



Submission of Legal Centre Lesvos to the Special Rapporteur on the situation of human rights defenders

15 June 2022

The last two years have seen a documented increase of collective expulsions, or ‘pushbacks’ at Greece’s land and sea borders with Turkey.¹ Now, the same organisations who have been reporting on and advocating against pushbacks are themselves facing scrutiny and threat of criminalisation due to their activities reporting on these crimes. One of the primary criminal laws used to prosecute human rights defenders in this context is the anti-smuggling legislation under Law 4251/2014, due to the law’s vague and undefined nature, and the potential for its broad application. Often additional charges such as membership in a criminal organisation or criminal group are combined with anti-smuggling charges in this context. Given recent changes to Greece’s Criminal Code, enacted in Law 4908/2022, the combined prosecution under these articles carry mandatory and disproportionate prison sentences, even for misdemeanours, creating a heightened risk for human rights defenders operating in this context.

➤ **Anti-smuggling legislation as applied against human rights defenders advocating against ‘pushbacks’**

The United Nations has defined smuggling of migrants as the facilitation of illegal entry to a state, in “order to obtain, directly or indirectly, a financial or other material benefit”, and specifies that migrants subject to smuggling operations shall not be criminalised.² Likewise, humanitarian assistance to migrants during illegalised border crossings is explicitly not subjected to criminalization.³ The original Schengen agreement of 1985, contained similar language to the UN protocols, aiming to penalise those who assist in illegal border crossing, *for financial gain*.⁴ In 2002, however, in the EU’s Facilitator’s package, this clause of “for financial gain” was deleted, leading to a contradiction with the UN Protocol. Furthermore, there is no exception in the EU Facilitator’s package for those providing humanitarian assistance in the context of migrants crossing borders.⁵

¹ UNHCR, “News Comment: UNHCR warns of increasing violence and human rights violations at European borders”, 21 February 2022, available at <<https://www.unhcr.org/news/press/2022/2/62137a284/news-comment-unhcr-warns-increasing-violence-human-rights-violations-european.html> >

² United Nations, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly Resolution 55/25, Articles 3 and 6, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-against-smuggling-migrants-land-sea-and-air>

³ Ibid.

⁴ European Union, *Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Schengen Agreement* 14 June 1985, Official Journal L 239 , 22/09/2000 P. 0013 - 0018, 42000A0922(01), Article 27 available at: <https://www.refworld.org/docid/3ddcb75a4.html> [accessed 1 June 2022]

⁵ European Commission, “Communication from the Commission to the European Parliament, The Council, THE European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum”, 23 September 2020, pp. 15

Greece enacted into law EU Directive 2011/51/EU,⁶ in 2014, through Law 4251/2014,⁷ the “Immigration and Social Integration Code and other provisions”. This law also contains Greece’s main anti-smuggling legislation. Like the EU Facilitator’s Package, and in contradiction to the UN Protocol on Smuggling, for conviction under this law there is no requirement of material or financial gain, no exception for those that are themselves subject to a smuggling operation, and no exception for those providing humanitarian assistance. Furthermore, given the high sentences associated with these crimes, Greece’s current anti-smuggling legislation is among the harshest in the EU.

Article 30 of Law 4251/2014, prohibiting “facilitating illegal entry”, is the main anti-smuggling law, and is a felony offence which results in a ten year prison sentence and an additional 15 years imprisonment for each person transported across a border whose life was put in danger. Additionally, the law allows for fines of a minimum of 200.000 Euros for each person transported. Financial gain is only considered an aggravating factor which does not make a significant change in the total sentence. While this law is mainly directed against migrants themselves⁸, it has also been applied and threatened to be used to criminalise human rights defenders – in particular Search and Rescue organisations⁹ – who have nothing to do with trafficking groups.

