



No State of Exception at the EU External Borders

The Implications of the Rule of Law in the Context of the Greek-Turkish Border Closure and the Temporary ‘Suspension’ of the Asylum Law in Greece

Date: 30/03/2020

Expert Legal Opinion commissioned by Erik Marquardt MEP

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Executive Summary

This study assesses the measures taken by the Greek government and the European Union (EU) since the end of February 2020 in response to Turkey's decision to cease its non-departure measures for refugees and asylum-seekers. It analyses the recent closure of the Greek-Turkish border and the temporary 'suspension' of the asylum law in Greece from the perspective of EU law, the European Convention on Human Rights (ECHR), and international refugee law. The opinion concludes that pushbacks or deportations without an individual asylum procedure violate the prohibition of refoulement and the prohibition of collective expulsion. The excessive use of violence at the border constitutes a severe violation of basic human rights, including the right to life. The opinion presents several alternatives to these reactions: EU asylum law in particular provides for solidarity measures and adaptations of the asylum procedure, which are available as appropriate and legal reactions.

MAIN FINDINGS

Background to the current events

- In March 2016, the EU-Turkey Statement was concluded between the EU member states and Turkey.
- As a result, **for the past four years**, Turkey has **actively prevented** refugees from leaving towards Greece. Those non-departure measures violate the human right to leave any country.
- Turkey has become **host to the largest number of refugees in the world**. Currently, about 4.1 million refugees live in Turkey.
- At the end of February 2020, Turkey announced that it would 'open its borders' for refugees wishing to depart towards the EU, citing violations of the EU-Turkey Deal by the EU and its Member States as reason.

Measures taken by Greece since 1 March 2020

- On 1 March 2020, Greece has 'closed' the EU external border to Turkey.
- On 2 March 2020, Greece adopted a '**suspension of the asylum law**' for one month.
- **Violent pushbacks** are taking place at the Greek-Turkish border. Those are carried out by state forces and by private parties.
- Asylum seekers who arrived to Greece after 1 March 2020 are **to be deported without an individual asylum procedure**.

Legal assessment of the measures taken by Greece

The measures taken by Greece are incompatible with EU law and with international law. There are **no legal grounds for suspending asylum law, refusing to receive asylum applications, or returning persons without an individual examination of their protection needs**.

1. **States may not suspend asylum law or refuse to receive applications for asylum** because of unwelcome arrivals.

- EU member states are obliged by the EU Asylum Procedures Directive to carry out asylum procedures whenever an asylum claim is made. The fact that the applicant arrived in an irregular fashion does not affect this obligation.
 - Effective access to an asylum procedure is also a necessary means for states to guarantee compliance with their non-refoulement obligations and with the prohibition of collective expulsions under international law.
2. **Pushbacks or deportations without an individual procedure violate EU and international law** in several respects.
- Specifically, they constitute **a violation of the non-refoulement obligation**, as laid down in:
 - Art. 33 of the Geneva Convention 1951, a **cornerstone of international refugee law**;
 - Art. 3 of the European Convention on Human Rights (ECHR), an **absolute, fundamental right**;
 - Art. 78 para 1 of the Treaty on the Functioning of the European Union (TFEU) and Art. 4, 18 and 19 of the Charter of Fundamental Rights (CFR), the **normative basis of the Common European Asylum System**.
 - Pushbacks or deportations without an individual procedure also **violate the prohibition of collective expulsion** as granted by Art. 19 para 1 CFR.
 - **Crucially, the oft-cited European Court of Human Rights judgment in the case N.D. & N.T. is not applicable to the situation at the Greek-Turkish border.**
 - In addition, **they violate the right to an effective remedy** as granted by Art. 13 ECHR and Art. 47 CFR.
 - Finally, those measures violate **EU asylum law**, and, in particular, the Asylum Procedures Directive.
3. Pushbacks or deportations without an individual procedure **cannot be justified under EU law or European human rights law**. Specifically:
- The **public policy clause of Art. 72 TFEU cannot be used to justify** the violation of absolute fundamental rights.
 - The **emergency clause of Art. 78 para 3 TFEU cannot be invoked unilaterally by a member state**. Invoking it requires a specific procedure and the adoption of a Council decision.
 - Under EU law, there is **no possibility to derogate from fundamental rights**. EU law does not foresee a state of exception that could justify the ‘suspension’ of fundamental rights.
 - As an **absolute right**, Art. 3 ECHR does not allow for any justification of an infringement at all.
4. The current situation violates the foundational values of the Union, namely the rule of law and respect for human rights, as granted in Art. 2 TEU.

Failure to act by the EU

- The legal responsibility for the administration of the Greek-Turkish border is shared between the Member States and Frontex, since it is part of the **external border of the EU**.
- The Commission is responsible for monitoring Greece's compliance with the **Common European Asylum System**, of which the Greek asylum system is part, and with the **foundational values of the Union** under Art. 2 TEU, namely the rule of law and respect for human rights.
- Despite its role as the guardian of the Treaties under Art. 17 para 1 TEU, the Commission has failed to react to the 'suspension' of the EU asylum law in Greece and to the illegal pushbacks at the EU border between Greece and Turkey.
- So far, the Commission has only announced enhanced financial support and increased Frontex support to Greece, thereby also signalling support for its policies.

Alternative measures available to the EU and its member states

There is a number of **alternative measures** available to the EU and its member states.

- EU law foresees **solidarity measures** in cases of particular stress to a member state's asylum system. In particular, the following measures are available:
 - The **European Asylum Support Office** (EASO), the EU agency with a mandate to support Greece in processing asylum claims, could increase its operational support to Greece.
 - The Council could adopt **Relocation Programme** under Art. 78 para 3 TFEU.
- In case that the EU for political reasons does not adopt the required solidarity measures, individual member states or groups of member states could **adopt bilateral solidarity measures** to support Greece.
- In particular, asylum applicants could be relocated from Greece to other member states.

A. The Background

I. The EU-Turkey Statement and the Border Closure by Turkey since March 2016

On 18 March 2016, the ‘EU-Turkey Statement’ (commonly known as the ‘EU-Turkey Deal’) was published as a press release by the European Council.¹ The Statement’s main objective was to ‘*end irregular migration from Turkey to the EU*’.² In order to achieve this goal, several measures were agreed upon, inter alia, the provision of considerable financial support to Turkey, and a return policy applying to asylum applicants who have entered the EU irregularly from Turkey via the Greek Aegean islands.³

Indeed, immediately upon the EU-Turkey Statement’s entry into force, the number of persons irregularly entering from Turkey to the EU in search of international protection *decreased substantially and sustainably*.⁴

The immediate decrease in the numbers of arrivals to the EU was, at least inter alia, owed to *measures taken by Turkey to prevent departures*, effectively closing its border with Greece for protection seekers wishing to cross into the EU. The European Commission in its regular reports on the EU-Turkey Deal acknowledged that the ‘Turkish Coast Guard has continued active patrolling and prevention of departures from Turkey.’⁵ The violation of the human right to leave any country was then at least tacitly accepted by the EU and Turkey.⁶

Also as an effect of this non-departure policy, Turkey has become host to the *largest number* of refugees worldwide with approximately 4.1 million refugees.⁷ Pressure on Turkey continues to be high: Over the course of the civil war, almost 1.5 million refugees fled from other regions of Syria to the Idlib region. Between December 2019 and February 2020, almost a million residents of Idlib have been internally displaced in the region.⁸ Meanwhile, the EU member states have still not set up a large-scale resettlement programme, as envisaged in the Statement once the numbers had stabilized.⁹ Within three years, only about 20,000 refugees have been resettled from Turkey to the EU under the so-called ‘1:1 scheme’ which was prominently provided for in the EU-Turkey Statement.¹⁰

¹ European Council, EU-Turkey statement, 18 March 2016, Press Release of 18 March 2016, available online: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> [hereinafter: *EU Turkey Statement*]. All online sources last accessed 19 March 2020.

² EU Turkey Statement (fn.1): ‘the EU and Turkey today decided to *end the irregular migration from Turkey to the EU*. In order to achieve this goal, they agreed on the following additional action points. [...]’ [emphasis added].

³ EU Turkey Statement (fn.1), point 1 and 6. The number of deportations from Greece to Turkey has remained low during the past four years, because Turkey can in most cases not be considered as safe third country.

⁴ see for numbers: European Commission, ‘Factsheet. The EU-Turkey Statement, Three years on’, March 2019, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information_en.

⁵ European Commission, ‘Sixth Report on the Progress made in the implementation of the EU-Turkey Statement’, 13 July 2017, COM (2017) 323 final, p. 4: ‘On its side, the Turkish Coast Guard has continued active patrolling and prevention of departures from Turkey.’ [emphasis added].

⁶ Cf for a similar constellation and the legal implication: Nora Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’, in *European Journal of International Law*, Volume 27 (2016) Issue 3, Pages 591–616; short summary online here: Nora Markard, ‘Is It a Violation of the Right to Leave to Prevent Migrants from Crossing the Border to Another State?’ (2016), available at: <https://lt.org/publication/it-violation-right-leave-prevent-migrants-crossing-border-another-state>.

⁷ United Nations High Commissioner for Refugees, ‘Operations, Turkey’ (2020), available at: <http://reporting.unhcr.org/node/2544>.

⁸ Florian Kriener, ‘Der Alptraum in Idlib. Die neusten Entwicklungen im syrischen Bürgerkrieg aus der Perspektive des jus contra bellum’, *Völkerrechtsblog*, 12 March 2020, available at: <https://voelkerrechtsblog.org/der-alptraum-in-idlib/>.

⁹ The so-called ‘Voluntary Humanitarian Admission Scheme’ (V-HAS) was to be activated once border-crossings from Turkey to Greece had substantially and sustainably decreased, see EU Turkey Statement (n.1), point 4. However, the V-HAS has not been activated until now.

¹⁰ EU Turkey Statement (n.1), point 2; European Commission, ‘Factsheet. The EU-Turkey Statement, Three years on’, March 2019, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information_en.

II. The End of Turkey's Non-Departure Policy in February 2020

During the past four years, Turkey has repeatedly announced plans to 'open its borders' to refugees as a way of exercising political pressure on the EU.¹¹ However, political negotiations have so far successfully prevented Turkey from following through.

This changed at the end of February 2020, when Turkey decided that it would no longer prevent refugees from departing the country towards the EU, and at the same time 'invited' refugees staying in Turkey to leave the country for Greece. President Recep Tayyip Erdogan explained: 'It's done. It's finished. The doors are now open. [...] Hundreds of thousands have crossed, soon it will be millions.'¹²

B. The Events and Measures Adopted by Greece Since 1 March 2020

In the hours following President Erdogan's announcement, the pressure at Greece's borders increased immensely. Aided by Turkey, thousands of people approached the land and sea borders of Greece in the regions of Evros and the Aegean islands.¹³

I. The Closure of the Greek-Turkish Border

Greece's initial reaction was to announce that it would close the borders to Turkey.¹⁴ This action was accompanied by several actions, including practical measures to prevent or obstruct border crossings, and pushbacks and deportations of those who had crossed the border into Greek territory. The border with Turkey was militarized and reinforcements were sent to protect the area. Further, Greece designated the entire border area as a site for military testing, allowing forces to shoot live ammunition.¹⁵ In addition, Greece just recently announced that it would expand its border fence from 12.5 to 36 km.¹⁶ The 'sealing' of the land border inevitably coincided with an increased pressure by individuals gathering on the Turkish side attempting to enter into Greek territory.

1. Denial of Entry to the Greek territory

The primary intended consequence of Greece's decision to 'seal' the land border was a general policy of denial of admission to the Greek territory. Not only was the border closed in a legal sense, Greek authorities also adopted proactive measures to violently prevent people from approaching and crossing it. These measures resulted in thousands of individuals being violently denied access to Greek territory.

¹¹ See for example: Ekatherimi, 'Erdogan threatens to flood Europe with some 5.5 million refugees', 09 September 2020, available at: <https://bit.ly/2vcFkP5>; Deutsche Welle, 'Erdogan threatens to open borders after European Parliament vote', 25 November 2016, available at: <https://bit.ly/2vZedXU>.

¹² Deutsche Welle, 'EU offers Greece migration support amid mounting refugee crisis', 3 March 2020, available at: <https://www.dw.com/en/eu-offers-greece-migration-support-amid-mounting-refugee-crisis/a-52623868>.

¹³ Ekathimerini, 'Tensions rise as more migrants reach Greek border', 29 March 2020, available at: <http://www.ekathimerini.com/250085/Art/ekathimerini/news/tensions-rise-as-more-migrants-reach-greek-border>; Al Jazeera, 'Greece on the defensive as Turkey opens border to refugees', 1 March 2020, available at: <https://www.aljazeera.com/news/2020/02/greece-defensive-turkey-opens-border-refugees-200229091808379.html>.

¹⁴ Ibid.

¹⁵ Ekathimerini, 'Greece conducts military exercises near Evros', 2 March 2020, available at: <http://www.ekathimerini.com/250100/Art/ekathimerini/news/greece-conducts-military-exercises-near-evros>. Immediately after the border was closed, the mentioned military exercise was announced.

¹⁶ Die Presse, 'Griechenland beginnt Ausbau von Grenzzaun', 09 March 2020, available at: <https://www.diepresse.com/5781926/griechenland-beginnt-ausbau-von-grenzzaun>.

This measure particularly concerns the official border crossing point between Edirne on the Turkish and Kastanies on the Greek side where at least several thousand persons were denied access.¹⁷ Lawyers from the Greek side had no means of meeting those persons in order to provide legal services – they were separated from them by a fence and line of armed forces. From the Turkish side, lawyers had access. The Istanbul Bar Association Human Rights Centre for Refugee Rights is regularly reporting on the situation.¹⁸ Refugees present at the border had often already crossed the customs office, meaning they could not easily return to wherever they were staying in Turkey, as Turkish border guards were blocking the entry to the customs office.¹⁹ In other words, they are trapped in a ‘no man’s land’ at the border.

In addition, persons have also tried to cross the land border between Greece and Turkey separated by the river Evros.

2. Pushbacks and Deportations without Individual Procedures

The relatively few persons who managed to enter Greek territory were swiftly pushed back to Turkey. They were not registered and thus prevented from having access to procedures for applying for international protection, in line with the provision of the Emergency Legislative Decree of 2 March 2020 (‘Suspension Act’, see B.II). In particular, the authorities did not conduct individual examinations in an appropriate and differentiated manner, and also prevented the individuals from putting forward arguments against the measure.²⁰

On the Aegean islands, the situation was similar. Since Turkey’s announcement that it would open its borders, the number of individuals arriving to the islands substantially increased. Following the adoption of the ‘Suspension Act’ (see B.II), authorities have denied new arrivals access to both asylum registration procedures and to the camps. Instead, new arrivals have been detained in unofficial and unequipped facilities (i.e. in Lesvos on a vessel anchored in the port and in Chios in a municipality building)²¹ awaiting their deportation first to mainland Greece and then from there to Turkey or their country of origin. Lawyers have been systematically denied access to the facilities where asylum seekers are being detained.²² Information on detention sites, destinations of deportations, and dates of transfers, has so far been absent or confusing, however alarming reports have emerged shedding some light on the situation.²³

¹⁷ Focus, ‘In Griechenland wächst Sorge über Entsendung von türkischen Spezialkräften’, February 2020, available at: https://www.focus.de/politik/ausland/focus-online-in-kastanies-fluechtlinge-eingekesselt-erdogan-schickt-1-000-polizisten-um-druck-auf-eu-zu-erhoehen_id_11743846.html.

¹⁸ See Istanbul Bar Association Human Rights Centre for Refugee Rights, ‘Report on Istanbul Bar Association Human Rights Center’s Visit to Pazarkule Checkpoint on 4-5 March 2020’, 8 March 2020, available at: <https://twitter.com/istbaroihm/status/1236757730637099012?s=20>.

¹⁹ According to the experience of Niki Georgiou, attorney at law, working with Equal Rights Beyond Borders.

²⁰ Al Jazeera, ‘Turkish police bolster Greek border to stop migrants’ return’, 5 March 2020, available at: <https://www.aljazeera.com/news/2020/03/turkish-police-bolster-greek-border-stop-migrants-return-200305114014230.html>; The Guardian, ‘Refugees told ‘Europe is closed’ as tensions rise at Greece-Turkey border’, 6 March 2020, available at: <https://www.theguardian.com/world/2020/mar/06/refugees-europe-closed-tensions-greece-turkey-border>.

²¹ Greek Reporter, ‘Greek Navy Ship Arrives in Mytilene to House Refugee, Migrant Families’, 04 March 2020, available at: <https://greece.greekreporter.com/2020/03/04/greek-navy-ship-arrives-in-mytilene-to-house-refugee-migrant-families/>; StonsiGr, ‘508 in the port’, 03 March 2020, available at: https://www.stonisi.gr/post/7345/508-sto-limani?fbclid=IwAR18VvHPWIEQJ-fREdcVEq6klwq04_gU5xHSO6SSyBjrkvuuWEE6Gbh-rg#.Xl4LerttclI.facebook.

²² According to the experience of Niki Georgiou and Aliko Potamianou, attorneys at law, working with Equal Rights Beyond Borders.

²³ See New York Times, ‘We are Like Animals’: Inside Greece’s Secret Site for Migrants’, 10 March 2020, available at: <https://www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html>; Human Rights Watch, Greece/EU: ‘Allow New Arrivals to Claim Asylum’, 10 March 2020, <https://www.hrw.org/news/2020/03/10/greece/eu-allow-new-arrivals-claim-asylum>.

There have also been reports of criminal proceedings and charges against persons who entered the country since 1 March 2020.²⁴

Although the number of people crossing the northern border and Aegean Sea has decreased over the past week,²⁵ these pushbacks are continuing and will continue as long as the legislative decree remains in place.

