**Third Joint Submission**
**of the International Commission of Jurists (ICJ)**
**and of the European Council on Refugees and Exiles (ECRE)**

**to the Committee of Ministers of the Council of Europe**
**in the case of *M.S.S. v. Belgium and Greece* (Application no. 30696/09) and related cases**

*May 2014*

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The International Commission of Jurists (ICJ) and the European Council on Refugees and Exiles (ECRE) are pleased to present to the Committee of Ministers of the Council of Europe this third submission under Rule 9.2 of the *Rules of Procedure* of the Committee of Ministers, in accordance with its supervisory role on execution of judgments of the European Court of Human Rights and, in particular, in the implementation of the general obligations arising from the judgment *M.S.S. v. Belgium and Greece*.

The present submission will focus on the respect of these obligations by Greece and, in particular, as highlighted in the Committee of Ministers' decision of 5 December 2013,[1] on the developments that have occurred with regard to the asylum procedure and conditions of detention. As this is an additional submission, reference to the points raised in previous submissions will be omitted and we invite the Committee to refer to the legal analysis in the ICJ and ECRE's first and second submissions.[2]

This submission addresses two of the three violations identified by the Court in respect of Greece:

- The violation of Article 3 ECHR as a result of the conditions of detention in which the applicant was held (para.234);
- The violation of Article 13 in conjunction with Article 3 ECHR because of the shortcomings in the asylum procedure as applied to the applicant and the risk of *refoulement* to Afghanistan without any serious examination of his asylum application and without his having had access to an effective remedy (para.321).

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1 Committee of Ministers, Decision of 1186th meeting (3-5 December 2013), available at: *http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=30696%2F09&StateCode=BEL&SectionCode*

2 ICJ and ECRE, Joint Submission to the Committee of Ministers of the Council of Europe in the case of *M.S.S. v. Belgium and Greece* (Application no. 30696/09), May 2012, available at *http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/11/ICJECRE-MSSSubmission-Final-1.pdf*; and, ICJ and ECRE, Second joint Submission to the Committee of Ministers of the Council of Europe in the case of *M.S.S. v. Belgium and Greece* (Application no. 30696/09), February 2013, available at *http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/ICJECRE-MSS-CommitteeMinisters-2ndsubmission-Final.pdf*

## 1. Overview of the situation of migrants and asylum seekers in Greece

According to our information, the arrival trend of migrants and asylum seekers "has dramatically changed since August 2012 with the building of a 10.5km fence at the border aimed at obstructing the entrance of third country nationals to Greece. This sudden shift of inflow has put a heavy burden to the sea borders and greatly compromises the treatment people seeking international protection (including vulnerable groups) received."[3]

According to the last United Nations High Commissioner for Refugees (UNHCR) report on *Asylum Levels and Trends in Industrialized Countries* in 2013, while, "[i]n Southern Europe …, the number of newly registered asylum-seekers increased by 49 per cent to 89,600, the highest on record," Greece had a reduction of newly registered asylum seekers from 9,580 in 2012 to 8,230 in 2013, i.e. a decrease of 14 per cent.[4]

The ICJ and ECRE share the concerns raised by Amnesty International that "the fence is inconsistent with, and will lead to the violation of, the right to seek and enjoy asylum from persecution, since it will prevent people who are seeking international protection from reaching Greece."[5] A critical problem arising from this strategy of restrictive border control was also highlighted by the Parliamentary Assembly of the Council of Europe (PACE) in a resolution of 25 January 2013: "While these policies have helped reduce considerably the flow of arrivals across the Evros border with Turkey, they have transferred the problem to the Greek islands and have not helped significantly in dealing with the situation of irregular migrants, asylum seekers and refugees already in Greece."[6]

The ICJ and ECRE are aware of several allegations of collective expulsions allegedly carried out by Greek authorities or with their acquiescence, some of which have led to deaths at sea of potential asylum seekers, including children. One such occurrence, the tragedy of Farmakonisi, took place in January 2014, during which 12 refugees, including several children, died.[7] In April 2014, Amnesty International reported that, "[b]etween March 2013 and January 2014, [it] has … documented many testimonies of refugees and migrants claiming to have been pushed back to Turkey by Greek police or coastguard. Almost all of the refugees and migrants interviewed said that they either experienced or witnessed violence or degrading treatment including slaps and beatings. They described being searched and valuables such as mobile phones, money, jewellery and baggage containing clothes confiscated or thrown into the sea. … Amnesty International's research also shows that the way in which such push-back operations are carried out by the Greek border guard or coastguard is putting lives at risk. Several of those interviewed

3 Asylum Information Database (AIDA) (a project of ECRE in partnership with Forum Refugiés-Cosi, the Hungarian Helsinki Committee and the Irish Refugee Council), Country Report: Greece, December 2013, p.65, available at *http://www.asylumineurope.org/reports/country/greece*. The database adds: "Indicative of this trend are the 1.623 arrests on the ground of illegal entry in the islands of Lesvos, Samos, Chios and the Dodecanese during the first trimester of 2013, as opposed to 118 such arrests during the same period in 2012. It is interesting that the respective numbers for the Evros region are 206 arrests in 2013 as opposed to 7,646 in 2012."

4 UNHCR, Asylum Levels and Trends in Industrialized Countries, 2013, 21 March 2014, p.8 and p.22, available at: *http://www.unhcr.org/5329b15a9.html*.

5 Amnesty International, Greece: the end of the road for refugees, asylum-seekers and migrants, Index: EUR 25/011/2012, December 2012, p.3, available at *http://www.amnesty.org/en/library/asset/EUR25/011/2012/en/443c4bcd-7b2e-4070-916c-087008f6762f/eur250112012en.pdf*

6 PACE, Resolution adopted on 25 January 2013 Resolution 1918 (2013), para.7, available at *http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=19467&lang=EN*

7 UNHCR, Statement on boat incident off Greece coast, 21 January 2014, available at *http://www.unhcr.org/52df83d49.html*. See also: Human Rights Watch, Greece: Investigate Pushbacks, Summary Expulsions, 30 January 2014, available at *http://www.refworld.org/country,,,,GRC,,52eb7a5c4,0.html*; Amnesty International, Greece: Amnesty International urges the Greek Government to carry out a transparent and thorough investigation into the circumstances which led to loss of life in the Aegean, 22 January 2014, available at *http://www.refworld.org/country,,,,GRC,,52e24e064,0.html*

by Amnesty International reported that their inflatable boats were rammed or nearly capsized while they were being towed or circled by a Greek coastguard boat; being abandoned in the middle of the sea on unseaworthy vessels; or left on small islands in the middle of the Evros river or on the Turkish side of the river with tied hands."[8]

The NGO Pro Asyl, on 7 November 2013, published a report in which it concluded that "illegal push-backs from Greek sea and land borders occur systematically. Push-backs take place from Greek territorial waters, the Greek islands and from the land border. The majority of the victims are refugees from Syria – men, women, children, babies, and people suffering from severe illness - trying to enter Europe to seek international protection or to reunite with their families who live in Germany, Sweden, the United Kingdom and various other European countries. … According to the interviewees' eyewitness accounts, it can be estimated that over 2,000 persons were pushed back, given the make-up of the groups they travelled with. Masked Special Forces officers are accused of ill-treating refugees upon apprehension, detaining them arbitrarily without any registration on Greek soil and then deporting them back to Turkey, in breach of international law. Special units of the Greek coastguard abandon refugees in Turkish territorial waters without consideration for their safety. The majority of the interviewees claimed that they had been ill-treated. In the cases of those who were pushed back from the island of Farmakonisi, the severity of the reported ill-treatment towards nine male Syrian refugees could amount to torture."[9]

The ICJ and ECRE are deeply troubled by these allegations of push-backs and ill-treatment. In those cases in which it can be established that national authorities were implicated, even at the level of assistance or information**,** these incidents would involve violations of Convention rights including, depending on the particular incident, the right to life and the prohibition of ill-treatment (for endangering the life and the physical integrity of the migrants, as well as in regard to physical abuse), the principle of *non-refoulement,* the prohibition of collective expulsions, and the right to an effective remedy.

