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# AN ANALYSIS OF GREECE'S POTENTIAL VIOLATIONS OF THE REFUGEE CONVENTION AND THE ROME STATUTE IN ITS TREATMENT OF REFUGEES

Leigh Marie Dannhauser<sup>1</sup>

## TABLE OF CONTENTS

INTRODUCTION .....	58
I. CLOSED REFUGEE CAMPS AND THE FREEDOM OF MOVEMENT .....	59
A. Is the Refugee Convention Applicable? .....	59
B. Interpreting Articles 26 and 31 of the Refugee Convention.....	60
C. How Greece is Operating its Closed Refugee Camps .....	65
D. Is the Refugees' Right to the Freedom of Movement Being Violated? .....	66
E. Do Greece's Practices Fall Under an Exception to the Freedom of Movement Under Article 26 or are Considered Necessary Under Article 31? .....	67
II. PUSHBACKS .....	70
A. Rome Statute .....	73
1. Common Elements .....	74
<i>a. Widespread or Systematic Attack Directed Against a Civilian Population .....</i>	<i>74</i>
<i>b. Conduct was Part of or Intended the Conduct to be a Part of a Widespread or Systematic Attack Against a Civilian Population .....</i>	<i>79</i>
2. Elements for Individual Crimes Against Humanity .....	80
<i>a. Murder .....</i>	<i>80</i>
<i>b. Deportation or Forcible Transfer of Population .....</i>	<i>83</i>
<i>c. Torture .....</i>	<i>85</i>
B. Refugee Convention .....	89
1. Expulsion.....	89

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2. Refoulement .....	91
III. REFUGEE CAMP LIVING CONDITIONS AND THE RIGHT TO HOUSING.....	94
IV. CAN STATE SOVEREIGNTY SHIELD GREECE FROM FACING ACCOUNTABILITY? .....	97
CONCLUSION.....	99

## INTRODUCTION

Over the past few years, Greece has been fighting to keep migrants from entering the country, accusing them of treating it as a gateway to the rest of Europe. Especially since the Taliban took control of Afghanistan,<sup>2</sup> Greek officials have been adamant that they will not permit a repeat of the 2015 refugee crisis, in which the number of migrants seeking asylum in Europe surged from less than 600,000 in 2014 to over 1.3 million in 2015<sup>3</sup> and where over 3500 migrants and refugees died trying to cross the Mediterranean Sea.<sup>4</sup> This Article analyzes whether Greece's migration policies and practices—specifically, its operation of refugee camps and its alleged practice of pushbacks—violate international law. It analyzes: (1) whether Greek actors are violating the Rome Statute by committing crimes against humanity of murder, deportation, and torture; and (2) whether Greece is violating its obligations from the 1951 Convention of the Status of Refugees (Refugee Convention), in particular Articles 21, 26, 31, 32, and 33 regarding housing, freedom of movement for lawful refugees, freedom of movement for unlawful refugees, expulsion, and refoulement respectively.<sup>5</sup>

The analysis proceeds by looking at three specific practices. Part I looks at the operation of the Samos refugee camp, which uses a technologically advanced security system to control who can enter and exit. Part II describes and analyzes the alleged pushbacks whereby refugees

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2. The Taliban re-took control of Afghanistan in August 2021 when the US withdrew from the country. Ruby Mellon, *The Shocking Speed of the Taliban's Advance: A Visual Timeline*, WASH. POST (Aug. 16, 2021), <https://www.washingtonpost.com/world/2021/08/16/taliban-timeline> [<https://perma.cc/2C95-2X2H>].

3. Phillip Connor, *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RESEARCH CTR. (Aug. 2, 2016), <https://www.pewresearch.org/global/wp-content/uploads/sites/2/2016/08/Pew-Research-Center-Europe-Asylum-Report-FINAL-August-2-2016.pdf> [<https://perma.cc/27ER-2M98>].

4. William Spindler, *2015: The Year of Europe's Refugee Crisis*, UNHCR (Dec. 8, 2015), <https://www.unhcr.org/en-us/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html> [<https://perma.cc/VY3M-WQKP>].

5. Greece's obligations result from having ratified the Refugee Convention in 1960. Human Rights Liaison Unit, *Compilation Rep. of the U.N. High Comm'r for Refugees, Universal Periodic Review: Greece 1* (Nov. 2010), <https://www.refworld.org/pdfid/4cd8f2ec2.pdf>.

who have entered Greece are rounded up by Hellenic Coast Guard personnel and either left floating in disabled life rafts or thrown directly into the Aegean Sea. Part III examines the operation of the Mavrovouni refugee camp, where migrants live in tents on lead-poisoned land. Finally, Part IV of this Article takes a brief look at whether Greece can successfully argue that its right to state sovereignty protects it from being held accountable for any violations of international law found in this analysis.

## I. CLOSED REFUGEE CAMPS AND THE FREEDOM OF MOVEMENT

### A. Is the Refugee Convention Applicable?

Before determining how the freedom of movement is interpreted and whether the closed camps violate that freedom, it must be determined whether those who are in the closed refugee camps are technically refugees under international law and subsequently fall under the protections of the Refugee Convention.

The Refugee Convention defines a refugee as one who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>6</sup> While the Refugee Convention defines the term ‘refugee,’ it does not establish the specific point in time when a person becomes a refugee who qualifies for the protections it provides. The United Nations High Commissioner for Refugees (UNHCR) has found that “[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined.”<sup>7</sup> Greece is recognizing at least some migrants as refugees after they have spent as many as two years in refugee camps.<sup>8</sup> Since migrants classi-

6. Convention Relating to the Status of Refugees, art. I(A)(2), *adopted* July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]. The original Convention includes the language “As a result of events occurring before 1 January 1951 . . .” The 1967 Protocol removed such language. Protocol Relating to the Status of Refugees, art. I(2), Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

7. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, at 17 ¶ 28, U.N. Doc. HCR/1P/4/ENG/REV. 4 (second re-issue 2019), <https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> [https://perma.cc/DB8A-7Z69].

8. INT’L RESCUE COMM., *The Cruelty of Containment: The Mental Health Toll of the EU’s ‘Hotspot’ Approach on the Greek Islands* 3 (Dec. 2020), <https://www.rescue-uk.org/sites/default/files/document/2389/crueltyofcontainmentreport.pdf> [https://perma.cc/RN82-XV4G].

fy as refugees once they satisfy the requirements rather than only once they are recognized by the host country, at least some migrants suffering in camps awaiting their status determination from Greece satisfy the definition of being a refugee and are therefore eligible to receive Refugee Convention protections.

## B. Interpreting Articles 26 and 31 of the Refugee Convention

Article 26 of the Refugee Convention states, “[e]ach Contracting State shall *accord* to refugees lawfully in its territory the right to choose their place of residence [and] to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.”<sup>9</sup> Since there has been no case law applying the freedom of movement under the Refugee Convention, this article remains uninterpreted. The first part of Article 26 seems straightforward—the rights at issue under Article 26 are the right to choose where one lives and the right to move freely within a country’s territory.<sup>10</sup> However, the second part of Article 26, “subject to any regulations applicable to aliens generally in the same circumstances,” is not as clearly defined. Article 6 of the Refugee Convention does define the phrase, “in the same circumstances,” but it only defines the phrase for the obligations that migrants owe for the purposes of enjoying the rights embodied in the Refugee Convention rather than who “aliens generally in the same circumstances” actually are.<sup>11</sup>

According to the Refugee Convention Travaux Préparatoires, the prior draft of Article 26 used the phrase “governing aliens generally” before the United States representative proposed the language change, which was adopted without subsequent discussion.<sup>12</sup> The lack of discussion following the proposal indicates that the substance is the same. Aliens, under international law, are those who are not nationals

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9. Refugee Convention, *supra* note 6, at art. 26.

10. “The right to move freely relates to the whole territory of a State, including all parts of federal States.” Off. of the High Comm’r for Human Rights, CCPR General Comment No. 27: Article 12 (Freedom of Movement), ¶ 5, CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999).

11. *Id.* at art. 6 (“For the purposes of this Convention, the term “in the same circumstances” implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling”).

12. U.N. High Comm’r for Refugees, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* by Dr Paul Weis art. 26 at 14 (1990), art. 26 <https://www.unhcr.org/4ca34be29.pdf> [<https://perma.cc/G9RS-E8RY>]

of the country.<sup>13</sup> As of October 2021, the only regulations in Greece that regulate the freedom of movement of aliens were for visitors diagnosed with COVID-19 upon arrival, requiring them to quarantine.<sup>14</sup> Thus, the clause of “subject to any regulations applicable to aliens generally within the same circumstances” likely will not impact the subsequent analysis.

As to the actual right to the freedom of movement under Article 26, Greece provided itself two exceptions to protecting this right when signing onto the Refugee Convention. It made a reservation specific to Article 26 listing both exceptions. Greece’s reservation states, “[i]n cases or circumstances which, in its opinion, would justify exceptional procedure for reasons of national security or public order, the Hellenic Government *reserves* the right to derogate from the obligations imposed by the provisions of article 26.”<sup>15</sup>

The guidelines of international treaty interpretation could be used to argue for more exceptions to the Refugee Convention. The Vienna Convention on the Law of Treaties (VCLT) provides a guide for interpreting such agreements. Article 31(3)(c) states that along with the context of an agreement, “any relevant rules of international law applicable in the relations between the parties” should be taken into account.<sup>16</sup> The International Covenant on Civil and Political Rights (ICCPR), which Greece ratified in 1997,<sup>17</sup> is a rule of international law relevant to Greece’s practice of forcing refugees to remain at refugee camps.<sup>18</sup> The ICCPR defines the freedom of movement similarly

13. G.A. Res. 40/144, art. 1 (Dec. 13, 1985); Int’l L. Comm’n., *Draft articles on the expulsion of aliens, with commentaries*, art. 2(b) (2014), [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_12\\_2014.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf) [<https://perma.cc/9RJ8-ZM7R>]; see U.N. High Comm’r for Refugees, CCPR General Comment No. 15: *The Position of Aliens Under the Covenant*, art. 2 (Apr. 11, 1986), <https://www.refworld.org/docid/45139acfc.html>.

14. HELLENIC REPUBLIC GENERAL SECRETARIAT FOR CIVIL PROTECTION, *Protocol for Arrivals in Greece*, <https://travel.gov.gr/#> (last visited Oct. 31, 2021). [<https://archive.ph/jKMJi>].

15. State Parties, Including Reservations and Declarations, to the 1951 Refugee Convention, U.N. High Comm’r for Human Rights (Sept. 2019), <https://www.unhcr.org/en-us/protection/convention/5d9ed32b4/states-parties-including-reservations-declarations-1951-refugee-convention.html> [<https://perma.cc/4TDK-8B5P>].

16. “There shall be taken into account, together with the context: (c) any relevant rules of international law applicable in the relations between the parties.” Vienna Convention on the Law of Treaties art. 31(3)(c), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

17. U.N. Human Rights Office of the High Comm’r, Status of Ratification Interactive Dashboard, <https://indicators.ohchr.org> (follow hyperlink; then under Countries column click “Greece”).

18. Scholars argue that there are three factors to determine whether a provision in another treaty is relevant rule of international law: (1) subject-matter; (2) object and

to the Refugee Convention,<sup>19</sup> but establishes four exceptions. Article 12(3) states: “The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect [1] national security, [2] public order (ordre public), [3] public health or morals or [4] the rights and freedoms of others . . . .”<sup>20</sup> Since the ICCPR is likely a relevant rule of international law applicable to Greece’s practice of forcing refugees to remain at refugee camps, it would follow that the exceptions Greece provided for itself in its reservation are the sole exceptions it has to the Refugee Convention, but that at most the exceptions to the freedom of movement are to protect (1) national security; (2) public order; (3) public health or morals; and (4) the rights and freedoms of others.

The notion of limited exceptions is supported by the Preamble to the Refugee Convention, which under VCLT Article 31 is a part of the context of a treaty.<sup>21</sup> The Refugee Convention’s Preamble states that the contracting parties considered the Universal Declaration of Human Rights (UDHR) as well as how the United Nations has “endeavored to assure refugees the widest possible exercise of these fundamental rights.”<sup>22</sup> The UDHR stipulates that “everyone has the right to the free-

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purpose; and (3) inter-temporal considerations. Sumith Suresh Bhat, *A Study of the Issue of ‘Relevant Rules’ of International Law for the Purposes of Interpretation of Treaties Under Article 31(3)(c) of the Vienna Convention on the Law of Treaties*, 21 INT’L CMTY. L. REV. 190, 192 (2019). While a full analysis, including varying views on the definition of “relevant rule” clause, is outside of the scope of this Article, all three factors lean towards the International Covenant on Civil and Political Rights (ICCPR) being a relevant rule for interpreting the Refugee Convention. The rules at issue both cover the freedom of movement supports that they share a subject-matter. See Refugee Convention, *supra* note 6, at arts. 26, 31; see International Covenant on Civil and Political Rights, art (12), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter ICCPR]. The Refugee Convention and the ICCPR are both human rights treaties and were written in the context of recognizing the rights of all human beings. *Id.* at Pmbl.; Refugee Convention, *supra* note 6, at Pmbl.; Finally, inter-temporal considerations are not applicable in this case since the legal terms in these two articles have not changed. See Suresh, *supra* note 18, at 210.

19. “(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. (2) Everyone shall be free to leave any country, including his own.” ICCPR, *supra* note 18, at art. 12(1)–(2).

20. *Id.* at art. 12(3).

21. “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the parties as an instrument related to the treaty.” Vienna Convention, *supra* note 16, at art. 31(2).