3. Violence Against Asylum Seekers at the Borders

Immediately following the State's adoption of the border closure, witnesses reported a disproportionate use of violence against persons trying to enter Greece. Greek border patrols repelled individuals attempting to cross by firing teargas, water cannons, stun grenades, and artillery directly towards them.²⁶ Different sources report the death of at least one person, a Syrian man, killed by bullets shot from the Greek side of the border. Greece, openly accused of causing the man's death by the Turkish foreign minister, denied its involvement in the casualty and referred to it as 'fake news.'²⁷

But the violence against asylum seekers goes far beyond preventing them from attempting to cross the border. Asylum seekers pushed back to the Turkish side reported that the Greek police had beaten them, confiscated their phones, money, documents and other belongings, and had forced them to return to Turkey in their underwear.²⁸ On 10 March 2020, the New York Times published a sweeping investigative report showing that the Greek government has been detaining asylum seekers in a 'secret extrajudicial location' before expelling them to Turkey.²⁹ The report noted that detainees have had no access to legal counsel and documented appalling conditions at the site.³⁰ On Lesbos, where over 450 asylum seekers are currently detained on a naval ship off the coast, Human Rights Watch has found that people do not have enough food

²⁴ Tagesschau, 'Missachtet Griechenland Migranten-Rechte?', 12 March 2020, available at: <https://www.tagesschau.de/investigativ/monitor/griechenland-fluechtlinge-schnellverfahren-101.html>; Urdupoint, 'Greece Notes Decrease In Number Of Illegal Border Crossing Attempts From Turkey - Reports', 04 March 2020, available at: <https://www.urdupoint.com/en/world/greece-notes-decrease-in-number-of-illegal-bo-855038.html>.

²⁵ See France 24, 'Erdogan Order Turkish Coastguard to Block Migrants Crossing Aegean Sea', 7 March 2020, available at: <https://www.france24.com/en/20200307-erdogan-orders-turkish-coastguard-to-block-migrants-crossing-aegean-sea>.

²⁶ Ekathimerini, 'Migrants, police clash again on Greek-Turkish border', 6 March 2020, available at: <http://www.ekathimerini.com/250298/Art/ekathimerini/news/migrants-police-clash-again-on-greek-turkish-border>; Ekathimerini, 'Thousands of migrants rush to cross Greek-Turkish border', 2 March 2020, available at: <http://www.ekathimerini.com/250111/Art/ekathimerini/news/thousands-of-migrants-rush-to-cross-greek-turkish-border>.

²⁷ The Guardian, 'Migration: EU praises Greece as 'shield' after Turkey opens border', 3 March 2020, available at: <https://www.theguardian.com/world/2020/mar/03/migration-eu-praises-greece-as-shield-after-turkey-opens-border>; Ekathimerini, 'Turkey deploys 1,000 police at Greek border to stem pushback of migrants', 5 March 2020, available at: <http://www.ekathimerini.com/250256/Art/ekathimerini/news/turkey-deploys-1000-police-at-greek-border-to-stem-pushback-of-migrants>; Ekathimerini, 'Greece calls 'fake news' on news of dead refugee', 2 March 2020, available at: <http://www.ekathimerini.com/250110/Art/ekathimerini/news/greece-calls-fake-news-on-news-of-dead-refugee>; Al Jazeera, 'Greece denies killing migrant attempting to cross from Turkey', 4 March 2020, available at: <https://www.aljazeera.com/news/2020/03/greece-denies-killing-migrant-attempting-cross-turkey-200304113034335.html>; for a reconstruction of the incident: Forensic Architecture, 'The Killing of Muhammad al-Arab', 5 March 2020, available at: <https://vimeo.com/395567226>, cf. Forensic Architecture, twitter, <https://mobile.twitter.com/ForensicArchi/status/1235325831607652352>

²⁸ Al Jazeera, 'Greece denies killing migrant attempting to cross from Turkey', 4 March 2020, <https://www.aljazeera.com/news/2020/03/greece-denies-killing-migrant-attempting-cross-turkey-200304113034335.html>; Sky News, "'They shot us with rifles': Migrants blame Greek authorities for border bloodshed", 5 March 2020, available at: <https://news.sky.com/story/they-shot-us-with-rifles-migrants-blame-greek-authorities-for-border-bloodshed-11949747>; Middle East Eye, "'They showed us no mercy': Greek border forces accused of stripping, beating refugees", 6 March 2020, available at: <https://www.middleeasteye.net/news/they-showed-us-no-mercy-greek-security-forces-accused-stripping-beating-refugees>.

²⁹ New York Times, "'We are Like Animals': Inside Greece's Secret Site for Migrants", 10 March 2020, available at: <https://www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html>.

³⁰ Ibid.

and that there are only ‘3 toilets for 451 people.’³¹ Human Rights Watch also reported that pregnant women and new mothers are among those currently on the ship.³²

The Istanbul Bar Association Human Rights Centre for Refugee Rights³³ reports several incidents of severe injuries, sexual harassment of women during pushbacks, and the separation of children from their families.

In addition to the military and police, groups of private individuals in the border region have joined forces with authorities to voluntarily patrol the area as ‘village guards’. Dressed in black clothes and military-style boots, these individuals have reportedly carried out violent ‘pushbacks’ on their own.³⁴ In some cases, they have even been armed.³⁵ Far from discouraging or preventing such actions, Greek Prime Minister Kiriakos Mitsotakis has actually thanked locals for helping to stop migrant crossings.³⁶

II. The Suspension of the Asylum Law in Greece

In addition to these practical measures, Greece on 02 March 2020 adopted an Emergency Legislative Act in response to the ‘asymmetrical threat’ posed by migration (hereafter: *Suspension Act*).³⁷ This emergency legislation suspends asylum applications for persons entering the country irregularly for a period of one month. These persons will be returned, without registration, to their country of origin or transit (i.e. Turkey). The emergency act applies retroactively as from 01 March 2020.³⁸

The UNHCR swiftly condemned the emergency act, stating that it violated international law.³⁹

III. The EU’s Reaction

On 3 March 2020, European Commission President von der Leyen, as well as the Presidents of the European Council and the European Parliament visited Greece.⁴⁰ At that point, there were already reports of several casualties, including a child who drowned when a dinghy capsized off the island of Lesbos.⁴¹

³¹ Human Rights Watch, ‘Greece/EU: Allow New Arrivals to Claim Asylum’, 10 March 2020, available at: <https://www.hrw.org/news/2020/03/10/greece/eu-allow-new-arrivals-claim-asylum>.

³² Ibid.

³³ See Istanbul Bar Association Human Rights Centre for Refugee Rights, ‘Report on Istanbul Bar Association Human Rights Center’s Visit to Pazarkule Checkpoint on 4-5 March 2020’, 8 March 2020, available at: <https://twitter.com/istbaroihm/status/1236757730637099012?s=20>.

³⁴ New York Times, ‘Vigilantes in Greece Say “No More” to Migrants’, 7 March 2020, available at: <https://www.nytimes.com/2020/03/07/world/europe/greece-turkey-migrants.html>.

³⁵ Ibid.

³⁶ Steffen Lüdke, ‘Live Ticker from from the press conference of Kiriakos Mitsotakis and Ursula von der Leyen’, 3 March 2020, available at: <https://twitter.com/stluedke/status/1234831791732805638>: “He is thanking not only hellenic army but also civilians who have helped”.

³⁷ Greek Legislative Act ‘Suspension of Asylum Applications’, Government’s Gazette No 45/A/02.03.2020, available at: <https://bit.ly/legislativeact>. An unofficial English translation provided by the Odysseus Network, available at: <https://docs.google.com/document/d/1yA782Vi56KnIhs2yVehXgkMYQeCieaPq5coWNHqh6xs/edit>.

³⁸ Cf. Greek National Commission for Human Rights, ‘GNHCR Statement: reviewing asylum and immigration policies and safeguarding human rights at the EU borders’, 5 March 2020, available at: <https://ccdh.public.lu/dam-assets/fr/actualites/2020/GNCHR-STATEMENT-Borders.pdf>.

³⁹ UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’, 2 March 2020, available at: <https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>.

⁴⁰ See Euronews, ‘Greece is ‘Europe’s shield’ in migrant crisis, says EU chief von der Leyen on visit to Turkey border’, 4 March 2020, <https://www.euronews.com/2020/03/03/greece-migrant-crisis-is-an-attack-by-turkey-on-the-eu-austria>

⁴¹ The incident marks the first known such death since Turkey opened its borders to refugees; the boy, aged around 6 or 7, was among 48 refugees rescued from waters off Mytilene International Airport on the island of Lesbos, see Euronews, ‘Child dies off Greece as migrants rush from Turkey to Europe’, 2 March 2020, available at: <https://www.euronews.com/2020/03/02/greece-cancels-asylum-as-turkey-lets-migrants-travel-towards-europe>.

During a press conference in Greece, Commission President von der Leyen said that ‘we will work to ensure we deliver the support that is needed. The situation is not only Greece's issue to manage. It is the responsibility of Europe as a whole.’⁴²

With regard to the emergency act, the Commission stated that it ‘cannot comment’ on a decision by Greece to suspend asylum applications for one month.⁴³ The Commission was however able to comment on the country’s decision to close its borders. Namely, the Commission President praised Greece as ‘Europe’s shield’. She stated that ‘this border is not only a Greek border, it is also a European border (...) I thank Greece for being our European shield in these times.’⁴⁴ The President of the European Council Charles Michel commented on the situation in a similar manner.⁴⁵

On 4 March 2020, the European Commission, as a contribution to the extraordinary Justice and Home Affairs Council presented its ‘Action Plan’ of measures to be taken by the Union and the Member States.⁴⁶ The Vice-President for ‘Promoting our European Way of Life’, Margaritis Schinas stressed that ‘the first priority is to ensure order at our external border.’⁴⁷

In particular, the Commission has proposed the following measures:⁴⁸

First, increased Frontex operational support, namely two rapid border interventions and a new return programme. The Commission President also announced that Frontex will deploy a rapid deployment team along with several patrol vessels, aircraft, and 100 new border guards to Greece’s land and sea borders to support the more than 500 currently stationed guards there.⁴⁹

Second, the EU will provide up to 700 million Euros in financial assistance.⁵⁰ Half of that money will be immediately available, while the State could request the other half ‘as part of an amending budget’.⁵¹ This money could be used to support reception capacity, voluntary returns, and infrastructure to carry out screening procedures for security and health.

Third, member states were asked to respond to the Civil Protection Mechanism, which has been triggered by Greece, to provide medical equipment, shelters, tents, blankets etc.⁵² Further,

⁴² Deutsche Welle, ‘EU offers Greece migration support amid mounting refugee crisis’, 3 March 2020, available at: <https://www.dw.com/en/eu-offers-greece-migration-support-amid-mounting-refugee-crisis/a-52623868>.

⁴³ EU Observer, ‘Commission silent on Greece suspending asylum claims’, 4 March 2020, available at: <https://euobserver.com/migration/147621>.

⁴⁴ She said: “This border is not only a Greek border, it is also a European border ... I thank Greece for being our European aspidia in these times,” which was translated as ‘shield’, see The Irish Times, ‘EU praises Greece as “shield” after Turkey opens border’, 3 March 2020, available at: <https://www.irishtimes.com/news/world/europe/eu-praises-greece-as-shield-after-turkey-opens-border-1.4191933>.

⁴⁵ JURIST, ‘Greece suspends asylum applications after Turkey allows entry into Europe’, 3 March 2020, available at: <https://www.jurist.org/news/2020/03/greece-suspends-asylum-applications-after-turkey-allows-entry-into-europe/>

⁴⁶ European Commission, ‘Extraordinary Justice and Home Affairs Council: Commission presents Action Plan for immediate measures to support Greece’, 4 March 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_384.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Euronews, ‘Greece is ‘Europe’s shield’ in migrant crisis, says EU chief von der Leyen on visit to Turkey border’, 4 March 2020, available at: <https://www.euronews.com/2020/03/03/greece-migrant-crisis-is-an-attack-by-turkey-on-the-eu-austria>; Deutsche Welle, ‘EU offers Greece migration support amid mounting refugee crisis’, 3 March 2020, available at: <https://www.dw.com/en/eu-offers-greece-migration-support-amid-mounting-refugee-crisis/a-52623868>.

⁵⁰ Ibid.

⁵¹ Euronews, ‘Greece is ‘Europe’s shield’ in migrant crisis, says EU chief von der Leyen on visit to Turkey border’, 4 March 2020, available at: <https://www.euronews.com/2020/03/03/greece-migrant-crisis-is-an-attack-by-turkey-on-the-eu-austria>.

⁵² The Civil Protection Mechanism is a mechanism to strengthen cooperation between the EU member states and six participating states in the field of civil protection, with a view to improve prevention, preparedness and response to disasters. For a short explanation, see: European Commission, ‘Factsheet: European Civil Protection and Humanitarian Aid Operations’, 10 February 2020, available at: https://ec.europa.eu/echo/what/civil-protection/mechanism_en.

member states were also asked to respond to the call by the European Asylum Support Office (EASO) for 160 experts to be deployed to Greece.

C. The Illegality of the Measures under EU and International Law

I. Denial of Entry, Pushbacks and Forced Returns Without Individual Procedure

Denial of entry, pushbacks at the border as well as forced returns without individual procedure are subject to the same requirements under international and EU law. States are prohibited from pushing back or returning an alien without an *individual examination* as to whether the pushback or return violates:

1. the principle of non-refoulement laid down in international refugee law and EU law;
2. the principle of non-refoulement laid down in European human rights law;
3. the right to an effective remedy laid down in European human rights law;
4. the prohibition of collective expulsion laid down in Art. 19 para 1 CFR;
5. the obligation to conduct an individual asylum procedure under EU asylum law.

So-called ‘protection elsewhere clauses’ such as the ‘safe third country concept’ cannot justify the violation of those provisions. Therefore, as the following legal assessment will show, the current measures taken by the Greek government, described above, violate international and EU law.⁵³

1. The Prohibition of Refoulement under Refugee Law

a. The Principle of Non-Refoulement

Art. 33 of the Convention relating to the Status of Refugees (hereafter: Geneva Convention 1951),⁵⁴ inter alia, establishes the principle of non-refoulement – the *cornerstone* of international refugee law. From this also flows the right to an individual examination of all asylum applications. The principle of non-refoulement is also a norm of customary international law, even of *ius cogens*.⁵⁵

By virtue of this principle, any contracting state shall not ‘expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’. This obligation also covers ‘chain refoulement’, that is, the return to a country from which the refugee will then be deported to a threat of persecution.

⁵³ Cf. UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’, 2 March 2020, available at: <https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>; Matthew Scott, ‘Key issues arising from the decision of the Greek government to close its border with Turkey’, Raoul Wallenberg Institute, 6 March 2020, available at: <https://rwi.lu.se/2020/03/key-issues-arising-from-the-decision-of-the-greek-government-to-close-its-border-with-turkey/>.

⁵⁴ United Nations Convention relating to the Status of Refugees, adopted in 1951, together with the UN Protocol relating to the Status of Refugees, adopted in 1967.

⁵⁵ UNHCR and its Executive Committee have even argued that the principle of non-refoulement is progressively acquiring the character of *ius cogens*; see UNHCR Executive Committee, ‘Conclusion No. 25’, para. (b); UNHCR, ‘Note on international protection’ UN docs. A/AC.96/694 (1987), para 21.; UNHCR, ‘Note on international protection’ (23 July 1985), UN docs. A/AC.96/660 para. 17; UNHCR, ‘Note on international protection’ (9 August 1984), UN docs A/AC.96/643, para. 15; UNHCR, ‘Note on international protection’ (26 August 1982), UN docs. A/AC.96/609/Rev.1 para. 5.

In this regard it has to be stressed, that the term ‘refugee’ used by the Geneva Convention 1951 is merely declaratory in nature, meaning that formal recognition is not a precondition for being considered a refugee under the Convention. Hence, every person claiming asylum must be treated in accordance with the non-refoulement principle. Without this assumption, the principle of non-refoulement fails to provide any protection.⁵⁶ Given this assumption, states may not refool asylum seekers without an individual examination.

b. The Obligations under EU Primary Law

This obligation from international refugee law has been incorporated into EU law. Art. 78 para 1 TFEU obliges the European Union to develop ‘a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.’

Consequently, EU primary law commits the EU to respect the Geneva Convention 1951. The EU is thus obliged to comply with the Convention, even though it is not a party to it and is therefore not bound by international law *per se*.⁵⁷ The Geneva Convention 1951 hence has ‘constitutive significance in terms of EU law’.⁵⁸

Based on Art. 78 para 1 TFEU, the principles provided for in the Geneva Convention were also codified in Art. 18 CFR (right to asylum).⁵⁹

c. Refoulement in Case of Pushbacks by State Forces

The principle of non-refoulement applies at the border and within the concerned state’s territory.⁶⁰ As repeatedly stressed by the UNHCR, refoulement at the border is indeed a classic example of when states are required to comply with the principle of non-refoulement. In this regard, it is of no matter whether or not the persons concerned are physically present the territory; ‘in any manner whatsoever to the frontiers of territories’ means that states are bound to the principle of non-refoulement wherever they act.

Greece therefore is violating the principle of non-refoulement by denying access to asylum seekers at the border without conducting an individual asylum procedure.⁶¹

⁵⁶ See UNHCR Executive Committee, ‘Conclusion No. 6’, para (c).

⁵⁷ See Daniel Thym, ‘Art. 78 AEUV’, in Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (eds.), *Das Recht der Europäischen Union* (CH Beck, Munich 2014), para. 6 and 16 et seq.

⁵⁸ Wolfgang Weiß, ‘Art. 78 AEUV’, in Rudolf Streinz (ed.), *EUV/AEUV* (CH Beck, Munich 2018), para. 5; Jürgen Bast, ‘Vom subsidiären Schutz zum europäischen Flüchtlingsbegriff’, in *Zeitschrift für Ausländerrecht und Ausländerpolitik* (ZAR) 2020, p. 42 (43).

