkVvr>

300. ECtHR, *N.H. and others v. France*, Application nos. 28820/13, 75547/13, 13114/15, 2 July 2020, available at: <https://bit.ly/3bSEER7>

301. *Equal Rights Beyond Borders, Litigation in Greece*, available at: <https://bit.ly/3jXmUF8>; see also, ECRE, *AIDA Country Report: Greece*, 2019 update, p. 160, available at: <https://bit.ly/2SVI77j>

302. *Idem*.

303. *RSA, European Court of Human Rights orders Greece to safeguard asylum seekers' life and limb on Lesvos*, 24 September 2020, available at: <https://bit.ly/214dF9p>

304. ECRE, *Greece: PIKPA Eviction Postponed, Shortages in New Lesvos Camp, COVID Outbreak Continues, New Pushback Incidents, Golden Dawn Leadership Straight to Jail*, 23 October 2020, available at: <https://bit.ly/3fXOkw3>

requests for interim protection were submitted to the Court regarding the immediate need for more suitable reception conditions.³⁰⁵ Three of the requests were granted and the applicants were transferred to Athens, while the fourth one led to action by the authorities to lift the applicant's geographical restriction.

Although largely a successful strategy, the Court's orders for interim protection have not always led to results in practice. Following the events of March 2020, two Rule 39 requests successfully managed to challenge the detention of two unaccompanied children under the context of the March suspension of asylum applications, although the Court refused interim protection in other cases with strong elements of vulnerability and destitution.³⁰⁶ Moreover, in several cases where interim protection was granted, the Court merely indicated general measures to be taken by the Greek authorities, a practice that may undermine the effectiveness of the Court's urgent protection mechanism.³⁰⁷ As discussed in previous sections, the Greek government routinely relies on a mere description of the legal framework and the action it is planning to take, instead of providing specific information on concrete measures to tackle violations.

Execution of judgments

Despite numerous Strasbourg judgments and enhanced execution monitoring in relation to many of these judgments, the situation remains unchanged in 2021 and underlines long-known issues with the implementation of the Court's judgments.³⁰⁸ Execution-related litigation or legal action before other Council of Europe bodies has equally led to strong condemnation of Greece's practices but with little immediate result.

Following a complaint lodged by the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists (ICJ),³⁰⁹ the European Committee of Social Rights issued a decision indicating to Greece the adoption of immediate measures to prevent serious and irreparable injury or harm to the children concerned, including damage to their physical and mental health, and to their safety.³¹⁰ Despite the clear requirements set by the Committee in its decision, the situation for migrant children remains unchanged at the time of writing, with the exception of changes in the protective custody of unaccompanied minors which will be discussed below. Similar conclusions can be drawn from the continuation of the Committee of Ministers' enhanced supervision of execution of the M.S.S. and Rahimi group of cases against Greece; despite a decade-long procedure with multiple findings of inadequate implementation, the situation continues to cause alarm. In its latest decision, the Committee expressed, *inter alia*, uncertainty over the country's approach to the accommodation of asylum seekers and encouraged the Greek authorities to improve the reception and protection of unaccompanied minors, especially by ending the practice of protective custody.³¹¹

Authorities implement the hotspot approach in full knowledge of the deficiencies in the country's reception system as already condemned by courts. The persisting problems in reception, and the implementation of the hotspot approach in spite of everything, underline the limits of national and regional litigation against the reception conditions in general, and the policy of island containment in particular. The limits may not necessarily relate to the ineffectiveness of the litigation *per se* but may be the result of strongly backed policies that favour deterrent approaches over dignified living standards. Deterrence, one of the main policies that underpins the hotspot approach, is based on a distortion of the concept of refugee reception that focuses on attempting to deter people rather than protecting those who have already arrived. This political pressure, coupled with a certain increase in the ECtHR's reluctance to condemn precarious reception conditions in some cases, reasonably discourages litigation actors or hampers the implementation of judgments in cases that were successfully litigated.