22. “Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.” Refugee Convention, *supra* note 6, at Pmbl.

dom of movement and residence within the borders of each State,” without any exceptions listed.<sup>23</sup> While the UDHR is not a legally binding document,<sup>24</sup> the fact that the drafters of the Refugee Convention explicitly considered it supports the conclusion, under VCLT treaty interpretation guidelines, that there are no more exceptions to the freedom of movement than those listed in the ICCPR.

Similarly, the Preamble's explicit reference to the United Nations' aspirations implies that the drafters shared the goal of assuring refugees the widest possible exercise of rights.<sup>25</sup> This reference further supports the notion that there are no additional permissible exceptions that would restrict the exercise of fundamental rights. Therefore, if Greece is violating Article 26 of the Refugee Convention in its treatment of refugees, arguably its actions need to fall under one of the two exceptions it provides for in its reservation (national security and public order) to comply with the Refugee Convention, but they must certainly fall under one of the four exceptions listed in the ICCPR.

Article 26 is limited in that it only protects the rights of refugees “lawfully within [a signatory's] territory.”<sup>26</sup> This limitation is shared by the ICCPR.<sup>27</sup> Therefore, before determining whether Greece's actions violate the Article 26 rights of the refugee residents at Samos, it needs to be determined whether Greece has the burden of protecting those rights to begin with. The UN Human Rights Committee, the body in charge of enforcing the ICCPR,<sup>28</sup> provides guidance as to who is lawfully in a territory. In 1999, the Human Rights Committee (the Committee) adopted a general comment on the freedom of movement.<sup>29</sup> In it, the Committee states, “[t]he question of whether an alien is ‘lawfully’ within a territory of a State is a matter governed by domestic law.”<sup>30</sup> The Committee

23. G.A. Res. 217 (III) A, art. 13, Universal Declaration of Human Rights (Dec. 10, 1948).

24. *Universal Declaration of Human Rights*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights> [<https://perma.cc/F5P6-GWED>].

25. See Refugee Convention, *supra* note 6, at Pmb1.; Vienna Convention, *supra* note 16, at art. 31(2).

26. “Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.” Refugee Convention, *supra* note 6, at art. 26.

27. “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” ICCPR, *supra* note 18, at art. 12(1).

28. *Id.* at art. 41.

29. See CCPR General Comment No. 27: Article 12 (Freedom of Movement), *supra* note 10.

30. *Id.* at ¶ 4.



also stated that it “has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory.”<sup>31</sup>

The determination of which refugees achieve regularized status also falls under the purview of domestic law.<sup>32</sup> An analysis and application of Greek domestic law, including which refugees are lawfully entering the territory and which refugees achieve regularized status, falls outside of the scope of this Article. But comments by Greek Migration Minister Notis Mitarachi at the opening of the closed Samos camp imply that at least some of the refugees in closed camps are legal.<sup>33</sup> Due to the uncertain legal status of the refugees in closed camps like Samos, this Article will complete the Article 26 analysis as if at least some refugees in the various camps are lawfully within Greece, but it acknowledges that the final determination of whether Greece is in violation will depend on this status.

As previously mentioned, Article 31 also refers to the freedom of movement. Article 31, which governs the rights of refugees who unlawfully enter a country, states in sub-article 2 that “[t]he Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary.”<sup>34</sup> Greece does not get to unilaterally decide which restrictions are “necessary”; rather, the standard is what is deemed reasonable and necessary in a democratic society.<sup>35</sup> Therefore, even if the refugees at Samos entered unlawfully under Greek domestic law, those refugees still have the right to the freedom of movement. The key difference is that Article 31 allows for a wider set of exceptions that permit restrictions to movement than for those refugees entering lawfully, since restrictions of movement for those

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31. *Id.*

32. See Amanda Levinson, *Why Countries Continue to Consider Regularization*, MIGRATION POL'Y INST. (Sept. 1, 2005), <https://www.migrationpolicy.org/article/why-countries-continue-consider-regularization> [<https://perma.cc/7M5D-65VR>].

33. Notis Mitarachi said, “The new closed-controlled access centre will give back the lost dignity to people seeking international protection, but also the necessary conditions of safeguarding and restraint for illegal migrants who are to be returned.” Logically, Mitarachi would not have made the distinction between those who are gaining lost dignity with illegal migrants should all of the migrants be illegal. See *Greece to open new ‘controlled’ migrant camp as rights groups criticise restrictions*, FRANCE 24 (Sept. 18, 2021, 9:38 AM), <https://www.france24.com/en/europe/20210918-greece-to-open-new-controlled-migrant-camp-as-rights-groups-criticise-restrictions> [<https://perma.cc/A3TK-KQRJ>].

34. Refugee Convention, *supra* note 6, at art. 31(2).

35. Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection* ¶ 122 (Oct. 2001), <https://www.unhcr.org/3bcfd164.pdf>.

entering unlawfully need only be considered necessary to comply with the Refugee Convention.

### C. How Greece is Operating its Closed Refugee Camps

In September 2021, Greece opened up its first “closed and controlled” refugee camp on the island of Samos.<sup>36</sup> The European Union (EU) committed hundreds of millions of dollars to the Samos camp as well as to the construction of four additional camps with similar design models on other Greek Aegean islands,<sup>37</sup> including two that were on track to be opened just a few months after the Samos camp.<sup>38</sup> The Samos camp is surrounded by multi-layered, military-grade, barbed-wire fencing<sup>39</sup> and uses advanced surveillance systems including CCTV<sup>40</sup> and unpiloted drones.<sup>41</sup> Greece’s Ministry of Migration and Asylum boasts that the camp uses “magnetic gates, x-rays, [and a] two-factor access control system” including identity and fingerprint checks to control entry and exit.<sup>42</sup> Furthermore, the camp is guarded by the Hellenic Police and by a private security company of at least fifty personnel per shift for 24 hours a day.<sup>43</sup> Most refugees are able to enter and exit between 8 a.m. and 8 p.m. daily,<sup>44</sup> but they have virtually nowhere to go. The camp is isolated,<sup>45</sup> nearly five kilometers from the

36. Press Release, HELLENIC REPUBLIC MINISTRY OF MIGRATION & ASYLUM, Closed Controlled Access Center of Samos (Sept. 21, 2021, 1:29 PM) <https://migration.gov.gr/en/nea-kleisti-elegchomeni-domi-samoy-enimerotiko> (last visited Nov. 3, 2021).

37. *Greece to open new ‘controlled’ migrant camp as rights groups criticise restrictions*, *supra* note 33.

38. Alkis Konstantinidis, *Greece opens new migrant holding camp on island amid tougher policy*, REUTERS (Sept. 18, 2021, 9:28 AM), <https://www.reuters.com/world/europe/greece-opens-new-migrant-holding-camp-island-amid-tougher-policy-2021-09-18>.

39. Eva Papaioannou et al., “*We can only help our patients to survive*” new camp on Samos, MÉDECINS SANS FRONTIÈRES (Sept. 17, 2021), <https://www.msf.org/we-can-only-help-refugees-survive-new-camp-greek-island> [<https://perma.cc/2EAM-LJS3>]; Konstantinidis, *supra* note 38; Helena Smith, *Why Greece’s expensive new migrant camps are outraging NGOs*, THE GUARDIAN (Sept. 19, 2021, 12:00 PM), <https://www.theguardian.com/world/2021/sep/19/why-greeces-expensive-new-migrant-camps-are-outraging-ngos> [<https://perma.cc/Q88W-RYM5>].

40. HELLENIC REPUBLIC MINISTRY OF MIGRATION & ASYLUM, *supra* note 36.

41. Petra Molnar, *Surveillance is at the heart of the EU’s migration control agenda*, EURACTIV (Sept. 18, 2021), <https://www.euractiv.com/section/justice-home-affairs/opinion/surveillance-is-at-the-heart-of-the-eus-migration-control-agenda> [<https://perma.cc/EJ87-WYKP>]; Alexia Kalaitzi & Katy Fallon, *Concrete walls and drones: Greek plans for refugee camps decried*, AL JAZEERA (May 25, 2021), <https://www.aljazeera.com/news/2021/5/25/concrete-walls-and-drones-greek-plans-for-refugee-camps-decried> [<https://perma.cc/YZ2D-ZL9P>].

42. HELLENIC REPUBLIC MINISTRY OF MIGRATION & ASYLUM, *supra* note 36.

43. *Id.*

44. Smith, *supra* note 39.

45. *See id.*

nearest town.<sup>46</sup> Finally, refugees arriving back to the Samos camp after 8 p.m. face disciplinary action.<sup>47</sup>

These conditions are not limited to these five new refugee camps. For example, at the Mavrovouni refugee camp on the island of Lesbos, refugees and asylum seekers cannot leave the grounds unless they have approval, and approval is typically granted only for specialized medical appointments or meetings with lawyers.<sup>48</sup> Furthermore, starting in early 2021, Greece was building cement walls around camps such as Ritsona.<sup>49</sup> Greece plans to construct walls around twenty-four other camps and to implement advanced security systems, such as the one at Samos, at thirty-nine camps.<sup>50</sup> As of April 2021, Greece had submitted proposals to start a curfew at other camps similar to the one at Samos.<sup>51</sup>

#### D. Is the Refugees' Right to the Freedom of Movement Being Violated?

Whether or not the refugees staying in Samos and at the other camps with walls, curfews, and surveillance technology are lawfully in Greece, there is a strong argument to be made that Greece is violating their freedom of movement, as analyzed below.

First, the refugees living in camps have zero choice as to where they reside in Greece while their asylum requests are processed,<sup>52</sup> directly violating the “right to choose their place of residence” of the Article 26.<sup>53</sup> Second, Greece is restricting the ability of refugees to move freely within the Greek territory, which is covered by both Articles 26 and 31. The Hellenic Police and private security forces who guard Samos

46. FRANCE 24, *supra* note 33.

47. Alexia Kefalas & Nathalie Savvaricas, *New migrant centre on Greece's Samos island boasts Wifi – and barbed wire*, FRANCE 24 (Nov. 2, 2021, 9:35 PM), <https://www.france24.com/en/europe/20211102-new-migrant-centre-on-greece-s-samos-island-boasts-wifi—and-barbed-wire> [https://perma.cc/3GEP-DY7W].

48. James Cox, *Irish MEP describes ‘harrowing conditions’ of Afghan refugees in Greece*, BREAKINGNEWS.IE (Sept. 11, 2021, 1:02 PM), <https://www.breakingnews.ie/ireland/irish-mep-describes-harrowing-conditions-of-afghan-refugees-in-greece-1182675.html> [https://perma.cc/T3GU-MAQX].

49. Kalaitzi & Fallon, *supra* note 41.

50. *Id.*

51. *Id.*

52. Asylum seekers must stay in refugee camps while waiting for their requests to be heard. While previously, the most vulnerable asylum seekers could stay in apartments under the Emergency Support to Integration and Accommodation Program, the Greek government phased the program out in December 2022, forcing those already in apartments back into refugee camps. Florian Schmitz, *Greece: Asylum-seekers moved back into refugee camps*, DEUTSCHE WELLE (Feb. 2, 2023), <https://www.dw.com/en/greece-asylum-seekers-moved-back-into-refugee-camps/a-64630101> [https://perma.cc/9CKH-ZBMH].

53. Refugee Convention, *supra* note 6, at art. 26.

are able to control who goes in and out of the camp, as well as when they may leave. And, as previously discussed, refugees at Samos essentially have a curfew—if they are not back by the time the gates close at 8 p.m., they face disciplinary action.<sup>54</sup> Samos is an island far east in the Aegean Sea which requires (on average) a 7.5-hour ferry ride to get to the Greek mainland.<sup>55</sup> By requiring refugees to return to camps by 8 p.m. or face discipline, Greece makes it impossible for refugee residents of Samos to move freely around all of Greece, directly violating the freedom of movement that the Refugee Convention is meant to protect.<sup>56</sup> As a result, the real question is not whether Greece is restricting the movement of refugees housed in Samos and in other similarly operated camps. The question is whether Greece's actions fall under one of the exceptions Article 26 provides or if they are considered necessary should Article 31 govern.

E. Do Greece's Practices Fall Under an Exception to the Freedom of Movement Under Article 26 or are Considered Necessary Under Article 31?

The Refugee Convention applies stronger protections to the freedom of movement under Article 26 than under Article 31, with Article 26 providing zero explicit exceptions to the freedom compared to the broader exception under Article 31 of restrictions that are “necessary.”<sup>57</sup> Therefore, this Subpart will first analyze whether Greece's closed camps violate Article 26, since those which fall under one of the possible exceptions discussed earlier in this Article would logically be considered necessary. Then, this Subpart will look at any justifications that could make the closed camps necessary but not fall under the Article 26 exceptions.

Greece appears to be using the COVID-19 pandemic as justification for the creation of closed camps such as Samos.<sup>58</sup> Pandemic-related

54. Kefalas & Savvaricas, *supra* note 47.

55. Ferry from Athens (Piraeus) to Samos Tickets & Schedules, FERRYHOPPER, <https://www.ferryhopper.com/en/ferry-routes/direct/piraeus-samos> (last visited Nov. 16, 2022).

56. “The right to move freely relates to the whole territory of a State, including all parts of federal States.” See CCPR General Comment No. 27: Article 12 (Freedom of Movement), *supra* note 10, at ¶ 5.

57. “The Contracting States shall not apply to the movements of [refugees unlawfully in the country of refuge] restrictions other than those which are necessary.” Refugee Convention, *supra* note 6, at art. 31(2).