⁵⁹ ECJ Judgment of 17 June 2009 – C-31/09 – Nawras Bolbol, para. 36 et seq.

⁶⁰ *Ibid.*

⁶¹ UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’, 2 March 2020, available at: <https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>; ‘Neither the 1951 Convention Relating to the Status of Refugees nor EU refugee law provides any legal basis for the suspension of the reception of asylum applications.’; Similarly, Matthew Scott, ‘Key issues arising from the decision of the Greek government to close its border with Turkey’, Raoul Wallenberg Institute, 6 March 2020, available at: <https://rwi.lu.se/2020/03/key-issues-arising-from-the-decision-of-the-greek-government-to-close-its-border-with-turkey/>; ‘Consequently, a decision by an EU Member State to close its land borders and to refuse to accept applications for asylum clearly risks obligations under international as well as EU law.’

Regarding those who have already entered Greek territory, there is no doubt that Greece violates the principle of non-refoulement in cases where *representatives of the state* expel persons without an individual examination, as has been reported.

d. Refoulement in Case of 'Pushbacks' Carried Out by Private Individuals ('Volunteer Border Guards')

As mentioned, there have also been reports that *private citizens* have been involved with some of these 'deportations'. According to the reports, these are often armed individuals, mostly from the region, who chase refugees to 'push them back' to Turkey. Prime Minister Mitsotakis went so far as to thank the 'volunteers' who have protected the borders.⁶²

Under certain circumstances, states can also be responsible, under international law, for the violent actions of private persons. This is the case if those actions are attributable to the state, or if the state had a duty to protect the victims against the violence inflicted by private parties.

Art. 33 para 1 Geneva Convention 1951 explicitly imposes an obligation on 'contracting states' not to refoul persons within their jurisdiction (negative obligation to respect rights). Greece is not directly responsible for the actions of those private individuals under the Draft Articles on the Responsibility of States for Internationally Wrongful Acts,⁶³ as the border guards have no connection whatsoever with state structures and are not mandated to act in the strict sense,⁶⁴ and assessing indirect forms of attribution exceeds the scope of this legal opinion.

However, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.⁶⁵ Under domestic law and international human rights and refugee law, Greece is therefore obliged to protect persons from the unlawful conduct of third parties (positive obligation to protect rights), even if the wrongful act was committed by private parties, if the authorities know or ought to know of the existence of a real and immediate risk to the fundamental rights of specific individuals.⁶⁶ If Greece fails to do so, this is a violation of its international obligations. This applies undoubtedly to the human rights prohibition of refoulement under Art. 3 ECHR.⁶⁷ However, this also applies to the Geneva Convention 1951 as an instrument of international law. The principle of non-refoulement is the basic principle of refugee law and the central right within the framework of the Convention. By violently pushing persons away from the territory of the respective state, private actors commit, above this, regularly the criminal offences of coercion, bodily injury or deprivation of liberty. Under international customary law, the state is obliged to take reasonable measures to prevent the commission of foreseeable unlawful acts against

⁶² See B.I.

⁶³ International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts', 2001, available at: https://legal.un.org/ilc/texts/instruments/english/draft_Art.s/9_6_2001.pdf.

⁶⁴ Anja Seibert-Fohr, 'Die völkerrechtliche Verantwortung des Staats für das Handeln von Privaten: Bedarf nach Neuorientierung?' (2013) *ZaöRV* 73, 37, 42.

⁶⁵ See e.g. ECtHR Judgment of 09 June 2009 – Appl. no. 33401/12 – Opuz., para 79 et seq; The Committee on the Elimination of Discrimination against Women, General Recommendation 19, para. 9.

⁶⁶ See ECHR, Guide on Article 2 of the European Convention on Human Rights: Right to Life, updated on 31 December 2019, para. 17–18, available at https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf; Seibert-Fohr, 'Die völkerrechtliche Verantwortung des Staats für das Handeln von Privaten', p. 43 et seq.; Sandra Stahl, *Schutzpflichten im Völkerrecht – Ansatz einer Dogmatik* (Springer Heidelberg 2010); cf. already General Claims Commission, *Janes Case* (Laura M. B. Janes et al. (U.S.A.) v. United Mexican States), UNRIIAA, vol. IV, 82-98 (16/11/1925).

⁶⁷ See for the obligation to protect ECtHR Judgment of 09 June 2009 – Appl. no. 33401/12 – Opuz.

another person's fundamental rights. If this duty of due diligence is neglected and states let violations happen, the state might, depending on the circumstances of the case, be fully responsible under international law.⁶⁸

In the case at hand, the Prime Minister of Greece clearly knows about 'volunteer border guards' conduct and has even expressed his gratitude towards them. Those factors at least suggest that the 'pushbacks' carried out by private individuals might be attributed to the state of Greece. This duty of protecting individuals from violent pushbacks is thus neglected and the Greek state is letting the violations happen by failing to exercise due diligence. This question however requires further and more detailed legal analysis in each individual case.

e. No Exclusion, Art. 33 para 2 Geneva Convention 1951

Exceptions from the principle of non-refoulement can only be made in cases where a refugee poses a national security threat, Art. 33 para 2 Geneva Convention 1951. The provision however requires an individual assessment of the person of the refugee, who himself or herself must be a threat to public security. This excludes any argument – which is inadmissible regardless – that the sheer number of refugees could be grounds for exempting states from the principle of non-refoulement under Art. 33 para 2 Geneva Convention 1951 across the board.

The individual grounds are identical to those of Art. 1 F Geneva Convention 1951.⁶⁹ There must be 'reasonable grounds' to exclude *an individual person* for the respective reasons. Hence, the burden of proof is, as a matter of course, with the contracting State; the State is not allowed to act arbitrarily and has to support its findings with evidence in a fair, individual procedure.⁷⁰

2. The Prohibition of Refoulement under European Human Rights Law

The prohibition of refoulement is also a fundamental principle of human rights law.

Most importantly, a prohibition of refoulement derives from Art. 3 ECHR, the prohibition of torture, inhumane or degrading treatment. The ECtHR first established this principle in its fundamental judgment in *Soering*.⁷¹ It has since developed a wide range of case law that emphasizes the absolute nature of Art. 3 ECHR, from which no derogation is possible, Art. 15 para. 2 ECHR.⁷² It has made clear that the non-refoulement guarantee implies a right to an individualized assessment of the risk, as well as a number of procedural rights (right to an interpreter, access to legal counsel, right to a legal remedy with suspensive effect). And it has clarified that Art. 3 ECHR also prohibits 'chain refoulement'.⁷³ The corresponding fundamental right is laid down in Art. 4 CFR, which according to Art. 52 para 3 CFR is

⁶⁸ In the so-called Tellini case, in which members of an international commission for the determination of the border between Greece and Albania died, a commission of lawyers appointed by the League of Nations found that responsibility for crimes committed by private individuals is founded in case appropriate measures to prevent and prosecute the crime were not taken. Especially the law 'on aliens' required special care in reference to foreigners. League of Nations, Tellini Case, Official Journal, 4th Year, No. 11, November 1923, 1349 et seq.

⁶⁹ Andreas Zimmermann/P. Wennholz, in: Andreas Zimmermann (ed.), 'The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol' (Oxford University Press, Oxford 2011), Art. 33 para 2, para 75 et seq.

⁷⁰ James Hathaway, 'The Rights of Refugees under International Law' (Cambridge University Press, Cambridge 2005), p. 345 with further findings.

⁷¹ ECtHR Judgment of 07 July 1989 – Appl. no. 14038/88 – *Soering*.

⁷² See e.g. ECtHR Judgment of 15 December 2016 – Appl. no. 16483/12 – *Khalifa et. al.*, para. 158.

⁷³ See e.g. ECtHR Judgment of 21 January 2011 – Appl. no. 30696/09 – *M.S.S.*, para. 286.

interpreted as having the same meaning and scope as Art. 3 ECHR. The prohibition of refoulement as deriving from Art. 3 ECHR is explicitly laid down in Art. 19 para 2 CFR.

a. Applicability of Art. 3 ECHR at the Border

According to the established case law of the European Court of Human Rights (hereafter: ECtHR) Art. 3 ECHR creates obligations for the Greek states not only for those already on the territory of Greece, but also with regards to individuals requesting entry to Greek territory at the Greek land border, irrespective of whether they set foot on Greek territory or not.

Whether or not a state is bound to the European Convention of Human Rights is to be determined according to Art. 1 ECHR, which secures to everyone within the contracting member states' jurisdiction the rights and freedoms defined in the Convention.

Although the ECHR does not provide a definition of 'jurisdiction', a long line of cases from the ECtHR has sought to clarify exactly who can come within a state's jurisdiction. The Court has found that the jurisdiction is primarily territorial, but that in exceptional cases a state can exercise its jurisdiction extraterritorially, including when the state exercises 'effective control' over an area outside its own territory (territorial mode of jurisdiction) or exercises 'effective control' over a person outside its territory, for example by intercepting or detaining that person (personal mode of jurisdiction).⁷⁴ The Court has made clear that 'Art. 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.⁷⁵

Determining when a state is responsible for persons outside its physical borders is ultimately a question of fact. Nonetheless, the Court has made clear that when a state exercises its control over an individual, she or he comes within its jurisdiction. As early as in its judgment *Soering*, the Court established that, 'in so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment'.⁷⁶ More recently the Court confirmed, that: 'It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Art. 1 to secure that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored.'⁷⁷ In other words, states can exercise their jurisdiction wherever their acts have the effect of violating an individual's rights, even if those individuals were never formally within the states' physical borders.

The ECtHR has already confirmed that the obligations under the convention apply to pushbacks of aliens on a vessel at the high sea.⁷⁸ Further, the ECtHR has recently confirmed that refusing entry at the border also falls within the scope of application of the ECHR since states exercise

⁷⁴ ECtHR Judgment of 12 December 2001 – Appl. no. 52207/99 – Banković et al, para. 61, 67-69; ECtHR Judgment of 07 July 2011 – Appl. no. 55721/07 – Al-Skeini et.al., para. 131 with references to earlier case law.

⁷⁵ ECtHR Judgment of 16 November 2004 – Appl. no. 31821/96 – Issa et.al, para. 71.

⁷⁶ ECtHR Judgment of 07 July 1989 – Appl. no. 14038/88 – Soering.

⁷⁷ ECtHR Judgment of 07 July 2011 – Appl. no. 55721/07 – Al-Skeini et.al., para. 137 emphasize added.

⁷⁸ ECHR, Judgment of 23 February 2012 – Appl. no. 27765/09 – Hirsi Jamaa et.al.

‘jurisdiction’ over the individuals they violently refuse entry to.⁷⁹ In this regard, it is irrelevant whether the border fence at which persons request entry is located on the territory of that state itself or on the territory of the neighbour state.⁸⁰ Moreover, the Greek authorities have undoubtedly been deploying force from within Greek territory and exercising control over those outside of it by using tear gas and other violent means against them.

Therefore, it is clear that in the current situation on the Greek-Turkish border, where Greek border guards have prevented access to official border crossing points by using coercive means such as tear gas, the state is exercising jurisdiction over the persons concerned, whether or not they have already crossed into Greek territory.

In summary, the jurisprudence of the ECtHR confirms clearly that, in addition to returns, Art. 3 ECHR is applicable to denials of entry. In order to assess whether the removal or denial of entry amounts to a real risk of a violation of Art. 3 ECHR, an *individual examination* must be carried out because such risk inevitably depends on individual circumstances.

b. Obligation to Conduct an Individual Examination

As mentioned, Art. 3 ECHR also gives rise to *procedural* obligations for signatory states when dealing with asylum seekers. These do not differ much between removal from the territory, transit zones, or pushbacks at the border.

When violations of Art. 3 ECHR are at issue, special requirements are imposed on states because of the irreversible damage that could occur when asylum seekers – a per se vulnerable group – are affected.⁸¹ Where evidence demonstrates that a real risk of an Art. 3 violation exists, it is then the Government’s burden to remove any doubt.⁸² Therefore, all foreseeable consequences of the individual’s return or denial of entry to the country of destination must be assessed by the state and ‘in the light of the general situation there as well as the applicant’s personal circumstances’.⁸³ The actual dangers that could occur as a result of a denial of entry or return must be carefully evaluated and based on the available current reports and opinions, including those by international and non-governmental organizations.⁸⁴

In principle, every state authority is obliged to take into account protection requests that signal a risk of a violation of Art. 3 ECHR. However, border guards and policeman are generally simply unable to assess such risks *ad hoc*. Further, EU law foresees that they merely register that a person wants to seek asylum, before referring them to the asylum service as the authority in charge of carrying out the individual examination. This means that individual assessments satisfying Art. 3 ECHR cannot be carried out by them.

⁷⁹ ECtHR Judgment of 13 February 2020 – Appl. nos. 8675/15, 8697/15 – N.D. & N.T.

⁸⁰ *Ibid.*, para. 90, 124.

⁸¹ ECtHR Judgment of 21 January 2011 – Appl. no. 30696/09 – M.S.S., para. 232.

⁸² ECtHR Judgment of 20 July 2010 – Appl. no. 23505/09 – N., para. 53; Judgment of 09 June 2010 – Appl. no. 41827/07 – R.C., para. 50.

⁸³ ECtHR Judgment of 28 June 2011 – Appl. nos. 8319/07, 11449/07 – Sufi and Elmi, para. 216.

⁸⁴ Cf. *ibid.*; ECJ, Judgment of 21 December 2011 – C-411/10, C-493/10 – N.S., Rec. 90 et seq.

c. The Implications of the ECHR Grand Chamber Judgment in N.D. & N.T.

This assessment is not affected by the recent Grand Chamber decision in *N.D. & N.T.*,⁸⁵ which specifically did *not deal with* any procedural guarantees under *Art. 3 ECHR* that might be violated by so-called ‘hot returns’ at the border.⁸⁶

The Court considered that a violation of *Art. 3 ECHR* had not been substantially argued by the applicants and therefore deemed that part of the application inadmissible at an early stage of the procedure.⁸⁷ Having in mind the absolute nature of *Art. 3 ECHR*, it is highly likely that the Court would have found a breach of *Art. 3 ECHR* where a pushback would have led to a risk of being exposed to torture, inhuman or degrading treatment, or chain refoulement. And unlike the prohibition of collective expulsion, which will be examined below (at C.I.4), the guarantee laid down in *Art. 3 ECHR* is in no case depending on a person’s ‘own conduct’.

Either way, the judgment in *N.D. & N.T.* can be explained by a procedural issue: The Court always has to assess the situation as it is at the time of the judgment. But the events in this case had overtaken the Court proceedings in time and facts. In retrospect, it was determined that there was no real risk of inhuman or degrading treatment upon deportation.⁸⁸ This was established retrospectively and taken into account in the proceedings per the procedural law of the ECtHR.⁸⁹ Following this explanation of the judgment, it is impossible to conclude that the judgment of the ECtHR was in essence based on an ‘exception’ to the prohibition of collective expulsion (see in more detail below C.1.4).

At the moment states refuse persons entry, there is no doubt that they are obliged to examine a potential violation of *Art. 3 ECHR*, and that the non-implementation of this requirement itself violates *Art. 3 ECHR*. However, it is impossible for border guards at the Turkish-Greek border to know whether a person needs international protection without assessing their individual needs. That is precisely why states are obliged to carry out individual examinations.

What is more, at the Greek-Turkish border, there are concrete indications that the denial of entry would lead to the real risk of a violation of *Art. 3 ECHR*, either due to the living conditions in Turkey or due to the danger of chain refoulement from Turkey to the country of origin (see C.I.6.b). As outlined below (at C.I.6.a), such risks have to be assessed in an individual procedure, before carrying out any denial of entry. Therefore, the pushbacks without such an individual assessment violate *Art. 3 ECHR*.

3. The Right to an Effective Remedy under European Human Rights Law

First and foremost, *Art. 13 ECHR* guarantees the right to an effective remedy before a national authority against violations of rights and freedoms laid down in the Convention. In case *Art. 3 ECHR* violations are at stake, the remedy must thoroughly and accurately examine such risks.⁹⁰ Whereas, generally, the procedure in which the remedy is granted can be accelerated, the

⁸⁵ ECtHR Judgment of 13 February 2020 – Appl. nos. 8675/15, 8697/15 – *N.D. & N.T.*,

⁸⁶ Rather, the judgment dealt with the prohibition of collective expulsion, see below C.I.4.

⁸⁷ ECtHR Decision of 07 July 2015 – Appl. nos. 8675/15, 8697/15 – *N.D. & N.T.*

⁸⁸ *Ibid.*

⁸⁹ Cf. Constantin Hruschka, ‘Hot Returns bleiben in der Praxis EMRK-widrig’, *Verfassungsblog* 21 February 2020, available at: <https://verfassungsblog.de/hot-returns-bleiben-in-der-praxis-emrk-widrig/>.

⁹⁰ ECtHR Judgment of 21 January 2011 – Appl. no. 30696/09 – *M.S.S.*, para. 387.

acceleration must not exclude the concerned person to submit relevant material supporting her or his claim.⁹¹

The right to an ‘effective remedy’ also requires factual access to such a remedy and an examination of the complaint, indeed before irreparable consequences can be brought about by the administration.⁹² Thus, if at the border or after entry into the East Aegean islands – where people are detained on boats and at the port – access to lawyers is structurally prevented or made impossible, there is already de facto no effective legal remedy. In such a case, it follows directly from the fundamental and human rights obligation to guarantee an effective remedy that, where necessary, a free legal advice infrastructure must be maintained. Legal advice must be accessible in fact and actually available.⁹³

In cases of forced returns, the ECHR has affirmed several times that the remedy can only be considered effective if it has suspensive effect.⁹⁴ From the current situation at the border and in the border area it is clear then that the persons subject to pushbacks and returns do not have access to any legal remedy, and the practice thus violates Art. 13 ECHR in conjunction with Art. 3 ECHR.