Despite this, recent years have seen an increase in legal activity on the islands: the exacerbation of the living conditions has contributed to an increase in the presence of legal aid actors on the islands and in the legal challenges undertaken. This is not only the result of litigation choices but also relates to the submission of individual Rule 39 requests in response to urgent situations and the applications that follow the interim requests. The increase could also be linked to the fact that it is not necessary for lawyers to know the Greek

305. Legal Centre Lesbos Quarterly Newsletter: January – March 2021, 13 April 2021, available at: <https://bit.ly/3e85rY>

306. RSA, Two children transferred out of Malakasa, protection still denied to many, 11 May 2020, available at: <https://bit.ly/2l0MsUN>

307. Information obtained from the ELENA Network.

308. ECRE, AIDA Country Report: Greece, 2019 update, p. 160, available at: <https://bit.ly/2SVI77j>

309. European Committee of Social Rights, International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece, Complaint No.173/2018, 21 December 2018, available at: <https://bit.ly/2l48eXL>

310. European Committee of Social Rights, Decision on admissibility and on immediate measures: International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece, Complaint No.173/2018, available at: <https://bit.ly/33718Jd>

311. Council of Europe, Committee of Ministers, CM/Del/Dec(2020)1383/H46-7, 1383rd meeting, 29 September – 1 October 2020 (DH), available at: <https://bit.ly/2HtO6xC>

legal system to engage Rule 39 procedures, a possibility that facilitates activities of non-Greek legal aid NGOs on the islands.

While Rule 39 requests were traditionally linked to expulsion and extradition proceedings,³¹² a large number of Rule 39 requests emanating from Greece now concerns transfers to suitable facilities and provision of care within the country. Whether the follow-up to these legal actions, and the implementation of any positive judgments, will be conducted with the same rigour and close scrutiny remains to be seen. Similarly, it will be interesting to monitor whether the sheer number of indirect requests could indirectly provoke changes in state policy.

Although reception litigation in Greece is not new, hotspot-specific litigation has not yet produced extensive jurisprudence and the consequences of potential judgments finding violations of Article 3 in hotspots cannot yet be discussed. The usefulness of this litigation target has not been unequivocally established and the now five years of island procedures certainly testify to that. Nonetheless, first, there are ethical reasons for pursuing challenges against persistent violations. Second, the impact of persistent litigation can still create change. The hotspot approach is still pursued, including through the construction of new centres and the special procedures proposed in the Pact, discussed above. Legal action is therefore important in the context of negotiations between the institutions on the CEAS reform, both as guidance for legislators and as a legal advocacy tool for civil society. As already noted, lawyers and courts cannot replace policymakers, but existing and emerging case law should inform the policy choices of the legislators .

At the individual level, the presence of legal aid NGOs can help secure minimum levels of protection not only through the use of Rule 39 requests but also through the domestic actions to protect vulnerable applicants discussed above. Regardless of reception-related litigation to bring about systemic changes, the identification and protection of individuals who are facing imminent danger in the hotspots is enough to justify perseverance. Impact litigation has its place in refugee protection but resources that are directed to the employment of lawyers are an important way to ensure individual case management and monitoring of implementation of law and jurisprudence on the ground.

Finally, despite the countervailing political pressure, it is important to recognise that litigation in Greece has led to significant judgments that have advanced the continent's jurisprudence on asylum both under the Convention system and EU law. The *M.S.S. v. Belgium and Greece*³¹³ judgment contained landmark findings regarding the principle of non-refoulement and the presumption of protection in Council of Europe states; the judgment halted returns of applicants to Greece for at least five years. Although not the product of Greek litigation, the *N.S. & M.E. case*³¹⁴ concerned reception deficiencies in Greece and heavily relied on the *M.S.S.* judgment; the case allowed the CJEU to set limits to the principle of interstate trust in the Union and to limit transfers under the Dublin system. The CJEU's interpretation of Article 4 CFREU obligations was later codified into Article 3 (2) of the Dublin III Regulation.

Similarly, in *H.A. and others*, the Court struck down the longstanding practice of protective custody of unaccompanied minors.³¹⁵ The judgment led to the creation of national legislation that explicitly prohibits the protective custody of unaccompanied minors.³¹⁶ The judgment itself has been described as the basis of the domestic prohibition in the explanatory report of the law, along with the decision of the European Committee of Social Rights mentioned above.³¹⁷

4.2.3. EU legal avenues

The infringement complaint by Oxfam and WeMove Europe mentioned above also concerns the violation by Greek government of EU law on reception and the CFREU. Inadequate reception facilities, precarious housing, lack of access to healthcare, and no protection for vulnerable persons form the complaint's main arguments regarding the violation of the recast RCD. The potential for infringement procedures is limited by a variety of factors discussed above. Moreover, the political pressure to implement deterrence-based approaches that was discussed in the previous sub-section is also relevant when assessing the

312. ECtHR, Interim Measures, Factsheet: April 2021, available at: <https://bit.ly/2S9Ar4H>

313. EDAL, ECtHR - *M.S.S. v Belgium and Greece* [GC], Application No. 30696/09, 21 January 2011, available at: <https://bit.ly/3edhrL0>