58. Greek Minister of Immigration and Asylum Notis Mitarakis stated that COVID-19 demonstrated the need to create closed and controlled structures. *Επιβεβαίωση της αναγκαιότητας δημιουργίας κλειστών και ελεγχόμενων δομών* [Confirmation of the need to create closed and controlled structures], STONISI (Sept. 2, 2020), <https://www.stonisi.gr/post/11100/epivevaiwsh-ths-anagkaiothtas-dhmioyrgias-kleistwn-kai-elegxomenwn-domwn> [[https://](https://www.stonisi.gr/post/11100/epivevaiwsh-ths-anagkaiothtas-dhmioyrgias-kleistwn-kai-elegxomenwn-domwn)

health concerns would potentially fall under not only the exception Greece permitted itself allowing the restriction of the freedom of movement for national security reasons, but also under the exception provided by the ICCPR for health reasons. While the exception provided by the ICCPR allowing for the restriction of the freedom of movement for health reasons clearly applies to COVID-19, Greece could try to argue that the situation falls under the exception for national security<sup>59</sup> given that it provided itself such an exception in its reservation to the Refugee Convention and therefore it would not be reliant on a body's interpretation of whether the ICCPR exceptions are included.

In 2020, Greece imposed mass quarantines on refugees such as those at the Moria refugee camp in response to a single confirmed case of COVID-19.<sup>60</sup> As a part of that response, Greek Minister of Immigration and Asylum Notis Mitarakis announced that this “demonstrates the need to create closed and controlled structures.”<sup>61</sup> While this justification may work for the Moria lockdown, it should not serve as an exception for closed camps such as Samos. Even absent the pandemic, these closed structures will remain based in part on Mitarakis' above comment, and Greece will continue to limit refugees' movements. Furthermore, the investment in the security system and the walls of camps such as Samos—the Samos refugee camp had a construction budget of 43 million euros<sup>62</sup>—show that they are not short-term solutions meant only for the duration of the pandemic. Refugees' ability to enter and exit will still be restricted, and, given that the Samos refugee camp will still be in an isolated part of the island once the pandemic is over, refugees will not be able to freely move around the island during those times that they can leave the camp. As a result, post-COVID, these restrictions should not fall under the health or national security exceptions.

[perma.cc/SE9J-3R5Z](https://perma.cc/SE9J-3R5Z)].

59. This is not a new argument. The United States has used the national security threats from COVID-19 to justify the suspension and restrict the entry of noncitizens from various countries. See Proclamation No. 10315, A Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019, 86 FR 68385 (Nov. 26, 2021).

60. *Greece imposes dangerous lockdown of Moria refugee camp after first COVID-19 case*, MEDECINS SANS FRONTIERES (Sept. 3, 2020), <https://www.doctorswithoutborders.org/latest/greece-imposes-dangerous-lockdown-moria-refugee-camp-after-first-covid-19-case> [<https://perma.cc/WQ4E-KL8J>].

61. *Confirmation of the need to create closed and controlled structures*, *supra* note 58; Ομάδα Σύνταξης, Μόρια κορονοϊός: Επαναφέρει «την αναγκαιότητα για κλειστές δομές» ο Μητράκης [*Moria coronavirus: Mitarachi restores “the need for closed structures”*], PRISMA 91.6 (Sept. 2, 2020), <https://prismaradio.gr/2020/09/02/moria-koronoios-epanaferei-tin-anagkaiotita-gia-kleistes-domes-o-mitarakis> [<https://perma.cc/5VLB-ZPC3>].

62. HELLENIC REPUBLIC MINISTRY OF MIGRATION & ASYLUM, *supra* note 36.

In response, Greece could argue that they cannot be violating the Refugee Convention based on the hypothetical operations of their closed refugee camps once the pandemic is over because the pandemic is still ongoing and will continue for the foreseeable future.<sup>63</sup> Since the health crisis is still ongoing, the lockdowns still likely fall under the national security and health exceptions. Only when the pandemic is over would these exceptions no longer apply. Furthermore, Article 26 provides these limited exceptions only when the refugees are lawful.<sup>64</sup> Depending on Greek domestic law it is possible that those living in the camps are not lawfully within Greece. If they are not lawfully within Greece, Article 26 protections are not extended to them.

Greece's potential argument regarding the ongoing health crisis is stronger than its argument that the refugees are unlawful, because, as discussed, unlawful refugees still enjoy some freedom of movement protections.<sup>65</sup> The COVID-19 pandemic justification is even stronger under the Article 31's "necessary" exception since Greece will no longer have to force a health crisis into a national security exception should it be found that the additional exceptions to the freedom of movement under the ICCPR do not apply to the Refugee Convention. But again, the end of the pandemic will conclude the validity of this justification, and Greece will have to find another justification for operating closed camps.

Greece might argue that a mass influx of refugees constitutes a sufficient justification to satisfy Article 31's necessary exception. In a paper prepared at the request of the Department of International Protection for UNHCR, Professor Guy Goodwin-Gill wrote, "[s]tates may impose restrictions on movement which are 'necessary', for example, on security grounds or in the special circumstances of a mass influx."<sup>66</sup> The European Commission created a directive in 2001 for temporary

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63. The World Health Organization (WHO) extended COVID-19's status as a "public health emergency of international concern" at the end of January 2023, and in the public statement announcing the extension, WHO Director General Tedros Adhanom Ghebreyesus did not express hope that the pandemic would end in 2023. Erin Prater, *Believe it or not, it's still officially a pandemic, the WHO says. Welcome to year 4 of COVID*, *FORTUNE* (Jan. 30, 2023), <https://fortune.com/well/2023/01/30/covid-pandemic-not-over-who-world-health-organization-announces-third-anniversary-enters-fourth-year-omicron-public-health-emergency-international-concern> [<https://perma.cc/637R-P4CZ>].

64. "Each Contracting State shall *accord* to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances." Refugee Convention, *supra* note 6, at art. 26.

65. Unlawful refugees have the right to the freedom of movement pursuant to Article 31 of the Refugee Convention. *Id.* at art. 31(2).

66. Goodwin-Gill, *supra* note 35, ¶ 121.

protections for asylum seekers in the event of a mass influx of refugees, which defined a mass influx as the “arrival in the [European] Community of a large number of displaced persons, who come from a specific country or geographical area.”<sup>67</sup> It was not triggered in 2015<sup>68</sup> when refugees arriving in Greece numbered over 850,000.<sup>69</sup> In 2022, just under 20,000 refugees entered Greece.<sup>70</sup> This comparison indicates Greece is not currently facing a mass influx of refugees and therefore it should not successfully use one as a basis to claim the restrictions it is imposing are necessary.

In conclusion, Greece’s practices in the operation of closed refugee camps such as Samos restrict the freedom of movement of the camps’ residents, whether or not they are lawfully in Greece. However, currently, Greece’s practices may fall under an exception. It is unclear whether Greece would be successful in using the COVID-19 pandemic as a valid justification that fits under the national security exception it created for itself in its reservation to the Refugee Convention. It much more clearly falls under the exception for health purposes, but it is unclear as to whether that exception explicitly from the ICCPR would carry over into the Refugee Convention. Finally, should every single refugee in the Samos refugee camp and the other closed camps be unlawful, the distinction between a health purpose and national security is no longer relevant since the standard is simply necessary. Once the COVID-19 pandemic is over, Greece’s closed camps should be addressed again to determine if their continuation would fall under any other exception not contemplated in this Article.

## II. PUSHBACKS

While a lot of focus has been on Greece’s efforts to keep migrants and refugees out, as well as on the living conditions in the camps once the migrants and refugees arrive, Greece is also actively taking refugees who have arrived in Greece and returning them to Turkey without processing their asylum requests.<sup>71</sup> Migrants who cross the Evros River

67. Council Directive 2001/55, art. 1, 2(d), 2001 O.J. (L 212) 12, 14 (EC).

68. It was triggered for the first time on March 2, 2022, in response to the mass influx of Ukrainian refugees to Europe fleeing Russia’s military invasion. *Temporary Protection*, EC: MIGRATION AND HOME AFFAIRS, [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en) [<https://perma.cc/L37G-6YTN>].

69. *Mediterranean Situation: Greece*, UNHCR: OPERATIONAL DATA PORTAL REFUGEE SITUATIONS, <https://data.unhcr.org/en/situations/mediterranean/location/5179> [<https://perma.cc/CAW5-LH92>].

70. *Id.*

71. See *Fear and Fences: Europe’s Approach to Keeping Refugees at Bay*, AMNESTY

are held in Greek detention centers before being dropped back off on the Turkish side of the river.<sup>72</sup> For migrants who are caught in Greek waters while crossing the Aegean Sea, Hellenic Coast Guard personnel tow them to Turkish waters and disable their boats, leaving them stranded for the Turkish Coast Guard to rescue.<sup>73</sup> Finally, those who successfully make it to the Greek islands are still being pushed back. Refugees are rounded up by Hellenic Police members on land, whereupon Hellenic Coast Guard personnel take them out to sea and either (1) drop the refugees in a raft without any engine or (2) directly drop the refugees in the water and tell them to swim to the nearby Turkish shoreline.<sup>74</sup> These practices are called pushbacks, defined as “the practice by authorities of preventing people from seeking protection on their territory by forcibly returning them to another country,” and are a violation of international law.<sup>75</sup> There is little doubt that Greece’s practices satisfy the definition,<sup>76</sup> and this Article calls these practices for what they are—pushbacks. This Article instead focuses on whether these practices violate the Rome Statute and the Refugee Convention.

Between March and August 2020, over 1000 refugees were left at sea by Hellenic Coast Guard personnel over the course of over thirty

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INT’L (2015), 59.

72. *Caught in a Political Game: Asylum-Seekers and Migrants on the Greece/Turkey Border Pay the Price for Europe’s Failures*, AMNESTY INT’L (Apr. 3, 2020), <https://www.amnesty.org/en/documents/eur01/2077/2020/en> [<https://perma.cc/4Y5M-NVTE>].

73. Giorgos Christides & Steffen Lüdke, *Greece Suspected of Abandoning Refugees at Sea*, SPIEGEL INT’L (June 16, 2020, 7:19 PM), <https://www.spiegel.de/international/europe/videos-and-eyewitness-accounts-greece-apparently-abandoning-refugees-at-sea-a-84c06c61-7f11-4e83-ae70-3905017b49d5> [<https://perma.cc/5HV8-RKJ2>].

74. *It’s Time for European Politicians To Take Off Their Blindfolds*, AEGEAN BOAT REPORT (Sept. 11, 2021), <https://aegeanboatreport.com/2021/09/11/its-time-for-european-politicians-to-take-off-their-blindfolds> [<https://perma.cc/THS3-8UPF>]; Carlotta Gali, *They Just Left Us’: Greece Is Accused of Setting Migrants Adrift at Sea*, N.Y. TIMES (Oct. 26, 2021), <https://www.nytimes.com/2021/07/18/world/europe/greece-migrants.html> [<https://perma.cc/8WKF-A7QE>].

75. Joint Agency Briefing Paper, Belgrade Centre for Human Rights, Macedonian Young Lawyers Association, & OXFAM, *A Dangerous ‘Game’: The pushback of migrants, including refugees, at Europe’s borders*, 4 (Apr. 2017), [https://www-cdn.oxfam.org/s3fs-public/file\\_attachments/bp-dangerous-game-pushback-migrants-refugees-060417-en\\_0.pdf](https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-dangerous-game-pushback-migrants-refugees-060417-en_0.pdf) [<https://perma.cc/VRF3-RY6T>].

76. For example, groups such as the ECRE and Human Rights Watch have labelled Greece’s practices as pushbacks. *Greece: Deadly End to 2021, Pushbacks Prevent Arrivals and Drive People Towards More Deadly Routes, Closed Control Camps Again Face Legal Scrutiny and Criticism*, ECRE (Jan. 14, 2022), <https://ecre.org/greece-deadly-end-to-2021-pushbacks-prevent-arrivals-and-drive-people-towards-more-deadly-routes-closed-controlled-camps-again-face-legal-scrutiny-and-criticism> [<https://perma.cc/8Y36-GAG7>]; “*Their faces were covered*”, HUMAN RIGHTS WATCH (APR. 7, 2022), <https://www.hrw.org/report/2022/04/07/their-faces-were-covered/greeces-use-migrants-police-auxiliaries-pushbacks> [<https://perma.cc/NKQ4-B6GR>].



pushbacks.<sup>77</sup> There are several reports of Hellenic Coast Guard personnel throwing groups of refugees into the water without life preservers.<sup>78</sup> For example, in September 2021, two migrants reported similar pushback experiences at the hands of Greek forces, just a few days apart, whereby they and others were thrown directly into Aegean Sea without life preservers.<sup>79</sup> These two were the sole survivors—the rest drowned.<sup>80</sup> Another twenty refugees reported similar treatment at the hands of Hellenic Coast Guard personnel in February 2022.<sup>81</sup> The frequency of reports of pushbacks had been increasing.<sup>82</sup> While there is no data as to how many people have died as a result of Greece's pushback operations, the two reports from September 2021 directly implicate Greece in at least four deaths,<sup>83</sup> and pushback operations across Europe are linked to the deaths of more than 2000 people.<sup>84</sup>

These reports do not result from pitting the word of refugees and the NGOs that support them against the word of the Greek government. NGOs such as Aegean Boat Report<sup>85</sup> and Legal Centre Lesbos,<sup>86</sup> government organizations such as the Council of Europe's human rights

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77. Patrick Kingsley & Karam Shoumali, *Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea*, N.Y. TIMES (Oct. 26, 2021), <https://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html> [https://perma.cc/V4E3-XPMK].

78. *Greece: Aegean Sea Unmonitored as Crackdown on Civil Society Continues, New Violent Pushbacks Amid Collective Deportations from Turkey to Syria, New Lesbos Camp in High Risk Area*, EUR. COUNCIL ON REFUGEES AND EXILES (ECRE) (Feb. 18, 2022), <https://ecre.org/greece-aegean-sea-unmonitored-as-crackdown-on-civil-society-continues-new-violent-pushbacks-amid-collective-deportations-from-turkey-to-syria-new-lesvos-camp-in-high-risk-area> [https://perma.cc/5RY7-B5MH].

