

HELLENIC REPUBLIC
GREEK NATIONAL COMMISSION FOR HUMAN RIGHTS

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Decision on the Situation of Aliens Trying to Enter Greece via the Aegean and the Practices of the Greek Coast Guard

I. Introduction

The NCHR acknowledges that the obligations of Greece towards the EU are particularly extended regarding both the guarding of the EU's external borders and the implementation of the Dublin II Regulation. Greece should co-operate with the other Member-States of the South in order to pursue a better burden-sharing in relation to asylum and migration. Nevertheless, NCHR notes that Greece's obligations in the framework of the EU do not absolve it from other international obligations deriving from human rights instruments.

The past few months several reports (ProAsyl, Amnesty International-Greek Section, Greek Ombudsman) have focused on allegations concerning ill-treatment of aliens trying to illegally enter Greece via the Aegean by the Greek Coast Guard. Although, the NCHR is not in a position to check the veracity of the allegations contained in the reports, the latter raise serious and mostly worrying concerns.

The reports focus mainly on three issues that call for our attention: a) treatment of aliens by the Greek Coast Guard; b) obligation of rescue; c) informal refoulement.

It needs to be clarified that the use of the term 'aliens' is preferred over the terms 'immigrants' or 'refugees' because it is not possible to distinguish between the two *in abstracto*, due to mixed flows, and due to the conditions of operation of the Coast Guard. Furthermore, we need to

note that while the treatment question involves both categories of aliens, the question of refoulement concerns mostly those in need of international protection.

II. Treatment of aliens by the Coast Guard

Several complaints concern aliens' ill-treatment (beating, submarino, mock executions, life threats) by the Coast Guard after the former's apprehension and during their on board interrogation. This kind of practices violate provisions both of the Greek Constitution (articles 2, 5(1), 7(2), 25(1-2)) and international conventions (article 3 ECHR, article 7 ICCPR, articles 2 and 16 of the UN Convention against Torture). Furthermore, they entail individual criminal responsibility of the perpetrators, since they constitute criminal offences (such as body injuries articles 308 seq CC, illegal threat article 333CC etc).

These practices are illegal even if they take place on the high seas based on the principle of active personality and the principle of the flag State. Moreover, the aforementioned international conventions are applicable extra-territorially, that is also on the high seas, resulting in the State being held internationally responsible. The ECtHR has held that a State has extra-territorial jurisdiction when through the effective control of the relevant territory and its inhabitants, as a consequence of military occupation, or through the consent, invitation or acquiescence of the authorities of that territory, exercises all or some of the public powers exercised by the latter. Given that the ECtHR recognizes extra-territorial jurisdiction over territories of other States, *a fortiori* there is such jurisdiction over the high seas. The crucial criterion is whether an individual in relation to the conduct in question falls under the effective control of those acting on behalf of the State. Moreover, according to the Human Rights Committee "a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".

On the basis of the above it can be safely argued that when officers of the Coast Guard board on the boats carrying aliens or when the latter are boarded on the Coast Guard boats, located on the high seas, the control exercised over those persons is such as to be deemed sufficiently effective. Thus, they fall under their jurisdiction and the above conventions apply extra-territorially. Therefore, officers of the Coast Guard must abstain, while dealing with aliens, from any conduct which may constitute torture, inhuman or degrading treatment whether they are located on territorial waters or the high seas.

Furthermore, we need to note that on the basis of article 3 ECHR, States need to conduct official, serious and effective investigations in cases where there are complaints alleging ill-treatment by State officials.

III. Search and rescue obligation

Aliens trying to enter Greece illegally in order to avoid being located by the Coast Guard usually use small non seaworthy boats, thus facing the risk of drowning. On the basis of article 98(1) of UNCLOS, chapter 5, regulation 7(1) of SOLAS and chapter 2, 2.1.10 of SAR States are obliged to rescue persons being in danger at sea. The rescue obligation is applicable in all maritime zones and it covers not just cases where a boat transmits SOS signal, but also cases where individuals or boats in danger are accidentally encountered.

Therefore, the Coast Guard is obliged to rescue aliens being in danger at sea, irrespective of the maritime zone in which they are located even if the aliens themselves have caused the danger either by jumping at sea or by damaging their boats in order to be assisted by the Coast Guard. Furthermore, these practices should not be used as a pretext to cut down on rescue operations.

The rescue obligation also entails the abstention from acts, on the part of State officials, which may cause danger to life at sea. It has been alleged that officers of the Coast Guard damage the aliens' boats or cause big waves in order to repel them and force them to return to the Turkish

coasts. Those practices, insofar they are true, do not comply with the rescue obligation. On the contrary, they entail such a great risk to life that their compliance with the right to life as it is provided for by the Constitution (article 5(2)) and international conventions (article 2 ECHR, article 6(1) ICCPR) is in doubt. Furthermore, they entail individual criminal responsibility of Coast Guard officers for crimes, such as manslaughter (articles 299 and 302 CC), omission to rescue (article 307 CC) etc.

The ECtHR has noted the positive obligation deriving from article 2 by stating that: “the first sentence of Article 2§1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its internal legal order to safeguard the lives of those within its jurisdiction”.¹ By extension, the coast guard needs to be extra careful while trying to repel aliens trying to enter Greece in order to minimize any danger to their life. Besides, according to the ECtHR, even when death has not occurred the examination of the applicant’s complaint under Article 2 is not excluded, since “if read as a whole, it demonstrates that it covers not only intentional killing but also situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life”.² The ECtHR held that “the degree and type of force used and the intention or aim behind the use of force may, among other factors, be relevant in assessing whether in a particular case the State agents’ actions in inflicting injury short of death are such as to bring the facts within the scope of the safeguard afforded by Article 2 of the Convention, having regard to the object and purpose pursued by that Article”.³ Therefore, the methods used by the Coast Guard in order to obstruct aliens from entering Greece need to be based on their safety and respect to human life and integrity.