Under Article 29, §6 of the same Law 4251/2014, Greece also prohibits the “facilitation of illegal stay” (emphasis added), which is a misdemeanour offence carrying a potential penalty of between one and five years imprisonment and at least a 5.000 Euro fine. As with the main anti-smuggling law, there is no exception for the provision of humanitarian assistance, and no requirement of financial or other material gain, in contradiction to the UN Protocol on Smuggling. While the crimes of “illegal entry” and “attempted illegal entry” exist in the Greek Criminal Code, after 2005 there is no such crime of “illegal stay”. Prosecution and conviction of an individual for facilitating an alleged act which is not a recognized crime, violates Article 7 §1 of the Constitution,¹⁰ which states that “there shall be no crime, nor shall punishment be inflicted unless specified by law in force prior to the perpetration of the act, defining the constitutive elements of the act”.¹¹ In short, this means that individuals are being charged and convicted of ‘facilitating’ something which is not considered a crime, creating a legal fallacy that has been abused by the courts to prosecute humanitarian actors.

⁶ Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, available at <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:132:0001:0004:EN:PDF>>

⁷ Greece: Law No. 4251/2014 available at < <https://www.e-nomothesia.gr/kat-allodapoi/n-4251-2014.html>>

⁸ Border Monitoring EU, *Incarcerating the Marginalised: The Fight Against Alleged Smugglers on the Greek Hotspot Island*, November 2020, available at <https://bit.ly/3b0e3DO>, see also, footnote 23.

⁹ University of the Aegean, “On the arrest of members of the NGO Emergency Response Center International (E.R.C.I.)”, 18 December 2018, available at: <

<https://refugeeobservatory.aegean.gr/en/observatory-news-bulletin-arrest-members-ngo-emergency-response-center-international-erc-i-updated> >

¹⁰ The Greek Constitution entered into force in June 1975 (GG A’/111) and was revised in 1986 (GG A’/23), 2001 (GG A’/85) and 2008 (GG A’/120) available at

<<https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>> accessed 31 May 2022.

¹¹ Ibid, Article 7 par. 1.

While there have been to date only a handful of *convictions* of human rights defenders under these Articles 29 and 30 of law 4251/2014, these convictions, together with the announcement of criminal investigations and the arrest and charging of individuals in prolonged court cases without resolution under these provisions, has led to an overall climate of fear in Greece, and has had a chilling effect on those who criticise government migration policies and denounce and expose government crimes.

CASE STUDY: Prosecution in Lesvos for facilitation of illegal stay

In October 2020, lawyers from Legal Centre Lesvos (LCL) represented an individual, PM, who was arrested and convicted under Article 29, §6 of Law 4251/2014.

PM was arrested at the site of where 25 recently arrived migrants were located on the island of Lesvos. He was charged with the misdemeanour offences of both facilitating illegal stay and disobedience. In his trial the only evidence presented that could have been constructed as “facilitating” anything for the 25 migrants who he was that he had given the group water to drink. There was no evidence that the defendant had any prior contact with the 25 migrants before they arrived in Greece, nor during their journey, nor after they had landed. The police and prosecutor presented no such evidence and made no such argument in the court that would connect the defendant in any way either with the migrants or any smuggling network. Despite the lack of evidence and opposition from LCL lawyers, the defendant in this case was convicted on both charges. Furthermore, as mentioned above, his conviction on the ‘facilitation’ charge was in contradiction to constitutional principles, since no article of the penal code punishes the illegal stay in Greece of a foreigner who entered without legal permission, no matter how many years he stays without legal permission.

While PM’s conviction was overturned on appeal a year after his initial conviction, the individual had multiple cameras and personal items confiscated as part of the supposed investigation, and for the year following his conviction, he feared returning to Greece.

The prosecution of the above mentioned individual in 2020, occurred at a time when the practice of collective expulsion, or ‘pushbacks’ in the Aegean had escalated.¹² There exists substantial evidence that collective expulsions are carried out systematically to expel those who manage to arrive to the Greek waters, and also those who reach the Greek islands – where they are hunted down, captured, and again taken out to sea where they are abandoned in motorless life rafts, and in some documented cases thrown directly into the sea in a murderous and calous disregard for