79. *Yemeni migrant thrown off boat by Greek forces in Aegean*, DAILY SABAH (Sept. 29, 2021, 9:18 AM), <https://www.dailysabah.com/politics/eu-affairs/yemeni-migrant-thrown-off-boat-by-greek-forces-in-aegean> [https://perma.cc/Y2WH-MNLM].

80. *Id.*

81. ECRE, *supra* note 78.

82. This was noted by Mireille Girard, the United Nations Human Rights Council's representative in Greece in April 2021. Lydia Emmanouilidou, *'People Are Being Abandoned in the Middle of the Sea': Claims That Greece Pushes Back Migrants to Turkey Are Rising*, THE WORLD (Apr. 14, 2021, 12:15 PM), <https://www.pri.org/stories/2021-04-14/people-are-being-abandoned-middle-sea-claims-greece-pushes-back-migrants-turkey> [https://perma.cc/RD85-CBBZ].

83. DAILY SABAH, *supra* note 79.

84. Lorenzo Tondo, *Revealed: 2,000 Refugee Deaths Linked to Illegal EU Pushbacks*, THE GUARDIAN (May 5, 2021, 1:00 AM), <https://www.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks> [https://perma.cc/689Q-CAHX].

85. *It's Time for European Politicians To Take Off Their Blindfolds*, *supra* note 74.

86. *See generally Crimes Against Humanity in the Aegean*, LEGAL CTR. LESVOS (Feb. 1, 2021), <http://legalcentrelesvos.org/wp-content/uploads/2021/02/Collective-Expulsions-in-the-Aegean-LCL-01.02.2021-1.pdf> [https://perma.cc/5ZJE-VGQK].

commission and the UNHCR, and the investigative journalism platform Bellingcat<sup>87</sup> have been collecting mounting evidence of pushback operations, which is being brought to the public's attention as well as to the attention of the European Court of Human Rights (ECtHR).<sup>88</sup> Legal Centre Lesvos investigated and collected evidence, including video and geolocation evidence, of two reported pushbacks committed by Hellenic Coast Guard members of over 200 people combined.<sup>89</sup> Der Spiegel, a German news outlet, reported that current and former senior officers in the Hellenic Coast Guard were able to identify men in alleged pushback videos as belonging to elite Hellenic Coast Guard units.<sup>90</sup> This Part will look at (1) whether Greek actors are criminally liable under the Rome Statute and (2) whether Greece is violating its obligations under the Refugee Convention through the practice of pushbacks.

#### A. Rome Statute

It is possible that through these pushbacks, Greek forces are committing crimes against humanity under the Rome Statute, specifically of murder,<sup>91</sup> of deportation or forcible transfer of population,<sup>92</sup> and of torture.<sup>93</sup> These three crimes share two common elements: (1) that the conduct was committed as part of a widespread or systematic attack directed against a civilian population, and (2) that the conduct was part of, or the perpetrator intended the conduct to be a part of, a widespread or systematic attack against a civilian population.<sup>94</sup> This Subpart will analyze the common elements of these crimes, then will look at the elements unique to each specific crime.<sup>95</sup>

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87. Bradley Secker, *Adrift in Uncertain Waters: Migrant Pushbacks in the Aegean*, POLITICO (July 21, 2021, 4:01 AM), <https://www.politico.eu/article/adrift-uncertain-waters-migrant-pushbacks-in-aegean-sea> [<https://perma.cc/F3UF-GYZH>].

88. Emmanouilidou, *supra* note 82.

89. LEGAL CTR. LESVOS, *supra* note 86, at 8–10.

90. Bashar Deeb et al., *Unmasking Europe's Shadow Armies*, LIGHTHOUSE REPS. (Oct. 6, 2021), <https://www.lighthousereports.nl/investigation/unmasking-europes-shadow-armies> [<https://perma.cc/UX8J-HGNX>].

91. Rome Statute of the International Criminal Court, art. 7(1)(a), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

92. *Id.* at art. 7(1)(d).

93. *Id.* at art. 7(1)(f).

94. Elements of Crimes, International Criminal Court art.7(1)(a)(2)-(3), art. 7(1)(d)(4)-(5), & art. 7(1)(f)(4)-(5) (2011), (Elements of all crimes against humanity include that “[t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population” and that “[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.” <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> [<https://perma.cc/TX9Z-V8UM>].

95. The Elements of Crimes lists all of the elements for each crime under the Rome

## 1. Common Elements

### *a. Widespread or Systematic Attack Directed Against a Civilian Population*

The first shared element, that the conduct was committed as part of a widespread or systematic attack directed against a civilian population, is likely satisfied by the evidence discussed below. Under Article 7(2)(a) of the Rome Statute, an attack directed against any civilian population is defined as: (1) “a course of conduct involving the multiple commission of acts”; (2) directed “against any civilian population”; and (3) “pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>96</sup> The first two of these sub-elements seem more easily satisfied. The frequency of pushback reports has been increasing,<sup>97</sup> which directly supports the course of conduct involving the multiple commission of acts which as argued below are forcible transfer of civilians, murder, and torture. Reports concerning a course of conduct cannot be increasing if there is only one commission of the act. As to the second sub-element, there is no doubt as to status of these migrants as civilians under international law,<sup>98</sup> so the question is

Statute. *See generally id.* at art. 7(1)(a), 7(1)(d), and 7(1)(f).

96. Rome Statute of the International Criminal Court, *supra* note 91, at art. 7(2)(a).

97. Emmanouilidou, *supra* note 82.

98. “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 50(1), June 8, 1977, 1125 U.N.T.S. 3, <https://ihl-databases.icrc.org/ihl/INTRO/470> [<https://perma.cc/BLT8-A9EW>]; The categories of persons in Article 43 of the Protocol Additional to the Geneva Conventions are: “(1) The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, ‘inter alia’, shall enforce compliance with the rules of international law applicable in armed conflict. (2) Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities. (3) Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall notify the other Parties to the conflict.” *Id.* at art. 43; The categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention are: “(1) Members of the armed forces of a Party to a conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized movements, belonging to a Party to the conflict and operating in or outside their own territory . . . (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power . . . (6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, providing they carry arms openly and respect the laws and customs of war.” Geneva

whether the attacks are directed against them. The International Criminal Court (ICC) Trial Chamber has found that “the civilian population must be the primary, as opposed to an incidental, object of the attack”<sup>99</sup> for the attack to be directed against them under Article 7(2)(a).

In the present case, Hellenic Police personnel are not rounding up all Greek civilians and giving them to Coast Guard personnel to take out to sea. Rather, they are specifically targeting refugees in their pushback efforts. For example, one man reported that he was attacked, taken to a car, and put onto a Coast Guard boat from which he and others were thrown into the Aegean Sea *after* he went up to an official to convey his asylum request.<sup>100</sup> In other cases, refugees are rounded up from wooded areas and taken out to sea.<sup>101</sup> The civilian population of refugees is not an incidental object of the attack because they are the only ones being attacked. Therefore, because the primary object of the attack by Greek forces is refugees, who are civilians, the second sub-element to the first shared element of crimes against humanity under the Rome Statute is satisfied.

The least straightforward sub-element is that Greek forces are committing these pushbacks “pursuant to or in furtherance of a State or organizational policy to commit such attack.” The Elements of Crimes notes that satisfaction of this sub-element requires that the “[s]tate or organization actively promote or encourage such an attack against a civilian population.”<sup>102</sup> The ICC Trial Chamber has found that such policy does not need to be formalized and can instead be inferred from a variety of factors.<sup>103</sup> The ICC Trial Chamber has looked at seven factors in determining the existence of a State or organizational policy:

- (i) the fact that the attack was planned or directed; (ii) the existence of a recurrent pattern of violence, for example, repeated actions occurring according to the same sequence; (iii) the use of public or private resources to further the policy; (iv) the involvement of State or organizational forces in the commission of crimes; (v) statements, instructions, or documentation attributable to the State or the

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Convention Relative to the Treatment of Prisoners of War art. 4(1)–(3), (6), Aug. 12, 1949, 75 U.N.T.S. 135, [https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.32\\_GC-III-EN.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.32_GC-III-EN.pdf) [<https://perma.cc/3HLR-JAMH>].

99. Prosecutor v. Bosco Ntaganda, ICC-01/04–02/06, Judgment, ¶ 668 (July 8, 2019).

100. DAILY SABAH, *supra* note 79.

101. Secker, *supra* note 87; Kostas Kallergis, *Pushbacks: Migrants Accuse Greece of Sending Them Back Out to Sea*, BBC (Dec. 12, 2020), <https://www.bbc.com/news/world-europe-55231203> [<https://perma.cc/N93Y-CF23>].

102. Elements of Crimes, *supra* note 94, at art.7, intro. ¶ 3.

103. Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05–01/08, Judgment Pursuant to Art. 74 of the Statute, ¶ 160 (Mar. 21, 2016).

organization condoning or encouraging the commission of crimes; (vi) an underlying motivation; and (vii) the existence of preparations or collective mobilization orchestrated and coordinated by that State or organization.<sup>104</sup>

Five of the seven factors lean in favor of the inference that Greece has a policy to commit attacks against the refugee population via pushbacks. To the first factor, the fact that there are two key moving parts to many of these attacks indicates that the attack is planned or at least directed. For the pushbacks that commence on land, members of the Hellenic Police round up migrants, oftentimes beating them and shoving them into vehicles. Then this first group passes the migrants to Hellenic Coast Guard personnel who drop them either into disabled lifeboats or directly into the Aegean Sea. These two groups logically need to coordinate in order to carry out these operations. The Hellenic Police has to know where to take the migrants, and who to hand them off to, for the second part of the attack to be completed. Thus, the first factor leans in favor of inferring that Greece has the necessary state policy for the third sub-element to be satisfied.

Similarly, the second factor leans in favor of a state pushback policy. For the attack of pushbacks against migrants, there are three similar yet distinct patterns of violence. The first, discussed in the previous factor's analysis, is that migrants who have made landfall on Greece are rounded up by police officers, handed off to Hellenic Coast Guard personnel, and left floating in the Aegean Sea either in lifeboats or in the water itself. In the second pattern, Hellenic Coast Guard personnel disable the boats that migrants use in their attempt to cross the Aegean Sea, tow them into Turkish waters, and then call the Turkish Coast Guard while leaving the migrants behind, helpless.<sup>105</sup> The third pattern is similar to the second but instead of occurring on the Aegean Sea through Coast Guard personnel, it occurs at the land border with Turkey at the Evros River instead.<sup>106</sup> These recurrent patterns of violence have been occurring for at least a year, sometimes many more.<sup>107</sup> Thus, the

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104. Bosco Ntaganda, ICC-01/04-02/06 at ¶ 674.

105. Christides & Lüdke, *supra* note 73.

106. AMNESTY INT'L, *supra* note 72.

107. Everton Gayle, *Greece's Illegal Push Backs of Asylum Boats Put Lives at Risk*, *Says Amnesty International*, EURONEWS (Aug. 25, 2015), <https://www.euronews.com/2015/08/25/greece-routinely-pushes-back-immigrant-boats-out-to-sea-says-amnesty> [<https://perma.cc/539G-KXZH>]; Press Release, Human Rights Watch, *Greece: Violent Pushbacks at Turkey Border* (Dec. 18, 2018, 12:01 AM), <https://www.hrw.org/news/2018/12/18/greece-violent-pushbacks-turkey-border#> [<https://perma.cc/5LAK-S2RS>]; Kallergis, *supra* note 101.

second factor supports a finding that Greece has a state policy to commit these pushbacks.

The third and fourth factors also support there being a Greek state policy of pushbacks. Hellenic Coast Guard personnel has been credibly identified as committing them.<sup>108</sup> Not only are Greek forces involved in the commission of pushbacks, satisfying the third factor, but state resources are being used as well. While it can be debated whether the Hellenic Coast Guard personnel who commit these pushbacks are also considered resources, they are using Hellenic Coast Guard boats.<sup>109</sup> Therefore, the perpetrators are using public resources to further attacks against the migrant population. As a result, both the third and fourth factors support a finding that Greece has a state policy to commit pushbacks.

Finally, the sixth factor, an underlying motivation, strongly leans in favor of finding that Greece has a policy to commit pushbacks against migrants. Greek authorities have not been shy about their resistance to accepting those fleeing to Greece from other countries. Following the Taliban takeover of Afghanistan, Greek officials have been adamant that they will not allow a repeat of the 2015 refugee crisis in which the number of migrants seeking asylum in Europe surged from less than 600,000 in 2014 to over 1.3 million in 2015<sup>110</sup> and over 3500 migrants and refugees died trying to cross the Mediterranean Sea.<sup>111</sup> Greece Prime Minister Kyriakos Mitsotakis said, “We will not accept uncontrolled migratory flows similar to the ones we saw in 2015,”<sup>112</sup> with Greek Migration Minister Notis Mitarachi adding that Greece “will not and cannot be the gateway of Europe for refugees and [m]igrants who could try to come to the European Union.”<sup>113</sup> When Greece completed a forty-kilometer wall on the border with Turkey in August 2021, which had been started before the Taliban takeover, Greece’s Citizens’ Protection Minister, Michalis Chrisochoidis, brought up the fact that

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108. Deeb et al., *supra* note 90.