314. EDAL, CJEU, Judgment of 21 December 2011, *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, available at: <https://bit.ly/3vsocOK>

315. EDAL, ECtHR, *H.A. and others v. Greece*, Application no. 19951/16, 28 February 2019, available at: <https://bit.ly/3vxPLpO>

316. Article 43, Law 4760/2020, Government Gazette A 247/11.12.2020, available at: <https://bit.ly/3aXmzRf>

317. Explanatory Report, Law 4760/2020, Government Gazette A 247/11.12.2020, p. 128, available at: <https://bit.ly/338GKHK>

Commission's willingness to initiate proceedings against the hotspot approach.

Although not directly related to Greece, the 2019 CJEU decision in *Jawo*³¹⁸ and *Ibrahim*³¹⁹ has offered some clarification on living conditions-related litigation under EU law by extending the scope of the Charter's protection to beneficiaries of international protection and defining the threshold for treatment that is prohibited by Article 4 CFREU. The clarification on the definition and the standard of proof when assessing such risks is welcome but the threshold to establish inhuman and degrading treatment seems to be based on multiple onerous requirements. Future litigation will show how this development in the EU Court's jurisprudence will affect general reception-related litigation, including in Greece. In Luxembourg, for example, the *Ibrahim* judgment has negatively affected the situation of people who have been previously granted subsidiary protection status in Greece.³²⁰

Beyond infringement, the possibility to engage the CJEU to clarify standards and obligations remains an important avenue for EU law litigation. The role of national judges in referring cases to the EU Court, however, limits significantly the initiatives that lawyers can pursue. These limits are even more strict in the Greek judicial context, where the number of preliminary references to the CJEU are generally low.³²¹ Awareness of EU law guarantees, CJEU jurisprudence, and preliminary procedures is crucial both for lawyers and judges. This is particularly relevant for national judges, as they are the main actors in ensuring domestic compliance with EU law and should be alert to situations where domestic law contravenes EU rules and should thus be set aside or referred to the CJEU.³²²

4.2.4. International legal avenues

ECRE has not been able to gather information on significant legal action targeting the reception conditions in Greece before international bodies. Although reports by NGOs to the 2019 CAT periodic review discussed reception issues resulting from hotspot overcrowding,³²³ the focus was mostly on detention and asylum procedures. The Committee's Concluding Observations also focused on the issue of procedural deficiencies and the individual assessment of asylum applications.³²⁴ On reception standards, the Committee invited Greece to make sure that restrictions on the freedom of movement of asylum seekers are consistent with its obligations under the Convention and that guidelines and training are formulated to ensure identification procedures are properly conducted.

Greece's non-ratification of the individual communications procedure under the Convention on the Rights of the Child (CRC)³²⁵ may constitute a significant limit to the potential of this avenue in securing protection for unaccompanied minors. A significant body of case law by the Committee has recently emerged in the area of child protection in reception systems, mostly following several individual complaints against Spain.³²⁶ The Committee's decisions include extensive analysis of international guarantees regarding the right of migrant children to information and representation, guardianship systems, and age assessment procedures.

However, Greece has accepted individual communications procedures for other UN Treaty bodies that could offer avenues for specialised litigation. In addition to the better-known CAT and CCPR, the Committee on the Rights of Persons with Disabilities (CRPD) and the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) offer specialised avenues for the protection of certain categories of vulnerable individuals against reception-related risks.

318. CJEU, Judgment of 19 March 2019, *Jawo*, C-163/17, EU:C:2019:218, available at: <https://bit.ly/38mUqml>

319. CJEU, Judgment of 19 March 2019, *Ibrahim and others*, Joined Cases C-297/17, C-318/17, C-319/17 & C-438/17, EU:C:2019:219, available at: <https://bit.ly/32jJQWf>

320. Information from the ELENA Network.

321. Court of Justice of the EU, Annual Report 2019, D – Statistics concerning the judicial activity of the Court of Justice, p. 182, available at: <https://bit.ly/3ekzgl3>

322. Tobias Nowak & Monika Glavina (2020) National courts as regulatory agencies and the application of EU law, *Journal of European Integration*, DOI: [10.1080/07036337.2020.1813734](https://doi.org/10.1080/07036337.2020.1813734)

323. For more information on reports to the periodic review by NGOs, see the OHCHR Treaty Body Database, CAT 67 Session (22 July 2019 – 9 August 2019), available at: <https://bit.ly/3xHB7OK>

