

The situation at the EU external borders and the future European asylum policy

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Joint Statement

The situation at the EU external borders and the future European asylum policy

April 2020



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1 Introduction

War and ongoing crises are forcing people to flee and leave their homes. According to UNHCR, there are currently 70.8 million forcibly displaced people worldwide. At the same time, the humanitarian situation among people seeking protection at the EU external borders is still unresolved and getting even worse. The latest developments since end of February, when thousands of people arrived at the Greek-Turkish border and tried to reach the EU, provoked a questioning of fundamental international refugee and human rights law and longstanding problems of the Common European Asylum System became even more apparent. Therefore, the future of the European Asylum System is one of the key human rights challenges for the EU. The European Commission President, Ursula von der Leyen, declared a New Pact on Migration and Asylum to be a priority issue on the agenda of the new European Commission. The Commission stated in its 2020 Work Programme that it aims to deliver a more resilient, humane and effective migration and asylum system.

According to recent reports, several countries including Germany have submitted different reform proposals suggesting the implementation of mandatory registration and/or asylum procedures at the EU external borders. The main approach proposed by the German Ministry of the Interior is to conduct initial assessments of asylum applications in reception centres at the borders. Suitable measures, which include restricting freedom if necessary, are intended to prevent the applicant from evading the preliminary proceedings. Asylum seekers who pass this assessment will be distributed within the EU in order to continue their asylum procedures, while the others will be refused entry. These ideas cannot be discussed without taking into account the current situation at the borders.

For this joint statement, the four National Human Rights Institutions (NHRIs) from Germany, Greece, Croatia and Bosnia-Herzegovina, which are part of the European Network of National Human Rights Institutions (ENNHRI)¹, have intensified their discussions regarding the national developments in their respective countries. The EU member states and neighboring non-EU-countries are differently affected by the European asylum policy. The Statement aims to give an idea to what extent the geographical situation plays a crucial role in affecting countries and which conclusions should be drawn from it. Due to their mandates, the Greek, Croatian and Bosnian-Herzegovinian NHRIs are able to provide an insight into the reception conditions, procedures and treatment of asylum seekers on the edge of the European Union. The current developments at the EU's external borders are alarming and demonstrate the consequences of the increasing externalisation and shift of the European migration and asylum policy to the borders.

¹ For further information about the evidence and work of European National Human Rights Institutions at the borders, see <http://ennhri.org/news-and-blog/new-paper-outlines-how-european-nhris-promote-and-protect-human-rights-of-migrants-at-borders/> (accessed 31 Mar. 2020).

2 Country situation

2.1 Greece

The Greek National Commission for Human Rights (GNCHR) is the independent advisory body to the Greek state on human rights issues. An important field of activity is the constant monitoring of developments regarding migrants' and refugees' rights.

Due to its geographical location, Greece is a key country for the EU in dealing with newly arriving migrants and asylum seekers. According to data published on a daily basis by the Ministry of Citizen Protection, there are currently 42.033 people seeking protection on the islands, whereas the official capacity of hosting and accommodation facilities is 8,816 (27.2.2020). UNHCR points out that 22% are women and 33% are children, of whom more than 6 out of 10 are younger than 12 years old. Approximately 14% of the children are unaccompanied or separated from their families, and come mainly from Afghanistan.

As a result of the EU-Turkey Statement agreed in 2016, all people who arrive on the islands are trapped in hotspots until their cases are decided. Hotspots - or "Reception and Identification Centers" (RICs) under Greek law – which were initially conceived as short-term hosting facilities for newly arriving refugees and migrants have quickly surpassed their limited hosting capacities and have been de facto transformed into vast unofficial camps (where more people stay outside the RICs in tents or makeshift shelters rather than inside the official structures). Additionally, the delays in family reunifications under the Dublin III-Regulation and insufficient adequate accommodation to enable unaccompanied minors and other vulnerable asylum seekers to be transferred to mainland Greece lead to an asphyxiating and mainly uncontrolled situation on the islands. During the last monitoring visit to Samos on 20 and 21 January 2020, the Greek National Commission for Human Rights noted that access to basic services ranges from limited to non-existent, especially regarding housing, healthcare, psychosocial support, legal aid, interpreting and children's access to education.