109. DAILY SABAH, *supra* note 79.

110. Connor, *supra* note 3.

111. Spindler, *supra* note 4.

112. Karolina Tagaris, *Greece Says Will Not Allow ‘Uncontrolled’ Migrant Flows from Afghanistan*, REUTERS (Oct. 1, 2021, 11:39 AM), <https://www.reuters.com/world/europe/greece-says-will-not-allow-uncontrolled-migrant-flows-afghanistan-2021-10-01> [<https://perma.cc/5L6W-VTF4>].

113. *Greece Says Cannot Become Gateway to EU for Fleeing Afghans*, REUTERS (Aug. 17, 2021, 3:11 AM), <https://www.reuters.com/world/europe/greece-says-cannot-become-gateway-eu-fleeing-afghans-2021-08-17> [<https://perma.cc/8DJ8-HN7X>].

the Taliban takeover “creat[ed] possibilities for migrant flows” and that Greece “[could not] remain passive to the possible consequences.”<sup>114</sup>

Furthermore, in 2021, the number of guards on Greece’s border with Turkey increased from 1000 to 1500 agents.<sup>115</sup> In November 2021, Greece announced it was going to add an additional 250 border agents on the Turkish border, citing fears over increased migration from Afghanistan.<sup>116</sup> All of these actions, and the statements by Greek government officials, show that the Greek government is motivated to prevent migrants from entering Greece. The practice of pushbacks, specifically, seems to be motivated by the desire to disincentivize potential migrants from attempting the voyage to Greece. In August 2021, Greece was one of six countries that signed a letter to the European Commission stating: “Stopping returns sends the wrong signal and is likely to motivate even more Afghan citizens to leave their home for the EU.”<sup>117</sup> This underlying motivation supports the notion that Greece has a policy to commit these attacks against migrants to disincentivize refugee entrances.

Ultimately, these factors lean in favor of there being a State policy to commit pushbacks against the migrant community. It is clear that these acts were committed in furtherance of that policy.

Under the Rome Statute, it is not enough for these crimes to be an attack against a civilian population. As the first common element of all crimes against humanity makes clear, an attack against the civilian population must also be widespread or systematic.<sup>118</sup> The pushback attacks on refugees may not be sufficiently widespread. The ICC Trial Chamber has found that widespread means “that the attack is large-scale in nature and targeted at a large number of persons.”<sup>119</sup> There is not enough data to determine if the pushbacks are targeting enough peo-

114. Rob Picheta & Chris Liakos, *Greece Finishes Wall on Border with Turkey, Amid Fears of Afghan Migrant Crisis*, CNN (Aug. 21, 2021, 9:54 AM), <https://www.cnn.com/2021/08/21/europe/greece-turkey-border-wall-completed-scli-intl/index.html> [https://perma.cc/3GU3-ZUZY].

115. *Greece to Bolster Border with Turkey over Afghanistan Migration Fears*, EURONEWS (Nov. 11, 2021), <https://www.euronews.com/2021/10/11/greece-to-bolster-border-with-turkey-over-afghanistan-migration-fears> [https://perma.cc/Y868-M7QK].

116. *Id.*

117. Sabine Siebold & John Chalmers, *Six EU Countries Warn Against Open Door for Afghan Asylum Seekers*, REUTERS (Aug. 10, 2021, 6:17 AM), <https://www.reuters.com/world/six-countries-urge-eu-not-stop-deportations-afghanistan-belgium-says-2021-08-10> [https://perma.cc/2LWM-ZAZY].

118. “The conduct was committed as part of a widespread or systematic attack directed against a civilian population.” Elements of Crimes, *supra* note 94, at art. 7(1)(a)(2), 7(1)(d)(4), 7(1)(f)(4).

119. Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Judgment, ¶ 691 (July 8, 2019).

ple to qualify as a large-scale attack. Given the nature of the attacks, we do not know how many people these attacks are actually targeting; instead, are we reliant on reports of survivors which have not been combined to show statistics specific to Greek pushbacks.

Still, the pushback attacks are systematic. The term ‘systematic,’ according to the ICC Trial Chamber, “refers to the existence of ‘patterns of crimes’, evidenced by non-accidental repetition of similar criminal conduct on a regular basis.”<sup>120</sup> There is no question as to the pattern of crimes with these pushbacks. The sheer volume and frequency of pushback reports is evidence that it is non-accidental and a regular practice. There were thirty reports of pushbacks performed by Greek forces in just a six-month span in 2020.<sup>121</sup> Between January 2020 and April 2021, the UNHCR looked into around 300 cases of reported pushbacks in Greece.<sup>122</sup> UNHCR’s Assistant High Commissioner for Protection, Gillian Triggs, agrees that the pushbacks are systematic. In January 2021, he said, “The pushbacks are carried out in a violent and apparently systematic way.”<sup>123</sup> Therefore, since the attacks appear to be systematic, the requirement that the acts constitute a widespread or systematic attack against a civilian population is likely satisfied.

*b. Conduct was Part of or Intended the Conduct to be a Part of a Widespread or Systematic Attack Against a Civilian Population*

The second shared element, that the conduct was part of, or the perpetrator intended the conduct to be a part of, a widespread or systematic attack against a civilian population, is also satisfied.<sup>124</sup> It should be clear to Hellenic Coast Guard members that towing boats full of refugees back to Turkish waters and disabling them, setting refugees adrift in dilapidated life rafts, and tossing refugees directly into the Aegean Sea pushes the victims back to Turkey. There is no other reason for committing these acts except to be a part of the widespread or systematic attack discussed above. The conduct of Coast Guard members is

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120. *Id.* at ¶ 692.

121. Kingsley & Shoumali, *supra* note 77.

122. Emmanouilidou, *supra* note 82.

123. Press Release, UNHCR, UNHCR Warns Asylum Under Attack at Europe’s Borders, Urges End to Pushbacks and Violence Against Refugees (Jan. 28, 2021), <https://www.unhcr.org/news/press/2021/1/601121344/unhcr-warns-asylum-under-attack-europes-borders-urges-end-pushbacks-violence.html> [<https://perma.cc/GQ34-W2RG>].

124. The difference between the first common element and the second is that the first is whether there is a widespread or systematic attack, while the second is whether the perpetrators’ conduct was a part of, or if they intended their conduct to be a part of, the widespread or systematic attack analyzed in Part II.A.1.a.



the attack itself, and therefore, it is difficult to argue that such conduct was not part of the attack.

Furthermore, the Hellenic Police officers' actions of rounding up the refugees who have landed in Greece and bringing them to Coast Guard personnel are a part of the attack of pushbacks, or at least are intended to be. While there is a sense of plausible deniability by passing off the refugees to Hellenic Coast Guard personnel who finish the attack, participating Hellenic Police personnel logically must know what is going on. Otherwise, Hellenic Police officers would not waste their time or resources in the effort. Second, even if police officers argued that they had no idea that Coast Guard personnel were dropping refugees into the water, that excuse could only work as a defense until migrants started making accusations of pushbacks. Given the accusations that have been leveled against Hellenic Coast Guard personnel in regard to the practice of pushbacks, that Hellenic Police officers continued rounding up refugees and passing them to Coast Guard personnel shows that the conduct is either part of or is intended to be a part of the widespread attack of pushbacks committed against the civilian population of refugees. Based on this analysis, the second shared element of all crimes against humanity under the Rome Statute is likely satisfied.

Since the two common elements of crimes against humanity under the Rome Statute appear to be satisfied, this Article will now dive into the remaining elements of each crime individually.

## 2. Elements for Individual Crimes Against Humanity

### *a. Murder*

The only additional element specific to the crime against humanity of murder explicitly listed under Article 7 is that a perpetrator has killed one or more people.<sup>125</sup> There is no mental element listed, so Article 30's rule that the perpetrator had to commit the crime with intent or knowledge applies.<sup>126</sup> The Court has interpreted this to mean that perpetrators must have either "(i) meant to kill or cause the death of one or more persons or (ii) were aware that death(s) would occur in the ordinary course of events."<sup>127</sup> Based on pushback reports discussed above, it is not a question of whether Hellenic Coast Guard personnel

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125. "Elements (1) The perpetrator killed one or more persons." Elements of Crimes, *supra* note 94, at art. 7(1)(a).

126. "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." Rome Statute of the International Criminal Court, *supra* note 91, at art. 30.

127. Prosecutor v. Jean-Pierre Bemba Gombo, *supra* note 103 at ¶ 90.

have killed people, but rather of how many people they have killed. Therefore, the additional explicit element of killing one or more persons for the crime against humanity of murder is satisfied. As for the mental element under Article 30, it seems clear that members of the Hellenic Coast Guard were aware that death would occur in the ordinary course of events. For example, it was reported that people were thrown into the Aegean Sea without life preservers and subsequently drowned, despite having told Hellenic Coast Guard personnel that they could not swim.<sup>128</sup> It should be obvious to the Hellenic Coast Guard perpetrators that people who say they cannot swim would drown if thrown into water without life preservers. Similarly, it is not difficult to imagine that leaving people floating in a life raft without a motor at night in the middle of the Aegean Sea could end up killing people. The boats in which the migrants are left are difficult for the Turkish Coast Guard to spot because a thermal radar can only detect them from within a two-mile radius due to their size.<sup>129</sup> Also, without an engine on the open sea, the boats could capsize and throw all aboard into the water.

Additionally, Greece is taking active steps to decrease the chance that these migrants get rescued. For example, Greece is levying smuggling-related charges against volunteers who take part in migrant rescue operations.<sup>130</sup> In July 2021, Greece initiated a felony investigation into four NGO workers on migrant smuggling allegations.<sup>131</sup> In November 2021, a group of 24 volunteers appeared in court after months of pre-trial detention for smuggling-related charges.<sup>132</sup> Furthermore, Greece is considering draft legislation that would impose heavy penalties on NGOs for unsanctioned rescue operations of migrants at sea.<sup>133</sup> Any rescue missions would require Hellenic Coast Guard permission to be considered sanctioned and for rescuers to avoid a €1000 fine and up to a year in jail.<sup>134</sup> Criminal penalties and rescue sanctioning

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128. DAILY SABAH, *supra* note 79.

129. Secker, *supra* note 87.

130. Vangelis Papanonis & Derek Gatopoulos, *Volunteer Migrant Rescuers Appear in Court in Greece*, AP NEWS (Nov. 18, 2021), <https://apnews.com/article/sports-middle-east-greece-turkey-migration-5cc611ea93cb559d094c14be4da16fa8> [<https://perma.cc/E2WM-VQEV>]; Elana Becatoros, *Critics: Greece Criminalizes Migration, Prosecutes Helpers*, AP (Nov. 14, 2021), <https://apnews.com/article/afghanistan-somalia-middle-east-turkey-europe-48431fc521e8de559347dc3e3ac6fdb9> [<https://perma.cc/Y5VH-WA57>].

131. Becatoros, *supra* note 130.

132. Papanonis & Gatopoulos, *supra* note 130.

133. Derek Gatopoulos, *Rights Body Raps Greece over Migrant Rescue Crackdown*, AP NEWS (Sept. 3, 2021), <https://apnews.com/article/europe-middle-east-greece-migration-53cc485e0123346ae6dc192a4334a988> [<https://perma.cc/78Rz-PV2A>].

134. *Id.*

requirements would put up additional barriers to the rescue of migrants left in disabled life rafts or directly in the Aegean Sea. These facts combined show that Hellenic Coast Guard personnel should be aware that death would result from their pushback practices. Therefore, this element, and the each of the elements of the crime against humanity of murder, are seemingly satisfied against the members of the Hellenic Coast Guard who are committing the pushbacks.

It would be harder to prove a case of murder against the Hellenic Police personnel who pass refugees off to Coast Guard personnel. As to the explicit element of killing one or more persons, Hellenic Police caused the refugees' deaths. The Elements of Crimes states, "[t]he term 'killed' is interchangeable with the term 'caused death'."<sup>135</sup> Hellenic Police personnel caused the death of refugees because if they did not round refugees up, refugees would not have been taken out and dropped into the Aegean Sea. Hellenic Police personnel did so by being co-perpetrators of pushbacks, which "requires an agreement between [the] perpetrators, which led to the commission of one or more crimes under the jurisdiction of the Court."<sup>136</sup> The nature of the handoffs of refugees between members of the Hellenic Police and Hellenic Coast Guard is evidence of such an agreement because, as discussed above, there seems to be no logical reason for members of the Hellenic Police to be passing refugees to Hellenic Coast Guard personnel unless there was an agreement to commit pushbacks.

However, the mental element is harder to prove for a case against members of the Hellenic Police. They may argue that they did not mean to kill anyone in the process of doing pushbacks, and instead claim that they only intended for those refugees to be returned to Turkey. More important is whether the Hellenic Police personnel were aware that deaths would occur in the ordinary course of events, which could also satisfy the mental element. The reports of pushbacks involving death make it more likely that Hellenic Police force members are aware that deaths are occurring in the ordinary course of pushbacks. Earlier in 2021, a report linked 2000 deaths in the EU to pushbacks.<sup>137</sup> If Hellenic Police personnel are aware of this report, or any of the other numerous reports of pushback deaths, then the mental element may be satisfied because then they would be aware that death would occur after they gave refugees to the Coast Guard. While not as strong of a case as

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135. Elements of Crimes, *supra* note 94, at n.7.

136. Prosecutor v. Lubanga, ICC-01/04-01/06 A 5, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction, ¶ 445 (Dec. 1, 2014).

137. Tondo, *supra* note 84.

it would be against the members of the Hellenic Coast Guard who put the refugees onto the rafts or into the water, there is arguably a successful case for the crime against humanity of murder against the members of the Hellenic Police who participate in pushbacks.