For the same reasons, the current practice violates Art. 47 CFR. Art. 47 CFR requires an effective *judicial* remedy against the violation not only of those rights laid down in the Charter of Fundamental Rights itself, but anywhere else in EU law, including EU secondary law. Art. 47 CFR therefore has a broader scope than Art. 13 ECHR.⁹⁵ Since applicants have no access to any legal remedy against their return or denial of entry, not only are their fundamental rights violated, but several of their rights under EU secondary law are as well (see below C.I.5). The absence of any judicial remedy constitutes a clear violation of Art. 47 CFR.

4. The Prohibition of Collective Expulsion

The prohibition of collective expulsion is laid down in Art. 4 Protocol No. 4 of the ECHR, which prohibits states from refusing entry to large groups of asylum seekers at border checkpoints without individual examination. While Greece did not sign that protocol,⁹⁶ Greece is bound by Art. 19 para. 1 CFR, which contains the same prohibition of collective expulsion. ECtHR jurisprudence is relevant to the interpretation of Art. 19 para. 1 CFR due to the Art. 52 para. 3 CFR.

Member states are bound by the CFR when implementing EU law, cf. Art. 51 para 1 CFR (see above). When refusing entry to third country nationals at the external border, member states implement Art. 14 Regulation (EU) 2016/399 (Schengen Borders Code)⁹⁷ and are therefore

⁹¹ Ibid., para. 389.

⁹² Ibid., para. 288 et seq.

⁹³ Ibid., para. 319 et seq.

⁹⁴ Ibid., para. 293; ECtHR Judgment of 05 February 2002 – Appl. no. 51564/09 – Čonka, para. 81-83.

⁹⁵ Cf. Anna Lübke, ‘The Elephant in the Room’, *Verfassungsblog* 19 February 2020, available at: <https://verfassungsblog.de/the-elephant-in-the-room/>.

⁹⁶ Council of Europe, ‘Chart of signatures and ratifications of Treaty 046, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto’ (13 March 2020), available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/046/signatures?p_auth=DuU4mz42.

⁹⁷ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movements of persons across borders (Schengen Borders Code) (codification), hereafter: Schengen Borders Code.

clearly bound by the CFR. But member states also implement EU law – and are therefore bound by the CFR – when returning third country nationals from their territory, as such returns are governed by the Return Directive.⁹⁸

To begin with, the prohibition of collective expulsion also applies to situations of refused entry,⁹⁹ if the denial of entry concerns the ‘immediate and forcible return of aliens from a land border following an attempt by a large number of migrants to cross that border in an unauthorised manner and en masse’.¹⁰⁰ As this is arguably the case at the Greek-Turkish land border, the denial of entry to a large group of migrants without an individual examination constitutes a collective expulsion within the meaning of Art. 4 Protocol 4 ECHR, Art. 19 para. 1 CFR.¹⁰¹

However, in its recent decision *N.D. & N.T.* the ECtHR held that in instances of unlawful border crossings by large groups using force, it must also be taken into account whether the respective convention state provided *genuine and effective access to means of legal entry, in particular border procedures*.¹⁰² Importantly, a state’s efforts to pushback large groups trying to cross the border with force will comply with the prohibition of collective expulsion only if other legal pathways for requesting entry exist and are effectively accessible. Only in those cases, the ECtHR argued, shall the state’s denial of entry and the failure of conducting an individualized procedure be interpreted as a consequence of the individual’s own conduct.¹⁰³

Within the current political and media discourse, this judgment is often referred in order to justify the denial of entry currently taking place at the Greek-Turkish land border. Manfred Weber, chair of the EPP group in the European Parliament, states: ‘We have now recently received a ruling from the European Court of Human Rights in Strasbourg, which has just applied the same procedure as that applied by the Spanish authorities in Morocco and Ceuta, for example, that even if there are collective attacks on the border, it is then possible to repatriate collectively. This is now also being implemented in Greece.’¹⁰⁴

This reference to the judgment in order to justify the current measures in Greece is wrong and highly misleading. A close look at the judgment makes clear that the Court found that Spain had not breached the prohibition of collective expulsion because it provided alternative legal avenues for the applicants to ask for entry to Spanish territory, including the possibility of

⁹⁸ See C.I.5. on the Return Directive. The fact that member states are bound to the CFR when implementing directives follows from the well-established case law of ECJ, see e.g. ECJ Judgment of 17 April 2018 – C-414/16 – Egenberger, para. 49. The mere fact that Greece obviously does not implement the Return Directive and the Schengen Borders Code in a lawful way cannot circumvent the applicability of the CFR.

⁹⁹ ECtHR Judgment of 13 February 2020 – Appl. nos. 8675/15, 8697/15 – *N.D. & N.T.*, para. 90, 124.

¹⁰⁰ *Ibid.*, para. 166.

¹⁰¹ See in detail: *ibid.*, Rec. 164 et seqq.

¹⁰² *Ibid.*, Rec. 201.

¹⁰³ *Ibid.*, Rec. 231. See for the justified criticism of this argument: Anna Lübke, ‘The Elephant in the Room. Effective Guarantee of Non-Refoulement after ECtHR *N.D. and N.T.*’, 19 February 2020, available at: <https://verfassungsblog.de/the-elephant-in-the-room/>; Constantin Hruschka, ‘Hot Returns bleiben in der Praxis EMRK-widrig’, 21 February 2020, available at: <https://verfassungsblog.de/hot-returns-bleiben-in-der-praxis-emrk-widrig/>.

¹⁰⁴ Cf. Deutschlandfunk, ‘An der Außengrenze muss Recht und Ordnung durchgesetzt werden’, 2 March 2020, available at: https://www.deutschlandfunk.de/europaeische-fluechtlingspolitik-an-der-aussengrenze-muss.694.de.html?dram:Art_id=471420.

asking for asylum at official border crossing points.¹⁰⁵ (Showing that this was not actually the case and that the judgment has technical deficiencies¹⁰⁶ is not task of this opinion.)

As described above, several thousand asylum seekers are currently demanding entry to Greek territory at the official border crossing point of Greece's external border, Kastanies. There is *no legal procedure* for these asylum applicants to request entry to Greek territory or to submit asylum applications at the border. On the Greek-Turkish border, there has not been any legal procedure for asylum applicants to request entry to Greece, rather unlawful pushbacks have been in place over the last years.¹⁰⁷ This type of border management is clearly not in accordance with the Court's decision, which explicitly demands that states increase the legal ways for individuals to submit asylum applications at borders.¹⁰⁸

The ECHR has already tried to clarify this in its judgment in an obiter dictum: 'However, it should be specified that this finding does *not* call into question the broad consensus within the international community regarding the obligation and necessity for the Contracting States to protect its borders – either its own borders or the external borders of the Schengen area, as the case may be – in a manner which complies with the Convention guarantees, and in particular with the obligation of non-refoulement.'¹⁰⁹

Therefore, it is clear that the current measures at the Greek-Turkish land border violate the prohibition of collective expulsion laid down in Art. 19 para. 1 CFR.

5. The Obligation to Conduct a Procedure in Line with EU Secondary Law

Whether a person is entitled to benefit from the guarantees of the Common European Asylum System depends on the scope of the respective Directives and Regulations. For the Directives 2013/32/EU (Asylum Procedures Directive – APD), 2013/33/EU (Reception Conditions Directive), 2011/95/EU (Qualifications Directive) and for the Regulation (EU) 604/2013 (Dublin Regulation III) to apply, an asylum application would have to be lodged.¹¹⁰ Directive 2008/115/EC (Returns Directive), on the contrary, is only applicable in case a person is not residing legally in the respective country.

a. 'Asylum Application' as Triggering the Application of EU asylum law

The European asylum law is based on a wide and non-formal definition of an asylum application. All of these instruments¹¹¹ understand an 'asylum application' as 'a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of the Directive 2011/95/EU

¹⁰⁵ ECtHR Judgment of 13 February 2020 – Appl. nos. 8675/15, 8697/15 – N.D. & N.T., para. 213-220.

¹⁰⁶ Cf. Maximilian Pichl/ Dana Schmalz, 'Unlawful may not mean without rights', Verfassungsblog, 14 February 2020, available at: <https://verfassungsblog.de/unlawful-may-not-mean-rightless/>.

¹⁰⁷ Cf. Greek Council for Refugees/Arsis/ HumanRights360, 'The new normality: Continuous push-backs of third country nationals on the Evros river', 2019, available at: <https://www.gcr.gr/en/news/press-releases-announcements/item/1028-the-new-normality-continuous-push-backs-of-third-country-nationals-on-the-evros-river>.

¹⁰⁸ ECtHR Judgment of 13 February 2020 – Appl. nos. 8675/15, 8697/15 – N.D. & N.T., para. 232.

¹⁰⁹ Ibid (emphasis added).

¹¹⁰ Cf. Art. 3 Asylum Procedures Directive (APD), Art. 3 APD, Art. 3 Dublin Regulation III and the scope of Qualifications Directive to 'process asylum applications'.

¹¹¹ Cf. Art. 2 lit. b APD, Art. 2 lit. h Qualifications Directive, Art. 2 lit. a Reception Conditions Directive in conjunction with Art. 2 lit. h Qualifications Directive, Art. 2 lit. b Dublin Regulation III in conjunction with Art. 2 lit. h Qualifications Directive.

(Qualifications Directive), that can be applied for separately.’ As it is enough that the request ‘can be understood’ to be a request for international protection, no formal application is necessary in order for the EU asylum law to apply.

Therefore, individuals arriving by rubber boat on European shores and coming mainly from countries where there is a high risk of persecution, who do not explicitly articulate that they *are not* seeking asylum, have submitted an application for international protection within the meaning of EU law.¹¹² The same applies for persons who have entered the territory through a land border and get in contact with a national authority. This also extends to persons standing towards armed forces at the border fence trying to enter.

Nowhere do these instruments provide for the possibility that the Greek State can simply ‘abolish’ the submission of asylum applications. Quite the contrary: as soon as an application in the described sense is received, a duty arises to forward the application to the responsible authority as soon as possible, specifically within three working days (cf. Art. 3 para 1 APD).

Where the concerned protection seekers do not have contact with the Greek Asylum Service, every national authority is obliged to receive and to accordingly register asylum applications, cf. Art. 6 APD. This also applies to applications lodged at the border or in transit zones, Art. 3 para 1 APD. With a view to the situation at the Greek-Turkish border, applications have therefore been submitted in all conceivable scenarios (see B.I).

b. The Obligation to Ensure the Guarantees From the Asylum Procedures Directive

Given that an asylum application has been submitted, Greece is obliged to ensure the guarantees provided for in the APD. The Directive has been transposed into Greek Law.¹¹³

Outlining all guarantees of the Asylum Procedures Directive would go far beyond the scope of this legal opinion. It must however be emphasized in particular that the Directive provides for a right to stay in the territory during the processing of the asylum application as well as for comprehensive procedural rights, such as the right to a thorough examination of applications, the right to an interpreter, and the right to access to legal counsel.¹¹⁴

c. The Obligation to Initiate a Procedure under the Dublin Regulation III

Additionally, the unlawful exclusion of the respective persons from the scope of the European asylum law also makes the exercise of other rights impossible, e.g. the right to family unity arising from the Dublin Regulation III.

According to Art. 3 para 1, Art. 20 para 1 Dublin Regulation III, Member States are obliged to conduct a procedure to appoint the Member State responsible for conducting the asylum procedure (hereafter: Dublin procedure) as soon as an asylum application is lodged in a Member State. This occurs irrespective of whether an asylum application has already been lodged in another Member State, i.e. irrespective of whether a take-charge procedure (Art. 21

¹¹² Nora Markard/ Helene Heuser, ‘Möglichkeiten und Grenzen einer menschenrechtskonformen Ausgestaltung von sogenannten „Hotspots“ an den europäischen Außengrenzen’, available at: <https://www.jura.uni-hamburg.de/media/ueber-die-fakultaet/personen/markard-nora/markard-heuser-hotspots-2016.pdf>, p. 27 et seq.

¹¹³ Since 01 January 2020 a new asylum law is in force, International Protection Act Law 4636/2019.

¹¹⁴ Art. 9 and 10 APD.

et seq.) or a take-back procedure (Art. 23 et seq.) is to be conducted.¹¹⁵ This applies even if the person concerned has already been returned under a Dublin procedure and again enters the Member State unlawfully.¹¹⁶

Applicants also have an individual right to the correct application of the provisions of the Dublin Regulation III, as it is established case-law of the European Court of Justice (hereafter: ECJ).¹¹⁷ The Greek authorities are also obliged to forward the informal asylum application to the responsible authority as soon as possible (Art. 6 APD).

Therefore, persons who have family members in another Member State are entitled to be reunited with them within the scope of Art. 8-10, Art. 16, Art. 17 para 2 Dublin Regulation III. Suspending asylum applications therefore also jeopardises the Dublin Regulation III and its target to ‘determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection’ (recital 5).

6. The ‘Protection Elsewhere’ Clauses

The obligations described above do not cease to apply when denials of entry or removals are carried out to a country which can supposedly be considered as a ‘safe third country’ or a ‘first country of asylum’.

To begin with, according to the majority opinion in legal scholarship, neither the Geneva Convention 1951 nor the ECHR generally prohibit states from applying so-called ‘protection elsewhere clauses’, i.e. returning asylum applicants to third countries considered ‘safe’ without examining the substance of their asylum applications.¹¹⁸

EU secondary asylum law defines the concept of protection elsewhere in two provisions of the Asylum Procedures Directive: Art. 38 APD concerns cases in which applicants have not yet received protection in Turkey (‘safe third country’). Art. 35 APD concerns those cases in which applicants were already granted protection in Turkey (‘first country of asylum’). Art. 38 para. 1 APD sets common minimum standards for the application of both, the safe third country as well as the first country of asylum concept.¹¹⁹ These standards require, inter alia, that the safe third country respects the principle of non-refoulement and provides for the possibility to request refugee status, and, in case refugee status is granted, to receive protection in accordance with the Geneva Convention 1951.

However, the concept of ‘protection elsewhere’ both under European human rights law as well as EU asylum law requires the examination of each individual case in order to determine whether the third state can actually be considered ‘safe’ for the specific applicant (C.I.6.a).

¹¹⁵ ECJ Judgment of 25 January 2018 – C-360/16 – Hasan, most recently ECJ Judgment of 2 April 2019 – C-582/17, C-582/17 – H. & R.

¹¹⁶ Ibid.

¹¹⁷ See for the first time ECJ Judgment of 7 June 2016 – C-63/15 – Ghezelbash; ECJ, Judgment of 7 June 2016 – C-155/15 – Karim; on the enforcement of formal criteria, see e.g. ECJ Judgment of 26 July 2017 – C-670/16 – Mengesteab; ECJ Judgment of 25 October 2017 – C-201/16 – Shiri.

¹¹⁸ Cf. Guy S. Goodwin-Gil and Jane McAdam, ‘The Refugee in International Law’ (Oxford University Press, 3rd edition, Oxford 2007), 390 et seq.; Cathryn Costello, ‘Safe Country? Says Who?’ International Journal of Refugee Law 28 (2016) 601 et seq.

¹¹⁹ Art. 35 last subpara reads, as if the application of the criteria of Art. 38 para. 1 would be mandatory when applying the first country of asylum concept (‘may take into account’). However, since Art. 38 para. 1 fully codifies criteria deriving from international human rights law, specifically the 1951 Convention and the ECHR, Art. 35 last subpara must be read in a way, that any *first country of asylum* must fulfill the requirements laid down in Art. 38 para. 1 APD; cf.: Jens Vedsted-Hansen, in: Kai Hailbronner/ Daniel Thym (eds.), ‘EU Immigration and Asylum Law’, 2nd edition (Nomos, Baden-Baden 2016), Part D IV, p. 1357.

What is more, Turkey can from the outset not be considered as ‘safe third country’ or ‘first country of asylum’ for the large majority of applicants (C.I.6.b).

a. The Obligation to Conduct an Individual Procedure

First, EU asylum law explicitly obliges states to carry out an individual examination that also includes the possibility to appeal their rejection and bring forwards reasons why the third country is not safe in the individual case, see Art. 35, Art. 38 para. 2, Art. 33 para. 2, Art. 46 para. 1 lit. a (ii) APD. The European Court of Justice has just confirmed that it has to be assessed in any individual case, whether the cumulative requirements laid down in Art. 35, 38 APD are fulfilled when rejecting asylum applications based on the assumption of safety in third country.¹²⁰ When applying Art. 35 ADP, it has to be assessed, whether the applicant received any kind of formalized protection in the third country, which he or she is still entitled to.¹²¹ When applying Art. 38 ADP, an individual connection between third state and applicant needs to be proven, for which it is reasonable to refer the applicant to protection in the third country; the mere transit is not sufficient.¹²² It is self-explanatory that the existence of these prerequisites can only be determined in an individual procedure.

Second, as shown above, the procedural dimension of the non-refoulement principle under refugee law and under human rights law obliges states to carry out an individual procedure. This obligation applies regardless of whether the pushback or deportations results in the applicant being returned to a ‘safe third country’ or ‘first country of asylum’, because it serves to ensure that no individual risks exist for the applicant in purportedly ‘safe’ countries.