324. Committee Against Torture, Concluding observations on the seventh periodic report of Greece, para. 18, available at: <https://bit.ly/2TetkF4>

325. OHCHR, Acceptance of individual complaints procedures for Greece, available at: <https://bit.ly/3gWA4EJ>

326. ECRE/ELENA Legal Note on Asylum and the UN Treaty System, March 2021, available at: <https://bit.ly/2RpHmWQ>

IV. CONCLUSIONS

It is clear that the reality of asylum in Greece presents numerous problems of a varied nature; some are the result of poor practical management, while others are the direct consequence of deliberate policy choices that operate at the edge of legality.

Five years have passed since the launch of the EU-Turkey Deal and the situation has been worsening in a steady and predictable manner. Despite strong advocacy and litigation efforts against the island containment policy by intergovernmental organisations and civil society, the scheme has persisted and was actually reinforced with the 2019/2020 legislative amendments that removed procedural guarantees and increased restrictions. At the same time, the COVID-19 pandemic and the Moria fire in September 2020 further exposed the unstable reception system on the islands as the humanitarian crisis that it actually is. Despite individual successes against serious violations of the rights of vulnerable people, or in cases where procedures were conducted in a flagrantly arbitrary manner, wide impact legal action has failed to stop, or even limit the damage of, the systemic flaws in the Greek asylum procedure and reception system.

The continued implementation of such policies underlines the high level of political commitment to an approach of deterrence and a disheartening truth regarding the limited impact of much litigation in the face of EU-backed policies. The Commission's proposals in the Pact continue in the same direction. While the CEAS negotiations are ongoing, litigation is necessary to ensure that rights-based approaches are heard and sanctioned at courts and that jurisprudence influences policy reforms. In the meantime, strengthening actors offering individual legal advice and litigation is an important tool to ensure some level of compliance and to increase the number of people that have access to legal support.

The events at the Evros land border also revealed the extent to which EU border policies make border management dependent on the fragile political balance in the region, which in turn means that incidents involving violation of the rights of displaced people will arise. In March 2020, the lack of information on both the Greek and the Turkish sides, as well as the obscure conditions under which returns have been taking place, made litigation difficult. The EU's support for Greece strengthens the government's policies and limits litigation avenues. However, the new ECtHR cases that have been brought in response to the unlawful returns of March may lead to an eventual "reminder" judgment on basic fundamental human rights and non-refoulement.

Domestic litigation

While strategies for regional and domestic litigation are being (re)designed to address recent developments and setbacks, support towards lawyers on the ground remains crucial. The active nature of domestic litigation in Greece has contributed to the protection in practice of people in individual cases of unlawful detention, dangerous reception conditions and violations of procedural guarantees. Despite the lack of potential for wider impact, this form of litigation ensures real and – at times – immediate relief from serious human rights violations. More importantly, domestic litigation is a significant tool to secure the rule of law by making use of independent judicial bodies and ensuring executive and legislative action remains compliant with domestic, EU and international obligations. To achieve this, concerted legal action would be important for every case of violation – although the absence of resources means this is far off.

The continuity and consistency of legal action in asylum cases should be based on an efficient and accessible state-funded legal aid system. The situation has changed in recent years, including as a result of litigation on the lack of legal aid and lack of information provision. In 2017, a national legal aid registry started operating in the Asylum Service and the number of cases that they have supported has steadily increased. The right to legal aid and information has been reiterated in different legislative proposals. Although these are welcome developments, practice reveals that issues with legal representation for asylum applicants remain.

Comprehensive support for domestic legal actors is also important. The aforementioned restrictions on the NGO sector and the deficiencies in the legal aid scheme complicate activities and drain civil society resources. Given these challenges, the facilitation of communication and coordination between European lawyers can enhance all kinds of domestic litigation, by supporting sharing of experience and knowledge in the face of common bad practices, by offering necessary direct support, and through the cooperation in cross-border cases. In the context of island litigation, where the presence of domestic and international legal aid actors has increased in the last three years, coordination is indispensable to prevent overlapping activities and to ensure optimal use of scant resources. In this sense, coordination may help redistribute

resources and energy to address different needs in an efficient and comprehensive way, based on division of responsibilities and avoiding duplication.