¹ *Kilic v. Turkey*, Judgment of 28 March 2000, para 62.

² *Makaratzis v. Greece*, Judgment of 20 December 2004, para 49.

³ *ibid* para 51.

IV. Obligation of non-refoulement

During repel operations it is not possible to distinguish between immigrants and asylum seekers. Due to mixed flows the latter are assimilated with the former. In the case of asylum seekers the compliance of repel methods with the principle of non-refoulement is in doubt. Article 33 of the Refugee Convention establishes the principle of non-refoulement which is the essence of refugee protection. The said principle is also incorporated in article 21 of the Qualification Directive 2004/83/EC.

Non-refoulement is equally applicable to refugees who seek to enter a country and to those who have already entered one. Non-refoulement is activated the minute refugees leave their country of origin. The prohibition of refoulement applies to any form of forced return, including deportation, extradition, transfer and non-admission at the border. Furthermore, non-refoulement encompasses return to any territory where there is a serious risk for the asylum seeker, irrespective of whether that territory is his country of origin or not.

The principle of non-refoulement does not fall under any territorial restrictions. It applies wherever the State exercises its jurisdiction, even *de facto*, irrespective of how and where State organs act in their official capacity, including the high seas, if their conduct constitutes effective control. It is safe to argue that any act which results in repelling or returning asylum seekers will fulfill the above conditions. The established State practice to intercept boats in great distance from their territories would render international refugee protection ineffective if State organs were to act outside the borders in breach of their international obligations. According to the Executive Committee of the UNHCR “interception must not result in denial of access to international protection or direct or indirect return to territories where there is risk of persecution”.⁴

Although non-refoulement does not entail a right to enter a State, the principle of non-rejection at the border –encompassed in the principle of

⁴ Executive Committee, Conclusion on Protection Safeguards in Interception Measures, No 97 (LIV) 2003.

non-refoulement- entails temporary admission in order for the individual's status to be determined. If a State returns a boat, on board of which there are asylum seekers, without first determining whether someone falls under the refugee definition, it violates the non-refoulement principle, if there were indeed refugees on board. Repels and other forms of rejection, before asylum seekers reach the border, constitute refoulement. Otherwise, the principle would be illusory since the State would be able to bypass it by obstructing asylum seekers to reach the borders. Without determining the status of the persons in question is impossible to know whether a State simply prevents violation of its migration legislation (article 19(2)(vii) of UNCLOS) or it violates the non-refoulement principle.

Furthermore, repel on the high seas constitutes *de facto* refoulement if asylum seekers are forced to return to their country of origin or chain refoulement in case they are forced to go to a country which will send them back to the country of origin.

VI. Conclusions-Recommendations

The UNHCR has repeatedly noted that asylum seekers do not lose their protection rights because they are part of mixed flows nor because they are forced to use smugglers in order to leave their country. It has also expressed its concern regarding the increasing non-compatibility of EU procedures and regulations for entry with refugee protection. We need to note that Regulation 2007/2004 establishing FRONTEX does not refer to the international obligations of Member States deriving from the Refugee Convention.

The NCHR realizes the complexity of the matter, both on domestic and European level, however, this does not absolve anyone from the obligation to respect the value, life and integrity of every human being and does not excuse any kind of inhuman or degrading treatment. For these reasons the NCHR expresses its concern for the aforementioned allegations regarding ill-treatment of aliens by the Coast Guard and repelling practices and underlines the following:

- 1) The phenomenon of mass immigration and large waves of asylum seekers trying to enter Greece and by extension the EU has attained large dimensions in the past few years. This situation cannot be properly addressed by the activities of the Greek Coast Guard aiming at preventing aliens to access Greek territory or arresting them. Greece needs to cooperate with its European partners so as to eradicate the generating factors of this phenomenon, i.e. the deplorable social and economical conditions that prevail in the countries of origin. The Greek Ministry of Foreign Affairs via its services for international co-operation and development and in co-operation with their European homologues need to develop and implement projects and actions in the countries of origin so as to improve the living conditions of the domestic population, thus providing them with incentives not to immigrate.
- 2) The Greek Coast Guard must treat the persons who attempt to enter Greece without legal documents with respect and abstain from any conduct which may constitute torture, inhuman or degrading treatment.
- 3) It is necessary to train and educate the Coast Guard personnel in human rights protection.
- 4) The NCHR notes that the Greek State is obliged, in cases of complaints alleging misconduct of Coast Guard personnel, to conduct immediate, thorough and effective investigations and impose disciplinary and penal sanctions insofar State officials are liable for any misconduct.
- 5) Greek Coast Guard needs to comply with the rescue obligation of persons being in danger at sea irrespective of the maritime zone where the latter are located and of the causes of the danger generated. It must also abstain from any practices which might endanger the aliens' life and safety.
- 6) Greek State needs to fully comply with the obligation of non-refoulement of persons in need of international protection.

7) In order to increase the effectiveness of the compliance with the obligation of non-refoulement, the Greek State needs to co-operate with its European partners and the UNHCR so as to develop and implement measures and *modus operandi* for guarding its borders which will ensure that immigrants and persons in need of international protection are not assimilated and treated as one and the same in terms of international protection needed.

8) Greek State needs to take effective measures against human traffickers.

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