However, as the returning country does not conduct an assessment as to the risk of a violation of Art. 3 ECHR with respect to the individual’s country of origin, the ‘safe third country’ concept applies only where, first, the individual will have access to an effective asylum procedure in that country and, second, is not at risk of being returned from that country either directly or indirectly to her or his home country or another state where she or he risks torture or inhuman or degrading treatment. The returning country must therefore take into account all available information about the safe third country’s asylum system and must give applicants the opportunity to demonstrate that the safe third country could not be considered as such due to the circumstances of their individual case.¹²³

Besides the real risk of indirect refoulement, the living conditions in the safe third country must also be in accordance with Art. 3 ECHR. Where asylum applicants are referred to protection in a third country, the living conditions in that country can as such constitute degrading or inhuman treatment. This is the case if the indifference of the authorities of third state towards the living conditions of the applicant, in the words of the ECtHR, ‘were to result in a person who is wholly dependent on public assistance finding himself, irrespective of his will and personal choices, in a situation of extreme material deprivation which did not enable him to satisfy his most basic needs, such as food, washing and housing, and which affected his

¹²⁰ ECJ Judgement of 19 March 2020 – C-564/18 – L.H., para. 28 et seqq., 35.

¹²¹ Ibid., para. 35.

¹²² Ibid., para. 45 et seqq.

¹²³ ECtHR Judgement of 21 November 2019 – Appl. no. 47287/15 – Ilias & Ahmed, para. 148.

physical or mental health'.¹²⁴ Whether precarious living conditions in a third country reach the threshold of a violation of Art. 3 ECHR also depends on the individual vulnerability of the asylum applicant.¹²⁵ Therefore, an individual examination is required also with regards to the material living conditions.

In sum, if Greece wants to refuse entry or return asylum seekers to Turkey on the grounds that Turkey is a safe third country, Greece must still carry out individual procedures in which applicants have the effective opportunity to rebut the presumption of security, either generally or with respect to their individual case. In the light of Art. 3 ECHR as well as EU asylum law, denial of entry as well as returns to Turkey without such individual examination are unlawful.

b. Turkey is not a Safe Third Country or a First Country of Asylum

When applying these standards to the situation of asylum-seekers in Turkey, it is clear that Turkey can by no means be regarded as generally safe.

Turkey already violates the basic minimum conditions provided for in Art. 38 para 1 APD. The example of Syrian citizens should illustrate the justified doubts about the presumption of security in Turkey: There have been several reports, particularly towards the end of 2019, about returns of Syrian nationals into the on-going war in Syria – this is a clear violation of the non-refoulement principle.¹²⁶ Further, Turkey collectively excludes all Syrian citizens from any individualized asylum procedure and therefore from requesting refugee status and enjoying the corresponding protection in accordance with the Geneva Convention 1951. Turkey rather collectively grants a *temporary protection* status to Syrians.¹²⁷ Returning any Syrian to Turkey based on the protection elsewhere clauses therefore clearly violates the requirements set forth in the Asylum Procedures Directive and is also contrary to international public law.¹²⁸

Notably, the above issues for Syrians are only two examples – it has been emphasized continuously over the last years by academics, NGOs and also courts, that Turkey cannot generally be considered as safe third country in light of EU and international law.¹²⁹

7. Conclusion

To conclude, breaches of several human and fundamental rights are currently taking place *en masse* at and around the Greek-Turkish border. In particular, Art. 3 and 13 ECHR as well as

¹²⁴ Established Jurisprudence of ECHR and ECJ since ECtHR Judgment of 21.01.2011 – Appl. no. 30696/09 – M.S.S., para. 263; cf. ECJ Decision of 13 November 2019 – C-540/17, C-541/17 – Hamed & Omar, para. 39.

¹²⁵ ECtHR Judgment of 04 November 2014 – Appl. no. 29217/12 – Tarakhel, para. 119; ECJ Judgment of 19 March 2019 – C-297/17, C-318/17, C-319/17, C-438/17 – Ibrahim et al., para. 93.

¹²⁶ See e.g. Amnesty International, 'Sent to a war zone, Turkey's illegal deportations of refugees to a war zone', October 2019, available at : <https://www.amnesty.org/download/Documents/EUR4411022019ENGLISH.pdf>.

¹²⁷ Cf. AIDA, 'Country Report Turkey', 2019, available at: <https://www.asylumineurope.org/reports/country/turkey/eligibility-criteria>.

¹²⁸ Cf. Anna Lübke, 'Deflection of Asylum Seekers to Ghettos in Third Countries?', *Verfassungsblog*, 4 May 2018, available at: <https://verfassungsblog.de/deflection-of-asylum-seekers-to-ghettos-in-third-countries/>.

¹²⁹ Cf. Catharina Ziebritzki/Robert Nestler, "'Hotspots' an der EU-Außengrenze. Eine rechtliche Bestandsaufnahme'. Arbeitspapier ('Hotspots' at the EU External Border. A Legal Survey) (July 28, 2017), Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper No. 2017-17, available at SSRN: <https://ssrn.com/abstract=3028111>, p. 41 et seq.; Yiota Masouridou/ Evi Kyrioti, 'The EU-Turkey Statement and the Greek Hotspots, A failed European Pilot Project in Refugee Policy', June 2018, available at: <http://extranet.greens-efa-service.eu/public/media/file/1/5625>, p. 9 et. seq.; Administrative Court Munich Decision of 17 July 2019 – M 11 S 19.50722, M 11 S 19.50759, English summary available at: <https://www.equal-rights.org/post/court-of-munich-again-turkey-is-not-a-safe-third-country-is-the-eu-turkey-deal-dead>.

Art. 4, 19 and 47 CFR are violated on a broad scale by unlawful governmental measures. Further, the measures obviously violate EU asylum law.

II. Criminalisation of Asylum Seekers

According to reports, persons who have entered Greece irregularly are being prosecuted, arrested and face accusations of illegal entry with penalties up to 10,000 Euro and three years in prison.¹³⁰ As a matter of course, an asylum procedure would have to be conducted for those persons as well. In addition, the Geneva Convention 1951 also underlines that: ‘Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees, who, coming directly from a territory where their life or freedom was threatened in the sense of Art. 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.’ (Art. 31 para 1 Geneva Convention 1951).

The term ‘refugee’ under the Geneva Convention 1951 is declaratory in nature and includes asylum applicants or persons who have not had a chance to lodge an asylum claim. While one might argue that the persons concerned do not come ‘directly’ from the respective territory, this term is misleading. It is widely agreed in scholarly literature¹³¹ and case law¹³² that Art. 31 para 1 exempts all applicants for protection from criminal liability, in terms of penalties, for illegal residence or illegal entry. The clause, in line with the original version of the Convention, which was expanded in scope by the Protocol 1967, was only intended to prevent persons from seeking protection more than once in different States, thus extending the periods for which protection is granted beyond the extent actually provided for. Persons who have already found protection elsewhere and have settled there permanently should therefore be excluded.¹³³

Therefore, imposing general penalties for illegal entry is not in line with the Geneva Convention 1951.

III. Use of Force against and Degrading Treatment of Asylum Seekers at the Borders

Recently, there have been increased reports of various forms of physical violence against asylum seekers who are present at the border. The violent acts are carried out by private individuals or by the state itself.¹³⁴

¹³⁰ See above B.I.

¹³¹ Gregor Noll, in Andreas Zimmermann (ed.), ‘The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol’ (Oxford University Press, Oxford 2011), Art. 31, para 39 et seq with further findings.

¹³² Cf. only German Constitutional Court (Bundesverfassungsgericht) Judgment of 8 December 2014 – 2 BvR 450/11, para 25 et seq., 30 et seq.

¹³³ Cf. James Hathaway, ‘The Rights of Refugees under International Law’ (Cambridge University Press, Cambridge 2005), p. 400; Gregor Noll, in Andreas Zimmermann (ed.), ‘The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol’ (Oxford University Press, Oxford 2011), Art. 31, para 50 et seq.

¹³⁴ See above B.I.

1. Use of Live Ammunition by State Forces

Reports suggest that Greek state forces are using live ammunition, and that this has already caused at least one fatality.¹³⁵ Assumed that those reports are correct, this would amount to a violation by Greece of its obligations under Art. 2 ECHR.

Art. 2 para 1 sentence 1 ECHR provides: ‘Everyone’s right to life shall be protected by law.’ The ECtHR has stressed in several occasions that Art. 2 para 2 ECHR ‘does not primarily define the situations in which it is permissible to intentionally inflict death, but describes those in which it is possible to ‘use force’, which may lead to the *unintentional* infliction of death.’¹³⁶ Art. 2 para 2 ECHR establishes an exhaustive list of exceptions from the rule that the taking of life – no matter whether intentionally or unintentionally – is prohibited. This provision thus standardises the situations in which violence that could lead to death may exceptionally be used. The ECtHR has defined that only where the use of force is ‘absolutely necessary’ in order to achieve one of the listed purposes, a lethal use of force may be justified.¹³⁷ The use of force by state officials to achieve one of the objectives may be justified under this provision only where it is based on an honest belief and in good faith that one of the preconditions is met, even though it subsequently proves to be mistaken.¹³⁸

Further, Art. 2 ECHR obliges Convention States to plan a life-threatening operation ‘so as to minimize, to the greatest extent possible, recourse to lethal force’.¹³⁹ This includes the general selection and appropriate training of state officials.¹⁴⁰ This, as a matter of course, includes the planning and the controlling of the actual operation.¹⁴¹ It would have to be assessed in detail whether those conditions have been met by Greece’s planning of the deployment of its state forces to the border.

Finally, however, the conduct of the persons killed must also be taken into account in the assessment. In particular, where the killed persons constitute a danger to the life and physical integrity of the state forces or where they are themselves armed, the lethal use of force might be justified.¹⁴² While this would require an assessment of the individual case, it does seem highly improbable, based on the reports and to the best of the authors’ knowledge, that those conditions were met in the cases at hand.

2. Degrading Treatment Inflicted by State Forces

It is furthermore reported that persons have been pushed back half-naked¹⁴³ or have been sexually harassed before being pushed back,¹⁴⁴ and that persons’ mobile phones were

¹³⁵ As found by investigations by Forensic Architecture, see: Forensic Architecture, ‘Joint Statement on the ongoing Violence at the Greece-Turkey Border’, 5 March 2020, available at: <https://forensic-architecture.org/programme/news/joint-statement-on-the-ongoing-violence-at-the-greece-turkey-border>.

¹³⁶ See only: ECtHR Judgment of 12 March 2013 – Appl. no.16281/10 – Aydan, para. 64 (emphasis added).

¹³⁷ The criterion does hence not suggest that the death itself could be absolutely necessary, see ECtHR Judgment of 27 September 1995 – Appl. No. 18984/91 – McCann et al, para. 148.

¹³⁸ ECtHR Judgment of 12 March 2013 – Appl. no.16281/10 – Aydan, para. 64.

¹³⁹ ECtHR Judgment of 27 September 1995 – Appl. no 18984/91 – McCann et al, para. 194.

¹⁴⁰ ECtHR Judgment of 26 July 2005 – Appl. no. 35072/97 – Şimşek et al., para. 105, 109

¹⁴¹ ECtHR Judgment of 27 September 1995 – Appl. no 18984/91 – McCann et al, para. 194.

¹⁴² ECtHR Judgment of 6 July 2005 – Appl. no. 43577/98, 43579/98 – Natchova, para. 95, 107.

¹⁴³ See Human Rights Watch, Greece: Violence against Asylum Seekers at the Border, available at: <https://www.hrw.org/news/2020/03/17/greece-violence-against-asylum-seekers-border>.

¹⁴⁴ See Istanbul Bar Association Human Rights Centre for Refugee Rights, ‘Report on Istanbul Bar Association Human Rights Center’s Visit to Pazarkule Checkpoint on 4-5 March 2020’, 8 March 2020, available at: <https://twitter.com/istbaroihm/status/1236757730637099012?s=20>.

confiscated to prevent them from making any calls.¹⁴⁵ If those reports are true, the treatment would also amount to inhumane and degrading treatment in the sense of Art. 3 ECHR. According to the case law of the ECtHR, a treatment is or conditions are degrading or inhumane if they are likely to arouse in her ‘feelings of fear, anguish, or inferiority capable of inducing desperation’.¹⁴⁶ A treatment is considered to be ‘degrading’ when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, and is capable of breaking an individual’s moral and physical resistance. It is sufficient if a victim is humiliated in his or her eyes, even if not in the eyes of others.¹⁴⁷

Being sexually harassed or pushed over a river half-naked shows a clear lack of respect for the individual and diminishes her or his human dignity. The persons are only used as sexual objects or to be made fun of.

3. Violence by Private Individuals (*‘Volunteer Border Guards’*)

There are also reports that ‘volunteer border guards’ are involved in pushbacks and are using armed force. The behaviour of those private ‘village guards’ cannot be *directly* attributed to the state of Greece.¹⁴⁸ However, this does *not* mean that Greece might not be responsible under international human rights law for the behaviour of those village guards, as will be shown in the following.

a. Obligation to Protect

The ECtHR describes the prohibition of torture, inhumane and degrading treatment and the right to life as *the most fundamental values in democratic societies* and as *closely bound up with respect for human dignity*.¹⁴⁹

Greece must not only abstain from inflicting such treatment upon asylum seekers through its state officials. Convention States are also obliged by Art. 2 and 3 ECHR to protect persons from mistreatment done by private parties. This explicitly applies for particularly vulnerable groups.¹⁵⁰

b. Criteria to Attribute Behaviour of Private Parties

In case States know or must know about a possible mistreatment, they have to take measures accordingly and can otherwise be held directly responsible.¹⁵¹ States can be held responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.¹⁵² Therefore, Greece also has a duty to protect asylum seekers from treatment that would amount to a violation of Art. 3 ECHR, such as severe

¹⁴⁵ See New York Times, “‘We are Like Animals’: Inside Greece’s Secret Site for Migrants”, 10 March 2020, available at: <https://www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html>.

¹⁴⁶ ECtHR Judgment of 21 January 2011 – Appl. no. 30696/09 – M.S.S., para 263.

¹⁴⁷ *Ibid.*, para. 220.

¹⁴⁸ The court once attributed responsibility to Turkey for the behaviour of ‘village guards’, those, however, were paid and advised by the state itself, cf. ECHR, Judgment of 24 May 2005 - Nos. 36088/97 and 38417/97 – Acar et al., §§ 80 et seq.

¹⁴⁹ See e.g. ECHR, Judgment 24 March 2008 – Appl. no. 23458/01 – Giuliani and Gaggio., para 174 et seq.

¹⁵⁰ Cf. ECHR, Judgment of 23 September 1998 – Appl. no. 25599/94 – A. v the United Kingdom, para 22

¹⁵¹ Cf. ECHR, Judgment of 28 March 2000 – Appl. no. 22535/93 – Kaya, para 116.

¹⁵² See e.g. ECtHR Judgment of 09 June 2009 – Appl. no. 33401/12 – Opuz., para 79 et seq.

mistreatment or refoulement when so-called volunteer border guards are involved. This applies when the state authorities know or should have known of the danger.¹⁵³

As has been shown, the Greek State is aware that volunteer border guards are ‘supporting’ official forces at Greek-Turkish land border.¹⁵⁴

c. Measures Attributed to the Greek State

In this respect, the push-backs carried out by non-governmental bodies have already been mentioned above, which, in the absence of an individual assessment, regularly constitute a violation of Art. 3 ECHR. Moreover, Art. 2 ECHR ‘covers not only situations where certain action or omission on the part of the State led to a death complained of, but also situations where, although an applicant survived, there clearly existed a risk to his or her life’.¹⁵⁵ The measures required to protect those who are attacked by private parties depend on the situation. However, not taking any measures in favour of the attacked is a clear failure to act with due diligence to prevent violations of rights, as the government knows or must know about the mistreatment and the actions carried out by ‘volunteer border guards’. By not taking any measures, the Greek government is therefore violating the obligation to protect persons against violations of Art. 2 and 3 ECHR. Yet, the Greek government has, to date, not taken any steps to prevent individuals from using force against protection seekers at the borders.

4. Deaths at Borders and The Obligation to Investigate under Art. 2 ECHR

According to well established case law of the ECtHR, Art. 2 ECHR also creates an obligation to investigate without delay, thoroughly and impartially, and ex officio – it must not depend on any form of application – and by an independent body, any deaths occurring in the course of interventions by public authorities.¹⁵⁶ The investigation must also be effective, i.e. it must produce a result that is sufficiently substantiated and justified by evidence. To this end, all reasonable steps must be taken, e.g. preservation, such as witness statements, trace analysis, autopsy.¹⁵⁷ For an examination to be independent it has to be independent in terms of hierarchy, practice and institutions, and hence cannot be conducted by officers of the same police station or soldiers of the same squad.¹⁵⁸ States therefore have to not only to reconstruct the causes of the event but also to find out the responsible persons.

After all, it does not have to be secured that the state itself was solely responsible for the death, on the contrary, investigations have to be conducted regarding every violent death, no matter whether it was caused by a state or not.¹⁵⁹ This is, according to the Court, because Art. 2 ECHR

¹⁵³ ECHR, Judgment of 28 October 1998 – Appl. no. 23452/94– Osman, §§ 115 et seq.; ECHR, Judgment of 8 November 2005 – Appl. no. 34056/02– Gongardze., para 164 et seq.

¹⁵⁴ See B.I.

¹⁵⁵ ECHR, Judgment of 15 May 2012 - Applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05– Kolyadenko et al., § 151

¹⁵⁶ Cf. inter alia ECtHR Judgment of 27 July 1998 – Appl. no. 21593/93– Güleç, para. 80 et seq; ECtHR Judgment of 4 May 2001 – Appl. no. 24764/94 – Jordan, para. 105; ECtHR Judgment of 24 April 2014 – Appl. no. 39583/05 – Perevedentyevy, para. 114 et seq; Overview: Ralf Alleweldt, in Oliver Dörr/ Rainer Grote/ Thilo Maurahn, GG/EMRK, Konkordanzkommentar (Mohr Siebeck Tübingen 2013), Chapter 10, para 106 et seq; Christoph Grabenwarter/ Katharina Pabel, ‚Europäische Menschenrechtskonvention‘, 6th Ed. (CH Beck, Munich 2016), § 20 para 31 et seq.

¹⁵⁷ ECtHR Judgment of 27 June 2000 – Appl. no. 21968/98 – Salman, para. 106.