**2. Response to the violation of Article 13 in conjunction with Article 3 resulting from the shortcomings in the examination of asylum requests**

*The European Court of Human Rights found that M.S.S. was at risk of refoulement from Greece in violation of Article 3 ECHR and did not have access to an effective remedy under Article 13 ECHR (paragraphs 299-322), in particular on the basis of the following findings:*

- *Lack of effective legal remedy: lack of rigorous scrutiny of a claim, lack of timely processing of an asylum application and a prompt response, lack of access to a remedy with automatic suspensive effect;*
- *Inadequacies in the asylum application procedure: Problems of access to the asylum procedure due to the short three-day time limit for application; insufficient information about asylum procedures; difficulties in obtaining access to the Attica Police Headquarters; shortage of interpreters; lack of training of relevant officials; lack of legal aid; excessive, lengthy delays in receiving a decision; stereotyped and unreasoned replies; lack of appeal to second instance committees (paras.301-311);*
- *low recognition rates for asylum or subsidiary protection granted by the Greek authorities*

8 Amnesty International, Report: Greece: A law unto themselves: A culture of abuse and impunity in the Greek police, April 2014, p.17 – p.20 'The Ill Treatment of Migrants', available at: *http://amnesty.org/en/library/info/EUR25/005/2014/en*

9 Pro Asyl, Press Release for 'Pushed Back: systematic human rights violations against refugees in the Aegean sea and at the Greek-Turkish land border', 7 November 2013, available at *http://www.proasyl.de/en/press/press/news/pro_asyl_releases_new_report_pushed_back/*

*as compared to other EU Member States (para.313);*

- *Access to Supreme Administrative Court for Judicial Review: lack of communication on behalf of the Court regarding the procedures; no information on organizations which offer legal aid; shortage of lawyers in the legal aid list; lengthy procedures before the Supreme Administrative Court; the appeal to the Supreme Administrative Court does not offset the lack of guarantees surrounding the examination of asylum applications on the merits (para.316- 320).*

*2.1. The old system*

The ICJ and ECRE welcome the fact that, after several postponements, the new Asylum Service began on 7 June 2013 and that, therefore, the police office of Petrou Ralli no longer registers new applications for asylum.[10] This marks the end of the transitional period during which asylum applications were to be considered under Presidential Decree 114/2010 (PD 114/2010), which is however still in force for all the applications filed between 2010 and 7 June 2013. There is also a backlog of cases from before 2010.

After a careful reading of the Government report to this Committee, the ICJ and ECRE still lack a precise figure for the backlog of cases under the old procedure. In its communication to this Committee of April 2014, the Greek government mentions "managing the backlog": on "28.2.2014, 4,237 applications were still pending at first instance and 41,634 in the second instance,"[11] which makes a total of 45,871 pending backlog cases at the end of February 2014. However, in June 2013, the Ministry of Public Order and Citizen Protection declared in its executive summary of the Greek Action Plan on Asylum and Migration Management that, "[a]fter archiving 17,170 cases as inactive, the Appeal Committees are processing since January the remaining 35,164 cases" and that "[a]ll "backlog" cases are to be concluded by mid 2014".[12] The ICJ and ECRE are not clear as to how the June 2013 figure of 35,164 remaining cases might have increased to 41,634 at the end of February 2014. Furthermore, the two organizations are concerned about the archiving of 17,170 cases without any further explanation as to the detailed reasons why these cases are "inactive". In the absence of a break-down of statistics as to the specific reasons for such a classification, this could indicate that the remedy provided for in these cases may not be an effective one.

In June 2013, the Minister of Public Order and Citizen Protection reported that "serious budget shortfalls remain to be urgently addressed, relating to interpretation services, securing free legal assistance for asylum seekers. Urgent funding of these services could be secured under current ERF Annual Programmes, ERF Emergency Measures 2013 or EEA grant."[13] In the Greek government's April 2014 submission to this Committee, the ICJ and ECRE do not see particular comments on this issue. It should be stressed that such information is of particular importance to determining the sufficiency of the resources dedicated to the exhaustion of the backlog and access to an effective remedy.

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10 Greek government, Communication from Greece concerning the case of M.S.S. against Belgium and Greece (Application No. 30696/09) (French only), 13 November 2013, para.2 available at: *https://wcd.coe.int/ViewDoc.jsp?id=2126853&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383*

11 Greek government, Communication from Greece concerning the case of M.S.S. against Belgium and Greece (Application No. 30696/09) (French only – unofficial English translation), 8 April 2014, p.5, available at: *https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD(2014)470&Language=lanFrench&Site=CM*

12 Greek Ministry of Public Order and Citizen Protection, Greek Action Plan on Asylum and Migration Management, Executive Summary, Progress Report January – May 2013, June 2013, available at: *http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/p4_progressreport_/p4_progressreport_en.pdf*

13 Greek Ministry Action Plan (n 12) p.5

**The ICJ and ECRE consider it important that the Greek government provides to the Committee and to the general public more detailed information in relation to its asylum system, in particular analysing the grounds of rejected and archived decisions and the management of the backlog; and that it inform the Committee about developments in the use of external funding to increase the capacity, independence and, therefore, effectiveness of the asylum system, in light of its obligations under article 13 ECHR read in conjunction with article 3 ECHR.**

*2.2. The new asylum system*

**2.2.1. First instance**

According to information from the Greek Government, Regional Asylum Offices, entrusted with registering and deciding at first instance on asylum applications, have been established in Athens (with a national jurisdiction), Northern Evros, Southern Evros, Lesvos and Rhodes. [14] Article 1.3 of Law 3907/2011[15] provides that "Regional Asylum Offices will be set up in Attica, Thessaloniki, Alexandroupolis, Orestiada, Ioannina, Volos, Patras, Heraklion, Levos, Chios, Samos, Leros and Rhodes." At present, out of 13 foreseen Regional Asylum Offices, only five are functioning.

An interview conducted by ECRE with Spyros Ryzakos of the NGO Aitima on 28 April 2014 confirmed that, at present, the only Regional Asylum Office which is not in a detention centre (be that a detention centre or a closed first reception centre) is that of Athens, and that this "impacts on the ability to seek asylum for non-detained asylum seekers".[16]

**The ICJ and ECRE consider that it would assist the Committee in its assessment of this case if the Greek Government could provide a roadmap indicating how and when article 1.3 of Law 3907/2011 will be completely implemented, including an account of the funding required and obtained for such undertakings. Furthermore, the ICJ and ECRE recommend that such centres be constructed outside and separated from detention or closed reception centres so as to increase their accessibility and not deter or discourage undocumented migrants from lodging asylum applications.**

**2.2.2. The Appeals Authority**

a. *Composition*

I. The Committee members

According to the law instituting the asylum appeal authority and the asylum service, each Appeals Committee must consist of:

1. "a chairman, who shall be a renowned personality with specialization or experience in refugee, human rights or international law",
2. "a person of Greek nationality, indicated by the United Nations High Commissioner for

14 Greek Government Communication of 8 April 2014, (n 11) paras. 2-3
15 Law No. 3907 of 2011 on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC "on common standards and procedures in Member States for returning illegally staying third country nationals" and other provisions, 26 January 2011, available at *http://www.refworld.org/docid/4da6ee7e2.html*
16 ECRE interview with Spyros Ryzakos of the NGO Aitima on 28 April 2014

Refugees", and

3. "a person holding a university degree in Law, Political or Social Sciences with specialization in international protection or human rights issues".[17]

This law holds that the "chairman and the third member of the Committee, as well as their alternates, shall be appointed by the Minister of Citizen Protection from among a list drawn up by the National Commission for Human Rights [NCHR] according to its Rules of Procedure"[18] and that the "Members of the Committee shall enjoy, during the exercise of their tasks, personal independence."[19]

On 24 March 2014, Law No. 4249/2014[20] modified the rules of composition of the Appeals Authority in two significant respects. First, it reduces the mandate of the Appeals Committees' members from two years to one year, renewable.[21] Second, it obliges the NCHR to provide "at least twice as many candidates as needed to staff the committees. Should the NCHR fail to provide the said list within the allotted time, or should it fail to provide the requested number of candidates, the list shall be established and communicated to the Minster by the Appeals Authority within 10 days from the related request. In case the Appeals Authority is unable, for whatever reason, to comply with the time limit or number of candidates required for the list, the 3rd members of the committees will be appointed by the Minister, based on the same criteria as those applicable to the NCHR."[22]

