



# Incarcerating the Marginalized

The Fight Against Alleged ›Smugglers‹  
on the Greek Hotspot Islands



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## Aegean Migrant Solidarity

Aegean Migrant Solidarity (AMS) has been monitoring trials against migrants accused of smuggling on the Greek hotspot islands since 2014. AMS is a regional group of the Christian Peacemaker Teams organisation, which places teams in areas of conflict at the invitation of local peace-making communities. These teams support and amplify the voices of local peacemakers who risk injury and death by waging nonviolent direct actions to confront systems of violence and oppression.

The work of Aegean Migrant Solidarity includes:

- Accompanying partners as they work non-violently to defend their rights and their communities
- Advocacy: amplifying the stories and voices of those experiencing violent oppressions
- Human rights observation and reporting
- Solidarity networking: collaborating with individuals and organizations to work toward change.

AMS understands that violence is rooted in systemic structures of oppression. It is committed to undoing oppressions, starting within our own lives and in the practices of our organization.

## Deportation Monitoring [Aegean.bordermonitoring.eu](http://Aegean.bordermonitoring.eu)

The non-profit association *bordermonitoring.eu* was founded in Munich in 2011. The association's activities focus on the analysis of policies, practices

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and events in the European border regime and migration movements. To this end, the association combines scientific research, civic engagement, critical public relations work and concrete support for refugees and migrants.

Deportation Monitoring Aegean, a local *bordermonitoring.eu* group run by independent activists and scholars, focuses on documenting deportations from Greece to Turkey, as well as detention situations and the criminalization of migrants on the Greek hotspot islands. The group provides support for migrants trapped under the EU-Turkey Deal and has been involved in several support campaigns fighting for the rights of people who have been criminalised on the Greek hotspot islands.

## **borderline-europe e.V.**

The Non-Governmental Organization *borderline-europe* was founded in 2007 in reaction to the increasing problems which migrants encountered with the Dublin II Regulation, as well as to the five-year trial against the boat captain and committee director of Cap Anamur. During the investigation, the association *borderline-Europe* was founded by the two accused and five other activists. The organization sees its work as an act of civil disobedience and fights for the free movement of people and their right to stay. It mainly consists of volunteers who conduct research on the current developments at the EU-European external borders, in the Mediterranean Sea as well as on the Balkan-route. The organization aims to draw public attention to the violation of human rights by the increasingly restrictive EU-European border and migration policies, which compel migrants to use more dangerous routes to reach the EU territory, sometimes with fatal consequences.

# Acknowledgement

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# Foreword

»Solidarity is not a crime« is the slogan that accompanies support campaigns against the criminalization of Sea Rescue, distribution of water or food, or driving a person in need from one place to another. While the European Union continues to fortify and externalize its borders, people also continue to move and others continue to support them. Their movement is challenged by agreements the EU concluded with authoritarian regimes in the MENA and Sahel regions. This externalization of the EU's bordering practices – extending far into other continents – increases the number of people dying of thirst in the desert or drowning in the sea. Also the Turkish government was provided with billions of euros to stop migration into Europe. Fences are built and militias, such as the so-called Libyan Coast Guard, are equipped with funds, surveillance devices, ships and training to pull-back persons into torture camps, despite the presence of well-known institutions such as the IOM and UNHCR and with constant media coverage on the human costs of so-called migration management. Several civilian search and rescue groups had to stop their operations in the Central Mediterranean Sea due to the criminalization of their work by the Italian government and the confiscation of their ships. The most prominent examples come from the NGO *Sea-Watch*, whose captain Carola Rackete was arrested in 2019, when the *Sea-Watch* crew had to disembark their passengers in Italy despite the government's prohibition. Other cases are the criminalization of the *Juventa 10* and the captain of *Sea Eye*, who were also accused of human smuggling. Also in Greece, there are cases of civilian sea rescuers accused of espionage and smuggling, as well as further north along the Balkan route, where supporters of migrants were accused of human smuggling. Thus, deterring migration by criminalizing solidarity is one of the most publicly discussed bordering practices of ›Fortress Europe«. Despite these difficult conditions, many activist groups continue their support

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work, while at the same time facing harsh legal consequences: exorbitant legal costs, longstanding proceedings, retention of the rescue vessels, stigmatisation of the helpers involved, and deterrence of potential supporters.

However, the people most affected by the criminalizing policies are not the ones supporting migration movements, but those who are forced to travel on insecure and illegalized routes. When migration itself is turned into a crime, persons seeking protection in Europe become the target of border authorities. The 2015 EU Agenda on Migration sets the ›fight against smuggling‹ as one of their top priorities. Thus, the EU regulations on the *facilitation of illegal entry* lead to the arrest of persons upon arrival in Europe, often before they have had a chance to seek legal assistance and without knowledge of the ›crimes‹ they will be accused of. For example, when FRONTEX or national Coast Guards intercept a boat, the passengers are immediately asked: »Who was driving the boat? Who held the compass?« Once registered as an accused ›smuggler‹, the persons concerned are at the mercy of trial procedures in violation of the rule of law: excessive pre-trial detention, lack of translations, unprepared public defenders, and thin evidence. In some cases, the negotiating courts use a single statement by the Coast Guard as evidence for a conviction.

As the first part of the report at hand outlines, public and political discourses on migration depict ›human smuggling‹ as a root cause for migration and interchangeably mix the phenomenon of ›human smuggling‹ with ›human trafficking‹. Though international law provides a clear distinction of both and emphasizes the need of protection of migrants being subjected to smuggling operations, EU law and bordering practices do not follow this legal separation. While ›trafficking‹ is characterised by exploitation and an expression of modern slavery, ›smuggling‹ is a result of the European policies of isolation, which do not allow fugitives to enter Europe legally. The in-depth documentation and analysis of court cases on the Greek Aegean islands convincingly contradicts the assumption that ›smuggling‹ can be equated with human trafficking. Even more important, it bears witness to the numerous cases where

persons seeking protection are brought before court with no due process- and turned into victims of the EUs deterrence practices.