*b. Deportation or Forcible Transfer of Population*

The crime against humanity of deportation or forcible transfer of population has three additional elements beyond those shared by all crimes against humanity under the Rome Statute:

- (i) The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more people to another State or location, by expulsion or other coercive acts. (ii) Such person or persons were lawfully present in the area from which they were so deported or transferred. (iii) The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.<sup>138</sup>

The first element, deportation or forcible transfer, is met by the Hellenic Police personnel who are rounding up migrants on land and the Hellenic Coast Guard personnel who are forcibly transferring people to another State or location by virtue of bringing them to Turkish waters. These deportations are without grounds permitted under international law. Under international law, specifically Article 13 of the ICCPR and Article 1 of Protocol 7 of the European Convention of Human Rights (ECHR), except when compelling reasons of national security otherwise require, expulsions of those lawfully in a territory are only lawful if the person being expelled is provided procedural guarantees.<sup>139</sup>

Presently in Greece, Hellenic Coast Guard personnel and Hellenic Police officers are not providing procedural guarantees since they not providing deportation procedures—they are instead skipping to forcibly

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138. Elements of Crimes, *supra* note 94, at art. 7(1)(d).

139. “An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.” ICCPR, *supra* note 18, at art. 13. “(1) An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority. (2) An alien may be expelled before the exercise of his rights under paragraph 1(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.” COUNCIL OF EUR., PROTOCOL NO. 7 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, AS AMENDED BY PROTOCOL NO. 11, E.T.S. 117, art. 1 (1984).

removing refugees from the country.<sup>140</sup> For example, one man reportedly told officials that he was seeking asylum and that same night he was beaten, tossed into a car, then into a boat, and then into the Aegean Sea.<sup>141</sup> He was not given the opportunity to submit reasons against his deportation and since no information was taken from him, it would be difficult for Greek perpetrators to argue that his deportation was due to a compelling national security reason that would allow them to avoid providing due process. By not collecting information, Greek perpetrators would be making an arbitrary decision as to who constitutes a threat to national security, which makes it nearly impossible for them to have a compelling national security reason. It is equally difficult to argue a national security justification for the numerous other reports of refugees who are either rounded up on land and taken back to the Aegean Sea or are in Greek territorial waters when towed to Turkish waters and their boats disabled.<sup>142</sup> In these cases, there are no individualized deportation procedures, and therefore, these deportations are without grounds permitted under international law.

Furthermore, international law specifically prohibits collective expulsions, which Greek forces are committing through their pushbacks.<sup>143</sup> There are reports of Hellenic Coast Guard personnel abandoning as many as 120 people divided between just two dilapidated life rafts.<sup>144</sup> According to the ECtHR, collective expulsion is “any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of reasonable and objective examination of the particular case of each individual alien in the group.”<sup>145</sup> In *Hirsi Jamaa and others v. Italy*, the ECtHR found that a group of migrants intercepted at sea and pushed back to Libya, a situation analogous to Greece’s pushback practices, was a collective expulsion.<sup>146</sup> This further supports the notion that Greek forces are committing expulsions without grounds permitted under international law.

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140. See UNHCR, *supra* note 123; DAILY SABAH, *supra* note 79; ECRE, *supra* note 78.

141. DAILY SABAH, *supra* note 79.

142. AEGEAN BOAT REPORT, *supra* note 74.

143. See U.N. HRC, 27th Sess., General Comment No. 15 (April 11, 1986) (“Article 13 [of the ICCPR] would not be satisfied with laws or decisions providing for collective or mass expulsions”); COUNCIL OF EUR., PROTOCOL NO. 4 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, E.T.S. No. 46, art. 4 (1968) (“Collective expulsion of aliens is prohibited.”)

144. LEGAL CTR. LESVOS, *supra* note 86, at 14.

145. Collective expulsions of aliens Factsheet, Eur. Ct. H.R. (2022), 1 [<https://perma.cc/BFZ7-CSV2>].

146. *Jamaa v. Italy*, Eur. Ct. H.R., Report of Judgments and Decisions, ¶¶ 9–12, 186, 2012.

However, the ICC Prosecutor likely will not be able to establish the second element, that such person or persons were lawfully present in the area from which they were so deported or transferred. Unlike under the Refugee Convention, under the Rome Statute the question of whether someone is lawfully present does not fall under a State's domestic law. According to international criminal courts and tribunals, whether a refugee has satisfied residency requirements or has been granted residency status under domestic immigration law is irrelevant for the purposes of determining whether a party has committed an international crime.<sup>147</sup> Instead, the Tribunal for the Former Yugoslavia held that what is important for the lawfully present analysis is whether the person or persons being deported have "come to live in the community – whether long term or temporarily"<sup>148</sup> because "the clear intention of the prohibition against forcible transfer and deportation is to prevent civilians from being uprooted from their homes and to guard against the wholesale destruction of communities."<sup>149</sup> The ICC shares this view.<sup>150</sup>

In the present case, the refugees being deported either have not yet made it to land or have not yet been able to form a community. For those refugees who make landfall, they are not being uprooted from their homes since they have not been in Greece long enough to form homes and become a part of a community by the time Hellenic Police officers round them up. Since the refugees are not lawfully present under international criminal law, the third element, that the perpetrators of the deportations know the lawful status of the people they are deporting, cannot be satisfied. Thus, the Prosecutor will likely not be able to establish the crime against humanity of deportation against members of either the Hellenic Police or the Hellenic Coast Guard.

### *c. Torture*

Finally, it is possible that Greece's pushbacks, specifically the Coast Guard members' history of leaving people in the Aegean Sea without life jackets, could qualify as torture. Under the Rome Statute, torture as a crime against humanity includes three elements beyond the shared elements of all crimes against humanity. They are:

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147. Prosecutor v. Popović, Case No. IT-05-88-T, Judgment, ¶ 900 (Int'l Crim. Trib. For the Former Yugoslavia June 10, 2010), <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf> [https://perma.cc/EPT7-2DVL].

148. *Id.*

149. *Id.*

150. "The requirement of 'lawful presence' does not mean that the victim must have had legal residence in the area. Indeed, this protection extends to individuals who, for whatever reason, have come to live in a community[.]" Ntaganda, ICC-01/04-02/06 at ¶ 1069.

(i) the perpetrator inflicted severe physical or mental pain or suffering upon one or more person; (ii) such person or persons were in the custody or under the control of the perpetrator; and (iii) such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.<sup>151</sup>

The second and third elements here are clearly established. The refugees who are being left directly in the Aegean Sea were under the control of Hellenic Coast Guard personnel, who are the perpetrators of pushbacks. As for the third element, there are no lawful sanctions permitting these pushbacks. According to the Office of the High Commissioner of Human Rights, “[l]awful sanctions refer only to penal practices that are widely accepted as legitimate by the international community and are compatible with basic internationally accepted standards.”<sup>152</sup> Since pushbacks do not meet these criteria,<sup>153</sup> such pain and suffering could not arise from or be incidental to lawful sanctions.

However, the first element is not as clearly established. We can assume that Hellenic Coast Guard personnel have inflicted some physical or mental pain or suffering upon one or more persons by dropping them directly into the Aegean Sea, especially since some deaths by drowning have resulted,<sup>154</sup> but there is no definition for what qualifies as “severe” physical or mental pain or suffering. The only guidance from ICC jurisprudence is that “an important degree of pain and suffering has to be reached in order for a criminal act to amount to an act of torture.”<sup>155</sup> Most cases do not analyze whether an action amounted to torture, and only concluded that the victim was tortured.<sup>156</sup> In one case, however, the ICC Pre-Trial Chamber listed actions that constituted torture, and included both “dunking in water” and “making the person think that he is going to be killed.”<sup>157</sup> The refugees being thrown

151. Elements of Crimes, *supra* note 94, at art. 7(1)(f).

152. Fact Sheet No. 4 (Rev. 1): Combatting Torture, U.N. Human Rights Office of the High Comm’r, <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet4rev.1en.pdf>, [<https://perma.cc/U9XA-WT2M>].

153. *Pushbacks of migrants on land and at sea must end, says UN expert*, U.N. Human Rights Office of the High Comm’r (Jul. 9, 2021), <https://www.ohchr.org/en/stories/2021/07/pushbacks-migrants-land-and-sea-must-end-says-un-expert> [<https://perma.cc/Z3YU-ZDHN>].

154. DAILY SABAH, *supra* note 79.

155. Prosecutor v. Gombo, ICC-01/05–01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 193 (June 15, 2009), <https://www.legal-tools.org/doc/07965c/pdf> [<https://perma.cc/7MEA-QVTX>].

156. See generally ICC Case Law Database, <https://legal-tools.org/cld> [<https://perma.cc/U32E-DRSN>] (last accessed Nov. 17, 2022) (“torture,” advanced search results).

157. Situation in the Republic of Burundi, Case No. ICC-01/17-X, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of

into the Aegean Sea are being dunked in water, and given that they are told to swim to the Turkish shoreline, people think they are going to be killed, especially those who do not know how to swim. Greek perpetrators could argue the case is not analogous since the Pre-Trial Chamber listed a total of fifteen actions that together constituted torture, including arguably more serious actions of stabbing, burning, and the crushing of fingers.<sup>158</sup> Greek perpetrators could also argue that there is no guidance for whether any of these acts alone constitute torture, or whether they are all needed, and conclude that having two potentially analogous facts is insufficient to prove that pushbacks constitute torture.

Greece ratified the Convention on Torture (Torture Convention) in 1988.<sup>159</sup> The Convention and its jurisprudence can provide guidance for how to interpret the crime against humanity of torture. The language of the Torture Convention is similar to the language regarding torture in the Rome Statute, defining it as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>160</sup> While the text of the Torture Convention itself is not particularly useful, as it is unclear as to what qualifies as “severe pain or suffering,” Torture Convention jurisprudence provides guidance in a somewhat analogous case.

In *Barry v. Morocco*, Moroccan gendarmes abandoned approximately forty people in the desert on the border with Mauritania.<sup>161</sup> They were left with minimal supplies such as food and water and, in order to reach civilization, they were forced to walk fifty kilometers through deserts containing anti-personnel mines.<sup>162</sup> The lack of supplies and the dangers faced in the route to safety in an expulsion are analogous to the dangers faced by the refugees in the Aegean Sea. The gendarmes, like the Hellenic Coast Guard, actively put refugees in danger, and the lack of food and water when being abandoned in a desert may be analogized

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an Investigation into the Situation in the Republic of Burundi,” ¶ 95 (Nov. 9, 2017), <https://www.legal-tools.org/doc/8f2373/pdf> [<https://perma.cc/Q5ML-9JSC>].

158. *Id.*

159. See U.N., *Treaty Series*, vol. 1465, 85,

[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en) [<https://perma.cc/833J-BYU6>].

160. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (entry into force June 26, 1987), <https://www.refworld.org/docid/3ae6b3a94.html> [<https://perma.cc/KV9B-KTVK>].

161. Committee against Torture, Communication No. 372/2009, CAT/C/52/D/372/2009, at ¶ ¶ 2.1–2.2 (July 8, 2014), [<https://perma.cc/H7NU-63LY>]

162. *Id.*



to being thrown into the water without a life jacket. Victims could also argue that being forced to walk through a desert filled with anti-personnel mines is similar to being forced to swim to shore in open water, where many dangers cannot be seen. The Committee Against Torture<sup>163</sup> found that the expulsion by the Moroccan gendarmes constituted the infliction of severe physical and mental suffering by public officials and as a result violated the Torture Convention.<sup>164</sup> Therefore, the ICC Prosecutor could use this analogy to argue that the first element of the crime against humanity of torture under the Rome Statute is met.

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As the above analysis shows, the Hellenic Coast Guard personnel's practice of committing pushbacks likely satisfies the elements of the crimes against humanity of both murder and torture while the actions of participating Hellenic Police officers likely satisfy only the elements of the crime against humanity of murder. The Prosecutor's case of murder seems strongest against all perpetrators from these two groups—the elements are more clearly established, and the potential defenses are weakest in this area.

The Greek perpetrators' strongest defense to murder would likely be to challenge whether the acts of dropping people directly into the water even took place at all. While there is plenty of evidence collected by NGOs that Greek forces are rounding up refugees and leaving them in disabled life rafts in the middle of the Aegean Sea,<sup>165</sup> there is much less evidence concerning the practice of dropping people directly into the water without life jackets. The only evidence is the reports of the survivors themselves, which Greek perpetrators will argue is not enough. Greek perpetrators will likely make the same lack of evidence argument for any deaths that occur by leaving refugees in dilapidated life rafts.

The Greek perpetrators' defenses against the potential charge of torture are likely stronger. The same defense regarding the weakness of evidence under murder, that there is little proof beyond the reports of survivors, exists for the crime of torture as well. Furthermore, Greek

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163. The Committee Against Torture is the legal body established by the Torture Convention for enforcement. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 160, at art. 171 (“There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided.”).

164. Committee against Torture, *supra* note 161, at ¶ 72.

165. *Fear and Fences: Europe's Approach to Keeping Refugees at Bay*, *supra* note 71, at 59; Kingsley & Shoumali, *supra* note 77.

perpetrators may challenge that even if there is enough evidence of their having dropped people directly into the Aegean Sea, the reliance on *Barry v. Morocco* to determine that the act causes severe physical or emotional suffering is misplaced since it is not sufficiently factually analogous. But some of the people they are dropping into the water do not know how to swim, so the mental suffering is severe as they know they are about to die. Finally, the Prosecutor will have the hardest time proving deportation since the third element, that the perpetrator of the deportation knows the lawful status of the person being deported, is likely not met. Thus, the Prosecutor will have the strongest case against members of the Hellenic Coast Guard and the Hellenic Police with the charge of the crime against humanity of murder.

## B. Refugee Convention

It is possible that Greece's pushback practices are also violating Article 32 (prohibition on expelling refugees) and Article 33 (prohibition on refoulement) of the Refugee Convention.