## II. The Director and the Secretariat

According to article 3.5 of Law 3907/2011, the Appeals Authority, of which the Committees form a part, "shall include a secretariat and a Director …. The Director of the Secretariat shall be appointed by decision of the Minister of Citizen Protection, following a public call for interest, [and] shall be in charge of the Authority's Secretariat and shall assist the Committees in their tasks."[23] The Director is a civil servant under the Ministry of Public Order and Citizen Protection and does not enjoy the "personal independence" guaranteed to the members of the Appeals Committees by article 4 of Law 3907/2011.[24]

The new Law No. 4249/2014, which amends Law 3907/2011, introduced a term of office of three years for the Authority's Director. This term can be renewed. The Director is now responsible "for the orderly and effective functioning of the Committees, in accordance with the Rules of Procedure of the Appeals Authority",[25] while previously she or he was "in charge of the Authority's Secretariat and [of assisting] the Committees in their tasks."[26] The law also introduces a new power for the Director of the Appeals Authority to appoint the heads of the

17 Article 3.3 of Law 3907/2011 (n 15)
18 Article 3.3 of Law 3907/2011 (n 15).
19 Article 3.4 of Law 3907/2011 (n 15).
20 "Law 4249 of 2014 on the Reorganisation of the Greek Police, Fire Brigade and the General Secretariat for Civil Protection, the Upgrading of the Services of the Ministry of Public Order and Citizen Protection and the Regulation of other issues concerning the competence of Ministry of Public Order and Citizen Protection and other provisions, 24 March 2014, (based on an unofficial translation) available at *http://www.policenet.gr/portal/downloads/astunomia-idruse-leitourgia-uperesion/636.html.*
21 Article 122 para.5.a of Law No. 4249/2014 (n 20)
22 Article 122 para.5.b. of Law No. 4249/2014 (n 20)
23 Article 3.5 of Law 3907/2011. (n 15)
24 Article 3.5 of Law 3907/2011 (n 15) says that the Director of the Appeals Authority must "be a civil servant" and "personal independence" is guaranteed in law only to the members of the Appeals Committee: "The Members of the Committees shall enjoy, during the exercise of their tasks, personal independence", article 3.4, Law 3907/2011 (no. 15).
25 Article 122 para.5.d. Law No. 4249/2014 (n 20)
26 Article 3.5, Law 3907/2011, (n 15)

newly created “Office of Rapporteurs and the Office of Secretarial Support”.[27]

These legislative modifications seem to increase the binding powers of a government-appointed civil servant, the Director of the Appeals Authority, over the Committees and their members. Furthermore, the insertion of a renewable term of office for the Director of the Authority and the reduction of the term for the members of the Committees appear to further increase the control of the Minister of Public Order and Citizens Protection over the functioning of the Committees.

Finally, the Director retains regulatory powers: “[i]ndividual issues, of technical, detailed or functional nature, which are not regulated by the present Rule of Procedure, shall be regulated by decisions and circulars of the Director of the Appeals Authority.”[28]

### III. The experts-rapporteurs

According to Presidential Decree no. 113/2013 (“P.D. 113/2013”), “[w]hen the Appeals Authority receives appeals, the Director shall assign the relevant case files to experts-rapporteurs and allocates them to each Committee according to the provisions of the internal regulation of the Authority”.[29] Like the Director of the Appeals Authority, experts-rapporteurs are civil servants under the authority of the Ministry of Public Order and Citizen Protection, they are not members of the Appeals Committee and, therefore, do not enjoy the “personal independence” guaranteed to the latter by article 3.4 of Law 3907/2011.[30] According to the law, the task of the expert-rapporteur is to “draft a proposal on the appeal and introduce it before the competent Appeals Committee.”[31]

According to the internal rules, “[t]aking into consideration the applicants’ country of origin and the degree of difficulty of the appeals, each expert-rapporteur, as a rule, shall process at least three (3) cases per day or sixty (60) cases per month”.[32] This understandable flexibility, due to the difficulty of the case or country of origin information gathering, contrasts quite remarkably with the lack of flexibility the rules provide to the Committees: “the Committees are obliged to examine all of the cases listed in the daily agenda on the same day and within the operating hours of the Appeals Authority. The Chairmen and members of the Appeals Committees shall fully process at least one (1) case each, every day.”[33] It is noteworthy that neither the Committees nor their chairmen have control over the agenda, which, as established by article 26.3 of P.D. 113/2013, is drafted by the Director of the Appeals Authority and merely signed by the Committees’ chairmen.[34]

The role of expert-rapporteurs is central: “[t]he proposal of the expert-rapporteur indicates the procedure that shall be followed by the Appeals Committee when examining the appeal, as well as his/her opinion on the merits of the appeal. The examination of the file by the expert-

27 Article 122 para.5.f of Law No. 4249/2014 (n 20)
28 Rules of Procedure of the Appeals Authority, Official Gazette of the Hellenic Republic, Volume B’, Issue Number: 63, 16th January 2014, Decisions Number 334, Article 13, available at *http://www.dsanet.gr/Epikairothta/Nomothesia/ya%20334_2014.htm* (references in this submission are based on an unofficial translation)
29 Presidential Decree No. 113/2013 Establishment of a single procedure for granting the status of refugee or of subsidiary protection beneficiary to aliens or to stateless individuals in conformity with Council Directive 2005/85/EC "on minimum standards on procedures in Member States for granting and withdrawing refugee status" (L 326/13.12.2005) and other provisions, 14 June 2013, Article 26.2, available at *http://www.refworld.org/docid/525e84ae4.html* (UNHCR Greece Unofficial Translation).
30 Article 3, paras 6-7, Law 3907/2011 (n 15)
31 Article 26.2, P.D. 113/2013 (n 29)
32 Rules of Procedure of the Appeals Authority, Article 6.4 (n 28)
33 Rules of Procedure of the Appeals Authority Article 7.3, (n 28)
34 Rules of Procedure of the Appeals Authority Article 7.1, (n 28)

rapporteur is completed when the above proposal is drafted and introduced before the competent Appeals Committee, which assumes the examination of the case without being able to refer the case back to the expert-rapporteur."[35] From these rules, it appears that the Committees must base their decision on the report of the expert-rapporteur without being able to gather information on their own initiative or from other parties if it is missing from the expert-rapporteur's report.

According to the Government's communication of 13 November 2013 to this Committee, at that time the Secretariat of the Appeals Authority consisted of a Director with legal education, fifteen persons with a university education in political, social and human sciences, and ten with secondary education. The fifteen persons with university education were doing the job of expert-rapporteurs.[36]

Following the enactment of the legal amendments of 2014, it appears that experts-rapporteurs will be under the hierarchical control of the Director of the Appeals Authority (see section on "Director and Secretariat"). The internal rules already provide that "he/she shall have the responsibility of monitoring the way the experts-rapporteurs manage the work entrusted to them. In this context, he/she shall ensure the quality of their work and the uniform/consistent treatment of the appeals under examination … ."[37]

*b. Admissibility*

It appears that it is the Director of the Appeals Authority, a civil servant under the Ministry of Public Protection and Order, and not the Appeals Committees themselves, who is in charge of deciding on the admissibility of appeals lodged after the appeal deadline. As highlighted above, the Director does not enjoy the statutory guarantees of "personal independence" like the members of the Appeals Committees. According to article 16.3 of the Rules of Procedure, "[a]ppeals that have not been lodged within the prescribed deadline shall be forwarded to the Director of the Appeals Authority on the same day, so that he/she decides on the admissibility of the appeal and he/she issues the relevant decision, without delay".[38] Indeed, article 25.5 of PD 113/2013 says that appeals "submitted after the deadline, shall be examined by the Director of the Appeals Authority who decides on the admissibility. When the Director considers the appeal as admissible, … the Director refers it to an Appeals Committee for the examination on the merits: Otherwise the appeal is rejected."[39]

*c. Hearings at appeals stage*

According to article 26.4 of P.D. 113/2013, the procedure before the Appeals Board takes place in written form and is examined solely based on the information of the file. Under this article, "[the] Appeals Committee may invite the appellant to an oral hearing, *upon a relevant proposal by the rapporteur*, when serious questions are raised relating to the thoroughness of the appellant's interview conducted before the issuance of the contested decision, or the appellant has submitted new serious elements or the case is particularly complicated. The Appeals Authority obligatorily invites the appellant to an oral hearing when appeals against decisions which revoke the international protection status are examined. An oral hearing is precluded

35 Rules of Procedure of the Appeals Authority Article 6.7, (n 28)
36 Greek government Communication of 13 November 2013, (n 10) para 16.
37 Rules of Procedure of the Appeals Authority, Article 9.3 (n 28).
38 Rules of Procedure of the Appeals Authority Article 6.3 (n 28)
39 P.D. 113/2013, Article 25.5 (n 29)

when the appealed decision rejects the application as inadmissible or was issued with the accelerated procedure or is issued pursuant to Article 24 of this Presidential Decree",[40] i.e. the border procedure (emphasis added).