*By Imke Behrends and Sara Bellezza, borderline-europe*



# Chapter 1

## Introduction

The following report outlines the system of punishment and incarceration of migrants who are accused of human smuggling at the EU-external border in the Aegean. It bears witness to the fates of people who have been sentenced to life long imprisonment in Greece. Some of them were not aware of having committed a felony crime by driving a boat with asylum seekers from Greece to Turkey; others were only crossing the border to seek asylum in the European Union themselves. Upon arrival, they were arrested, often beaten, and held for months in pre-trial detention, until they were convicted in a court procedure violating basic standards of fairness. The harsh criminalization described in this report cannot be understood outside of the broader framework of the anti-smuggling policies of the European border regime, which will be analysed in this report alongside narratives on human smuggling, as well as the evolution of anti-smuggling legislation within the European Union.

To further understand how the criminalization of migrants on the Greek Aegean islands is possible, the islands' special role within the European border regime will be characterized in this introduction. Located at the EU's external border in the Aegean, Greece forms a central entry point into the European Union and at the same time a transit country for secondary migration to northern Europe. Both the *facilitation of illegal entry* into the country, and the *facilitation of illegal exit*, are defined as crimes in Greek law and penalized with excessive punishments.

Since the »long summer of migration« (Hess et al. 2016), commonly referred to as »refugee crisis«, when hundreds of thousands of people managed to cross

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the EU borders and seek protection in Europe, the militarization and externalization of the European border regime has advanced further. The 2015 European Agenda on Migration introduced the 'hotspot approach'. So-called hotspot centres were set up in south Italy and on the five Greek islands of Lesbos, Chios, Samos, Leros and Kos, close to the Turkish shore, in order to register and fingerprint incoming migrants. With the EU-Turkey statement of 18<sup>th</sup> March 2016, a new fast-track asylum procedure was introduced for the Greek islands only and the geographic restriction of movement for asylum seekers implemented. The registration centres quickly transformed into chronically overcrowded barbed-wire camps and the islands into an extraterritorial space – a buffer zone with a special legal asylum framework (Hänsel & Kasperek 2020). At the same time, several EU and international agencies were stationed in the Aegean. The border security within the Aegean Sea was strongly increased and the crackdown on smuggling networks became a top priority. Migrants seeking protection have to pass a militarized border zone monitored by the Turkish and Greek Coast Guards, FRONTEX and NATO. In many cases, they are intercepted and brought back to Turkish prisons, from which they are either deported or eventually released so that they are able to try the crossing again (dm-aegean 2019; Hänsel 2019; van Liempt et al. 2017). In several cases, migrants have also violently been pulled or pushed back from Greek into Turkish waters (Alarm Phone 2019, 2020a; Legal Centre Lesbos 2020a), breaking the non-refoulement requirements of international law.

While smuggling accusations against European sea rescuers such as the Sea Watch captain Carola Rackete gain a lot of media attention, which can lead to international pressure and courts eventually deciding to drop the charges, the everyday practice of incarcerating non-Europeans on the Greek islands goes almost unnoticed by the public. Here, the consequences of European anti-smuggling policies come clearly to light. According to the Greek Ministry of Justice, 1,905 people convicted of the crime of facilitating illegal entry into the country (human smuggling) served their sentence in Greek prisons in 2019 (Hellenic Ministry of Justice 2019). As the analysis laid out in this report shows, most of them are third-country nationals. Their initial convictions can even

exceed a sentence of 300 years, with money penalties exceeding one million EUR, which are a life sentence to be served for 25 years<sup>1</sup>. Our research in the North Aegean also shows that in most cases, those who organise the crossings and who financially profit from them are not the people arrested and imprisoned. Instead, people tried in court for facilitating illegal entry (human smuggling) are often those suspected of steering a boat with migrants crossing from Turkey into Greece. As outlined in the following pages, they are either people seeking asylum in the European Union or Turkish citizens living precarious lives, who are pushed to undertake this task by their economic situation.<sup>2</sup>

The following report – based on a research period from 2014 to 2019 – analyses the reality of the implementation of anti-smuggling policies on the Greek Aegean islands. The quantitative data set is based on 48 court cases in Greece, monitored between 2016 and 2019. In order to understand how the draconian punishments of third-country nationals are made possible, the evolution of the concept of human smuggling – the criminalization of facilitating entry – will be outlined in the first part. The evolution of anti-smuggling laws at the levels of the United Nations, the European Union and the Greek state, show how the current harsh anti-smuggling law in Greece is interwoven with the evolving European border regime and the development of the EU legal framework, which provides the conditions for the possibility of the high punishment of migrants under Greek law. Then, EU and national narratives around human smuggling are outlined, describing how the figure of the ›human smuggler‹ has been shaped through security and humanitarian discourses. The next empirical section focuses on the role of the Greek justice system in the implementation of anti-smuggling law. It follows the cases of third-country nationals from their arrest after arrival in boats, along the period of pre-trial

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<sup>1</sup> Under the 2019 New Criminal Code lifelong imprisonment is 20 years.

<sup>2</sup> The term migrant will be used throughout this document to refer to people crossing the border from Turkey to Greece in order to seek protection, coming from a variety of different countries (including Turkey), and Turkish citizens who are pushed by their financial situation to drive the boat.

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detention and into the courtroom, looking at the court procedures and judgments.