### 1. Expulsion

Under Article 32, States are prohibited from expelling a refugee lawfully in their territory with just two exceptions—expulsions on the grounds of national security or of public order.<sup>166</sup> Furthermore, lawfully present refugees are granted the right to due process of law, unless there is a compelling national security reason. Article 32(2) states, “[e]xcept where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by competent authority.”<sup>167</sup>

Given the volume of verified reports of pushbacks, there seems to be little question whether Greece is expelling refugees from its territory. The issue instead turns on whether the victims of Greece's pushback practices are considered lawfully present in Greece since Article 32 only applies to lawfully present refugees. Because the legal status of refugees falls under domestic law rather than international law,<sup>168</sup> a full analysis of whether the pushback victims are lawfully in Greece falls outside of the scope of this Article. Instead, this Article

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166. “The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.” Refugee Convention, *supra* note 6, at art. 32(1).

167. *Id.* at art. 32(2)

168. CCPR General Comment No. 27: Article 12 (Freedom of Movement), *supra* note 10, ¶ 1.

assumes refugees' lawful presence. This assumption is bolstered by the UNHCR, which stated in a press release in January 2021, as a direct response to reports of pushbacks, that the Refugee Convention requires States to protect the right of people to seek asylum even if they enter irregularly.<sup>169</sup> In May 2021, Felipe González Morales, the UN Special Rapporteur on the human rights of migrants, published a report that said, "States have an obligation to respect, protect and fulfil the human rights of everyone in their territory or within their jurisdiction or effective control, irrespective of migration status."<sup>170</sup> Therefore, international human rights bodies seem to indicate that the rights of the victims of pushbacks should be protected, whether or not they are legally in Greece.

If the refugees being expelled are legally in the country, then Greece is violating Article 32 of the Refugee Convention. First, even if these pushbacks were to fall under the exceptions of either national security or public order that Article 32(1) provides, the due process rights of the refugees who are being left helpless out in the middle of the Aegean Sea are being violated, thereby violating Article 32(2) of the Refugee Convention. In the process of these pushback practices, there is no opportunity for refugees to submit evidence to clear themselves or to show that their expulsion would not fall under the two exceptions, and they have no opportunity to appeal and to be represented before a competent authority.<sup>171</sup> Instead, refugees are oftentimes dropped in the Aegean Sea shortly after they are rounded up on land, or before they even make landfall. Article 32(2) does provide the exception for the violation of due process rights should there be "compelling reasons of national security;" however, Greece has not claimed any national security justification for this violation.

Second, presumably, if Greece were to have a sufficiently compelling national security or public order justification for these pushbacks, the Greek government would have brought them up when being accused of these practices. Instead, Greece adamantly denies that the pushbacks are taking place at all. Without efforts by Greece to justify the pushbacks and the difficulty in finding any national security justification

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169. UNHCR, *supra* note 123.

170. U.N. Gen. Assembly, Hum. Rts. Council, Rep. on means to address the human rights impact of pushbacks of migrants on land and at sea, at ¶ 39, A/HRC/47/30 (May 12, 2021) (González Morales (Special Rapporteur)), <https://www.ohchr.org/en/documents/thematic-reports/ahrc4730-report-means-address-human-rights-impact-pushbacks-migrants> [<https://perma.cc/9A2N-WW6M>].

171. *Fear and Fences: Europe's Approach to Keeping Refugees at Bay*, *supra* note 71, at 59.

that could debatably allow for such a violation of due process rights, it is difficult to analyze whether they would actually fall under one of the two Article 32(1) exceptions.

Assuming that the refugees who are being pushed back are considered “legal,” Greece is likely violating its obligations under Article 32 of the Refugee Convention. Based on the facts analyzed above, Greece is clearly expelling refugees from its territory without providing them any due process of law as required under the Refugee Convention. This analysis could change in the future should Greece back away from its blanket denial strategy and instead attempt to provide justifications, which it likely will not do.

## 2. Refoulement

Under the Refugee Convention, signatories are also prohibited from the practice of refoulement. Article 33 states, “[n]o Contracting State shall 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.”<sup>172</sup> It is important to note that this protection is not limited to refugees lawfully in a signatory’s territory.<sup>173</sup> In the present case, there is no doubt that Greece is returning refugees to Turkey.

It is true that Greece is not returning refugees to a territory where their lives are threatened on account of one of the numerous reasons listed in Article 33. In June 2021, Greece declared Turkey a “safe third country” for asylum seekers from Afghanistan, Bangladesh, Pakistan, Somalia, and Syria,<sup>174</sup> who make up nearly seventy percent of asylum seekers in Greece.<sup>175</sup> Therefore, if Greece is returning refugees to Turkey through the practice of pushbacks, it is not violating its obligations

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172. Refugee Convention, *supra* note 6, at art. 33.

173. In other sections of the Refugee Convention, it makes it clear when an article is limited to residents lawfully in the territory. That limitation is not present in the text of Article 33. Therefore, Article 33 protects all refugees, legal or not. *Id.*

174. U.N. Refugee Agency, *UNHCR's Position and Recommendations on the Safe Third Country Declaration by Greece* (Aug. 2, 2021), <https://www.unhcr.org/gr/en/22885-unhcrs-position-and-recommendations-on-the-safe-third-country-declaration-by-greece.html> [<https://perma.cc/7ZNJ-2B6B>].

175. *Greece: While the Designation of Turkey as Safe Country and Pushbacks Undermine Protection in Greece, the Country is Criticised for not Preventing Secondary Movement*, ECRE (June 11, 2021), <https://ecre.org/greece-while-the-designation-of-turkey-as-safe-country-and-pushbacks-undermine-protection-in-greece-the-country-is-criticised-for-not-preventing-secondary-movement> [<https://perma.cc/ZF79-JRTU>].

against refoulement under Refugee Convention because Turkey has been designated safe.

However, this determination is complicated. The UNHCR has made clear that countries are obligated to consider the asylum applications of refugees to satisfy their Article 33 obligations. In 2007, the UNHCR stated in an advisory opinion that countries are “required to grant individuals seeking international protection access to the territory and to fair and efficient” asylum procedures to satisfy their obligations of non-refoulement under the Refugee Convention.<sup>176</sup> Then in August 2020, the UNHCR specifically called upon Greece to refrain from push-back practices, emphasizing that “[e]very individual has the right for their case to be heard and their protection needs assessed.”<sup>177</sup> Finally, in July 2021, in response to allegations of pushbacks by various members of the EU, the UNHCR stated in a press release that to satisfy the Refugee Convention’s protections from refoulement, “[a]uthorities cannot automatically deny entry to or return people without undertaking an individual assessment of those in need of protection.”<sup>178</sup>

Greece could try to argue that Article 33 of the EU’s Asylum Procedure Directive (APD) permits it to send people back to Turkey without an assessment. The APD says, “Member States may consider an application for international protection as inadmissible only if . . . (c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38.”<sup>179</sup> But even though Greece labeled Turkey as a safe third country, an individual assessment is still required.<sup>180</sup> According to the UNHCR, that assessment requires an analysis of whether the third country “will (1) readmit the person, (2) grant the person access to a fair and efficient asylum procedure, (3) permit the person to remain while a status determination is made, and (4) *accord* the person standards of treatment commensurate with the

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176. Office of the U.N. High Comm’r for Refugees, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, ¶ 8 (Jan. 26, 2007), <https://www.unhcr.org/4d9486929.pdf> [<https://perma.cc/2Q4V-A4N8>].

177. Press Release, UNHCR, UNHCR concerned by pushback reports, calls for protection of refugees and asylum-seekers (Aug. 21, 2020), <https://www.unhcr.org/gr/en/16207-unhcr-concerned-by-pushback-reports-calls-for-protection-of-refugees-and-asylum-seekers.html> [<https://perma.cc/427D-Q3FT>].

178. UNHCR, *supra* note 123.

179. Council Directive 2013/32/EU, 2013 O.J. (L. 180) 60, 79, <https://www.easo.europa.eu/sites/default/files/public/Dve-2013-32-Asylum-Procedures.pdf> [<https://perma.cc/XM2F-93DG>].

180. U.N. Refugee Agency, *supra* note 174.

[Refugee Convention] and international human rights standards.”<sup>181</sup> In Greece’s practice of pushbacks, it is not making any individual determination as to whether an application is admissible pursuant to these guidelines. Hellenic Police officers are not collecting asylum applications from refugees before rounding them up and giving them to Hellenic Coast Guard personnel.<sup>182</sup> One of the pushback victims reported that he told an official that he was seeking asylum, and the only thing that occurred between his request and Hellenic Police officers rounding him up was the official making a phone call.<sup>183</sup> The refugee was from Yemen, not one of the five countries Greece listed whose nationals are safe in Turkey.<sup>184</sup> Similarly, the Hellenic Coast Guard does not look at asylum applications before it disables the boats of refugees and tows them back to Turkish waters.<sup>185</sup> In October 2020, a group of 180 to 200 refugees from various countries, including Iran, Russia, and Iraq (none of which are on Greece’s list of nationals who would be safe in Turkey), were on an old fishing boat when Hellenic Coast Guard personnel took them, forced them onto motorless life rafts, and left them in Turkish waters for Turkey’s Coast Guard to rescue.<sup>186</sup> These examples illustrate exactly why an individual assessment is required before returning a refugee to a designated safe third country, because the country might not be considered a safe third country for a given refugee depending on a their nationality.

Second, even if an individual assessment is not required, Greece’s unilateral decision to label Turkey a safe third country<sup>187</sup> makes that qualification uncertain. As the European Council of Refugees and Exiles noted, it is unclear what information Greece used in making this decision and how it decided that nationals of the five listed countries would be safe there.<sup>188</sup> Under Article 38 of the ADP, a safe third country must be one where a person seeking international protection (1) does not have their life or liberty threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (2) does not face a risk of serious harm; (3) is protected from

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181. *Id.*

182. *Fear and Fences: Europe’s approach to keeping refugees at bay*, *supra* note 71, at 59.

183. DAILY SABAH, *supra* note 79.

184. *Id.*

185. *Fear and Fences: Europe’s approach to keeping refugees at bay*, *supra* note 71, at 59.

186. LEGAL CTR. LESVOS, *supra* note 86, at 10–15.

187. ECRE, *supra* note 175.

188. *Id.*

refoulement; (4) is protected from removal; and (5) can request refugee status.<sup>189</sup> While an analysis of whether Turkey qualifies as a safe third country is outside the scope of this Article, it is important to note that even if Greece did individualized assessments, it could still be returning refugees to a country that was not safe for them, violating Article 33. Should Greece clarify the methodology and analysis it used in making this decision as the UNHCR recommends it does,<sup>190</sup> it is possible that the return of refugees to Turkey following an assessment is not a violation of Article 33.

In determining a violation of Article 33, the UNHCR may bypass the safe third country analysis because evidence shows that Greece is not using fair and efficient asylum procedures and instead is pushing refugees back to Turkey without any hearings whatsoever. As a result, Greece is *per se* violating the rights of refugees to not be subject to refoulement and is therefore violating its obligations under Article 33 of the Refugee Convention.

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Ultimately, Greek actors are likely violating the Rome Statute and thereby committing international crimes, and Greece itself is violating its obligations under the Refugee Convention through the practice of pushbacks. The ICC Prosecutor will have the strongest case under the crime against humanity of murder against members of both the Hellenic Coast Guard and the Hellenic Police. As for the Refugee Convention, the violations against Article 26 and Article 33 are similar, but there is a stronger argument for Greece violating Article 33's protection against refoulement because this protection does not require the refugee to be lawfully in the country.

### III. REFUGEE CAMP LIVING CONDITIONS AND THE RIGHT TO HOUSING

While one of the concerns about the housing provided to refugees who are not pushed back is that it restricts their freedom of movement, the quality of housing itself is another potential violation of the Refugee Convention. There have been reports of terrible conditions at refugee camps, such as the overcrowding at the Moria camp when it burned down in September 2020. The camp had over 12,000 people living there when the official capacity was just 2800.<sup>191</sup> As a case study, this Article will look at the Mavrovouni refugee camp.

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189. Council Directive, *supra* note 179, at art. 38.

190. U.N. Refugee Agency, *supra* note 174.

191. Florian Elabdi, *Surviving in the Ruins of Moria*, AL JAZEERA (Dec. 29, 2020),

In response to the Moria camp fire, the Mavrovouni refugee camp was hastily put together in just a few days to provide refugees with another place to live.<sup>192</sup> This new camp was built on land that was formerly used as an artillery firing range. The land was poisoned with lead, and there were leftover unexploded mortar shells and live small arms ammunition that had not been removed.<sup>193</sup> While the camp was designed to be temporary, in September 2021, on the first anniversary of the Moria camp fire, a new permanent camp had yet to be constructed.<sup>194</sup> Greek Migration Minister Notis Mitarachi said that over 3300 people continued to live there still at risk.<sup>195</sup> Even though the camp was designed to be temporary, the refugees still were forced to endure pitiful conditions. Mavrovouni was set up as a tent camp for almost 8000 people,<sup>196</sup> but as of April 2021, residents lacked mattresses<sup>197</sup> and did not have sufficient protection from the elements—there was no heating for the winter months<sup>198</sup> and no shade in the summer months to provide relief from heat waves.<sup>199</sup> Furthermore, the camp was prone to flooding whenever it rained,<sup>200</sup> forcing refugees to use shovels in attempts to remove water from the inside of their tents, and completely destroying the tents of others.<sup>201</sup> From a sanitation standpoint, there was

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<https://www.aljazeera.com/features/2020/12/29/surviving-in-the-ruins-of-moria> [https://perma.cc/JD7X-EBWW].