In this regard, article 8.2 of the Rules of Procedure provides that, "[i]n exceptional cases, the Appeals Committees may invite the appellant to an oral hearing, *upon a relevant proposal by the rapporteurs*, for any of the reasons exhaustively provided by the Article 26 par. 4 of the Presidential Decree 113/2013"[41] (emphasis added).

The issue of the autonomy of the Appeals Committee to call for a hearing without the prior proposal of the expert-rapporteur was put forward to the State Legal Council, an Executive body whose legal opinions are binding on all public administration,[42] including the Asylum Service and the Appeals Authority. The Legal Council in its Opinion 339/2013 of 22 October 2013, ruled that, according to Greek administrative law, a "hearing is not obligatory for the cases examining applications for international protection including refugee status recognition or the grant of subsidiary protection."[43]

The Council ruled that "the Committee can summon the appellant for an interview provided that a relevant recommendation has been made by the rapporteur, who is obligated to make such a recommendation if, during the examination of the files and the compiling of the report, it is determined that doubts arise over the completeness of the interview that preceded the decision in the first instance or the appellant submitted substantial new evidence or the case is particularly complex. This provision is justifiable because the procedure for the examination of the appeal, as described in Law 3907/2011 (Articles 3 and 5) and Presidential Decree 113/2013 (Articles 25 and 26), guarantees the appeal's legally and substantially due examination and, consequently, secures its status as a quasi-judicial appeal."[44]

An interview conducted by ECRE with Spyros Ryzakos of the NGO Aitima on 28 April 2014 confirmed that appeal procedures in most cases have no hearing and that this "puts a

40 P.D. 113/2013, Article 26.4 (n 29)

41 Article 8.2, Rules of Procedure (n 28). The rule continues : « Also, the Appeals Committees obligatorily invite to an oral hearing when the case regards revocation of the international protection status, whereas an oral hearing is precluded when the appealed decision rejects the application as inadmissible or was issued under the accelerated procedure or is issued pursuant to Article 24 of the Presidential Decree 113/2013 (cases of applications for international protection filed in transit zones of ports or airports within the country)."

42 See, Article 7 para.4, "Law No. 3086 of 2002 on the Organisation of the Legal Council of the State and the Status of its members and civil servants, 23 December 2002, (based on an unofficial translation) available at *http://nomoi.info/%CE%A6%CE%95%CE%9A-%CE%91-324-2002-%CF%83%CE%B5%CE%BB-1.html*.

43 State Legal Council, Opinion 339 of 2013, Section D' (4), on "Whether, in the procedure described under Presidential Decree 113/2013 (A146) regarding the recognition of aliens and stateless persons as refugees or as deserving subsidiary protection status, in accordance with Council Directive 2005/85/EC, and considering more specifically the provisions of Article 26 (section 4 subsection b) of the Presidential Decree, the Appeals Committees may or may not summon the appellant for an interview for the examination of their quasi-judicial appeal, without a relevant recommendation of the competent rapporteur", Session of 8 October 2013, available at *http://et.diavgeia.gov.gr/f/nsk/ada/%CE%92%CE%9B1%CE%94%CE%9F%CE%A1%CE%A1%CE%95-%CE%9D%CE%97%CE%96*, para. 3a (based on an unofficial translation). Furthermore, the judgment appears to give to the report of the rapporteur the effect of leading to nullifying the subsequent acts, such as the decision of the Appeals Authority, "the Report by the competent agent to the collegial body seeks to fully inform the said body as regards the case under examination and to thus prevent the issuance of an erroneous decision due to absence or incompleteness of information on the part of the members of the collegial body. If the Rapporteur fails to submit a complete report, namely with no gaps or ambiguities and with full justification of its findings, where this is required by law, this makes the resulting act null on the grounds of non-fulfilment of essential procedural requirements", para. 3b.

44 State Legal Council, Opinion 339 of 2013 (n 43), para 4 (unofficial translation). It added that "This arrangement does not at all violate the interested party's right to a prior hearing, given on the one hand that this is not a case of adopting an adverse measure on the basis of data associated with this party's individual behavior (on this v. Minutes of Proceedings and Opinion no. 152/2013 of the Fifth Chamber of the Supreme Administrative Court, on the review of the draft of the Presidential Decree mentioned just above) and on the other hand that the case is brought before this administrative Committee after the filing of a quasi-judicial appeal, by means of which the appellant has already set forth his views and demands."

disproportionate importance on first instance. The problem is that the personnel working on first instance examination are not experienced in the asylum field. Because of austerity measures, the State cannot recruit new staff. Therefore, it could not provide staff specialized in asylum. Instead, the government took lawyers/political scientists from other departments and assigned them the duty to examine applications in the new asylum service. The State has provided them with brief training on the asylum procedure. However, such brief training is not sufficient to compensate for the lack of actual experience of the asylum field. This affects the quality of the first-instance examination. For this reason a thorough second-instance examination including hearing is more than necessary."[45]

**The ICJ and ECRE consider that the Greek government should take, as a matter of priority, further steps to implement reforms of the asylum system necessary to comply with obligations under Article 3 and Article 13 ECHR. In particular, Greece should ensure institutional independence of the asylum appeals committee by:**

- **Making reports of expert-rapporteurs only consultative, not decisive;**
- **Increasing the length of tenure of committees' members;**
- **Giving power to an independent authority, such as, for example, the National Human Rights Commission or the Judiciary, to appoint members to the committees, besides the UNHCR representatives;**
- **Entrusting the committees with decisions on admissibility of all appeals, and not only those that are lodged before the deadline;**
- **Entrusting the committees with the discretionary power to hold hearings without prior binding proposal by expert-rapporteurs or any other civil servant;**
- **Ensuring that committees' chairmen and/or a board of chairmen be placed in charge of procedural or macro-organizational issues directly related to the work of the committees, such as the drafting of internal rules.**

### 2.2.3. Further appeals

a) Against the asylum appeal decision

As regards appeal of asylum decisions, the asylum seeker, as well as the Minister, has the right to request the annulment of a decision of the Appeals Committees before the Administrative Court of Appeals, under article 28 of P.D. 113/2013. However, the filing of such request does not automatically suspend the measures of removal of the applicant taken with the rejection of the appeal at the Appeal's Committee.

Furthermore, according to the Asylum Information Database country report on Greece, applications before administrative courts must be "written in Greek and registered by a lawyer" and "court decisions on a request for temporary suspension of execution of the challenged decision may take 10 days to 4 months, leaving the applicant without protection against deportation during that time [and] it is up to the applicant to request this suspension."[46]

b) Against deportation orders

As regards appeals of deportation orders, Law No. 3907/2011 provides, under article 28, for a

45 ECRE Interview with Spyros Ryzakos of the NGO Aitima on 28 April 2014
46 Asylum Information Database, Country Report: Greece, December 2013, p.23-24, available at *http://www.asylumineurope.org/reports/country/greece*.

quasi-judicial appeal to be carried out by administrative bodies, against deportation orders issued by police authorities. It further states that "the administrative bodies competent for ruling on the appeals […] are also competent […] to temporarily suspend [the] enforcement" of the deportation orders.[47]

Given that the administrative body handling the deportation appeals is only 'competent', rather than 'obligated' to suspend enforcement, this law fails to protect against the risk of *refoulement* pending the appeal. Without such automatic suspensive effect, the judicial remedy against deportation could be rendered futile and ineffective.