¹² Legal Centre Lesvos, ‘Collective Expulsions in the Aegean Sea: March-July 2020’ (15 July 2020), <<http://legalcentresvos.org/wp-content/uploads/2020/07/Collective-Expulsions-in-the-Aegean-July-2020-LCL.pdf>>; Mare Liberum, “Pushback Report 2020”, 2021, available at <<https://daten.mare-liberum.org/s/4HdxAPACaPsqzEx>>; Legal Centre Lesvos, ‘Crimes Against Humanity in the Aegean Sea’ (1 February 2021), available at <<http://legalcentresvos.org/wp-content/uploads/2021/02/Collective-Expulsions-in-the-Aegean-LCL-01.02.2021-1.pdf>>

the lives of those seeking protection in Greece.¹³ Over the past two years, public statements from the highest levels of the Greek government have insinuated that those who denounce, report on, and advocate against pushbacks, or provide humanitarian assistance to newly arrived asylum seekers, are themselves involved in smuggling networks.¹⁴

Law 4251/2014, Article 29 was used also in 2015 to prosecute individuals in Lesbos who transported migrants in their cars from the northern side of the island to the main city of Mytilene, where the migrants could at that time take a ferry to Athens and continue their journey. After immense public pressure about the both unlawful and inhumane application of the law, its use was discontinued for several years. Following the arrest and conviction of PM in 2020, however, police and prosecutors have used anti-smuggling legislation on repeated occasions against those arrested at the site of migrant boat landings.¹⁵ The use and threatened use of anti-smuggling legislation against those providing assistance to newly arrived, unregistered asylum seekers, is particularly alarming for those intervening to provide humanitarian and legal assistance to newly arrived asylum seekers.

There has been a growing threat of prosecution of actors involved in reporting on and advocating against ‘pushbacks’. Two years ago, four human rights monitoring and migrant solidarity groups – which all publicly denounced collective expulsions in the Aegean – were reportedly identified by Greek police in an investigation that accused them, among other crimes, of forming and membership of a criminal organisation, and violating anti-smuggling legislation.¹⁶ Later, the Mytilene Police themselves announced an investigation of ten individuals for *organised* facilitation of illegal entry of third country nationals, hinting that the investigated criminal acts are both for facilitation of illegal entry and participation in a criminal organisation.¹⁷ While the individuals and organisations were not named, nor the activities that caused the police to initiate

¹³ UNHCR, “News Comment: UNHCR warns of increasing violence and human rights violations at European borders”, 21 February 2022, available at <<https://www.unhcr.org/news/press/2022/2/62137a284/news-comment-unhcr-warns-increasing-violence-human-rights-violations-european.html>>; Spiegel International, “Death in the Aegean: EU Border Officials Accused of Throwing Refugees into the Sea”, 17 February 2022, available at <<https://www.spiegel.de/international/europe/death-in-the-aegean-eu-border-officials-accused-of-throwing-refugees-into-the-sea-a-19ba0711-eedb-4c10-82da-ca12f5e01936>>

¹⁴ InfoMigrants, “Greece minister: Smugglers spread false rumors about pushbacks”, 1 September 2020, available at <https://www.infomigrants.net/en/post/26966/greece-minister-smugglers-spread-false-rumors-about-pushbacks>; New York Times, “Greece Accuses Aid Groups of Helping Smugglers of Migrants”, 11 August 2021, <https://www.nytimes.com/2021/07/30/world/europe/greece-migrants-aid-groups.html>; Efsyn, “Iasonas Apostolopoulos responds to the vulgar targeting of him”, 8 June 2022, available at (Greek) https://www.efsyn.gr/ellada/dikaiomata/347450_o-iasonas-apostolopoylos-apanta-sti-hydaia-stohopoiisi-toy

¹⁵ EFSYN, “He was charged for giving water and food to refugees” 5 June 2022, available at (Greek) https://www.efsyn.gr/ellada/koinonia/346965_katigoreitai-giati-edine-nero-kai-fagito-se-prosfyges; Sto Nisi, 8 May 2022, “Transporting migrants by taxi: The son of a taxi owner who transported migrants from the area of Mandamados was arrested on Saturday morning” available at (Greek) <https://www.stonisi.gr/post/29684/metefere-metanastes-me-taksi>