¹⁵⁸ ECtHR Judgment of 28 May 2002 – Appl. no 43290/98 – McShane, para. 95; Judgment of 15 May 2007 – Appl. No. 52391/99 – Ramsahai, para. 324 et seq.

¹⁵⁹ ECtHR Judgment of 2 September 1998 Appl. no. 22495/93 Yaşa, para. 100; ECtHR Judgment of 14 May 2002 – Appl. no. 22876/93 – Semse Önen, para. 87.

would be without value, if in practice there would not be a procedure to evaluate the lawfulness of the killing – Convention States shall ‘secure human rights’.¹⁶⁰

Hence, Greece – and Turkey – are obliged under the ECHR to investigate the deaths at the border in the described manner.

D. No Justification of the Measures under EU or International Law

In the political and legal debate, in particular three arguments have been put forward in order to justify the measures at the Greek-Turkish border and the suspension of the asylum law in Greece, namely: the emergency clause of Art. 78 para 3 TFEU, the argument of an ‘instrumentalisation’ of EU asylum law, and the public policy clause of Art. 72 TFEU. Neither of those arguments is persuasive. In particular, EU law does not allow for a derogation of fundamental rights, let alone for a violation of the EU’s foundational values, during an extraordinary factual situation. In other words: There is no lawless state of exception under EU law.

I. The Emergency Measures Clause of Art. 78 para 3 TFEU

The Greek Prime Minister has invoked Art. 78 para 3 TFEU in order to support the decision to ‘suspend’ the asylum law for one month. In his words on Twitter: ‘Our national security council has taken the decision to increase the level of deterrence at our borders to the maximum. As of now we will not be accepting any new asylum applications for 1 month. We are invoking Art. 78.3 of the TFEU to ensure full European support.’¹⁶¹

This reference to Art. 78 para 3 TFEU is misleading and wrong. Neither the procedural nor the substantive requirements of that provision are fulfilled here. In any case, Art. 78 para 3 TFEU does not allow states to violate the non-refoulement principle as granted by EU and international law, something that has been correctly emphasized by the UNHCR.¹⁶²

Art. 78 para 3 TFEU provides that ‘in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.’

The clause has until now mainly been interpreted as a legal basis allowing for measures implementing the principle of solidarity.¹⁶³

In terms of procedural requirements, as becomes clear from the wording of Art. 78 para 3 TFEU already, the clause does *not* allow a member state to *unilaterally* take the measures which it considers appropriate. The provision rather prescribes the following procedure for a Council Decision: First, the Commission must propose a measure. Second, the European Parliament

¹⁶⁰ Cf. Art. 1 ECHR. See first in: ECtHR Judgment of 27 September 1995 – Appl. no 18984/91 – McCann et al, para. 161.

¹⁶¹ Prime Minister of Greece, ‘Statement via Twitter’, 1 March 2020, available at: <https://twitter.com/PrimeministerGR/status/1234192922813267976>.

¹⁶² UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’, 2 March 2020, available at: <https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>.

¹⁶³ European Parliamentary Research Service, ‘Emergency measures on migration: Art. 78(3) TFEU’, 6 March 2020, available at [https://www.europarl.europa.eu/thinktank/de/document.html?reference=EPRS_ATA\(2020\)649325](https://www.europarl.europa.eu/thinktank/de/document.html?reference=EPRS_ATA(2020)649325).

must be heard. Then, third, the Council may decide to adopt the measure. As has been clarified by the ECJ, the legislative procedure under Art. 289 para 3 TFEU does not apply, so that unanimity is not required in the Council, and it is sufficient that the Parliament is heard.¹⁶⁴

The substantive requirements have been clarified by the CJEU in regard to its two decisions establishing the so-called Relocation Programme adopted on the basis of Art. 78 para 3 TFEU.¹⁶⁵ The ECJ clarified that, in principle, a measure adopted under Art. 78 para 3 TFEU may provide for a deviation from secondary EU asylum law,¹⁶⁶ but that the deviation must be strictly temporarily limited, and that it must comply with the principle of proportionality.¹⁶⁷

However, Art. 78 para 3 TFEU does *not* allow for measures which would amount to a violation of EU primary law, including the CFR.¹⁶⁸ Otherwise, the Council could, in a procedure under Art. 78 para 3 TFEU deviate from – and hence de facto amend – the EU treaties. This would amount to a circumvention of the Treaty amendment procedure laid down in Art. 48 TEU.

Therefore, Art. 78 para 3 TFEU does not permit measures that violate the non-refoulement principle and rights granted by the CFR.

II. The Argument of an ‘Instrumentalisation’ of Asylum Law

Secondly, a general reference to a purported ‘instrumentalisation’ of asylum law cannot justify a deviation from binding EU and international law.

Greek politicians have argued that Turkey is ‘using desperate people to promote this geopolitical agenda’,¹⁶⁹ and that Turkey ‘is making use of innocent people in its efforts to destabilize Greece and Europe’,¹⁷⁰ or have even compared the movement of asylum seekers towards the EU to an ‘organized invasion from a foreign country’.¹⁷¹ Similarly, European Commission President has stated that ‘those who seek to test Europe’s unity will be disappointed. We will hold the line and we will prevail. Turkey is not an enemy and people are not just means to reach a goal.’¹⁷² The fact that those statements rhetorically refer to a situation of armed conflict seems so far-fetched from a legal perspective, that it does not seem necessary to further consider this line of argument in the following.

What does require some attention is the – almost equally far-fetched – argument that EU and international asylum law is not applicable to the situation at hand because it is not covered by

¹⁶⁴ ECJ Judgment of 6 September 2017 – C-643/15, C-647/15 – Slovakia and Hungary vs. Council.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid., para. 66.

¹⁶⁷ Ibid., para. 78.

¹⁶⁸ European Parliamentary Research Service, ‘Emergency measures on migration: Art. 78(3) TFEU’, 6 March 2020, available at: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649325/EPRS_ATA\(2020\)649325_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/649325/EPRS_ATA(2020)649325_EN.pdf); ECRE, Statement on the Situation at the Greek Turkish Border, available at: <https://www.ecre.org/ecre-statement-on-the-situation-at-the-greek-turkish-border/>; UNHCR, ‘UNHCR statement on the situation at the Turkey-EU border’, 2 March 2020, available at: <https://www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html>; Daniel Thym, ‘Deutschland macht eigentlich das Gleiche wie die Griechen’, 3 March 2020, available at <https://www.zeit.de/politik/ausland/2020-03/griechisch-tuerkische-grenze-fluechtlinge-tuerkei-griechenland-daniel-thym>.

¹⁶⁹ The Guardian, ‘Migration: EU praises Greece as ‘shield’ after Turkey opens border’, 3 March 2020, available at: <https://www.theguardian.com/world/2020/mar/03/migration-eu-praises-greece-as-shield-after-turkey-opens-border>.

¹⁷⁰ Deutsche Welle, ‘EU officials to visit Greek-Turkish border amid migrant surge’, 3 March 2020, available at: <https://www.dw.com/en/eu-officials-to-visit-greek-turkish-border-amid-migrant-surge/a-52617903>.

¹⁷¹ Ibid.

¹⁷² Deutsche Welle, ‘EU offers Greece migration support amid mounting refugee crisis’, 3 March 2020, available at: <https://www.dw.com/en/eu-offers-greece-migration-support-amid-mounting-refugee-crisis/a-52623868>.

the *telos* of asylum law. This is because the Greek Suspension Act refers to ‘the extraordinary circumstances of the urgent and unforeseeable necessity to confront an asymmetrical threat to the national security, which *prevails over the reasoning for applying the rules of EU law and international law on asylum procedures* [...]’.¹⁷³

To be sure, the argument that the rationale or the *telos* of a certain law does not cover a certain situation is, in principle, a valid legal argument.¹⁷⁴ Historical interpretation, referring to the origins of a certain international treaty, is, in principle, also a valid legal argument to support a specific reading or to clarify a clause that cannot be elucidated by wording, context, and *telos*.¹⁷⁵ And even EU primary law may, in principle, be subject to a constitutional transformation in the sense that where the practice of EU institutions continuously disregards a certain provision, that provision may have to be understood as *de facto* overturned.¹⁷⁶

However, neither of those arguments leads to the conclusion that the violation of EU and international law in the situation at hand may be somehow re-interpreted as ‘actually not amounting to a violation’. This becomes clear from the following three arguments.

First, a historical and teleological interpretation of the Geneva Convention 1951 leads to the conclusion that it covers the situation at hand. The Convention was adopted in order to address the situation in Europe after World War II.¹⁷⁷ In that historical context, refugees were forced to leave certain countries. It therefore follows *a fortiori* that the permission to leave Turkey – which is actually not an extraordinary situation, but rather complies with the human right to leave any country¹⁷⁸ – is covered by the *telos* of the Geneva Convention 1951.

Second, and more importantly, neither a teleological nor a historical interpretation of EU law may contradict the values enshrined in Art. 2 TEU. In other words: No method of interpretation may be invoked to justify an interpretation that amounts to a violation of the rule of law or fundamental rights. Such an outcome would be at odds with basic constitutional foundations of the EU.

Finally, and in any case, the EU, or its member states can hardly invoke the instrumentalisation of asylum law as an argument in situations where they, through a political agreement with a third state, put the latter in a position to ‘instrumentalise’ a large number of refugees in the first place. This is however exactly what the EU has done with the EU-Turkey Statement. What is more, the EU has previously instrumentalised the externalization of migration control in order to prevent people from reaching its borders and therefore being bound by an obligation to carry

¹⁷³ Suspension Act (fn. 37) preamble para 2 (emphasis added).

¹⁷⁴ Art. 31 para 1 of the Vienna Convention on the Law of Treaties (VCLT), UNTS 1155, 331: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

¹⁷⁵ Art. 32 VCLT: ‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation according to Art. 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.’

¹⁷⁶ Cf. Michalis Ioannidis, ‘Europe’s new Transformations: How the EU economic constitution changed during the Eurozone Crisis’, in: *Common Market Law Review* 53/5 (2016) pages 1237-1316.

¹⁷⁷ UNHCR, ‘The Refugee Convention, 1951. The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis’, available online: <https://www.refworld.org/docid/53e1dd114.html>, p. 2.

¹⁷⁸ Nora Markard, ‘The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries’, in *European Journal of International Law*, Volume 27 (2016) Issue 3, pages 591–616.

out individual asylum procedures and, in some instances, grant international protection to those trying to reach EU territory.

III. The Public Policy Clause of Art. 72 TFEU

The Suspension Act invokes ‘the extraordinary circumstances of the urgent and unforeseeable necessity to confront an asymmetrical *threat to the national security*’ and ‘the sovereign right and the constitutional obligation of the Hellenic Republic to safeguard its integrity, and its right to take any measure to this effect.’¹⁷⁹

As explained above, the ‘suspension of the asylum law’ and the ensuing deportations without individual procedure constitute a violation of EU and international law. They can also not be justified on the basis of the public policy clause of Art. 72 TFEU.¹⁸⁰

The public policy clause of Art. 72 TFEU allows the member states to derogate from EU law.¹⁸¹ In particular, it enables member states to *deviate* from EU asylum law, provided that the preconditions of that clause are met, and that the derogation does not exceed the scope it permits. Art. 72 TFEU provides that EU asylum law ‘shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.’

The provision must be interpreted in light of the principle of the national security clause enshrined in Art. 4 para 2 sentence 2 and 3 TEU.¹⁸² The competences of the European Court of Justice are restricted in that context, Art. 276 TFEU.¹⁸³ It is hence not surprising that the CJEU has not yet provided an interpretation of Art. 72 TFEU.

1. Preconditions for the application of the public policy clause of Art. 72 TFEU

As a precondition of invoking Art. 72 TFEU, the ‘law and order’ or the ‘internal security’ of the concerned member state must be endangered, and the concerned member state must provide a substantiated justification for invoking the public policy clause in case of a deviation from EU law.¹⁸⁴ Due to the autonomous interpretation principle of EU law, the terms ‘law and order’ and ‘internal security’ must be interpreted consistently throughout the Union; member state definitions are not dispositive.¹⁸⁵ Hence, not every instance in which a member state invokes the public policy clause is actually covered by it from the outset. At the same time, and in line with the limited competences of the CJEU to review an invocation of Art. 72 TFEU, there is

¹⁷⁹ Suspension Act (fn. 37), preamble para 2, 3 (emphasis added).

¹⁸⁰ See Daniel Thym, ‘Deutschland macht eigentlich das Gleiche wie die Griechen’, 3 March 2020, available at <https://www.zeit.de/politik/ausland/2020-03/griechisch-tuerkische-grenze-fluechtlinge-tuerkei-griechenland-daniel-thym>; Constantin Hruschka, ‘Was Griechenland an der Grenze zur Türkei tut, ist illegal’, 5 March 2020, available at: <https://www.nzz.ch/international/interview-mit-constantin-hruschka-ld.1544581>.

¹⁸¹ Matthias Rossi, ‘Art. 72 AEUV’ in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4th Ed. (CH Beck, Munich 2011), para. 5 with further references; Hans-Holger Herrfeld, ‘Art. 72 AEUV’, in: Jürgen Schwarze/ Ulrich Becker/Armin Hatje/Johann Schoo (eds.), EU-Kommentar (4th edition, Nomos, Baden-Baden 2019), para. 5.

¹⁸² Matthias Rossi, *ibid.*, para. 1.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*, para. 7; Wolfgang Weiß, ‘Art. 78 AEUV’, in Rudolf Streinz (ed.), EUV/AEUV (CH Beck, Munich 2018), para. 6.

¹⁸⁵ Matthias Rossi, ‘Art. 72 AEUV’ in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4th Ed. (CH Beck, Munich 2011) para 6. But see: Hans-Holger Herrfeld, ‘Art. 72 AEUV’, in: Jürgen Schwarze/Ulrich Becker/Armin Hatje/Johann Schoo (eds.), EU-Kommentar (4th edition, Nomos, Baden-Baden 2019), para 8; Kai Hailbronner, in: EUV/EGV (Heymanns), Art. K, para 73.

some room for interpretation by the concerned member state to define whether a given situation qualifies as triggering the public order clause.¹⁸⁶

Some interpret the clause in line with the jurisprudence of the CJEU in the context of the internal market.¹⁸⁷ More convincingly, the term ‘law and order’ in Art. 72 TFEU stands in the international law tradition of the ‘ordre public’ and thus refers to fundamental characteristics of the national legal order.¹⁸⁸ The term ‘internal security’ refers to the essential institutions of the state including those tasks that are usually carried out by the police.¹⁸⁹ The threshold is quite high, such that Art. 72 TFEU was not even invoked in the context of the 2015 ‘refugee crisis’. Even the provisions in the Dublin Regulation III allowing for a deviation from the general rules were interpreted by the CJEU in a rather strict and narrow manner.¹⁹⁰ It is therefore highly doubtful whether the situation described above justifies an invocation of Art. 72 TFEU by Greece as a justification for its measures. Turkey’s decision to open its borders did not create a situation in which the fundamental characteristics of the national legal order were endangered, nor is it apparent that the spike in arrivals amounts to a threat to the internal security of Greece – certainly not when compared with the experience of 2015.

2. No justification of a violation of fundamental rights

Further, and regardless of the question whether the preconditions of Art. 72 TFEU are met, it is generally acknowledged that the public policy clause cannot be interpreted as allowing a deviation from *any* possible provision of EU law.

In particular, Art. 72 TFEU does *not* allow a violation of absolute fundamental rights.¹⁹¹ As measures based on Art. 72 TFEU fall within the scope of EU law, such measures must be in line with the CFR, Art. 51 para 1 CFR.¹⁹² The current measures implemented by Greece however do violate absolute fundamental rights, especially Art. 4 and Art. 19 CFR, as shown above.¹⁹³

The re-introduction of checks at the EU internal borders illustrates very well the kind of measures which might be justified under Art. 72 TFEU in conjunction with the respective secondary law provisions concretising the public order clause.¹⁹⁴ The measures in question are however of an entirely different nature: Those measures violate absolute fundamental rights as granted under EU and international law.

¹⁸⁶ Matthias Rossi, ‘Art. 72 AEUV’ in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4th Ed. (CH Beck, Munich 2011), para 7 with further references, para 9.

¹⁸⁷ Art. 45 para 3, Art. 52 para 1 TFEU.

¹⁸⁸ Matthias Rossi, ‘Art. 72 AEUV’, in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4th Ed. (CH Beck, Munich 2011), para 7.

¹⁸⁹ Ibid. with further references; Hans-Holger Herrfeld, ‘Art. 72 AEUV’, in: Jürgen Schwarze/Ulrich Becker/Armin Hatje/Johann Schoo (eds.), EU-Kommentar (4th edition, Nomos, Baden-Baden 2019), para 8; Wolfgang Weiß, ‘Art. 72 AEUV’, in Rudolf Streinz (ed.), EUV/AEUV (CH Beck, Munich 2018), para 6.

¹⁹⁰ Cf. ECJ Judgement of 26 July 2017 – C-646/16 – Jafari.

¹⁹¹ Daniel Thym, ‘Deutschland macht eigentlich das Gleiche wie die Griechen’, 3 March 2020, available at <https://www.zeit.de/politik/ausland/2020-03/griechisch-tuerkische-grenze-fluechtlinge-tuerkei-griechenland-daniel-thym>.

¹⁹² See only: Stephan Breitenmoser/Robert Weyeneth, ‘Art. 72 TFEU’, in: von der Groeben/Schwarze/Hatje (eds.), Europäisches Unionsrecht, 7th edition (Nomos, Baden-Baden 2015), para 25.

¹⁹³ See above C.

¹⁹⁴ Matthias Rossi, ‘Art. 72 AEUV’ in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4th Ed. (CH Beck, Munich 2011), para 8f; Art. 25 et seq. Schengen Borders Code.