**The ICJ and ECRE consider that the Greek government should, as a matter of priority, ensure the effectiveness of the administrative remedy by modifying legislation to ensure that any appeal against expulsion based on *non-refoulement* grounds is automatically suspensive of the expulsion measure.**

### 2.2.4. Legal aid and assistance

According to article 10.1 of P.D. 113/2013, asylum seekers "have the right to consult, at their own cost, a lawyer or other legal advisor on matters relating to their asylum application".[48] No free legal assistance is foreseen at the Appeals Committee stage. In the case of an appeal before administrative courts, the applicant "may receive free legal assistance …".[49]

According to our information, legal aid "is provided upon the applicant's request and two criteria must be fulfilled: (a) the application must be founded and (b) the applicant's financial inability to pay for legal services must be established. The counsellor's choice is made according to a list created by the relevant Bar Association."[50] However, "[t]here are a number of obstacles in having access to free legal aid. In order for the request to legal aid to be examined, the asylum seeker must submit an application to the court signed by a lawyer, so s/he must pay one for this service or find a lawyer that will work on this pro bono. In addition, there is no choice of lawyer, as the available ones are only those designated in the lists of the Bar Associations. Furthermore, the low remuneration accorded to lawyers in asylum cases under legal aid, and huge delays in paying them for their work results in only a very small number of lawyers willing to take up such cases."[51]

**The ICJ and ECRE consider that the Greek government should, as a matter of priority, ensure effective access to the asylum service and the Appeals Committee by providing for free legal aid to asylum seekers for the first instance stage and Appeals Committee stage.**

47 Law 3907/2011, Article 28.2 (n 15)
48 P.D. 113/2013, article 10.1 (n 29)
49 P.D. 113/2013, article 10.2 (n 29)
50 Asylum Information Database, Country Report: Greece, December 2013, p.28, available at *http://www.asylumineurope.org/reports/country/greece*.
51 Asylum Information Database, Country Report: Greece, December 2013, p.28, available at *http://www.asylumineurope.org/reports/country/greece*. The report specifies that 'This creates a shortage in the availability but also the quality of legal aid services. In practice free legal assistance and representation is provided by NGOs through European Refugee Fund (ERF) funding which is limited vis-à-vis the number and the needs of asylum seekers. Although the Greek Government alleges that it provides sufficient free legal aid through ERF-funding, the previous funding ended in April 30th 2013 and an announcement on the launching of the new call for ERF funding took place on the 4th June 2013. Although the new funding will cover the gap retrospectively, nevertheless, during this period NGO funding has been suspended and uncertainty over when and whether the new Call for Proposals would take place resulted in the suspension of legal aid."

### 2.2.5. Conclusions

In accordance with the right to an effective remedy guaranteed under international human rights law, a remedy must be prompt, effective, accessible, provided through an impartial and independent procedure, must be enforceable, and lead to cessation of or reparation for the human rights violation concerned.[52] In certain cases, such as where gross human rights violations are alleged, the remedy must be provided by a judicial body,[53] but, even where the remedy is not judicial, it must fulfil the requirements of effectiveness and independence. The remedy must be effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities.[54] In cases of *non-refoulement* to face a risk of torture or ill-treatment, the absolute nature of the rights engaged further demands the right to an effective judicial remedy[55] and means that the decision to expel must be subject to close and rigorous scrutiny.[56]

The right to an effective remedy also requires review of a decision to expel, by an independent and impartial appeals authority, which has competence to assess the substantive human rights issues raised by the case, to review the decision to expel on both substantive and procedural grounds, and to quash the decision if appropriate. The European Court of Human Rights has held that judicial review constitutes, in principle, an effective remedy, provided that it fulfills these criteria.[57] The appeal procedure must be accessible in practice, must provide a means for the individual to obtain legal advice, and must allow a real possibility of lodging an appeal within prescribed time limits.[58] In *non-refoulement* cases, an unduly lengthy appeal process may render the remedy ineffective, in view of the seriousness and urgency of the matters at stake.[59]

To provide an effective remedy, the appeal must be suspensive of the expulsion measure from the moment the appeal is filed, since the notion of an effective remedy requires that the national authorities give full consideration to the compatibility of a measure with human rights standards, before the measure is executed.[60] A system that provides that stays of execution of the

52 See, generally, ICJ, Practitioners' Guide No. 2, The right to a remedy and to reparation for gross human rights violations, Geneva, 2006, pp. 46-54.
53 ICJ Practitioners Guide (n 52) pp. 49-54.
54 *Muminov v. Russia*, ECtHR, para. 100; *Isakov v. Russia*, ECtHR, para. 136; *Yuldashev v. Russia*, ECtHR, para. 110-111; *Garayev v. Azerbaijan*, ECtHR, Application No. 53688/08, Judgment of 10 June 2010, paras. 82 and 84.
55 *Agiza v. Sweden*, ECtHR, para. 13.8.
56 *Jabari v. Turkey*, ECtHR, para. 39.
57 Vilvarajah and Others v. United Kingdom, ECtHR, para. 99; Isakov v. Russia, ECtHR, para. 137; Yuldashev v. Russia, ECtHR, para. 110-111; Garayev v. Azerbaijan, ECtHR, paras. 82 and 84; *Al-Nashif v. Bulgaria*, ECtHR, para. 133. See also, C.G. and Others v. Bulgaria, ECtHR, para. 56.
58 M.S.S. v. Belgium and Greece, ECtHR, para. 318.
59 M.S.S. v. Belgium and Greece, ECtHR, para. 320.
60 *Jabari v. Turkey*, ECtHR, para. 50; *Conka v. Belgium*, ECtHR, para. 79; *Gebremedhin v. France*, ECtHR, Application No. 25389/05, Judgment of 26 April 2007, paras. 58, 66; *Muminov v. Russia*, ECtHR, para. 101; *Concluding Observations on France*, CAT, UN Doc. CAT/C/FRA/CO/3, 3 April 2006, para.7; *Concluding Observations on Belgium,* CCPR, UN Doc CCPR/CO/81/BEL, 8 December 2004, para. 21; *Concluding Observations on Morocco*, CCPR, UN Doc. CCPR/CO/82/MAR, 1 December 2004, para. 13; *Concluding Observations on Uzbekistan*, CCPR, UN Doc. CCPR/CO/83/UZB, 26 April 2005, para. 12; *Concluding Observations on Thailand*, CCPR, *op. cit.*, fn. 244, para. 17; *Concluding Observations on Ukraine*, CCPR, UN Doc. CCPR/C/UKR/CO/6, 28 November 2006, para. 9; *Concluding Observations on Libyan Arab Jamahiriya*, CCPR, UN Doc. CCPR/C/LBY/CO/4, 15 November 2007, para. 18; *Concluding Observations on Belgium*, CAT, UN Doc. CAT/C/BEL/CO/2, 19 January 2009, para. 9; *Concluding Observations on Yemen*, CAT, UN Doc. CAT/C/YEM/CO/2, 19 November 2009, para. 22; *Concluding Observations on Belgium*, CAT, Report of the Committee against Torture to the General Assembly, 58th Session, UN Doc. A/58/44 (2003), p. 49, paras. 129 and 131: the Committee expressed concern at the "non-suspensive nature of appeals filed with the Council of State by persons in respect of whom an expulsion order has been issued". The Council of States in Belgium is the Supreme Court in administrative matters. See also, *Concluding Observations on Cameroon*, CAT, UN Doc. CAT/C/CR/31/6, 5 February 2004, para. 9(g); *Concluding Observations on Monaco*, CAT, UN Doc. CAT/C/CR/32/1, 28 May 2004, paras. 4(c) and 5(c); *Concluding Observations on Mexico*, CAT, UN Doc. CAT/C/MEX/CO/4, 6 February 2007, para. 17; *Concluding Observations on South Africa*, CAT, UN Doc. CAT/C/ZAF/CO/1, 7 December 2006, para. 15; *Concluding Observations on Australia*, CAT, UN Doc. CAT/C/AUS/CO/3, 22 May 2008, para. 17; *Concluding Observations on Azerbaijan*, CAT, UN Doc. CAT/C/AZE/CO/3, 8 December 2009, para. 22; *Concluding*

expulsion order are at the discretion of a court or other body is not one that adequately protects the right to an effective remedy, even where the actual risk that a stay will be refused is minimal.[61]

The ICJ and ECRE consider that the institutional independence of the Appeals Committees is seriously compromised where civil servants, such as the Director of the Appeals Authority and the experts-rapporteurs, who are ultimately appointed by the Minister for Citizen Protection, have, in practice, binding powers able to potentially interfere with the work of the Appeals Committees. It appears that Appeals Committees are neither masters of their own procedure, nor can they fully assess a case of their own motion or on the basis of information sent to them directly and not through their Secretariat. The fact that the Committee members' mandate is only two years and is subject to renewal by the Minister for Citizen Protection also suggests a lack of institutional independence. Furthermore, the fact that the new legislation has reduced this appointment period to one year and increased the discretion of the Ministry in the appointment of the Committee members sheds serious doubts on the institutional independence of the Committee system in law and in practice. The fact that legal aid is not available at the Asylum Service and Appeals Committees stage also undermines the effectiveness of this remedy. For these reasons, the ICJ and ECRE consider that the Appeals Authority and its committees, as their rules stand, cannot be considered to be a mechanism that administers an effective remedy under article 13 ECHR, read in conjunction with article 3 ECHR.