¹⁶ North Aegean Journalists Information Office, “33 members of NGOs and 2 third-country nationals, are included in a case file for an organised circuit to facilitate the illegal entry of aliens into the Greek territory, via the island of Lesbos, 28 September 2020, available at (Greek): http://www.astynomia.gr/index.php?option=ozo_content&lang=%27..%27&perform=view&id=97610&Itemid=2509&lang=

¹⁷ Hellenic Police, “Four members of N.G.O. and six third country nationals are included in a case file for organized action of persons who were active in facilitating the illegal entry of foreigners into Greek territory through the islands of the Northeastern Aegean.19 July 2022, available at (Greek): http://www.astynomia.gr/index.php?option=ozo_content&lang=%27..%27&perform=view&id=103779&Itemid=2662&lang=

the investigation, the Hellenic Police state in their press release that the groups were “operating in an ostensibly humanitarian manner.” In May 2022, four additional organisations were reportedly under criminal investigation for potential involvement with smuggling networks – reportedly because they notified the authorities about the location of newly arrived migrants, and requested authorities to intervene to provide assistance.¹⁸

Impact of criminalisation on the work of Legal Centre Lesvos

The Legal Centre Lesvos (LCL) is a Greek non-profit organisation providing legal assistance to migrants, asylum seekers, and refugees in Lesvos since 2016, including unregistered asylum seekers newly arrived on the island. The LCL is among the organisations that have been advocating against and reporting on the practice of collective expulsions, or ‘pushbacks’, in the Aegean over the last two years, producing two extensive reports based on the direct testimony and evidence provided by survivors.¹⁹ The LCL has also filed litigation in the European Court of Human Rights (ECtHR) against the Greek state, in representation of individuals who have survived collective expulsion, or ‘pushbacks’, from Greece to Turkey, two cases of which have now been communicated to Greece.²⁰ In recent months, the Legal Centre has also filed successful emergency petitions to the ECtHR under Rule 39 of the Rules of the Court, requesting ‘interim measures’ on behalf of unregistered asylum seekers recently arrived to Greece, in order to ensure their access to asylum procedures, medical support and prevent their collective expulsion, or ‘pushback’ to Turkey.²¹ In two cases filed by the LCL, the ECtHR partially granted the petition and in all cases, those represented by the LCL were allowed to register their asylum claims in Greece.²²

In the context of carrying out the above work, newly arrived asylum seekers have contacted the LCL for legal assistance in accessing the asylum procedure. In response, LCL has notified authorities of their arrival and intent to seek asylum in Greece. LCL has also physically attended the location of recently arrived asylum seekers, in order to provide emergency legal assistance in ensuring the human rights of these asylum seekers are respected, in circumstances where authorities denied

¹⁸ News.IT, ‘Evros: Investigation into the activities of NGOs and their connection with illegal immigrant networks’, 29 May 2022, Available at (Greek), <https://www.newsit.gr/ellada/evros-ereyna-gia-ti-drasi-mko-kai-ti-syndesi-tous-me-ta-kyklomata-paratypon-metanas-ton/3534121/>

¹⁹ Legal Centre Lesvos, 1 February 2021, Crimes Against Humanity in the Aegean, available at <https://legalcentrelesvos.org/2021/02/01/crimesagainstumaniyintheaegean/>; Legal Centre Lesvos, July 2020, Collective Expulsions in the Aegean Sea, available at <http://legalcentrelesvos.org/2020/07/13/press-release-new-legal-centre-lesvos-report-details-collective-expulsions-in-the-aegean-sea/>

²⁰ Legal Centre Lesvos, 22 December 2021, European Court of Human Rights to examine 32 cases filed against Greece concerning illegal collective expulsions, available at <https://legalcentrelesvos.org/2021/12/22/european-court-of-human-rights-to-examine-two-cases-filed-against-greece-concerning-illegal-collective-expulsions/>.

²¹ Legal Centre Lesvos, Quarterly Report: January – March 2022, May 2022, available at <https://legalcentrelesvos.org/2022/05/25/legal-centre-lesvos-quarterly-newsletter-january-march-2022/>.