This wide overview of anti-smuggling policies allows us to connect the excessive punishment of alleged smugglers in Greece to the securitization<sup>3</sup> of migration within the European border regime. The European Union provides a legal system that allows severe punishment of people facilitating crossings at the EU's external borders. Together with the Greek anti-smuggling law (that forms one of the strictest laws within the European Union) and a poor Greek justice and prison system (that does not live up to the standards of a fair trial outlined in the European Charta on Human Rights), it leads to the disenfranchisement and conviction of people accused of smuggling. As the report shows, it hits those who are only the smallest link in the chain, people who often have to rely on smuggling networks themselves, attempting to seek asylum in the European Union. The report bears witness to the lives of those who have fallen victim to these ruthless EU policies against smuggling that do not only violate basic human rights but are also ineffective in destroying smuggling networks and stopping migration into Europe, which is their declared goal.

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<sup>3</sup> Securitization is a process, in which a phenomenon is discursively addressed as an exceptional security threat. This discursive construction also produces the necessity for a security political answer in order to fight the threat.



Confiscated boats that were used for migrants to cross the Aegean Sea in the port of Mytilene, Lesvos. November 2019. Photo: Ralf Henning.



# Chapter 2

## Methodology

This report analyses the impact of the EU's anti-smuggling policies focussing on the region's external border in the Aegean, from a long-term perspective, drawing on a multi-methodological approach.

It is primarily based on a set of data, consisting of participatory observation and interviews with migrants, lawyers and experts over five years from 2014 to 2019. These qualitative methods are combined with the statistical analysis of the data arising from 48 court cases against migrants monitored between 2016 and 2019 regarding categories such as length of pre-trial detention, trial duration, and sentencing. In addition, the report analyses local policies of incarceration in the context of European migration management and confinement policies, through an analysis of the evolution of anti-smuggling legislation at the UN, EU and national level. This is combined with the analysis of narratives surrounding the figure of the ›human smuggler‹, which also played a central role in the legislative process to combat human smuggling.

The data presented in this document was recorded and collated by Aegean Migrant Solidarity members, volunteers, and supporters during the period between 2014 and 2019. It is also based on 15 interviews conducted with individuals accused of human smuggling during their time incarcerated in pre-trial detention in the prisons and police stations of Lesbos and Chios. It draws on the testimonies presented in court by the defendants and eyewitnesses, on the arguments presented by the defence lawyers, and on the judgement of the court. Aegean Migrant Solidarity collaborated with Greek lawyers who attended these trials and provided detailed reports on court proceedings,

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and with various interpreters who helped with translation when visiting the accused in pre-trial detention. The legal and discursive analysis and further interpretation of the data is provided by [bordermonitoring.eu](http://bordermonitoring.eu), also drawing on the findings of an in-depth analysis of the criminalisation of migrants at the European borders published by [borderline-Europe e.V.](http://borderline-Europe.eV) in 2017 (Bellezza et al. 2017).

## Chapter 3

# Evolution of Anti-Smuggling Law

In the following, we outline the legal framework that allows for the draconian punishment of migrants convicted of human smuggling, describing the different layers of anti-smuggling law on the levels of the United Nations, the European Union and the Greek state. We argue that the anti-smuggling law currently implemented on the Greek islands derives from the process of Europeanization. The opening of Europe's internal borders under the terms of the Schengen agreement led to the creation of the EU's external border and the perceived need to secure this border against migrants (Karamanidou/Kasperek 2018). As outlined below, with the process of harmonisation of EU legislation came an increasing emphasis that ›illegal immigration‹ had to be prevented. Human smuggling was defined as a core challenge against establishing the ›European space of freedom, security and justice‹ (Article 29, Treaty of Amsterdam). However, EU legislation only vaguely establishes a penal code against human smuggling: contrary to the UN documents, it does not clearly define the offense of human smuggling and leaves the terms of punishment to the discretion of member states. In addition, EU law also allows for the punishment of migrants for facilitating illegal entry, even if they crossed into EU territory in order to seek asylum themselves. As shown in the following, the transposition of EU law against human smuggling into Greek law led to an excessively punitive criminal justice system, allowing for uncapped prison sentences for the offense of human

smuggling, which targets third-country nationals in particular, including asylum seekers.

### **3.1 UN Convention against Transnational Organized Crime**

The first international resolution on human smuggling at the UN level was drafted in 1993 by the UN General Assembly. *Resolution 48/102 on Prevention of Smuggling of Aliens* explicitly enables the punishment of smuggling and unauthorized transport of migrants, yet simultaneously states the necessity that migrants should not be criminalised for being subjected to a smuggling operation.

In 2000, the *Convention Against Transnational Organized Crime* was drafted. It was supplemented by two different protocols, clearly dividing the charges of human smuggling and human trafficking: the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* and the *Protocol Against the Smuggling of Migrants by Land, Sea and Air*. They entered into force in 2004 and was signed by 116 states and ratified by all countries of the EU, with the exception of Ireland.

The *Protocol Against the Smuggling of Migrants by Land, Sea and Air* is based on two drafts by Italy and Austria that were eventually merged. Claiming that smuggling operations were responsible for the number of deaths at sea, Italy handed in a draft convention to the International Maritime Organization in order to target the smuggling of migrants by sea under international law. Shortly after, Austria proposed a draft document, the *International Convention Against the Smuggling of Illegal Migrants* to the UN Secretary General. Both legislative initiatives eventually led to the *Protocol Against the Smuggling of Migrants by Land, Sea and Air*. As Bellezza and Calandrino outline, the protocol follows the three different aims to:

a) provide a legal framework against the smuggling of migrants,

### 3.1 UN Convention against Transnational Organized Crime

- b) promote international cooperation,
- c) protect the rights of migrants who are smuggled (Bellezza et al. 2017).