The ICJ and ECRE are aware that this lack of institutional independence could be, in principle, compensated for by the possibility of appeal to the administrative courts against the Appeals Authority decisions. However, the ICJ and ECRE stress that these procedures are not automatically suspensive of expulsion. In addition, access to these procedures is not easy in practice, due to the difficulties in acquiring legal aid. Therefore, the two organizations consider that, at present, Greece does not yet provide an effective remedy against *non-refoulement*, as mandated by the *M.S.S*. judgment.

## 3. Response to the violations of Article 3 resulting from the conditions of detention

*In M.S.S., the European Court of Human Rights found that detention conditions in which the applicant was held amounted to degrading treatment in violation of Article 3 ECHR (paragraphs 230-234). In finding this violation, the Court took into account:*

- *The systematic placement of asylum seekers in detention without informing them of the reasons for their detention, as the applicant had alleged had occurred in his case (para.225-226)*
- *Accounts of brutality and insults by the police consistent with the applicant's allegations (para.227)*
- *Living conditions in detention centres: overcrowding, lack of space and ventilation, insufficient hygienic conditions.*

### *3.1. Operation Xenios Zeus*

The ICJ and ECRE have previously reported on the conduct of Operation Xenios Zeus by the Greek authorities in their last submission of February 2013. This Operation, begun on 2 August 2012 in the regions of Evros and Attica, has the purported aim to seal the Greek border and

*Observations on Canada*, CAT, UN Doc. CAT/C/CR/34/CAN, 7 July 2005, para. 5(c). See also, *C.G. and Others v. Bulgaria*, ECtHR, para. 62.

61 *Conka v. Belgium*, ECtHR, paras. 81-85.

remove irregular immigrants from the centre of Athens. However, this operation has led to the rounding up of thousands of migrants on the basis of their perceived ethnicities in a seemingly discriminatory manner and may have resulted in cases of arbitrary detention. Reportedly, a large number of those arrested in mass round-ups were brought in for questioning on the basis of their perceived ethnicity. Despite information that arrests stopped around June 2013, reports have documented further implementation of this operation in this reporting period.

In April 2014, Amnesty International reported that, "[b]etween August 2012 and June 2013, police had stopped around 123,567 foreign nationals for identity checks and taken them to police stations. Of those, only 6,910 were found to have no papers. The difference between those transferred to police stations and those eventually held for lacking papers supports the concerns about the discriminatory nature of these operations and the abusive character of the transfers to police stations of third-country nationals who have papers proving their legal residence."[62]

The EU Fundamental Rights Agency (FRA) has reported that "the police resumed operation Xenios Zeus in Athens on 29 September 2013; 150 officers apprehended 334 persons resulting in 41 arrests"[63].

**The ICJ and ECRE consider that the Greek Government must cease arrests of undocumented migrants in the framework of Operation "Xenios Zeus" or any related operation where grounds for arrest are based, in practice, on any discriminatory rationale.**

### *3.2. Detention policy*

#### 3.2.1. Asylum detention

Article 13.4 of the Presidential Decree 114/2010 has been amended by Presidential Decree 116/2012 in order to extend the maximum period of detention for asylum seekers by twelve months, thereby permitting a total duration of detention of an asylum seeker for up to 18 months.[64] According to research by Amnesty International published on 19 December 2013, the Greek Chief of Police has been reported to have stated that "[w]e aimed for increased periods of detention ….we increased it to eighteen months…for what purpose? We must make their life unbearable…"[65].

#### 3.2.2. Detention pending removal

According to an Opinion[66] published on 20 March by the State Legal Council, when the

62 Amnesty International, Report: Greece: A law unto themselves: A culture of abuse and impunity in the Greek police, April 2014, p.33, available at: *http://amnesty.org/en/library/info/EUR25/005/2014/en*. See also, Human Rights Watch, Greece: Submission to UN Committee against Torture, March 2014, available at *http://www.hrw.org/news/2014/03/24/greece-human-rights-watch-submission-united-nations-committee-against-torture*

63 EU Fundamental Rights Agency, Racism, discrimination, intolerance and extremism: learning from experiences in Greece and Hungary, December 2013, p.21, available at: *http://fra.europa.eu/en/publication/2013/racism-discrimination-intolerance-and-extremism-learning-experiences-greece-and*

64 PD 116/2012 , (based on an unofficial translation) available at: http://www.unhcr.gr/no_cache/prostasia/nomiki-prostasia/o-nomos-stin-ellada/nomothesia-gia-to-asylo.html?L=0%252F&cid=799&did=1536&sechash=c77ffb52. The eighteen month period has been confirmed also by ECRE Interview with Spyros Rizakos (AITIMA), 12 February 2013. It entered into force in October 2013

65 Amnesty International, Greece: Investigate police chief's alleged call targeting migrants, 19 December 2013, available at *http://www.refworld.org/country,,,,GRC,,52ca890e4,0.html* . Confirmed by interview with AITIMA.

66 Greek State Legal Council, Opinion on Extension of detention beyond 18 months, following a request by the Ministry of Citizen Protection, 20 March 2014, available at *http://www.nsk.gov.gr/webnsk/gnwmodothsh.jsp?gnid=1868995*

deportation of a detained undocumented migrant cannot be executed due to a lack of cooperation of the migrant, and if there is a justifiable risk of absconding after 18 months passes, "a restrictive measure of compulsory residence in the centre of detention before departure may be automatically imposed upon the foreign national until he/she cooperates with the competent authorities."[67] According to the Opinion, such detention beyond 18 months is considered lawful because "if all illegal aliens are released, [...] that jeopardizes the public interest and the purpose of the EU and national legislation, since we are led to indirect 'legitimization' of their stay [...] while it is estimated with certainty [...] that this release will inevitably lead to the rapid population growth of illegal immigrants in the interior of the country, with resultant adverse effects on the public order and safety."

The Opinion claims that "both the public interest and their individual interest are simultaneously protected since they are vulnerable persons, without permanent residence, without legal documents and without the opportunity to work and they are in danger of falling into deep poverty or illegal networks which will exploit them." In particular, according to the State Legal Council, "in case an alien has been held in detention for 18 months in view of deportation or return [...] the competent authorities [...] may automatically impose the measure of mandatory stay in the area of detention."[68]

On 15 April 2014, UNHCR expressed, with reference to this decision, "concern the developments in the policy and practice of administrative detention for foreign nationals for whom a return order was issued."[69] MSF announced on 8 April 2014 that the decision had already been put into practice in two detention centres in northern Greece (Paranesti and Fylakio) causing a stir among the detainees.[70]

On 6 May 2014, ECRE, Aitima and the Greek Council for Refugees sent a letter[71] urging the Greek Ministry of Public Order and Citizen Protection to immediately withdraw this policy of prolonging detention of migrants pending removal beyond the 18 month limit set by the EU Returns Directive. Another letter[72] was sent to the European Commission, requesting infringement procedures to begin if no immediate action were taken by Greece to stop these breaches of EU law. According to the letter to the Greek Ministry, "[a]lthough not public, a Ministerial Decision of 28 February 2014 [4000/4/59] seems to endorse the Legal Opinion as it is explicitly referred to in the first individual decisions applying such continued detention beyond 18 months." Attached to the letter are copies of two individual recent decisions, which both explicitly refer to the abovementioned Legal Opinion and the Ministerial Decision. According to the letter, the decisions "leave no doubt that following the expiry of the maximum time limit of 18 months 'in case of non-compliance the measure of mandatory detention will be imposed either in the pre-removal detention centre of Fylakio or any other place of detention that will be