²² Ibid.

basic assistance for extended periods of time, including urgently needed medical assistance. Following such interventions on behalf of newly arrived asylum seekers, members of the LCL team have been questioned by the Hellenic Police or Coast Guard.

In parallel, the LCL also represented an individual prosecuted under anti-smuggling legislation after his provision of humanitarian assistance to newly arrived asylum seekers, has provided legal advice to other individuals, including journalists and NGO workers, who face risks of criminalisation for their humanitarian work and activities in supporting migrants in Lesbos. The LCL has also represented several migrants, themselves subject to smuggling networks, who were charged under Greece's anti-smuggling laws.²³

While the LCL itself has not been informed of any criminal investigation against the organisation or any members of its team, the recent announcements that criminal investigations have been initiated against organisations who notified authorities about newly arrived asylum seekers' location, combined with ongoing discourse accusing of smuggling those who denounce 'pushback' policies²⁴, means that *we continue to operate under constant threat of criminalisation and prosecution, in a climate where many humanitarian and human rights actors do not intervene, given the risk of arrest and prosecution.*

➤ **Amendments to Greek criminal code introduce disproportionate mandatory sentences, subject to abuse and use against human rights defenders**

On the 11th of March 2022, Greece enacted a new law, Law 4908/2022.²⁵ Article 72 of Law 4908/2022 amends Article 187 of the Greek Criminal Code (hereinafter CC),²⁶ the criminal law which prohibits formation and participation in criminal organisations and criminal groups. Specifically, Article 187 was amended to add a paragraph which states that “in cases of conviction for offences under this Article, as well as for related offences that were co-convicted by the same decision, the sentence *shall not be suspended or commuted in any way, and any appeal lodged shall not have suspensive effect.*”

CC Article 187 §1 prohibits the formation and participation in an operationally structured organisation of three or more persons, with continuous criminal activity. The potential penalty for conviction under this article is minimum 5 years imprisonment, if the criminal activity the

²³ See, e.g. Legal Centre Lesbos, “Justice for K.S.”, 10 May 2021, available at <http://legalcentresvos.org/2021/05/10/justice-for-k-s/>; Legal Centre Lesbos, “Cruel and unjustified postponement of Amir and Razuli appeal trial”, 7 April 2022, available at <https://legalcentresvos.org/2022/04/07/cruel-and-unjustified-postponement-of-amir-and-razuli-appeal-trial/>

²⁴ See footnote 14.

²⁵ Greece: Law No. 4908/2022 available at <<https://www.e-nomothesia.gr/kat-athlitismos/nomos-4908-2022-phek-52a-11-3-2022.html>> accessed 31 May 2022.

²⁶ Greek Criminal Code (as amended Law No. 4908/2022), Article 187 «Criminal Organization».

persons are seeking to commit are felony offences. If the criminal activity planned by the organisation is a misdemeanour, the minimum prison sentence is ten days, but can be up to three years imprisonment (CC Article 187, §2). Furthermore, under Article 187, §3, participation in a criminal group with the intention to carry out a crime carries a minimum of six months in prison, if the crime intended to be committed is a felony offence. A criminal group under Greek criminal law is a group of at least two people who gather with the intention to commit a crime.

Normally, even for more serious offences, such as felonies, a prison sentence of up to 5 years can be suspended at the discretion of the judge while the case is decided on appeal (CC Art. 99, §1). Additionally, misdemeanour offences with a prison sentence of up to 3 years are normally automatically suspended while a decision is reached on appeal (Ibid). A court in the past could decide at its discretion to suspend prison time for felony offences, for a variety of reasons, including evidence that the perpetrator is not likely to commit additional crimes, evidence that the defendant is remorseful, evidence that the defendant was providing humanitarian or other assistance, evidence of particular hardship the defendant will face in prison due to age or medical condition, or evidence of any other mitigating factors. **The provision of mandatory prison sentences without the possibility of suspension, removes the discretion of judges and ignores the individual circumstances of each case.**