On 1 January 2020, a new law on international protection entered into force in order to speed up all procedures, for example, and to conclude the examination of international protection claims in 25 days. At the same time, the reasons for the existing delays, such as the shortage of qualified permanent staff in the relevant public service sectors and the lack of infrastructure, remain unresolved. In 2020, the Greek Government decided to establish new "closed" reception centers at the islands and has proceeded with a requisition of land plots. Local authorities have opposed to the establishment of new centers without the prior closing of the old ones and the decongestion of the islands. General strikes of the local population, riots of the refugee and migrant communities and violent clashes between locals and police forces have been reported. The Greek National Commission for Human Rights, through its Racist Violence Recording Network – established in 2011 in collaboration with the UNHCR- closely monitors the situation in the field and has recently noted a worrying trend on racist and xenophobic attacks against newcomer refugees and migrants, staff of international and civil society organizations as well as journalists.

At the land border with Turkey, there has been a steady increase of arrivals in 2018 and 2019. However, in late February this year, thousands of refugees and migrants arrived at the Greek–Turkish land borders asking for entry in the Greek/EU territory at the invitation of the Turkish Government. The Greek Government considered the "sudden, massive, organized and coordinated pressure from population movements on its eastern, land and sea borders [...] an active, serious, exceptional and disproportionate threat to the country's national security" and decided the closure of Greek-Turkish borders and the suspension of lodging of new asylum applications for one month, starting from March 1st.

In view of the above, the Greek National Commission for Human Rights reiterated its previous recommendation for an immediate transfer of the asylum seekers from the Eastern Aegean Islands to mainland Greece, the effective investigation of reported violent and racist attacks and the lifting of temporary restrictive measures to asylum. The temporary measures expired on March 31st and there has been no renewal. Consequently, the asylum system is now fully operational.

Press release regarding the visit to Samos (23.01.2020)

http://www.nchr.gr/images/English_Site/NEWS/Press%20Release_Samos.pdf

GNCHR Statement: Reviewing asylum and immigration policies and safeguarding human rights at the EU borders (05.03.2020)

http://www.nchr.gr/images/English_Site/PROSFYGES/GNCHR_STATEMENT_Borders.pdf

2.2 Croatia

The Ombudswoman of the Republic of Croatia is an independent and autonomous commissioner of the Croatian Parliament responsible for the promotion and protection of human rights and freedoms. Among others, she can examine individual complaints. Furthermore, she has the mandate of the National Preventive Mechanism for the protection of persons deprived of their liberty, and regularly visits places of detention. The Office of the Ombudswoman is also accredited as Status A NHRI, in line with the Paris Principles.

The Ombudswoman has received a continuous string of complaints regarding police violence and denial of access to the asylum procedures, which could be in breach of international and EU law. In 2019 alone, she opened 35 cases regarding police treatment of irregular migrants and asylum seekers, with some of them relating to larger groups of migrants. Furthermore, such allegations have also been gathered by a variety of international and national organisations and bodies such as Human Rights Watch and Amnesty International, but is also based on a report from a border police officer, who, due to fear of possible consequences for his job and family, sent it in March 2019 to the Ombudswoman anonymously. He states that the superior police officials give orders to the policemen to return all refugees and migrants to Bosnia and Herzegovina „without papers and processing“ thus leaving no trace, to take money, break mobiles and throw them in the river or keep for themselves. Two other police officers, also anonymously, stated similar experiences

in the media. All this may point to systematic illegal conduct, rather than isolated incidents, and call for efficient investigations.