67 Unofficial translation by Hellenic League for Human Rights, Press Release: SLC: They called the detention of foreign nationals a restrictive measure so as not to confess that the Operation Xenios Zeus was a fiasco..., 22 March 2014, available at *http://www.hlhr.gr/index.php?PageLang=english*

68 Greek Council for Refugees, Press Release: Indefinite detention: a direct infringement of national, European and international law, 8 April 2014, available at *http://www.gcr.gr/index.php/en/news/press-releases-announcements/item/352-ep-aoriston-kratisi-mia-eftheia-prosvoli-tou-ethnikoy-evropaikoy-kai-diethnoys-dikaiou/352-ep-aoriston-kratisi-mia-eftheia-prosvoli-tou-ethnikoy-evropaikoy-kai-diethnoys-dikaiou*

69 UNHCR, Press Release: UNHCR asks the Greek Government to review the measure for prolonged administrative detention, 15 April 2014, available at: *http://www.unhcr.gr/nea/artikel/2b713d4f68c7e44faa2b8917ee2ecf86/i-ypati-armosteia-z-3.html*

70 *Update from Medecin sans Frontieres, 8 April 2014, available at: http://www.msf.gr/magazine/oi-giatroi-horis-synora-kataggeloyn-tin-apofasi-ton-ellinikon-arhon-gia-ep-aoriston-kratisi 8 April 2014*

71 ECRE, Aitima and the Greek Council for Refugees, Letter to Minister Nikolaos Dendias, 6 May 2014, available at: *http://ecre.us1.list-manage.com/track/click?u=8e3ebd297b1510becc6d6d690&id=be4434d700&e=3003c02bf9*

72 ECRE, Aitima and the Greek Council for Refugees, Letter to Commissioner Malmström, 6 May 2014, available at: *http://ecre.us1.list-manage.com/track/click?u=8e3ebd297b1510becc6d6d690&id=0f856794dd&e=3003c02bf9*

required' and that the person will 'stay there until he agrees and cooperates to his removal'."

The Court of Justice of the European Union (CJEU) in C-357/09 *Kadzoev* ruled that the EU Returns Directive[73] 'in no case authorises the maximum period [of 18 months] to be exceeded', even where 'the person concerned ... is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose."[74]

### 3.2.3. Detention on medical grounds

According to a report by a group of NGOs concerned with migration issues, "in April 2011 then Health Minister and Public Order Minister pushed legislation through Parliament to permit detention of migrants and asylum seekers suspected of representing a danger to public health. Carrying an infectious disease, belonging to a group vulnerable to infectious diseases (an assessment which can be based on country of origin), being an intravenous drug user or sex worker, or living in conditions that do not meet minimum standards of hygiene are all grounds for detention and deportation."[75]

This legislative provision, contained in article 59 of Law 4075/11.04.2012, was, according to our information, issued on the basis of a decision of the Ministry of Health and Social Solidarity (G.I. 39a/02-04-2012), which provides for the obligatory control of migrants and asylum seekers who may possess a disease, such as HIV, that is identified and used as a de facto ground for detention by the Greek authorities. An application for revocation of this Ministerial decision was been lodged by the Greek Council for Refugees and ACT-UP[76] on the grounds that it breaches international and EU law. The Vice-Minister of Health subsequently withdrew the Decree GY/39A, and the NGOs' application was withdrawn. But then the decision was reinstated by the current Minister of Health in the summer of 2013. As a consequence, GCR, with Praxis and ACT-UP, have submitted two new applications before the same Court for the cancellation of the reinstatement of the GY/39A Decision which is still in force. To the knowledge of the ICJ and ECRE, this case is still pending. The ICJ and ECRE consider it important for the Committee of Ministers to know the current status of this legislative provision and, if still in force, the way in which is has been implemented.

The ICJ and ECRE are alarmed at these measures to extend asylum detention, detention pending removal, and detention on health grounds, especially considering that, despite significant measures taken to improve the infrastructure, conditions in many migrant detention facilities appear to remain degrading, in breach of Article 3 ECHR. Furthermore, it is ICJ's and ECRE's understanding that no detention lasting 18 months can be justified under Article 5.1.f ECHR as such a prolonged period of detention cannot be considered reasonable for avoiding unauthorised entry nor for allowing the undertaking of an effective return. In addition to being

73 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, available at: *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF*

74 CJEU, C-357/09 Kadzoev, 30 November 2009, para. 69, available at: *http://curia.europa.eu/juris/document/document.jsf?text=&docid=72526&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=15940&utm_source=Weekly+Legal+Update&utm_campaign=f352d7f686-WLU_04_04_2014&utm_medium=email&utm_term=0_7176f0fc3d-f352d7f686-419258809*

75 Taken from: A group of organisations working with migrants, asylum seekers and beneficiaries of international protection in Greece led by the Platform for International Cooperation on Undocumented Migrants (PICUM), 'Recommendations to the European Union to Urgently Address Criminalisation and Violence Against Migrants in Greece', March 2014, p.5, available at *http://picum.org/picum.org/uploads/publication/Recommendations%20to%20address%20criminalisation%20and%20violence%20against%20migrants%20in%20Greece_March%202014.pdf*

76 AIDS Coalition to Unleash Power – an international advocacy group for people with AIDS.

unreasonable and disproportionate, extending detention beyond the maximum 18 months limit is not in accordance with the law of the EU Returns Directive, which has superior legal force over Member State primary law.

**The ICJ and ECRE consider that the Greek authorities must immediately repeal any executive decision and bring an end to any practice of detaining migrants for longer than the maximum of 18 months. Furthermore, the ICJ and ECRE recommend that any resort to detention should be a measure of last resort to be used only when any other alternatives are not available, and that its use should be subject to the principles of necessity and proportionality.**

*3.3. Conditions of detention*

In a report published in December 2013, the Fundamental Rights Agency of the European Union declared that, "[d]espite the establishment of the new centres, a large number of third-country nationals is still detained in police cells. According to police data, 2,702 third- country nationals were detained in police station cells in July 2013. During its missions, FRA met with detainees who had been held in cells of the central Police station of Omonia for many months, some more than six months. The detainees, as well as the police officers, said that lengthy multi-month detention created problems, especially as there is limited space in these cells, which are designed for temporary detention pending judicial proceedings."[77]

Amnesty International recently reported that, "[s]ince … 2012, Amnesty International has continued to receive many allegations of torture and/or ill-treatment of members of vulnerable groups such as refugees and migrants in immigration detention. The organization has also received allegations of police using excessive force against detained refugees and migrants and using chemical irritants inside the buildings where the migrants were held during uprisings prompted by prolonged detention periods and poor conditions. All of the reported incidents have taken place in large pre-removal centres such as Amygdaleza, Komotini and Corinth which have been operating since April 2012."[78]

On 1 April 2014, Medecins sans Frontières published a report entitled *Invisible Suffering*, in which they concluded that "[i]n many detention facilities – particularly in regular police stations and in the pre-removal centre in Komotini – physical conditions are extremely poor. Overcrowding, substandard hygiene conditions, inadequate heating, not enough hot water and a lack of ventilation are all factors that contribute to the outbreak and spread of respiratory, gastrointestinal and dermatological diseases"[79] and that "[p]hysical conditions in detention facilities for migrants remain largely substandard, despite the availability of European funding and small improvements in some facilities."[80]

The organization documented that "[s]anitary conditions are substandard as maintenance, cleaning services and distribution of personal hygiene items are completely or almost non-existent. In some facilities there is no or insufficient provision of hot water. In the pre-removal