192. *Greece: Lead Poisoning Concerns in New Migrant Camp*, HUMAN RIGHTS WATCH (Dec. 8, 2020, 1:00 AM), <https://www.hrw.org/news/2020/12/08/greece-lead-poisoning-concerns-new-migrant-camp> [https://perma.cc/6LXZ-FNPJ].

193. *Id.*

194. Elena Becatoros, *Aid Groups Decry Migrant Camp Conditions a Year After Fire*, AP NEWS (Sept. 9, 2021), <https://apnews.com/article/europe-middle-east-fires-greece-migration-9eaee26f819998065aa68b56125352db> [https://perma.cc/JCR8-3C5F].

195. *Id.*

196. Helena Smith, *Refugees on Lesbos Face Winter in Makeshift Facility After Camp Razed*, THE GUARDIAN (Nov. 19, 2020, 1:15 PM), <https://www.theguardian.com/law/2020/nov/19/refugees-on-lesbos-face-winter-in-makeshift-camp-after-september-fires> [https://perma.cc/HV5N-25DR].

197. John Psaropoulos, *Refugees Forced to Uproot Again as Greece Closes 'Safe' Camp*, AL JAZEERA (Apr. 30, 2021), <https://www.aljazeera.com/news/2021/4/30/refugees-forced-to-uproot-again-as-greece-closes-safe-camp> [https://perma.cc/4LK6-VPVB].

198. Florian Schmitz, *Greece: Despite EU Funds, Migrant Conditions Still Lacking*, DEUTSCHE WELLE (Mar. 30, 2021), <https://www.dw.com/en/greece-eu-funds-migrants-lesbos-asylum/a-57051718> [https://perma.cc/WZ72-EYF9].

199. Gabriel Geiger, *'I Can't Take It Anymore': Refugees Struggle to Cope in Extreme Heat*, VICE NEWS (Aug. 9, 2021, 5:59 AM), <https://www.vice.com/en/article/5db4y3/i-cant-take-it-anymore-refugees-struggle-to-cope-in-extreme-heat> [https://perma.cc/3FX8-GB5X].

200. Becatoros, *supra* note 194.

201. Janis Papadimitriou, *Lesbos After Moria Fire: 'People Are Still Living in Tents by the Sea'*, DEUTSCHE WELLE (Sept. 8, 2021), <https://www.dw.com/en/lesbos-after-moria-fire-people-are-still-living-in-tents-by-the-sea/a-59115403> [https://perma.cc/5V5F-J52G].



no running water and instead water had to be trucked in every day.<sup>202</sup> There was no electricity.<sup>203</sup> There were also personal safety concerns, as women were afraid to go out of their tents at night after other women reported being raped.<sup>204</sup> As of December 2021, nearly 2200 refugees still lived at the Mavrovouni camp<sup>205</sup> in uninsulated refugee housing units provided for by an NGO.<sup>206</sup>

Article 21 of the Refugee Convention requires that States “*accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.*”<sup>207</sup> At least some of the refugees staying at Mavrovouni are considered lawfully in Greece and as a result are protected by Article 21 of the Refugee Convention, yet it has been reported that those who are recognized as refugees are often hosted in the same area as those whose asylum applications have been rejected.<sup>208</sup>

As to the protections Article 21 provides, the refugees in the Mavrovouni refugee camp have not been afforded treatment as favorable as possible. The above-described treatment violates Article 21 in two distinct ways. First, if the refugees staying at Mavrovouni were afforded treatment as favorable as possible, they would not be forced to reside in a camp that was dangerous by virtue of where it was built. Greek authorities did not conduct any testing on the land to make sure it was safe, even though there was a known risk that it was poisoned with lead as a former military firing range.<sup>209</sup> Furthermore, Greek authorities did not take the time to remove all of the unexploded mortar projectiles and live small arms. Second, even if Mavrovouni was not built on a former

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202. Schmitz, *supra* note 198; Press Release, Pregnant Women, Families and People with Disabilities Removed from Safe Accommodation to Dangerous Camp in Lesbos, Warns IRC, INTERNATIONAL RESCUE COMMITTEE (Apr. 26, 2021), <https://eu.rescue.org/press-release/pregnant-women-families-and-people-disabilities-removed-safe-accommodation-dangerous> [<https://perma.cc/NQU8-2XTG>].

203. *Id.*

204. Psaropoulos, *supra* note 197.

205. *Pope Francis calls neglect of migrants the ‘ship-wreck of civilisation’ on visit to Lesbos*, FRANCE 24 (Dec. 5, 2021, 12:44 PM), <https://www.france24.com/en/europe/20211205-pope-francis-calls-neglect-of-migrants-the-shipwreck-of-civilisation> [<https://perma.cc/35A4-6CNM>].

206. Eurorelief (@eurorelief), FACEBOOK (Jan. 10, 2022), <https://www.facebook.com/eurorelief> (last visited Oct. 13, 2022); *About*, EURORELIEF, <https://www.eurorelief.net/about> (last visited Oct. 13, 2022).

207. Refugee Convention, *supra* note 6, at art. 21.

208. *There is Nothing More Permanent Than the Temporary*, LEGAL CENTRE LESVOS (Sept. 14, 2021), <https://legalcentrelesvos.org/2021/09/14/one-year-of-mavrovouni-camp> [<https://perma.cc/9DTJ-GR2F>].

209. HUMAN RIGHTS WATCH, *supra* note 192.

artillery range, the living conditions in the camp show that the refugee residents are not afforded the treatment as favorable as possible that is required under Article 21 of the Refugee Convention.

Even if these terrible conditions *are* the most favorable that Greece can give to the refugees at Mavrovouni, this argument can be countered by comparing the previously discussed camp conditions to the conditions of some of Greece's other refugee camps. In other words, it is difficult for Greece to win an argument of the impossibility of better conditions when it offers better conditions to refugees at other camps. For example, the Kara Tepe refugee camp (on the same island as Mavrovouni), which the government abruptly closed in April 2021,<sup>210</sup> had over 200 prefabricated, insulated containers equipped with heaters and air conditioning.<sup>211</sup> Kara Tepe also had toilets and showers that were regularly maintained.<sup>212</sup> Once it closed, resident refugees were moved to Mavrovouni.<sup>213</sup> Similarly, the previously discussed Samos camp that opened in September 2021 has air conditioning, restaurants, playgrounds, and special rooms for vulnerable people.<sup>214</sup> The operation and the construction of Kara Tepe, Samos, and other similar camps is evidence that Greece could afford the refugees staying at Mavrovouni better treatment. Because Greece is not affording the refugees at Mavrovouni housing treatment as favorable as possible, Greece is violating its obligations under Article 21 of the Refugee Convention.

#### IV. CAN STATE SOVEREIGNTY SHIELD GREECE FROM FACING ACCOUNTABILITY?

To avoid consequences, Greece may assert that its state sovereignty immunity trumps its human rights obligations.<sup>215</sup> This Article does not deny that Greece has the right to sovereignty. But Greece ceded its sovereignty rights to ICC jurisdiction when it became a

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210. Psaropoulos, *supra* note 197.

211. UNHCR, *Kara Tepe More Than A Home 2016 – 2021*, OPERATIONAL DATA PORTAL REFUGEE SITUATIONS (May 21, 2021), <https://data2.unhcr.org/en/documents/details/86762> [<https://perma.cc/K3Z5-89TF>].

212. *Id.*

213. Psaropoulos, *supra* note 197.

214. Smith, *supra* note 196.

215. This is the exact argument that countries such as the United States posed in 2018 when backing out of the negotiations over the Global Compact for Safe, Orderly and Regular Migration, which it and four other countries voted against when the General Assembly voted for its adoption. See *The Global Compact on Migration (GCM) and U.S. Policy*, CONGRESSIONAL RESEARCH SERVICE (updated Mar. 27, 2020), <http://sgp.fas.org/crs/row/IF11003.pdf> [<https://perma.cc/8P9K-MJ82>].

signatory to the Rome Statute.<sup>216</sup> Therefore, the question is whether state sovereignty trumps Greece's human rights obligations under the Refugee Convention.

UN Secretary General António Guterres disagrees with Greece's arguments.<sup>217</sup> Greece voted in favor of the Global Compact for Safe, Orderly and Regular Migration (GCM) in 2018, which helps to answer the debate between state sovereignty and obligations to respect human rights, specifically when it comes to the treatment of migrants.<sup>218</sup> The GCM purposefully protected state sovereignty as much as possible, to the detriment of key migration issues.<sup>219</sup> However, the GCM specifically limited the sovereign right of States to determine their own national migration policies to be "in conformity with international law."<sup>220</sup> The Refugee Convention and its binding status falls under this clause as an international treaty. Thus, as recently as 2018, Greece agreed and affirmatively voted that its sovereignty is subject to its international obligations to protect human rights, at least in regard to its treatment of migrants.

Finally, even if one disagrees with the conclusion that a state's sovereignty does not trump its human rights obligations and therefore believes that Greece cannot be held legally liable under the Refugee Convention, Greece can still be held *politically* liable. While multilateral human rights treaties such as the Refugee Convention specifically concern the rights of people and the duties of nations to uphold those

216. "The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other state." Rome Statute of the International Criminal Court, *supra* note 91, at art. 4(2).

217. At an event marking the 70<sup>th</sup> anniversary of the Universal Declaration of Human Rights, UN Secretary General António Guterres stated, "There is still resistance to supporting human rights, often linked to a false dichotomy between those rights and national sovereignty. But human rights and sovereignty must go hand in hand. Human rights strengthen States and societies and reinforce sovereignty." *Secretary-General's remarks to High-Level Event marking the 70th Anniversary of the Universal Declaration of Human Rights: A Prevention Tool to Achieve Peace and Sustainable Development [as delivered]*, UNITED NATIONS SECRETARY-GENERAL (Sept. 26, 2018), <https://www.un.org/sg/en/content/sg/statement/2018-09-26/secretary-generals-remarks-high-level-event-marking-70th-anniversary> [<https://perma.cc/X7QL-JM7J>].

218. Global Compact for Safe, Orderly and Regular Migration: resolution / adopted by the General Assembly, UNITED NATIONS DIGITAL LIBRARY, <https://digitallibrary.un.org/record/1656414?ln=en> (last accessed on Feb. 5, 2022) [<https://perma.cc/23KR-VE3E>].

219. Francesca Capone, *The alleged tension between the Global Compact for Safe, Orderly and Regular Migration and state sovereignty: 'Much Ado about Nothing'?*, 33 LEIDEN J. INT'L L., 713, 719 (2020).

220. "The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law." G.A. Res. 73/195, Global Compact for Safe, Orderly and Regular Migration, ¶ 15 (Dec. 19, 2018).

rights,<sup>221</sup> treaties are also commitments to other nations.<sup>222</sup> In this sense, even if Greece could theoretically use its right to sovereignty as a shield from its legal obligations to protect the rights of migrants under the Refugee Convention, other States can exert political pressure to force Greece into compliance.<sup>223</sup> Nations such as Greece should not be able to hide behind sovereignty. Instead, the international community needs to respond to the reports of these violations and exert pressure on Greece to treat the migrants arriving on its shores and in its waters with dignity and to protect their human rights and fundamental freedoms.

### CONCLUSION

This Article sought to determine whether Greece is violating international law with its operations of refugee camps and its practice of pushbacks. It first concluded that Greece is restricting the freedom of movement of refugees staying in camps. But, due to the COVID-19 pandemic, these restrictions are likely permissible. For “legal” refugees, the pandemic likely falls under one of the exceptions that Greece created for itself in a reservation.<sup>224</sup> For those refugees at Samos not considered legal, the restrictions likely will be considered necessary.

Greece is likely violating its Refugee Convention obligations, and Greek actors are likely committing international crimes through the practice of pushbacks. As for the Refugee Convention’s protection against expulsion under Article 32, Greece is violating its obligations should the refugees be considered lawful under domestic law. Hellenic Coast Guard personnel are likely committing the crimes against humanity of murder and of torture, and members of the Hellenic Police are likely committing the crime against humanity of murder through their respective participation in pushbacks. They are likely not committing

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221. See generally Refugee Convention, *supra* note 6.

222. “[T]reaties use conventional forms to signify a seriousness of commitment . . . The effect of treaties, then, is to raise the political costs of noncompliance.” See Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT’L ORG., 495, 508 (1991).

223. A current example is the pressure the international community is placing on China for its alleged human rights abuses against Uyghurs and other minority groups in Xinjiang. These pressures include economic sanctions, trade restrictions, and the shelving of agreements. See Michael Schuman, *America’s China Strategy is Working*, THE ATLANTIC (Sept. 20, 2021), <https://www.theatlantic.com/international/archive/2021/09/us-china-human-rights/620112> [<https://perma.cc/D94J-EMJE>]; *Xinjiang Supply Chain Business Advisory – Risks and Considerations for Businesses and Individuals with Exposure to Entities Engaged in Forced Labor and other Human Rights Abuses linked to Xinjian, China*, US DEP’T OF STATE (updated July 13, 2021), [<https://perma.cc/R6XN-FKTD>].

224. State Parties, Including Reservations and Declarations, to the 1951 Refugee Convention, *supra* note 15.

the crime against humanity of deportation because the refugees being deported via pushbacks are likely not lawfully present in Greece under international criminal jurisprudence.

Also, Greece is violating the Refugee Convention, specifically its obligation under Article 21, due to the conditions of some of the refugee camps that it operates. Finally, Greece voted in favor of the Global Compact for Safe, Orderly and Regular Migration, which acknowledges a state's right to sovereignty but limits this right to a State being in compliance with international law. Even if Greece successfully argues that its sovereignty rights trump its human rights obligations, which is unlikely, it can still be held politically liable for violating its commitments to the international community.