In October 2019 the European Commission (EC) considered that Croatia had taken the measures needed to ensure that the necessary conditions for the application of all relevant parts of the Schengen *acquis* were met. Still, according to the EC, the protection of human rights of asylum seekers and other migrants, and the allegations of denial of access to the asylum procedure and of use of force by law enforcement officials at the border - remain a challenge. In this respect, part of emergency funding was dedicated to a new monitoring mechanism to help to ensure that border control activities remain fully compliant with EU law, international obligations and with the respect of fundamental rights and the rights resulting from the EU asylum *acquis*, including the principle of non-refoulement. The results of the monitoring mechanism are to be discussed with the EC, the Ombudswoman and civil society organisations, which has not been done thus far.

On this backdrop, the power of the Croatian Ombudswoman to act and react has been impaired by partial or full denial of direct access to data concerning the treatment of irregular migrants from the Croatian Ministry of the Interior, both in her investigative proceedings and in NPM visits, which violates the Optional Protocol to the Convention against Torture (OPCAT) and national legislation.

Press release regarding allegations of police violence <https://www.ombudsman.hr/en/no-institutional-reaction-to-alleged-illegal-police-treatment-of-migrants/>

2.3 Bosnia and Herzegovina

The Institution of the Human Rights Ombudsman of Bosnia and Herzegovina is an independent institution responsible for the protection of rights in accordance with the constitution of Bosnia and Herzegovina and international human rights instruments. It can be approached by any individual who is a victim of a human rights violation.

The number of migrants entering Bosnia and Herzegovina has significantly increased since March 2016, following the closure of the so-called “Balkan route”. For most of them, Bosnia and Herzegovina is merely a transit country on their way to EU countries. However, many of them have become stuck at the border with Croatia in overcrowded camps under inhumane living conditions. The large number of arrivals of migrants also complicates the difficult general economic and social situation in BiH.

A significant positive step was the closure of the Vučjak camp in Una-Sana Canton in December 2019, where approximately 600 people were living in 50 tents. Migrants from the Vučjak camp have been relocated to the newly-formed Blažuj camp and the existing Ušivak camp in the Sarajevo canton. Nevertheless, Bosnia and Herzegovina has a major problem accommodating migrants. One of the key obstacles is that all potential locations for reception centres are facilities or land owned by entities, cantons or municipalities, which have shown no interest

in cooperation. At the same time, the European Commission is not willing to finance and equip private facilities.

According to figures announced by the International Organisation for Migration (IOM), 20% of the approximately 5,300 migrants currently registered are children, 11% of which are unaccompanied minors. They are one of the most vulnerable groups. With no effective protection mechanisms in place, there is a high risk of their abuse through trafficking and other forms of organized crime.

The Ombudsmen of Bosnia and Herzegovina have sent their recommendations to the Council of Ministers of Bosnia and Herzegovina, urgently requesting, inter alia, the increase of accommodation capacities for migrants, the establishment of clear operational procedures for the competent authorities and the strengthening of their staff capacities.

<https://www.ombudsmen.gov.ba/Default.aspx?id=0&lang=EN>

3 Joint recommendations

NHRIs are mandated to protect and promote human rights and to monitor the compliance of government actions with fundamental and human rights standards. Currently, we are witnessing both the urgency for immediate measures to be taken to ensure that human rights are respected at the EU external borders and the need to take decisive steps to advance the negotiations for a reform of the Common European Asylum System (CEAS), taking into account both the current situation at the borders and the fundamental and human rights obligations that form the basis of the European Union.

3.1 The need for immediate measures to ensure that human rights are respected at the EU external borders

3.1.1 By countries at the borders

Access to individual and fair asylum procedures is non-negotiable. Neither security reasons nor the call for a more effective migration control system justify violence, pushbacks or collective expulsion. The principle of non-refoulement is guaranteed inter alia in Art. 33 of the Geneva Convention of 28 July 1951 and Art. 3 of the European Convention on Human Rights. The recurrent reports about pushbacks and violence at the external borders of the EU should be taken very seriously. Transparent and independent monitoring by NHRIs must be reinforced through such a mandate or through comparable independent bodies at the borders. The national governments must ensure that the bodies vested with this mandate can carry out their work effectively in practice by granting them access to data which they are authorized in accordance with domestic and international law and ensuring sufficient funding.