77 EU Fundamental Rights Agency, Racism, discrimination, intolerance and extremism: learning from experiences in Greece and Hungary, December 2013, p.21, available at: *http://fra.europa.eu/en/publication/2013/racism-discrimination-intolerance-and-extremism-learning-experiences-greece-and*
78 Amnesty International, Report: Greece: A law unto themselves: A culture of abuse and impunity in the Greek police, April 2014, p. 17-20, available at: *http://amnesty.org/en/library/info/EUR25/005/2014/en*,
79 Médecins Sans Frontières (MSF), Invisible Suffering, 1 April 2014, available at *http://www.msf.org/sites/msf.org/files/invisible_suffering.pdf* p. 9
80 MSF (n 79) p. 10

centre in Komotini, malfunctioning hygiene facilities have not been repaired for almost a year. As a result, waste from the toilets on the first floor is flooding the bathrooms on the ground floor, contaminating the area and making more than three-quarters of the latrines and showers unusable."[81] Furthermore, "[m]any detained migrants have no or limited access to the outdoors. In the detention facilities in Evros and Komotini, where MSF teams worked in recent months, migrants were allowed in the yard for a maximum of one hour in the morning and one hour in the afternoon. In the regular police stations visited by MSF teams, detainees spent several months at a time – in some cases for as long as 17 months – inside the cells area with no access to the outdoors. … The lack of natural light, ventilation and heating is a serious problem in many detention facilities, particularly in regular police stations, where people detained in cells often have no access to natural light and fresh air." [82]

According to information available to the ICJ and ECRE, "[i]ssues of great concern are the overall lack of information for detainees on the duration of detention, their rights in detention, the inability of detainees to communicate with the outside world and their limited ability to access legal aid (not least because the resources of NGOs providing legal aid are overstretched). … In addition, the fact that any police station can potentially be used as a detention centre, coupled with the remoteness of many of these police stations renders NGO access to detainees held there practically impossible."[83]

AITIMA, in a recent interview with ECRE, reported that "some detainees who had previously been in police stations have reported that the situation in pre-removal centres was even worse. According to the accounts of detainees, problems in pre-removal centres include: overcrowding and use of violence by the Police."[84]

The ICJ and ECRE note that severe overcrowding can amount to cruel, inhuman or degrading treatment either in itself[85] or in conjunction with other poor conditions of detention.[86] The cumulative effect of a number of poor conditions may lead to violation of this prohibition.[87] Since the beginning of August 2013, the European Court of Human Rights has given five judgments concluding that the conditions of detention of third- country nationals in Greece violated the prohibition on inhuman or degrading treatment in Article 3 ECHR.[88] It should also be noted that the European Court of Human Rights in *M.S.S.* found that even a short period of detention was unjustifiable in the case at issue, emphasising the fact that the applicant was an asylum seeker and therefore "particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously."[89]

The conditions of detention are also important when considering the maximum length possible

81 MSF (n 79) p. 10
82 MSF (n 79) p. 11
83 Asylum Information Database, Country Report: Greece, December 2013, p.64, available at *http://www.asylumineurope.org/reports/country/greece*.
84 ECRE Interview with Spyros Ryzakos of Aitima – 28/04/2014.
85 *Kantyrev v. Russia*, ECtHR, Application No. 37213/02, Judgment of 21 June 2007, paras. 50-51; *Labzov v. Russia*, ECtHR, Application No. 62208/00, Judgment of 16 June 2005, para. 44.
86 Theo Van Boven, UN Special Rapporteur on Torture, *Annual Report to the Commission on Human Rights*, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 49; *Belevitskiy v. Russia*, ECtHR, Application No. 72967/01, Judgment of 1 March 2007, paras. 73-79.
87 *Dougoz v. Greece,* ECtHR, Application No. 40907/98, Judgment of 6 March 2001*; Z.N.S. v. Turkey*, ECtHR, Application No. 21896/08, Judgment of 19 January 2010.
88 ECtHR, Herman and Serazadishvili v. Greece (nos. 26418/11 and 45884/11) 24 April 2014; ECtHR, B.M. v. Greece (no. 53608/11) 19 December 2013; ECtHR, C.D. and Others v. Greece (nos. 33441/10, 33468/10 and 33476/10) 19 December 2013; ECtHR, Khuroshvili v. Greece (no. 58165/10), 12 December 2013; ECtHR, Horshill v. Greece (no. 70427/11), 1 August 2013
89 M.S.S. v Belgium and Greece, op cit, para. 232.

of a detention to prevent unauthorized entry. The Court has found a detention to be arbitrary, where the periods of detention amounted to three months or six months in inappropriate conditions while a determination was pending in respect of the migrant's entitlement to stay on the territory.[90]

International standards stipulate that, except for short periods, detained migrants should be held in specifically designed centres in conditions tailored to their legal status and catering for their particular needs.[91] Under the particular scheme of Article 5 ECHR, holding a detainee in a facility which is inappropriate in light of the grounds on which he or she is held (for example for the prevention of unlawful entry or pending deportation under Article 5.1(f)) may also violate the right to liberty.[92] So for example, it has been held that holding a child asylum seeker with adults in a facility not adapted to her needs, violated the right to liberty.[93] A similar rationale would be likely to apply to the long-term use of prisons or police cells for immigration detention.

In light of these important international human rights safeguards on detention, coupled with the recent reports of Medecins sans Frontières, the EU Fundamental Rights Agency and Amnesty International continuing to condemn the detention conditions for migrants in Greece, the ICJ and ECRE submit to the Committee that detention facilities are still not compliant with Article 3 ECHR, and require further scrutiny from the Committee.

**The ICJ and ECRE consider that Greek authorities should take prompt and meaningful measures to considerably improve conditions of detention in closed centres for asylum seekers and undocumented migrants, so as to bring them into line with EU law and with the ECHR and other international law and standards. Furthermore, the ICJ and ECRE stress that by abandoning its policy of automatic detention of undocumented migrants, Greek authorities would substantially contribute to easing the conditions of detention, in particular problems of overcrowding. The ICJ and ECRE recommend the Committee of Ministers to maintain scrutiny of the matter.**

*3.4. Remedy to complain about the conditions of detention*

The ICJ and ECRE are aware that, by Law No. 3900/2010, paragraph 4 of the Article 76 of Law No 3386/2005 has been amended and now provides that the competent judge "shall also decide on the legality of the detention or its extension." Prior to this amendment, the position of the European Court of Human Rights was that the judicial authorities had an inadequate power to review detention, restricted as they were to reviewing solely on the grounds of risk of flight and danger to public order. As the European Court of Human Rights notes in *Herman and Serazadishvili v. Greece*, the new scope of reviewing the lawfulness of detention includes a power to review complaints concerning the conditions of detention.[94]

ECRE and ICJ share the concerns of the Greek Council of Refugees about the practical

90 *Suso Musa v. Malta*, ECtHR, Application No. 42337/12, Judgment of 23 July 2013, paras. 100-103 ; *Kanagaratnam and Others v. Belgium*, ECtHR, Application No. 15297/09, Judgment of 13 December 2011, paras. 94-95
91 *CPT Standards*, *op. cit.*, fn. 629, page 54, Extract from 7th General Report [CPT/Inf (97) 10], para. 29; *European Guidelines on accelerated asylum procedures*, CMCE, *op. cit.*, fn. 119, Principle XI.7: "detained asylum seekers should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel. Detained families should be provided with separate accommodation guaranteeing adequate privacy." See also, *Vélez Loor v. Panama*, IACtHR, *op. cit.*, fn. 536, para. 209.
92 *Aerts v. Belgium*, ECtHR, Application No. 25357/94, Judgment of 30 July 1998, para. 46.
93 *Mayeka and Mitunga v. Belgium*, ECtHR, Application no 13178/03, Judgment of 12 October 2006.
94 *Herman and Serazadishvili v. Greece ,* ECtHR, Applications nos. 26418/11 and 45884/11, Judgment of 24 April 2014, para. 72

implementation of this legislative amendment.[95] The European Court of Human Rights has already found in one case[96] of detention occurring after the amendment that the Administrative Court failed to properly apply the amendment, and use the new power to review the legality of detention. Instead, the Administrative Court refused to consider the legality of the decision to detain and declared the action inadmissible. Because of this, the European Court of Human Rights ruled that Greece had violated Article 5(4) of the Convention.

**The ICJ and ECRE consider that it would greatly facilitate the Committee in its assessment of this new law providing for review of the legality and conditions of detention if the Greek Government could provide all relevant statistics and jurisprudence on the application of this new remedy in practice.**

95 See the submission of GCR to the Committee of Ministers, April 2014, p.13-14
96 ECtHR, Housein v. Greece, (no. 71825/11), 24 October 2013, paras 79-84