The question of whether a temporary ‘suspension’ of the processing of asylum claims in the sense of a general *delay* in the procedures is compatible with Art. 72 TFEU or not,¹⁹⁵ is not relevant to the present opinion. The measures undertaken by Greece amount to a ‘suspension’ of the asylum law in the sense that the persons are being deported without access to an asylum procedure and are prevented from lodging an application and thus excluded from benefiting from the guarantees for asylum seekers – this is an entirely different situation.¹⁹⁶

IV. No Lawless ‘State of Exception’ under EU law

Finally, and rather for the sake of completeness of the argument, it is emphasized that neither Art. 72 TFEU, nor Art. 78 para 3 TFEU, nor any other EU law provision allows for a ‘suspension’ of the rule of law or even of fundamental rights. In other words, there is *no state of exception* under EU law. The rule of EU law, at least insofar as *the essence of fundamental rights* is concerned, cannot be suspended under any circumstances.

Both Art. 72 and Art. 78 para 3 TFEU allow for emergency measures to ensure that the member states retain sufficient flexibility to react to threats to the public order despite the transfer of the competences to the EU in the area of migration and asylum under Art. 78 para 1 and para 2 TFEU.¹⁹⁷ Beyond those provisions, deviations or suspensions of EU law are *not* permissible.

Moreover, it is not legally possible under EU law to ‘suspend’ fundamental rights. The Charter of Fundamental Rights does not provide for a derogation clause. Permissible infringements are conclusively governed by Art. 52 para 1 CFR, which provides that ‘*any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms*. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’¹⁹⁸ Thus, even though the Charter shall be interpreted in line with the ECHR (Art. 52 para 3 CFR), the derogation clause of Art. 15 ECHR cannot be applied to the Charter. And in any case, neither the substantial nor the procedural requirements of Art. 15 ECHR are met.¹⁹⁹

E. Accountability Avenues under EU Law for Illegal Measures at the Border

I. Infringement Procedures Against Member States

The European Commission is the ‘*guardian of the Treaties*’.²⁰⁰ As such, it ‘shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union’ (Art. 17 para 1 TFEU).

¹⁹⁵ Cf. on that question Daniel Thym, ‘Deutschland macht eigentlich das Gleiche wie die Griechen’, 3 March 2020, available at <https://www.zeit.de/politik/ausland/2020-03/griechisch-tuerkische-grenze-fluechtlinge-tuerkei-griechenland-daniel-thym>.

¹⁹⁶ Cf. Constantin Hruschka, ‘Was Griechenland an der Grenze zur Türkei tut, ist illegal’, 5 March 2020, available at: <https://www.nzz.ch/international/interview-mit-constantin-hruschka-ld.1544581>.

¹⁹⁷ Matthias Rossi, ‘Art. 72 AEUV’ in: Christian Calliess/Matthias Ruffert (eds.), EUV/AEUV, 4th Ed. (CH Beck, Munich 2011), para 1.

¹⁹⁸ Emphasis added.

¹⁹⁹ Cf. for an analysis of the preconditions: Robert Nestler, ‘Terrorismus als Ausnahmezustand’, (2018) Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, p. 23 et seq.

²⁰⁰ Art. 17 TEU.

With regard to e.g. the EU hotspot administration, the Commission carries out its supervisory obligations within the framework of the European Regional Task Force (EURTF). In the context of the administration of the Common European Asylum System and the EU external border, the Commission has several possibilities to ensure member state compliance with EU law. In particular, the Commission has the competence to initiate an *infringement procedure* under Art. 258 TFEU against a Member State which violates EU law.

The infringement procedure is in essence a *sanction mechanism*. As such, it stands in a certain contrast to the impetus of the solidarity measures,²⁰¹ which in essence amount to a support mechanism. In the Internal Market, the Commission routinely relies on infringement procedures against member states to enforce the rule of EU law. In the same vein, it relies on infringement procedures to enforce EU law in the Area of Freedom, Security and Justice, including in the Common European Asylum System.²⁰²

As shown above, the Greek measures are at least partly incompatible with EU law. Until now, however, the reaction of the Commission has been limited to praising the closure of the Greek-Turkish border and promising financial and operational support to ensure that the border remains closed.²⁰³ It has not shown any intention of initiating an infringement procedure against Greece.

The decision whether or not to initiate such a procedure lies, in principle, in the *political discretion* of the Commission.²⁰⁴ The question of whether there are *legal limits* to the political discretion of the Commission in the context of Art. 258 TFEU arises in particular where a violation of the values enshrined in Art. 2 TEU is at stake – and, as has been shown above, this is the case here. As EU law stands, however, there is little clarity over this question.²⁰⁵ On the one hand, the case law of the CJEU in the context of the Eurozone crisis, which in turn confirms earlier jurisprudence in the context of state aid and competition law, suggests that the Commission is under a positive obligation to do everything within its competences to ensure the compliance with EU law, wherever it is involved in the relevant procedures.²⁰⁶ On the other hand, it is not entirely clear what it is that the Commission is required to do, and which are the legal consequences of a failure of the Commission in this regard, in particular whether the Union would be liable in this case. Those questions require further legal analysis that go beyond the scope of this legal opinion. In conclusion, the Commission would be able to start infringement procedures against Greece, but it is not clearly obliged to do so.

II. Liability of the Union for Illegal Conduct by Frontex

The Union – namely the Commission and EU agencies – are closely involved in the administration of the Common European Asylum System and the EU external border in Greece. This raises the question whether the Union is liable in case the measures in question

²⁰¹ See below F.I.

²⁰² Cf. the pending infringement procedures due to an incorrect implementation of the EU asylum law such as: ECJ, C-808/18, *Commission v Hungary*; ECJ, C-757/17, *Commission v Poland*.

²⁰³ See above.

²⁰⁴ ECJ, T-47/96 – *SDDDA v Commission*, para 42.

²⁰⁵ Cf. Cremer, ‘Artikel 258 AEUV’, in: Calliess/Ruffert (eds.), *EUV/AEUV*, 5th edition (CH Beck 2016), para 40 et seq.

²⁰⁶ ECJ, Judgment of 20 September 2016 – C-8/15 P – *Ledra Advertising v Commission and ECB*; GC, Judgment of 13 July 2018 – T-786/14 – *Bourdouvali and Others v Council and Others*.

result in the violation of fundamental rights of asylum seekers.²⁰⁷ This section will focus on whether Frontex or the Union may be held liable in the case Frontex was involved in illegal administrative conduct such as e.g. pushbacks, deportations without individual procedure or an excessive use of force.

The Regulation (EU) 2019/1896 (Frontex Regulation) provides that ‘European integrated border management’ is ‘a *shared responsibility of the Agency (Frontex) and of the national authorities* responsible for border management’. Thus, the European integrated border management shall be implemented by Frontex, while the ‘member states shall retain primary responsibility for the management of their sections of the external borders’.²⁰⁸ During the past four years, Frontex has continuously provided extensive operational support to Greece. In reaction to the recent events, it has been announced that the Frontex support in particular at the Greek-Turkish land border would be further increased.²⁰⁹

In this context, it cannot be excluded from the outset that Frontex might be involved in illegal measures at the border. This is well illustrated by reports of Frontex ordering a Danish boat participating in the Operation Poseidon²¹⁰ to carry out a pushback at sea.²¹¹ Although, according to reports, the Danish boat in that case refused to carry out that order, which the Danish crew commander considered as ‘not justifiable’,²¹² it is possible that commands to carry out pushbacks are followed in other cases. In addition, the possibility that Frontex might also be involved in pushbacks or the excessive use of violence at the Greek-Turkish land border cannot be excluded from the outset.²¹³ The 2019 Frontex Regulation allows for the use of force by Frontex team members in certain circumstances²¹⁴ which increases the risk that Frontex team members will be involved in incidents that violate individual or even fundamental rights.

When implementing its tasks, Frontex is obviously obliged to respect the EU law, including fundamental rights and international refugee law. This follows from Art. 51 CFR and is explicitly laid down in, *inter alia*, Art. 1 and Art. 80 Frontex Regulation. The latter explicitly provides, in para 1, that Frontex ‘shall guarantee the protection of fundamental rights in the performance of its tasks under this Regulation in accordance with relevant Union law, in particular the Charter, and relevant international law, including the 1951 Convention relating to the Status of Refugees, the 1967 Protocol thereto, the Convention on the Rights of the Child and obligations related to access to international protection, in particular the principle of non-refoulement.’

²⁰⁷ Catharina Ziebritzki, ‘Refugee Camps at EU External Borders, the Question of the Union’s Responsibility, and the Potential of EU Public Liability Law’, 5 February 2020, available at: <https://verfassungsblog.de/refugee-camps-at-eu-external-borders-the-question-of-the-unions-responsibility-and-the-potential-of-eu-public-liability-law/>.

²⁰⁸ Frontex Regulation, Art. 7.

²⁰⁹ See above.

²¹⁰ Frontex, ‘Operation Poseidon’, 2020, available at: <https://frontex.europa.eu/along-eu-borders/main-operations/operation-poseidon-greece/>.

²¹¹ Politico, ‘Danish boat in Aegean refused order to push back rescued migrants’, 6 March 2020, available at: <https://www.politico.eu/Art./danish-frontex-boat-refused-order-to-push-back-rescued-migrants-report/>.

²¹² Mads Korsager Nielsen, ‘Sådan foregår bevogtningen af EU's yderste grænser: Dansk patruljebåd beordret til at sætte flygtninge tilbage i vandet’, 5 March, available at: <https://www.dr.dk/nyheder/indland/saadan-foregaar-bevogtningen-af-eus-yderste-graenser-dansk-patruljebaad-beordret-til>.

²¹³ See C.I.

²¹⁴ See Annex V Frontex Regulation.

Where violations of these obligations are at issue, Frontex only provides for a *non-judicial internal accountability mechanism* to ensure that its actions comply with EU law and in particular with fundamental rights, Art. 111 Frontex Regulation. Such a mechanism does not fulfil the requirements of the right to an effective remedy before a ‘tribunal’ as granted by Art. 47 CFR.

However, where Frontex is closely involved in an incident amounting to a violation of individual rights granted by EU secondary law or the CFR, the concerned individual might file an *action for damages* before the European Court of Justice. Such an action for damages can be filed either against the agency under Art. 97 para 4 and Art. 98 Frontex Regulation, or against the Union under Art. 340 para 2 TFEU. To be sure, the conditions of the public liability of the Union as established by the ECJ must be met in order for such an action to be successful.²¹⁵ Further, there are several practical issues that seem to explain why no such action for damages based on illegal conduct of Frontex has been lodged yet.²¹⁶ In addition, member states might, under certain circumstances, be liable for illegal conduct of their state forces deployed to Greece as part of a Frontex team. Assessing all this in more detail would, however, go beyond the scope of this legal opinion.²¹⁷

F. Alternative, Legal Measures as Foreseen under EU Law

From the above it follows that, even with in increased migratory pressure at the external border of a certain member state, international human rights and refugee law continues to require an individual asylum procedure to be carried out before denials of entry or deportations can occur. Therefore, the first and most important measure in accordance with the legal obligation would be to:

- immediately revoke the suspension of the right to asylum;
- guarantee access to an asylum procedure to all asylum seekers at the border and to those who reached Greek territory already.

Such measures would of course increase the pressure on the asylum and reception system in Greece.

Therefore, *solidarity measures* could be activated by the EU (I.) and its member states (II.). in order to deal with the increased influx of asylum seekers at the EU external border to Turkey. In addition, EU law provides for legal ways in which Greece can respond to increased pressure on its asylum system, namely by modifying the asylum procedure (III.).

²¹⁵ Cf *ibid.*

²¹⁶ In particular, the lack of access to legal aid of those concerned.

²¹⁷ See in more detail: Melanie Fink, ‘EU liability for contributions to Member States’ breaches of EU law’ (2019) 56 *Common Market Law Review*, Issue 5, pp. 1227–1264; Melanie Fink, ‘Frontex and Human Rights, Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law’ (Oxford University Press, Oxford 2018). See also Melanie Fink, ‘The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable’, 21(3) *German Law Journal* 532 (2020), forthcoming at <https://www.cambridge.org/core/journals/german-law-journal/latest-issue>.

I. EU Solidarity Measures

1. The Directive 2001/55/EC on Temporary Protection in the Event of Mass Influx

While the Directive 2001/55/EG (Mass Influx Directive – MID) is designed specifically for situations of an increased influx of asylum seekers, it is unlikely to be helpful here.

The MID provides mechanisms for handling the situation of ‘*arrival of a large number of displaced persons*’ (Art. 2 lit. d MID). If such a situation is declared by the Council of the European Union by qualified majority (Art. 5 para. 1 MID), the Directive provides the possibility to grant a temporary protection status to a specific group of persons in the situation of mass influx, without individual examination in order to decrease and postpone the administrative efforts that would result from carrying out individual asylum procedures. Conversely, it *does not* provide for denial of status, unlawful pushbacks, or suspensions of asylum law in such situations. Rather, these situations should be handled by simplifying the procedures for granting protection.

However, the Directive has little potential for the current situation at the Greek-Turkish border for three reasons. First, it seems questionable whether the current situation is equivalent to a mass influx in purely numerical terms. Second, the MID has never been used yet, even in 2015, with far higher numbers of asylum seekers, making it unlikely that the EU Council will rely on it now. Third, the MID refers to an influx of applicants ‘*from a specific country or geographical area*’,²¹⁸ implying that the legal assessment of their protection claims will not vary much. By contrast, bearing in mind the current population of asylum seekers on the Greek islands,²¹⁹ the protection seekers at the Greek-Turkish land border may be rather diverse with regards to their nationality.

2. Relocation Decision under Art. 78 para 3 TFEU

Instead, the EU or the other member states should consider temporary *solidarity mechanisms* to assist Greece in managing the situation. In the event that the number of asylum procedures overburdens the country’s asylum system, the Council could adopt another relocation scheme as a provisional measure according to Art. 78 para. 3 TFEU – as it has already done in 2015 (Council Decisions 2015/1523 and 2015/1601).

The Council has broad discretion with regards to how it deals with ‘emergency situations’ as described in Art. 78 para. 3 TFEU.²²⁰ However, as the past relocation mechanism has shown, such mechanism will only be successful if member states are ready to implement it.²²¹ According to the 2015 relocation decisions, 66,400 applicants were to be relocated from Greece. Further 54,000 applicants were to be relocated from either Greece or Italy. However,

²¹⁸ Art. 2 lit. d MID.

²¹⁹ Which consists of Afghan, Syrian, Somali citizens as well as other nationalities, cf. the data provided by UNHCR, ‘Operation Portal: Aegean Islands Weekly Snapshot 24 February - 01 March 2020’, 3 March 2020, available at: <https://data2.unhcr.org/en/documents/details/74359>.

²²⁰ ECJ Judgment of 06 September 2017 – C-643/15 & C-647/15, para. 246, 253.

²²¹ Cf. ECJ, Judgment of 26 July 2017 – C-646/16 – Jafari and C-490/16 – A.S.; ECJ, Judgment of 6 September 2017 – C-643/15, 647/17 – Slovakia and Hungary v Council; Nora Markard/Anuscheh Farahat, ‘Recht an der Grenze: Flüchtlingssteuerung und Schutzkooperation in Europa’, in: Juristenzeitung 22/2017, 1088 et seq.

less than 22,000 applicants were actually relocated from Greece.²²² This shows that, for a successful implementation of a relocation scheme, the willingness of the member states to implement the scheme fully is crucial.

3. Operational Support through EU Agencies

Operational administrative support, provided to Greece via EU agencies such as EASO and Frontex could be an additional solidarity measure.²²³

a. Operational Support by the European Asylum Support Office (EASO)

As has been shown, the main issue is the lack of the implementation of EU asylum law at the EU external border in Greece. Certainly, the Greek asylum system is under pressure – which is not a recent phenomenon, but has indeed been the case for the last decade.

The EU agency EASO was established in 2011 ‘in order to help to improve the implementation of the Common European Asylum System (the CEAS), to strengthen practical cooperation among Member States on asylum and to *provide and/or coordinate the provision of operational support to Member States subject to particular pressure on their asylum and reception systems*’ (Art. 1 Regulation (EU) 439/2010 – hereafter: ‘EASO Regulation’). In particular, EASO ‘shall *provide effective operational support to Member States subject to particular pressure on their asylum and reception systems, drawing upon all useful resources at its disposal* which may include the coordination of resources provided for by Member States under the conditions laid down in this Regulation’ (Art. 2 para. 2 EASO Regulation).

Indeed, EASO is providing substantial operational support to Greece already. Certainly, the operational support by EASO leads to several legal challenges. In case of enhanced EASO support, attention should be paid in particular to EASO acting within the limits of its competences, and in line with EU and national asylum law.²²⁴ Provided those conditions are met, operational administrative support through EASO could indeed contribute to maintaining a functioning asylum system in Greece despite increased numbers of asylum applications. The EASO Regulation also provides for an increase of involvement of EASO in cases of an increase of pressure on national asylum systems (cf. Art. 8, 10 lit. a, b EASO Regulation).

Most importantly, EASO may deploy *asylum support teams*.²²⁵ This may include coordination, technical assistance, and further kinds of operational administrative support. The deployment of further EASO asylum support staff would require the conclusion of an additional or the amendment of the existing Operational Plan between Greece and EASO. In the alternative, the current EASO Operational Plan could be amended with a view towards enhancing the number of staff and technical assistance provided to Greece.²²⁶

²²² Cf. the Greek Asylum Service Statistical Data: Greek Ministry of Migration and Asylum, ‘Statistical Data’, 2020, available at: asylo.gov.gr/en/?page_id=110.

²²³ Also Eurojust and Europol, but we do not consider those in the following.

²²⁴ Cf. on EASO overstepping its competences: European Ombudsman, ‘EASO’s involvement in applications for international protection submitted in the ‘hotspots’ in Greece’, CASE 735/2017/MDC, Decision of 5 July 2018, available at: <https://www.ombudsman.europa.eu/en/case/en/49987>.