The protocol against human smuggling includes the facilitation of transport for migrants within the definition of transnational organised crime. Smuggling is defined in Article 3 of the *Protocol Against the Smuggling of Migrants by Land, Sea and Air* as a crime committed with the consent of the smuggled person, meaning the facilitation of entry over national borders in order to gain financial or material benefit:

»Smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.« (United Nations 2000:2)

As mentioned, migrants subjected to the smuggling operation are to be protected under the protocol, meaning that they cannot be held responsible for having been subjected to illegalised transport. Also, humanitarian assistance to migrants during illegalised border crossings is explicitly not subjected to criminalization. However, Article 6 of the protocol criminalises the act of enabling a person to remain in a country of which the person is not a legal resident or citizen in return for a direct or indirect ›financial or other material benefit.«

The term ›trafficking in persons‹ is clearly differentiated from the definition of ›smuggling of migrants‹. Article 3 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *United Nations Convention against Transnational Organized Crime* defines trafficking as intrinsically coercive and exploitative, and not bound to border crossings:

»›Trafficking in persons‹ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the

threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.« (United Nations 2001: 32)



The ›graveyard of life vests‹ on Lesvos Island close to Molivos. Photo: Knut Bry.

### **3.2 The EU Facilitators Package**

Since the beginning of the evolution of the European Union, the topic of creating a unified approach towards migration policies was discussed by the Member States and eventually evolved into the aim to create a Common European Asylum System (CEAS). The *Schengen agreement* of 14 July 1985 can be re-

garded as »the birth of the European external border«, since it »gave rise to the notion of a common external border, which – as a compensatory measure to the abolition of internal border controls – would need to be policed more strongly, and under commonly agreed standards« (Karamanidou/Kasperek 2018: 13). The actual implementation and organisation of common external border controls began with the 1990 *Schengen Convention* (ibid). Within the Europeanisation process, the offense of *facilitation of illegal entry* was first mentioned in Article 27 (1) of the *Schengen Agreement*. In a similar vein to the UN-protocols, the Schengen Agreement states its aim to:

»impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens.«  
(Article 27 (1) Schengen Agreement 1985)

On 1 May 1999, the *Treaty of Amsterdam* entered into force, incorporating the *Schengen Agreement* of 1985 and the *Schengen Convention* of 1990 into the EU treaties through the *Schengen Protocol*, and marking the beginning of the emergence of a new field of Europeanised policies. The European Union set the ambitious goal to create an »Area of Freedom, Security and Justice« (AFSJ), which was closely interwoven with the aim to protect this space against outsiders. The Tampere Council Conclusion formulates:

»The European Council is determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants. It urges the adoption of legislation foreseeing severe sanctions against this serious crime.« (European Parliament 1999)

This formulation shows how the term »illegal immigration« is brought up at the EU level and is immediately connected to human trafficking and exploitation, blurring the clear differentiation of human trafficking and human smuggling

outlined in the UN convention. Furthermore, the source of ›illegal immigration‹ is seen in exploitative networks, which ignores root causes of individuals to flee a country, such as war, persecution or poverty, or simply the individual's decision to willingly migrate to another place.

In 2002, new legislation was established through the *Facilitators Package*. The package is based on the *Council Directive 2002/90/EC* and the *Framework Decision 2002/946/JHA9*,<sup>4</sup> which are again connected to the millennium *Framework Decision on Strengthening the Penal Framework for the Facilitation of Unauthorized Entry and Residence* and the *Global Action Plan (6621/1/02) to combat illegal immigration and trafficking in persons* from 2002.<sup>5</sup>

The *Facilitators Package* marks a shift in the criminalisation of facilitation of border crossings of third-country nationals. It does not even refer to the *UN Protocol against the Smuggling of Migrants by Land, Sea and Air*, a key instrument providing a framework for definitions of smuggling and trafficking (Carrera et al. 2018). Already the preamble of the *Council Directive* and the *Framework Decision* highlight the aim of combatting both ›illegal immigration‹ and the ›aiding of illegal immigration‹ (c.f. Bellezza et al. 2017). In contrast to Article 5 of the UN Smuggling Protocol, the *Facilitators Package* therefore does

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<sup>4</sup> The *Directive 2002/90/EC* was adopted by the Council of Europe. It created a framework for EU member states to introduce sanctions against smugglers, defined as persons assisting entry, transit or residence to non-nationals against the country's laws (Art. 1 (a), (b)). Member states were required to transpose the Directive into national legislation within two years. The *Council Directive* was followed by the *Framework Decision 2002/946/JHA9* with the aim of ›the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence.« It outlines different types of sanctions that EU member states could impose, including sentences (Art. 3), extraditions (Art. 1, 5) and fines (Art. 2) (Karamanidou/Kasperek 2018).

<sup>5</sup> In 2000, the French Presidency of the European Council elaborated a legislative proposal, named *Framework Decision on Strengthening the Penal Framework for the Facilitation of Unauthorized Entry and Residence*. In 2002, the *Global Action Plan (6621/1/02) to combat illegal immigration and trafficking in persons* was outlined. It sets out the role of Europol and introduces a catalogue of measures regarding visa policies, information exchange, readmission and return policies, border management, pre-frontier measures, and penalties (for details see Bellezza et al. 2017; Schloenhardt 2015).

not provide protection for those subjected to a smuggling operation (Carrera et al. 2018).

In addition – contrary to the UN Protocol – the *Facilitators Package* does not define the term ›smuggling‹. Therefore, it provides for a wide range of charges based on the offense of ›facilitating illegal entry‹, which needs to fulfil only a minimum set of requirements for criminalisation. Other terms such as ›financial gain‹ and ›humanitarian assistance‹ are also not clearly defined (Carrera et al. 2016). The *Facilitators Package* therefore creates a high degree of legislative ambiguity and legal uncertainty (European Commission 2017).