Regarding unlawful returns, domestic litigation before Greek criminal courts is still pending and may provide a promising first step in the recognition of unlawful border actions, the promotion of accountability, and the tackling of impunity. Close monitoring of these issues and advocacy support for the pending litigation efforts remains important. However, prevention of illegal returns needs to be tackled through the establishment of systems providing records of incidents and through complaints procedures. Existing national human rights institutions have the technical knowledge to help in the establishment of border monitoring mechanisms and accountability procedures.³²⁷ Political willingness will be key in the shaping of such mechanisms' functions and independence.

Council of Europe

The use of the ECHR has been central in the efforts to check and control the Greek government's asylum and migration management but it does not come without challenges and setbacks. The Court's recent jurisprudence has been criticised for not ensuring effective protection (*Ilias and Ahmed v. Hungary*,³²⁸ *N.D. and N.T. v. Spain*³²⁹) and for avoiding politically sensitive cases (*M.N. and others v. Belgium*).³³⁰ However, the Court has established significant protection principles regarding the reception of asylum applicants and access to asylum, including through its judgments in Greek cases (*M.S.S. v. Belgium and Greece*, *B.A.C. v. Greece*³³¹).

The entry into force of Protocol no. 15 to the ECHR in August 2021³³² will elevate the importance of the principle of subsidiarity and the margin of appreciation in the Convention system, possibly making the Court's decision-making more distanced and technical. However, litigation is ongoing and significantly increased during the 2020 events, with a focus on illegal returns, thus giving the Court another chance to reiterate the absolute nature of Article 3, including in situations of mass arrivals and difficulties in migration management.

Finally, Rule 39 procedures do provide a certain degree of urgent relief and protection in reception and detention cases, and it is often regarded as the last resort in a context where remedies are slow, or otherwise fail. The Court's approach, however, has been inconsistent. In some cases, the Court was satisfied with ordering general measures and requesting information rather than compelling the Greek government to respond with specific actions.

EU law

At the EU-level, the technical nature of the preliminary reference system before the Court of Justice of the EU automatically limits the possibilities of asylum litigation, at least when it comes to human rights litigation. It rightly does: the CJEU is not a human rights court and its function is limited to ensuring compliance with the EU legal order, rather than adjudicating individual violations. The rule of law is an essential part of that legal order and it has been used successfully in asylum-related litigation, not least in the famous Article 47 CFREU judgments in recent years.³³³ Compliance with EU law and its long-standing legal principles has emerged as a core element of domestic asylum litigation in Europe and the use of EU law and CJEU jurisprudence should be promoted everywhere among lawyers and the judiciary.

Although not appropriate for individual human rights violations, the preliminary reference procedure should be an option when the violation is clearly linked to incorrect transposition or implementation of EU law, or when the correct implementation results in violation of Charter rights. Training and information on how to handle cases with potential for CJEU referral is important for lawyers. Similarly, judicial training to increase awareness of EU legal guarantees and promote the use of the referral mechanism is necessary, especially among judges of lower courts who can also submit preliminary questions.

327. ENNHRI, Stronger human rights monitoring at Europe's borders – why NHRIs are part of the solution, 27 May 2020, available at: <https://bit.ly/3vK0Vlj>

328. EDAL, ECtHR - *Ilias and Ahmed v. Hungary*, Application No. 47287/15, 21 November 2019, available at: <https://bit.ly/381f8bh>

329. EDAL, ECtHR - *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020, available at: <https://bit.ly/32lUpv4>

330. EDAL, ECtHR – *M.N. and others v. Belgium*, Application no. 3599/18, 5 May 2020, available at: <https://bit.ly/2laaZqN>

331. EDAL, ECtHR – *B.A.C. v. Greece*, Application no. 11981/15, 13 October 2016, available at: <https://bit.ly/3hUALio>

332. Council of Europe, Italy ratified the Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, 21 April 2021, available at: <https://bit.ly/3nKLe0q>

333. See, for example, EDAL, CJEU, Judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, available at: <https://bit.ly/3kcuDzz> and EDAL, CJEU, Judgment of 14 May 2020, *FMS and Others, Joined Cases C-924/19 PPU and C-925/19 PPU*, EU:C:2020:367, paragraph 153, available at: <https://bit.ly/2QSkJtD>

A pending case before the CJEU will soon clarify the mandatory nature of preliminary referrals by Supreme Courts;³³⁴ according to the Advocate General's opinion in the case, the Court might have to revisit the traditional criteria regarding the duty of Supreme Courts to refer.³³⁵ The Judicial Network of the EU could also play an enhanced role in this regard by providing the necessary forum to promote a mutual understanding of EU law and procedures.³³⁶ A similar approach of compliance and good administration should also inform the EU Commission's stance. The Oxfam/WeMove Europe complaint will show whether the Commission is willing to initiate infringement procedures to protect the established legal guarantees of the asylum acquis. The political nature of such a choice certainly creates significant obstacles; however, the successful procedures launched against Poland, Hungary and the Czech Republic on the 2015 Relocation decisions should at least remove some hesitation.