By applying CC Article 187, §6, any prosecutor or judge can prosecute or sentence human rights defenders (or migrants themselves subject to smuggling networks) under Articles 29 and 30 of Law 2541/2014, in combination with a charge of participation in a criminal group or organisation. Given the already proven broad and arbitrary prosecution of migrants and human rights defenders under anti-smuggling legislation, for both the felony offence of facilitation of illegal entry, and the misdemeanour offence of facilitation of illegal stay, this amendment to the criminal code has created an even more chilling environment for human rights defenders. As detailed above, criminal investigations have already been initiated in this context against several members of non governmental organisations involved both with documenting and advocating against pushbacks, or intervening to attempt to prevent pushbacks, and these investigations include investigation for participation in criminal organisations or groups.²⁷ It is not only human rights defenders who are at risk or abuse under this new legislation. Notably, Lawyers' bar associations in Greece are actively opposing this particular tightening of the law, due to the disproportionate and inflexible sentences that would result from its application, with continuous abstentions from trials in which this specific article is included as a charge.²⁸

²⁷ See footnotes 16-18. Additionally, anti-smuggling legislation is not the only law that human rights defenders are being prosecuted under, and that has the potential to be prosecuted in combination with anti organised crime legislation. For example, a well known 75 years old photographer, charged under CC Article 148 §2, with a felony charge of espionage. Thus far he has not been charged with additional crimes, but if charged in combination with a charge of participating in a criminal group or organisation, any sentence given, if convicted, would not be suspendable. In this case, he only avoided pre-trial detention in Greece, following an overwhelming international outpouring of support and intervention of his country's embassy. See, Keep Talking Greece, "Internationally acclaimed Norwegian photographer Knut Bry arrested on Lesbos" 17 March 2022, available at <https://www.keeptalkinggreece.com/2022/03/17/knut-bry-norwegian-photographer-arrested-lesvos-greece/>

²⁸ Lawnet "DSA: Decision on targeted abstentions of lawyers" (Lawnet, 31 May 2022) available at <<https://lawnet.gr/law-news/dsa-apofasi-gia-stochevmenes-apoches-dikigoron/>>

➤ Conclusion

Anti-smuggling legislation, not only in Greece, but throughout Europe, has been used not only to target those exploiting and profiting from migrants inability to cross borders legally, but as a punitive tool against migrants themselves, and increasingly against people who provide humanitarian assistance or who attempt to defend the rights of migrants crossing borders. Such attempts by states (and organisations of states such as the EU) to frame migrants, migrants' rights defenders and solidarity actors as criminals and threats to the nation is a deliberate and effective tactic to circumvent their own liability for severe criminal acts and human rights violations occurring at its borders. Reform of anti-smuggling legislation is particularly urgent in order to prevent the arbitrary and malicious prosecution of both human rights defenders and migrants who are attempting to reach safety in Europe.

Recommendations:

- Bring anti-smuggling legislation, in particular Articles 29 and 30 of Law 4251/2014, in line with UN Protocol on Smuggling, to add a requirement of financial or other material gain to the definition of smuggling, to eliminate the prosecution of migrants who are themselves subject to smuggling networks, and to eliminate the prosecution of those providing humanitarian and legal assistance to newly arrived, but not yet registered asylum seekers.
- Elimination of the prohibition of “facilitation of illegal stay” of irregular third country nationals, under Article 29, §6, of Law 4251/2014 given the lack of any underlying crime of “illegal stay”, and its violation of Article 7 §1 of the Constitution.
- Retraction of Article 72 to Law 4908/2022, which introduced mandatory prison sentences, even for misdemeanour offences, for criminal convictions issued in combination with conviction for participation in criminal organisations or groups. Reintroduce the discretionary power of the courts to suspend prison sentences, in particular in cases where mitigating circumstances merit release from prison on appeal or pre-trial detention.
- Bring an end to the practice of collective expulsion, or ‘pushbacks’, including through (criminal) investigation of unlawful conduct carried out by State agents in connection with collective expulsion, or ‘pushbacks’ from Greece to Turkey from 2020.