²²⁵ Art. 10 lit c EASO Regulation in conjunction with Art. 13 et seq EASO Regulation.

²²⁶ See for the current operational plan: European Asylum Support Office, ‘Operational Plan’, 2020, available at: <https://easo.europa.eu/archive-of-operations>.

Enhanced operational EASO support could thus support the Greek asylum system, even in case of a situation of so-called ‘mass influx’. Dealing with these kinds of situations was one of the very reasons why EASO was established, and is indeed part of the very core of the mandate of the EU agency.

However, it should not be ignored that EASO according to the Regulation may only support member states, and ‘*shall have no powers in relation to the taking of decisions by Member States’ asylum authorities on individual applications for international protection.*’ (Art. 2 para 6 EASO Regulation). Within the current administrative framework on the Greek islands, however, EASO often conducts legal interviews and drafts the decision in form of a ‘legal opinion’. The Greek Asylum Service then decides upon the individual case only upon the interview protocol of the interview conducted by EASO and on the EASO legal opinion. Such procedure is clearly in violation of Art. 2 para 6 EASO Regulation and should clearly be avoided in any circumstance where EASO’s mission in Greece is expanded.²²⁷

b. Operational Support by Frontex

As has been mentioned above, the EU has so far announced increased Frontex support, as part of the shared responsibility for the administration of the EU’s external border.²²⁸

In particular, the Frontex staff provided in the context of an existing *joint operation* could be increased, or a *rapid border intervention* could be launched. While the purpose of the former is to provide technical and operational assistance,²²⁹ the latter is a form of intervention which is tailor-made to a situation ‘at the external borders of those Member States facing specific and disproportionate challenges, taking into account that some situations may involve humanitarian emergencies and rescue at sea in accordance with Union and international law’²³⁰.

With regard to the support provided by Frontex, it must however be emphasized that the mandate of Frontex is not limited to ‘blocking borders’ by coordinating pushbacks²³¹ or providing tear-gas. Rather, as set out above, the mandate of Frontex requires the agency to comply with EU and international refugee law.²³² This means that Frontex may also provide support for registering asylum claims or with similar administrative conduct related to the implementation of the EU asylum law.²³³

²²⁷ Catharina Ziebritzki/Robert Nestler, “‘Hotspots’ an der EU-Außengrenze. Eine rechtliche Bestandsaufnahme”. Arbeitspapier (‘Hotspots’ at the EU External Border. A Legal Survey) (July 28, 2017), Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper No. 2017-17, available at SSRN: <https://ssrn.com/abstract=3028111>, p. 48 et seq ; Evangelia (Lilian) Tsourdi, ‘Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?’, 21(3) German Law Journal (2020), forthcoming at <https://www.cambridge.org/core/journals/german-law-journal/latest-issue>.

²²⁸ See above B.III.

²²⁹ Art 10 lit g Frontex Regulation.

²³⁰ Art. 10 lit. h Frontex Regulation

²³¹ See on those reports above E. II.

²³² Art. 51 CFR, Art. 1 Frontex Regulation.

²³³ See in particular the mandate Frontex staff deployed as part of the migration management support teams, cf. Art. 40 Frontex Regulation. See on the details of the tasks of Frontex staff in Greece including registering asylum claims: Frontex, ‘Operation Poseidon’, 2020, available at: <https://frontex.europa.eu/along-eu-borders/main-operations/operation-poseidon-greece/>.

4. Financial Support

Finally, the EU could provide enhanced financial support to Greece. As has been mentioned above, this is indeed one of the solidarity measures that has been proposed by the European Commission.

The Union's financial support to Greece to better manage migration and borders is currently provided through three EU funds, including the AMIF, the Internal Security Fund (ISF) and the Emergency Support Instrument (ESI).²³⁴

The AMIF has been set up for the period 2014–20, with a total of 3.1 billion Euro for the seven years, in order to promote the efficient management of migration flows and the implementation, strengthening and development of a common Union approach to asylum and immigration.²³⁵ The ISF was set up for the period 2014–20, with a total of 3.8 billion Euro for the seven years. The Fund is supposed to promote the implementation of the Internal Security Strategy, law enforcement cooperation and the management of the Union's external borders.²³⁶ The aim of the ESI is close to that of the AMIF, it namely 'aims to preserve life, prevent and alleviate human suffering and maintain human dignity'. Through ESI, the EU can fund emergency humanitarian support for people in need within the EU territory in urgent and exceptional circumstances, such as the sudden influx of refugees in Europe.²³⁷

While assessing the funding possibilities in detail goes beyond the scope of this legal opinion, it must be stressed that enhanced financial support to Greece under the AMIF, ESI, or to a certain extent also under the ISF, could contribute to allowing the Greek national authorities to adequately process asylum applications in line with EU and international law. However, it must be ensured, that money allocated to the Greek asylum system, including the reception conditions, also leads to an improvement of the state of the asylum system. In the past, the European Court of Auditors has reported that there is room for improvement concerning the manner in which funds dedicated to the asylum system are being spent. Reception conditions in Greece have not significantly and sustainably increased, despite considerable financial aid by the EU.²³⁸

II. Bilateral Solidarity Measures: Admission of Asylum Seekers from Greece

Further, EU member states could establish bilateral solidarity mechanisms.

²³⁴ European Commission, 'Managing Migration: EU Financial Support to Greece', February 2020, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/202002_managing-migration-eu-financial-support-to-greece_en.pdf ;

²³⁵ Leonhard den Hertog, 'EU Budgetary Responses to the "Refugee Crisis": Reconfiguring the Funding Landscape', (May 2016) CEPS Paper in Liberty and Security in Europe No. 93, available at: <https://www.ceps.eu/system/files/LSE%20No%2093%20LdH%20on%20EU%20Budgetary%20Responses%20to%20the%20Refugee%20Crisis.pdf>.

²³⁶ European Commission, 'Internal Security Fund – Police', 2014-2020, available at: https://ec.europa.eu/home-affairs/financing/fundings/security-and-safeguarding-liberties/internal-security-fund-police_en .

²³⁷ European Commission, 'Emergency support within the EU', 22 May 2019, available at: https://ec.europa.eu/echo/what-we-do/humanitarian-aid/emergency-support-within-eu_en .

²³⁸ European Court of Auditors, 'Special report No 24/2019: Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results', 13 November 2019, available at: <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=51988> .

1. No Exclusion under EU law

Such bilateral mechanisms especially are not excluded under EU law. To the contrary, EU law is based on the principle of solidarity among member states as expressed in Art. 3 para 3 subpara 3 TEU. The principle is specified for the Common European Asylum System in Art. 80 TFEU, which requires that asylum policies adapted by the European Union are aligned with the principle of solidarity and fair sharing of responsibility.

Art. 80 TFEU does stipulate concrete legal obligations for EU bodies and member states on how to implement an asylum policy that meets the principle of solidarity and fair sharing of responsibility. Thus, the responsible actors have broad discretion when implementing solidarity mechanisms.²³⁹ However, in cases of increased migratory pressure, the Council is obliged to undertake solidarity measures in favour of the effected member states.²⁴⁰ In case the Council does not – for whatever reason – sufficiently fulfil this obligation, member states cannot be prohibited from finding bilateral solutions. These bilateral solutions do not constitute any harm for other member state or the functioning of the European asylum system. Quite the contrary, they are tangible manifestations of the solidarity principle.

An exclusion of bilateral solidarity mechanisms also does not follow from the Dublin Regulation III. Rather, under Art. 17 Dublin Regulation III, member states have broad discretion to take responsibility for asylum procedures that they are not otherwise responsible for under the binding responsibility criteria of chapter III of the Dublin Regulation III. This discretion is specifically designed to allow states to derogate from the responsibility criteria for humanitarian reasons (recital 17 of the Regulation).

2. Practical Implementation

There are several different options for the implementation of bilateral solidarity mechanisms.

Firstly, asylum applicants from Greece can be admitted through the Dublin Regulation III.²⁴¹ This procedure has recently been applied by Italy and Ireland in order to admit small numbers of asylum seekers from Greece. It is further currently used to distribute responsibility for asylum seekers rescued at sea by Italy among other EU member states.²⁴²

Secondly, the bilateral mechanisms can be implemented under the domestic immigration law of the receiving state. The so-called ‘Dubs-Scheme’ in the United Kingdom, as established in Rule 67 of the Immigration Act 2016, is an example of this. Under this scheme, unaccompanied minor asylum applicants from France and Greece were relocated to the UK. Similarly, federal

²³⁹ Cf. ECJ Judgment of 06 September 2017 – C-643/15 & C-647/15, para. 246, 253.

²⁴⁰ Cf. ECJ Judgment of 06 September 2017 – C-643/15 & C-647/15, para. 252.

²⁴¹ Cf. for a description: ECRE, ‘Relying on Relocation’, 2019, available: <https://www.ecre.org/wp-content/uploads/2019/01/Policy-Papers-06.pdf>, p. 8 et seq.; Human Rights Watch et al., ‘NGOs’ Urgent Call to Action: EU Member States Should Commit to the Emergency Relocation of Unaccompanied Children from the Greek Islands’, 4 March 2020.

²⁴² See e.g. for Germany: Deutscher Bundestag, 19. Wahlperiode, ‘Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Gökay Akbulut, Dr. André Hahn, weiterer Abgeordneter und der Fraktion DIE LINKE – Drucksache 19/9146’, available at: <https://kleineanfragen.de/bundestag/19/9703-aufnahme-und-verteilung-aus-seenot-geretteter-schutzsuchender>.

states in Germany are currently trying to implement programs to admit unaccompanied minors from Greece under § 23 German Residency Act.²⁴³

Family reunification procedures are a third option for relief, which however is notoriously under-used, despite the fact that they secure individual rights. The Dublin Regulation III provides a right to family reunification if a person already has family members in another Member State.²⁴⁴ In this case, the Member State in which the family member is already present is responsible for conducting the asylum procedure.²⁴⁵ This affects quite a number of asylum seekers arriving in Greece. The rejection rates for take-charge requests sent by Greece for this category of persons are all high. For example, Germany rejects over 70 percent of those take-charge request.²⁴⁶ However, because the rejections are often unlawful, legal proceedings are successful in the majority of cases.²⁴⁷ Therefore, simply applying current EU law would give Greece considerable relief.

III. Modification of the Asylum Procedure in Greece: Border Procedures and Accelerated Procedures

As shown, there is no legal possibility for a member state to withdraw from the obligations arising from EU asylum law. This also means that the persons concerned must benefit from its guarantees. There are, however, opportunities to modify the procedures in order to adjust them to increased migratory pressure, which Greece may legally use.

Under the Asylum Procedures Directive (APD), the procedure can be accelerated and/or be carried out at the border. However, EU law provides strict guidelines for accelerating procedures, which the EU hotspots in Greece violate already.

According to Art. 43 para 1 APD, the applications of certain categories of persons (mentioned in Art. 31 para. 8 APD) may be examined under the *border procedure*. For these groups, a prior examination of the admissibility of the application – concerning ‘protection elsewhere’ (Art. 33 APD) – and the examination on the merits of asylum application of certain groups of persons can be conducted at the border.²⁴⁸ According to Art. 43 para. 2, the procedure must be concluded within four weeks; if not, applicants must be transferred to the normal procedure. Art. 43 para. 3 provides for an exception as to when the deadline can be extended. It can be assumed that Greece is systematically violating the formal requirements for the applicability of the border procedure by applying the EU hotspot approach.²⁴⁹

²⁴³ See Deutsche Welle, ‘German state considers bringing refugee children from Greece unilaterally’, March 2020, available at: <https://www.dw.com/en/german-state-considers-bringing-refugee-children-from-greece-unilaterally/a-51788588>.

²⁴⁴ Regarding the subjective right: Robert Nestler/Vinzent Vogt, ‘Dublin-III reversed – Ein Instrument zur Familienzusammenführung?’ *Zeitschrift für Ausländerrecht und Ausländerpolitik* (2017), p. 21 et seq.

²⁴⁵ See for the requirements and a broad overview Robert Nestler/Vinzent Vogt/Catharina Ziebritzki, ‘Family reunion in Germany under the Dublin III Regulation’, 2018, available at: https://www.diakonie.de/fileadmin/user_upload/Diakonie/PDFs/Diakonie-Texte_PDF/Family_Reunion_Dublin_III_advisory_guide_2018.pdf.

²⁴⁶ See Greek Asylum Service, ‘Statistical Data’, 2020, available at: http://asylo.gov.gr/en/wp-content/uploads/2020/02/Dublin-stats_January20EN.pdf.

²⁴⁷ See for an overview of cases: Equal Rights Beyond Borders, ‘Litigation on Family Reunion’, 2020, available at: <https://www.equal-rights.org/litigation-family-reunion>.

²⁴⁸ See above C.I.6.

²⁴⁹ Yiota Masouridou/Evi Kyrioti, ‘The EU-Turkey Statement and the Greek Hotspots, A failed European Pilot Project in Refugee Policy’, June 2018, available at: <http://extranet.greens-efa-service.eu/public/media/file/1/5625>.

According to Art. 31 para 8 APD, the border procedure may be ‘*accelerated*’ for certain categories of persons. This concerns those whose asylum applications are considered to have little chance of being successful and are then rejected as ‘manifestly unfounded’, or those who violate mandatory cooperation obligations and, for example, refuse to give fingerprints to establish the Member State responsible.

When relying on these procedures, states must still comply with the guarantees contained in the second chapter of the APD (cf. Art. 31 para 8 APD) and in the Reception Conditions Directive. This applies to both human rights guarantees and protection obligations.

The EU hotspot approach adopted by the EU Turkey deal is an example of such an accelerated border procedure, but its three-year implementation also reveals the implied dangers. Analysis²⁵⁰ consistently shows that it structurally facilitates violations of EU law and human rights violations and leads to inhuman and degrading conditions often amounting to violations of Art. 3 ECHR / Art. 4 CFR.

In the words of EU fundamental rights experts: ‘The approach of processing asylum claims at borders, particularly in relatively remote locations, creates fundamental rights challenges that appear almost unsurmountable.’²⁵¹

Moreover, a border procedure makes legal protection structurally impossible, especially in remote locations. If the European Union also sends agencies to support the respective Member State, a structural imbalance arises that is in tension with the principle of equality of arms based on the rule of law. Combined with the deliberately short deadlines, this regularly leads to violations of the right to an effective remedy under Art. 47 CFR and Art. 13 ECHR.

The right to an effective remedy requires effective access and scrutiny particularly *before* irreparable harm can be brought about by the administration. If necessary, a system for free legal advice must be maintained and information about it provided to asylum seekers. Legal advice must therefore also actually be accessible and available.²⁵² This requirement can be met neither in the EU hotspots nor at the land border with Turkey, particularly now that authorities are denying access to the persons concerned.²⁵³

G. Conclusion

The current escalation of the situation at the EU external border in Greece is truly worrying and violates EU law and international law.

First and foremost, the situation is alarming because the current measures *endanger the lives and the dignity* of those people who are attempting to cross the Greek-Turkish border. There is no lawless state of exception at the EU external borders. Tear-gas, ever-higher fences, and more

²⁵⁰ Catharina Ziebritzki/Robert Nestler, “‘Hotspots’ an der EU-Außengrenze. Eine rechtliche Bestandsaufnahme”. Arbeitspapier (‘Hotspots’ at the EU External Border. A Legal Survey) (July 28, 2017), Max Planck Institute for Comparative Public Law and International Law (MPIL) Research Paper No. 2017-17, available at SSRN: <https://ssrn.com/abstract=3028111>.

²⁵¹ Cf. European Union Agency for Fundamental Rights, ‘Update of the 2016 Opinion of the FRA on fundamental rights in the “hotspots” set up in Greece and Italy’, FRA Opinion – 3/2019, February 2019, 7 et seq. On 6 Nov 2019, the head of FRA has described the EU hotspot approach as implemented in Greece as ‘the single most worrying fundamental rights issue that we are confronting anywhere in the European Union’, see: <https://euobserver.com/migration/146541>.

²⁵² See ECtHR Judgment of 21 January 2011 – Appl. no. 30696/09 – M.S.S., para. 288 et seq.; 319 et seq.

²⁵³ See B.I.

physical violence cannot be the answer. The line between endangering lives and scarifying lives in the name of ‘European migration management’ is thin.

Second, the situation is dangerous because the *foundational values of the European Union* and the *regime of international refugee law* are put at risk. Greece is acting in clear violation of EU law and international law. And yet, neither EU institutions nor member states have clearly raised their voice in support of the rule of EU and international law. Quite to the contrary, EU institutions aggravate the situation by speaking in favour of those measures.

Certainly, it can be said that Turkey instrumentalises the refugees who have entered its territory in search of protection from persecution or other serious harm. However, if the EU gave into that kind of ‘political blackmailing’ by adopting the argument that the instrumentalised people are, because they are being instrumentalised, deprived of their individual rights, the EU would both betray its foundational values, and endanger the regime of international refugee law.

Europe had to learn the importance of human and refugee rights as well as the rule of law in the hardest way imaginable. It should not tap into the seductive trap of betraying its foundations by adopting the arguments against the rule of law and against human rights. The EU stands ready to sharply criticize Turkey whenever it violates the rule of law and human rights – and rightly so. The EU should hence have the courage and the strength to stand for its values, even where this might be perceived as being politically difficult. Anything else would be not only constitute a violation of EU constitutional law. It would also be hypocritical. And what is more, given the model role which the EU still is, it would have real and dangerous consequences in other parts of the world as well.

EU law provides for several *possibilities to support Greece in a spirit of solidarity*, while at the same time *ensuring the respect for EU law and international law*. In particular, operational and financial support should be provided, and the asylum seekers arriving to Greece should be relocated to other member states. Those are the options that the EU and the other member states should pursue.