Article 27 (1) of the *Schengen Agreement* is replaced, erasing ›financial gain‹ as a condition for the criminalisation of facilitating border crossing and adding instead ›intentional assistance‹. The Council Directive criminalises:

- a) Any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens.
- b) Any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens. (Art. 1, Council Directive 2002)

While the EU member states are required through the *EU Council's Framework Decision* to sanction the *facilitation of illegal entry* as a criminal offense through »effective, proportionate and dissuasive sanctions« (Art. 1 Framework Decision, 2002; Art. 3 Council Directive, 2002), it is left to the member states' discretion how the sanctions are to be transposed into their national legislation. This leads to significantly differing standards among the member states (Karamdiou/Kasparek 2018; Bellezza, Callandrino 2017). There is also no concrete definition about how to deal with cases of humanitarian aid and assistance, that – according to the UN protocol – should not be criminalised.

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In addition, the Council's Framework Decision foresees stricter sanctions for aggravating circumstances:

»When facilitation is provided for financial gain and/or as part of an activity of a criminal organization that endangers migrants' lives, Member States must sanction these infringements with a maximum sentence of not less than eight years.« (Art. 1 (3) Framework Decision 2002)

In 2015, the *European Agenda on Migration* speaks of the fight against smuggling and trafficking in one breath, defining this fight as one of the key priorities within EU migration politics, arguing: »Action to fight criminal networks of smugglers and traffickers is first and foremost a way to prevent the exploitation of migrants by criminal networks.« (European Commission 2015a: 8)

In addition, the European Commission published in May 2015 an *Action Plan Against Migrant Smuggling* that defines smuggling as a form of organised crime, which allows for strengthened penalties. At the same time, the Commission noted that it would avoid criminalising those who provide humanitarian assistance to migrants in distress (European Commission 2015b: 4). Combatting human smuggling and trafficking also became a key task of the European Border and Coast Guard Agency FRONTEX (European Parliament/Council of the European Union 2016, 2019) and the implementation of efforts to combat smuggling has been constantly growing. In December 2018, for example, the EU Council announced it had »approved a set of measures to fight smuggling networks« (Council of the European Union 2018).



Migrants waiting at Mytilene port in front of a confiscated fishing boat that was used in a smuggling operation, January 2016. Photo: Ralf Henning.

### 3.3 Greek Anti-Smuggling Legislation

Greece has adopted one of the strictest anti-smuggling legislations within the European Union. Due to its location at the EU's external border, both the *facilitation of illegal entry* and the transport within the country and *facilitation of illegal exit*, are considered criminal offenses. In addition, anti-smuggling law includes the crime of *illegal transportation*. Gradually, the laws have become harsher. However, the history of the criminalisation of smuggling in Greece is rather short and connected to the EU's penal framework, as will be outlined in the following.<sup>6</sup>

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<sup>6</sup> The analysis is mainly following the argumentation of Giorgos Maniatis (for an in-depth description of the evolution of anti-smuggling law in Greece see Maniatis 2017).

## *Anti-Smuggling Law*

The first law defining the *facilitation of illegal entry* as a criminal offense is from 1991. It targets the following:

»captains of any ship and vessel or airplane and drivers of any means of transportation who transfer from abroad into Greece third country nationals who [...] do not have the right to enter the Greek territory or whose entry has been prohibited for any reason, [...] persons who move them within the country or facilitate their transport or provide them accommodation [...] all the persons abetting the above mentioned offenses.« (L 1975/1991)

This first Greek national law against smuggling already highlights that those who carry out the transportation of migrants are the central focus of anti-smuggling legislation. Compared with current legislation, the sentence is rather low: at least one year of imprisonment and a fine of between 100,000 and 1,000,000 Drachmas (about 300 – 3,000 EUR) for each transported person. The law connects the penalty to the number of persons transported. If »the transport is committed by profession or for unlawful profit or is committed by public servants or tourist, shipping and travel agents«, aggravating circumstances increase the penalties.

Ten years later, following the EU Council's *Framework Decision on Strengthening the Penal Framework for the Facilitation of Unauthorized Entry and Residence*, the new Greek Law 2910/2001 entered into force, increasing penalties and expanding aggravating circumstances. In 2003, Law 3153/2003 was passed that defined two new felonies: the first offense of »transfer in conditions that endanger the life« was to be sentenced with a minimum of five years and a 100,000 EUR fine, while the second was defined as »causing the loss of life«, to be punished with lifelong imprisonment and a 500,000 EUR fine. The impact of the EU Facilitation Directive was seen in 2005 through Greek Law 3386/2005, defining the facilitator committing a criminal offense as anyone who

### 3.3 Greek Anti-Smuggling Legislation

»moves them [foreign nationals] from the entry points, external or internal borders in the Greek territory and, vice versa, to the territory of a member state of the EU or a third country or facilitates the transport moving in or provides accommodation to conceal them.« (L 3386/2005)

In 2009, this law was amended with Law 3772 and significantly tightened: all forms of facilitation of entry or exit were defined as a felony crime. This resulted in a radical increase of penalties, reaching up to ten years for each transported person. In cases with aggravating circumstances, ten years was set as the minimum sentence. Since then, trials have taken place under appeal courts, in charge of judgement on serious crimes with high penalties.