Reception conditions must comply with international human rights standards. In EU member states, they must also meet the requirements of the Reception Conditions Directive (2013/33/EU). The reception of asylum seekers must not only fulfil needs such as food, drink, hygiene, healthcare and shelter. Access to education, the labour market and social participation, as well as privacy and psychological and legal support, are equally important aspects of a human rights-based reception. In addition,

the conditions must meet the special needs of families and vulnerable groups, such as children, single women, traumatized persons or people with disabilities. Confronted with health emergencies like the current global corona virus pandemic (Covid-19), overcrowded camps with severely low hygiene standards and limited or non-existent access to health services expose the people to a high risk of infection and serious diseases.

Reception centres should be open and let the people move freely in and outside the camps. The deprivation of liberty must remain a measure of the very last resort. It must be subject to a strict necessity, legality and proportionality test in every single case. If the sole reason for detention is to simplify administrative procedures, this does not comply with the Reception Conditions Directive (2013/33/EU).²

3.1.2 By EU member states without external borders

The countries at the borders should be immediately relieved with regard to the reception of asylum seekers and newly arriving migrants. The Dublin III-Regulation (604/2013) obliges the member states to enable family reunifications. The first measure should be to conduct these procedures in a fast and unbureaucratic manner, especially if children are concerned. The second measure should be the relocation of a significant number of people from the overcrowded camps. That would have noticeable effects on the unacceptable humanitarian situation in the camps. It would be a first step towards a fair share and a solution based on the rule of law and the principle of solidarity. A few countries, including Germany, should step forward so that others may follow. Especially in times when a serious virus pandemic put the people in the camps to a particularly high infection risk and the host country has no possibility to transfer the people to other reception centres, other countries should take over a number of people, especially the most vulnerable ones, under the necessary health precaution measures in order to avoid a rapid spread of the virus.

Member states which support other member states by sending material or border guards in the context of missions of the European Border and Coastguard Agency (Frontex), must neither tolerate nor actively participate in violence or pushbacks at the external borders.

3.1.3 By the EU

The EU must ensure the compliance with international refugee and human rights law, wherever it is at stake in the member states. The EU must not tolerate pushbacks or the use of force against people seeking protection, especially where the European Border and Coastguard Agency (Frontex) is involved in border control activities. Monitoring bodies such as NHRIs with an NPM mandate are able to provide valuable, objective and independent information about the situation at the borders from which the EU can benefit. The EU should call on the member states to ensure the work of existing independent monitoring bodies.

Not only EU member states but also Non-EU countries at the external borders of the EU need significant financial and practical support in order to deal with the

² See also <http://ennhri.org/wp-content/uploads/2019/09/Submission-to-CDDH-MIG-%E2%80%93-Consultation-on-the-Draft-%E2%80%93-Practical-Guidance-on-Alternatives-to-Immigration-Detention%E2%80%99.pdf>; <http://ennhri.org/wp-content/uploads/2019/09/Statement-on-Immigration-Detention.pdf> (accessed 31 Mar. 2020).

humanitarian challenges they have to face regarding the reception of an increasing number of migrants and refugees trying to reach the EU.

3.2 Reform of the Common European Asylum System

The ongoing externalization of the European asylum and migration policy denies Europe's responsibility towards people in need of protection from persecution and serious human rights violations. We submit the following recommendations to the EU institutions, the national governments involved in the negotiations for a new Asylum System via the Council of the European Union, and particularly Germany, which takes over the Presidency of the Council in July 2020:

- To find a solution for a fair sharing within the EU regarding the distribution of asylum seekers who arrive in the member states at the external borders, which prevents the consolidation of the current situation in the border hotspots. There must be a proportional distribution of asylum seekers, in accordance with the principle of solidarity and equitable responsibility sharing among EU member States, as well as in full compliance with the international human rights' and refugee law. The distribution mechanism should take into account personal ties of the applicants to certain countries, such as resident family members, language and other social relations.
- To make the strengthening of effective independent monitoring and complaint systems at the borders a mandatory precondition for the planned significant reinforcement of the European Border and Coastguard Agency (Frontex). Frontex should cooperate with already existing and experienced national monitoring bodies, such as NHRIs with an NPM mandate. Furthermore, there must be a clear definition in place as to who is responsible in the cases of violence and breaches of international human rights and refugee law in the context of border management and controls, and how victims of such violations can effectively claim their rights.
- To oppose the creation of transit zones at the external borders, where the principle of non-refoulement guaranteed in numerous international human rights treaties such as the Geneva Convention of 28 July 1951 and the European Convention on Human Rights, as well as related fundamental procedural rights, risk being limited or leveraged.
- To abandon the idea of preliminary assessments at the borders based on generalized criteria such as safe third countries or safe countries of origin, leading to accelerated procedures that run the risk of limiting the applicant's right to a fair and individual asylum procedure as defined in the Asylum Procedure Directive (2013/32/EU) and thus may lead to violations of the principle of non-refoulement.
- To refrain from solutions that establish the deprivation of liberty for persons seeking international protection as a standard procedure. Procedures at the borders that are designed to determine who has the right to enter the EU and who does not entail the necessity of closed reception centres. The principle that immigration detention must be a measure of the very last resort and not the standard procedure is enshrined in Article 31 of the Geneva Convention of 28 July 1951 and the Reception Conditions Directive (2013/33/EU). The deprivation of

liberty constitutes a serious human rights infringement that necessitates particularly high requirements for justification.

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German Institute for Human Rights

The German Institute for Human Rights is the independent National Human Rights Institution of Germany. It is accredited according to the Paris Principles of the United Nations (A-status). The Institute's activities include the provision of advice on policy issues, human rights education, information and documentation, applied research on human rights issues and cooperation with international organizations. It is financed by the German Federal Parliament (Deutscher Bundestag). In addition, the Institute is specifically mandated to monitor the implementation of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and has established Monitoring Bodies for these purposes.

Greek National Commission for Human Rights

The Greek National Commission for Human Rights (GNCHR) is, according to its founding Law 2667/1998, the independent advisory body to the Greek State on matters pertaining to human rights protection. It was established in accordance with the UN Paris Principles as the National Human Rights Institution of Greece and has been accredited, since 2002, A status (full compliance). Forty institutions whose activities cover the field of human rights are currently represented in the GNCHR (independent authorities, departments of university-level educational institutions, workers' and disabled persons' confederations, NGOs, political parties and ministries).

Institution of Human Rights Ombudsman of Bosnia and Herzegovina

The Institution of Human Rights Ombudsman of Bosnia and Herzegovina was established in 1996 under Annexes IV and VI of the General Framework Agreement on Peace for Bosnia and Herzegovina. Pursuant to Article 1 of the Law on Human Rights Ombudsman of Bosnia and Herzegovina, the Ombudsman is an independent institution set up in order to promote good governance and the rule of law and to protect the rights and liberties of natural and legal persons. On 24 November 2017 SCA GANHRI re-accredited IHROBiH in "A" status as a national human rights protection mechanism which takes an active part in the networks of the human rights bodies as a member (GANHRI, ENNHRI, ECRI, ENOC, IOI, Equinet). The Ombudsman Institution is an equality body in accordance with the provisions of the Anti-Discrimination Act.

The Office of the Ombudswoman, the Republic of Croatia

The Ombudswoman of the Republic of Croatia is a commissioner of the Croatian Parliament responsible for the promotion and protection of human rights and freedoms and the performance of the mandates of the National Equality Body, the National Preventive Mechanism for the protection of the persons deprived of their liberty as well as protection of whistle blowers. She is independent and autonomous in her work. The Office of the Ombudswoman has been accredited as Status A NHRI according to the Paris Principles since 2008.