The need for Commission action, however, must start before violations occur by supporting enforcement of the current legal regime. Lawful and rights-oriented policy action should be the norm and litigation should return to being an exceptional protective measure of last resort. The defence of the Treaties also covers legal design and transposition monitoring. The linking of fundamental rights protection with funding is a powerful tool to implement EU law and compel Member States to monitor and take action when violations occur. Recently, the Commission rejected applications for grants from Polish towns on account of rule of law concerns regarding domestic policies of LGBTQI+ discrimination.³³⁷ Moreover, in its proposal for a Common Provisions Regulation, the Commission has introduced enabling conditions for Member States to be able to invest EU funds and these include compliance with the CFREU.³³⁸ If these powers are properly used, the protection of fundamental rights will be based on strong foundations and will not have to be the subject of exhaustive litigation and court proceedings.

In the long-term, the Commission's strategy to strengthen the application of the CFREU includes the empowerment of civil society, rights defenders and justice practitioners; it also supports increasing CFREU guarantees.³³⁹ These measures, and prioritisation of EU law training for justice practitioners, could increase domestic compliance with the Charter.

International law

The engagement of international legal mechanisms to achieve litigation and legal advocacy goals is not a priority for actors in Greece, with limited use made so far of international legal channels in the areas assessed here (based on available information). Action is mainly focused in the participation of civil society in the periodic examination of Greece before UN Treaty bodies and the ad hoc engagement of the UN Special Procedures. Individual communications procedures for the CAT, the CCPR, the CEDAW and the CRPD have been accepted by Greece,³⁴⁰ but little use is made of them.³⁴¹ The Treaty Bodies have developed extensive jurisprudence on non-refoulement and the guarantees of vulnerable migrants and asylum seekers, and provide litigation opportunities for Greek cases.³⁴² The specialised nature of these bodies, especially for ill-treatment (CAT), gender (CEDAW) and disability (CRPD), may offer possibilities for engagement that can result in technical knowledge and litigation where the establishment of claims becomes complicated. The recent complaint to the CCPR is an important action to monitor. Training on how to access these mechanisms should be increased. Although implementation of UN bodies' conclusions and results following requests for action are not always guaranteed, they can complement other litigation or enhance legal knowledge and advocacy. Litigation capacity is also based on information and knowledge, regardless of the avenue chosen; contact with UN experts could help reinforce legal action at all levels.

334. CJEU, C-561/19, Request for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 23 July 2019 — Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA, available at: <https://bit.ly/3nNk6xS>

335. CJEU, Opinion of Advocate General Bobek, Case C-561/19, Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA, 15 April 2021, available at: <https://bit.ly/3b3xc56>

336. CJEU, Judicial Network of the EU, available at: <https://bit.ly/3vo2tYC>

337. Politico, Commission to Poland: Respect fundamental rights or lose funds, 30 July 2020, available at: <https://politi.co/2RsahcU>

338. Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM/2018/375 final - 2018/0196 (COD), Article 11, available at: <https://bit.ly/3vFfcWG>

339. European Commission, Strategy to strengthen the application of the Charter of Fundamental Rights in the EU, COM (2020) 711 final, 2 December 2020, available at: <https://bit.ly/2SeXQBI>

340. OHCHR, Acceptance of individual complaints procedures for Greece, available at: <https://bit.ly/3gWA4EJ>

341. See for example, CAT: The Work of The Committee: Statistical Survey on individual complaints (1 registered complaint as of 2015), available at: <https://bit.ly/2QJZ1sp>; CCPR: The Work of The Committee: Statistical Survey on individual complaints (13 registered complaints as of 2016), available at: <https://bit.ly/2QQr21a>; CEDAW: The Work of The Committee: Statistical Survey on individual complaints (0 registered complaints as of 2020), available at: <https://bit.ly/2RqyU9v>; CRPD, The Work of The Committee: Statistical Survey on individual complaints (0 registered complaints as of 2014), available at: <https://bit.ly/3eVs8Rc>

342. ECRE/ELENA Legal note on asylum and the UN Treaty System, March 2021, available at: <https://bit.ly/3xE81zE>