The 2009 amendment was fully integrated into Greek law through Law 4251/2014. In Article 29 of the *Code on Migration and Social Integration and Other Provisions*, the unusually high minimum sentence of 10 years is enabled:

»5. Persons who facilitate the entry or exit from the Greek territory of third-country nationals without performance of the checks stipulated in Article 5 shall be sentenced up to ten (10) years of imprisonment and a fine of twenty thousand (20,000) EUR as a minimum. If the act was carried out with a view to making a profit or by profession or habit, or if two (2) or more persons acted jointly, the above shall be sentenced to at least ten (10) years of imprisonment and a fine of fifty thousand (50,000) EUR as a minimum.« (Art. 29 L 4251/2014)

Article 30 elaborates further who can in practice be criminalised. It targets in particular drivers of vehicles or vessels, but simultaneously also people facilitating ›accommodation for concealment«. In both cases, financial gain is

not seen as a precondition for criminal liability but instead is considered an aggravating circumstance.<sup>7</sup> Punishable are:

»captains of ships or other vessels or aircrafts and drivers of any means of transportation [...] as well as persons who collect them from entry points, external or internal borders, with a view to move them in Greece or to the territory of an EU Member State or a third country, or facilitate their transportation or provide them with accommodation for concealment.« (Art. 30 L 4251/2014)

Furthermore, the number of people transported is calculated, and with each person transported the punishment increases, becoming even harsher in cases *endangering human lives* – for example in insecure transport in rubber dinghies – or in cases of loss of human life. In the following, the penalties laid out in Article 30 of Law 4251/2014 are listed. In addition, the amendments made by the New Criminal Code of Law 4619/2019 are written in brackets:

- a. imprisonment of up to ten (10) years and a fine from ten thousand (10,000) to thirty thousand (30,000) EUR for each transported person [after the amendments of the New Criminal Code the penalty remains up to ten (10) years];
- b. at least ten (10) years of imprisonment and a fine from thirty thousand (30,000) to sixty thousand (60,000) EUR for each transported person, if the offender acted with a view to making a profit or by profession or habit, or is a relapsing offender, or acts in the capacity of civil servant or tour or shipping or travel agent, or if two or more persons acted jointly [after the amendments of the New Criminal Code

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<sup>7</sup> Contrary to this, as outlined above, assistance to »a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens« requires, according to the EU Council Directive, financial gain as a precondition for consideration as a criminal offense (Art. 1(b) Directive).

the penalty is at least ten (10) years and up to fifteen (15) years];

- c. at least fifteen (15) years of imprisonment and a fine of two hundred thousand (200,000) EUR as a minimum for each transported person, if the act could endanger human life [after the amendments of the New Criminal Code the penalty is at least ten (10) years and up to fifteen (15) years];
- d. life imprisonment and a fine of seven hundred thousand (700,000) EUR as a minimum for each transported person, if the act referred to in c) above resulted in the loss of life [after the amendments of the New Criminal Code the penalty is either life imprisonment (20 years to be served or at least 10 years up to 15 years)].

In 2019, Article 30 was amended by Article 12 (4), (5) of Law 4637/2019 and the fines for the first two examples were expanded to (a) 30,000 – 60,000 EUR and (b) 60,000 – 100,000 EUR.

Although the penalties were further increased in recent years, becoming one of the harshest anti-smuggling penal codes in the entire European Union, there have, in recent years, also been slight adaptations in favour of the accused:

In line with an announcement from the European Commission, the 2014 law was amended by Law 4332/2015, introducing the so-called ›humanitarian exception‹:

- »6. The above sanctions are not imposed in the case of rescue at sea, transfer of people in need of international protection in accordance with the principles of international law, as well as in the case of push to the inland or facilitation of travel, for the purpose of falling under the procedures of Article 83 of Law

3386/2005 or of Article 13 of Law 3907/2011 after the competent police and coast guard authorities are notified.« (Art. 14 L 4332/2015)

Under the New Criminal Code (L 4619/2019), the penalty of imprisonment (κάθειρξη) has been reduced from 10–20 years to 5–15 years. Thus, based on the above amendment and on article 463 of the New Criminal Code, the penalty of imprisonment cannot exceed 15 years. This means that the penalties of article 30 b, c, d are at least 10 years with a maximum of 15 years and the penalty of imprisonment of article 30 a remains up to 10 years of imprisonment (because of the explicit exception of the latter from the penalties of the revised new Criminal Code). Lifelong imprisonment however poses an exception, and allows for a maximum of 20 years prison time to be served. In practice, people charged with human smuggling are often accused of several different offenses, including *endangering human life*. Furthermore, Article 463 of Law 4619/2019 provides courts with more discretion; wherever a penalty of life imprisonment is foreseen, the court can instead impose a penalty of at least ten years imprisonment.

A custodial sentence can also affect the right to apply for international protection. Being sentenced for *facilitation of illegal entry* does not in itself lead to exclusion from the right to apply for international protection; this is only the case if convicted for certain extreme felonies and in a few other exceptional cases (Art. 12 L 4636/2019, Art. 12 EU Guideline 2011/95). However, it is impossible to be granted subsidiary protection if the applicant has been convicted for a crime with a minimum custodial sentence of three years, which is the case for *facilitation of illegal entry* (Art. 17 L 4636/2019, specifying Art. 12 EU Guideline 2011/95). Certain groups of asylum seekers can only receive a subsidiary protection status instead of refugee protection. Subsidiary protection is in effect based on their nationality, so people from countries such as Morocco are in fact deported after serving their sentence.

### 3.3 Greek Anti-Smuggling Legislation



Court procedure in Komotini on 4 February 2020 against two men from Morocco, accused of facilitating illegal entry. Photo: Julia Winkler (Rollhäuser/Winkler 2020).



## Chapter 4

# Narratives on ›Human Smuggling‹ and their Implications

In the following chapter, we briefly analyse political narratives around human smuggling, which have influenced anti-smuggling legislation and its implementation. We outline how the figure of the ›human smuggler‹ was shaped as a threat to the sovereignty of both the nation state and the European Union, as well as to the safety of migrants themselves.

We point out three different discursive elements that are closely intertwined and play a crucial role in the creation of this figure:

1) The conflation of the concepts of ›human smuggling‹ and ›human trafficking‹ both on a discursive and legislative level. As mentioned above, the EU legislation on the *facilitation of illegal entry* does not clearly define the difference between ›smuggling‹ and ›trafficking‹, creating a narrative that treats ›human smugglers‹ as a potential threat (Bellezza et al. 2017). Dropping this differentiation leads foremost to the criminalisation of people facilitating border crossings, even if they do so according to the explicit will of the persons transported and without any financial gain.

2) The securitisation of flight-migration (especially in the aftermath of the long summer of migration). We briefly outline dominant narratives of the Euro-

pean Commission on human smuggling as well as crucial political developments on the Greek hotspot islands since the long summer of migration.

3) We will highlight how the European Commission and national politicians refer to humanitarian narratives in order to justify border and anti-smuggling policies.

We argue that these discourses and legislative frameworks veil existing power relations and turn the ›human smuggler‹ into a scapegoat, allowing the continued illegalisation of immigration. This shifts the focus of debate on the causes of thousands of deaths away from deadly EU border policies and towards the *facilitation of illegalised entry*. Governance narratives ignore the fact that for those who want to claim asylum in the EU, border policies create the need for smuggling in the first place.

## **4.1 ›Human Smuggling‹ and ›Human Trafficking‹**

As outlined above, discourses connected to the EU's approach to migration management have intertwined the necessity to fight both ›human trafficking‹ and ›human smuggling‹. In the aftermath of the long summer of migration – labelled the ›refugee crisis‹ and perceived as a security threat by the EU (Hess et al. 2019) – the entanglement of both concepts was especially visible in political and public discourse. To point to just one example, German Chancellor Angela Merkel explained the increase of finances for Operation Triton, the FRONTEX border protection mission, as the need ‘to stop the trafficking of smugglers, brutal smugglers’ (Brössler 2015).<sup>8</sup>

While both human smuggling and trafficking can overlap, they are – as outlined above – by definition profoundly different. Trafficking in human beings is an exploitative practice, describing for example cases of forced prostitution and modern slavery, and is defined as ‘the recruitment, transportation,

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<sup>8</sup> Original: ›den Menschenhandel von Schleppern, brutalen Schleppern, zu unterbinden‹.

#### 4.1 ›Human Smuggling‹ and ›Human Trafficking‹

transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation' (Art. 3 UNODC 2004).

On the other hand, using the service of smugglers is, in many cases, a decision that migrants make that does not involve being coerced by the smuggler. In order to enter the EU's asylum system under the current European border regime, the reliance on smuggling networks is unavoidable for most. The lack of humanitarian visas binds access to basic rights, such as those enshrined in the European Charter of Human Rights and the Geneva Convention, to the ability to physically reach EU territory. In this regard, militarised bordering practices – ostensibly targeting smuggling networks – create the business of smuggling in the first place. These border policies, keeping in place a world system marked by massive inequalities, illegalise border crossings for certain groups of people, pushing them towards smuggling networks.

In practice, border protection in addition creates a context in which human smuggling and human trafficking can overlap. People who are marginalised and travelling on illegalised routes – where they are excluded from basic citizenship rights – are forced into situations of vulnerability in which they can easily become victims of human trafficking (c.f. Heisterkamp 2018). The EU's claim to fight both human trafficking and human smuggling is especially absurd in cases in which civilian search and rescue operations are criminalised under anti-smuggling operations – as in the Central Mediterranean Sea – while militias such as the so-called Libyan Coast Guard are financed. These policies only foster human trafficking, since migrants apprehended by Libyan forces are systematically abused, detained and often sold on slave markets (c.f. Ayoub 2017).

## **4.2 The ›Refugee Crisis‹ and the ›Smuggler‹ as a Scapegoat**

The depiction of the long summer of migration of 2015 as a ›refugee crisis‹, posing a threat to public order and state control, fostered increased securitization and repressive approaches in migration management. Before that, preventing migrant smuggling and trafficking were central aims in EU official discourses (Walters 2010). But since 2015 the EU has increasingly focussed on border externalisation measures (ECRE 2017; Hess et al. 2016) and, at the same time, on cracking down against smuggling networks (Carrera et al. 2018; Council of the European Union 2015, 2016; European Commission 2015b, 2016a). The European Agenda on Migration of 2015 explicitly called for changes in the EU legislative framework ‘to tackle migrant smuggling and those who profit from it’. At the same time, it introduced the ›hotspot approach‹, forming the context in which the criminalisation of migrants in Greece, analysed in this report, takes place. The European Commission outlined in the EU Action Plan against migrant smuggling (2015–2020):

›The European Agenda on Migration, which was adopted by the European Commission on 13 May 2015, identified the fight against migrant smuggling as a priority, to prevent the exploitation of migrants by criminal networks and reduce incentives to irregular migration.« (European Commission 2015b)

The figure of the smuggler as a criminal – a security threat, the root cause for flight-migration, migrant suffering, death and, to top it off, a threat to EU and national public order – was born. As the European Commission argues:

›Migrant smuggling is increasingly associated with serious human rights violations and deaths, in particular when it occurs by sea. The loss of migrants’ lives at the hands of smugglers in the Mediterranean Sea is an acute reminder of the need to tackle migrant smuggling, using all of the legal, operational, and administrative levers available. The fact that migrant smuggling net-

## 4.2 The ›Refugee Crisis‹ and the ›Smuggler‹ as a Scapegoat

works are closely linked to other forms of serious and organised crime including terrorism, human trafficking, and money laundering increases this urgency even further.« (European Commission 2020)

The figure of the ›human smuggler‹ also has an unequivocally gendered dimension: the images used by politicians, newspapers and authorities evoke exclusively pictures of male smugglers. The ›smuggler‹ thus represents an intensified version of the discursive figure of the ›criminal migrant‹ – which is also constructed as a male figure – and to whom characteristics such as dominance and patriarchal behaviour, propensity towards violence, danger of (sexual) assault and criminality are attributed. This discursive construction is also accompanied by the denial of characteristics attributed to female migrants such as vulnerability, need for protection and passivity (cf. Elle/Hess 2018).<sup>9</sup> This gender dimension of the figure of the ›smuggler‹ thus supports an interpretation that evokes less empathy, understanding or identification and thereby paves the way for harsher punishments.

In addition, the figure of the ›human smuggler‹ has a racist dimension: The people classified as such are constructed as ›the others‹. They are regarded as strangers and not part of a ›European community‹. Once again, this view is underpinned by a binary logic, in which Europeans are mostly perceived as *white* and others as *non-white*. This dichotomy allows for discriminatory treatment of ›the others‹. In such a racist conception, a *white* Europe has the right or even the obligation to defend itself against external threats. In right-wing populist narratives, migrants are constructed as such a threat and the figure of the ›criminal smuggler‹ represents an even bigger danger.

In the local connotation at the EU's external border in the Aegean Sea, the figure of the ›smuggler‹ also has an orientalist dimension. While Greece is seen as part of Europe and ›the Occident‹, Turkey is conceived in many narratives

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<sup>9</sup> This discursive framing is also based on a binary view of gender, which assumes that each person can be assigned exactly one of two opposite sexes from birth, which are linked to fixed character traits.

as part of the contrary ›Orient‹. Turkish people are often stereotyped accordingly. These stereotypes are entangled with long-lasting nationalistic conflicts between Greece and Turkey, for example over territorial claims.

Within Greece, during the 2015 long summer of migration, public debates on immigration became less hostile – for a short time. The Syriza Government aimed to abolish – in part – the criminalisation and detention of migrants, while the registration procedure in the newly erected EU hotspot camps led to the regularisation of immigration. As Georgos Maniatis describes:

»In this context, dominant Greek discourse on facilitation became highly contested, yet without losing its dominant position. However, discourses treating ›illegal‹ migration as a threat to national security and integrity were marginalised from public debate, as were discourses equating assistance to ›illegal‹ migrants with human smuggling and trafficking.« (Maniatis 2017: 211)

This changed, however, when the EU-Turkey Deal was concluded on 18 March 2016. Maniatis outlines a shift towards what he calls ›pragmatic humanitarianism‹, which was combined with nationalist and xenophobic discourses. As he explains:

»The ›European solution to the crisis‹ became the leitmotiv of governmental officials, who faced strong pressure to reinforce the controls over migration and borders, expressed characteristically in the EU Commission's threat to exclude Greece from the Schengen-Zone.« (Maniatis 2017: 211f.)

Since the EU-Turkey Deal, migrants have been trapped on the Greek hotspot islands in overcrowded barbed-wired camps for prolonged periods of time. Furthermore, different forms of administrative detention and confinement are again on the rise.<sup>10</sup>

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<sup>10</sup> On Lesbos island men coming from countries with low recognition rates for international protection are detained directly upon arrival under the low-profile detention pilot project

## 4.2 The ›Refugee Crisis‹ and the ›Smuggler‹ as a Scapegoat

The situation regarding criminal detention and convictions dramatically deteriorated in March 2020 after the Turkish president threatened to open the borders for migrants heading towards Greece, and the number of arrivals strongly increased for a few days. The Greek government reacted by suspending the asylum procedure for new arrivals in March 2020. An unknown number of asylum seekers were convicted and given prison sentences – not for *facilitating illegal entry*, but for the alleged crime of *illegal entry* itself. Several newspapers reported different numbers of arrests and convictions on the Greek mainland, varying between 17 and 138 convictions, and prison sentences between three and four years (dm-aegean 2020b). Furthermore, criminal charges were pressed against the March arrivals on the Greek hotspot islands (HIAS 2020). This practice violates the requirements of the UN Smuggling Protocol against criminalising migrants for being subjected to a smuggling operation. In the following months, the general entry into Greece has sweepingly been made impossible through illegal and violent pushbacks (dm-aegean 2020c; Legal Centre Lesvos 2020a).

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(Hänsel 2019; Saranti 2019). After the election of the right-wing Nea Demokratia government in 2019, the situation for migrants deteriorated further. There has been a rise in violent pushbacks, both at the land border towards Turkey in the Evros region and in the Aegean Sea (Alarm Phone 2020b; bordermonitoring.eu et al. 2020; dm-aegean 2020b). The Greek government also announced its intention to build closed camps on the Greek hotspot islands, which led to a wave of protests (AYS 2020). On Kos, since January 2020, everyone who arrived seeking protection has been detained directly upon arrival, including children (dm-aegean 2020a). Due to the Covid-19 pandemic, the hotspot camps were then put under curfew, with extremely limited exceptions. In addition, new arrivals have since March 2020 been trapped for extended periods on the shore of the islands or in de-facto detention, for example in the port of Mytilene (Legal Centre Lesvos 2020b).



Confiscated engines of rubber dinghies that arrived on Lesbos, stored in the port of Mytilene, Lesbos. Photo: Ralf Henning (January 2016).

## 4.3 Smuggling and Humanitarianism

The following section briefly outlines how humanitarian and security-driven arguments are interwoven in political discourse around border security and the prevention of human smuggling, both in European Commission statements and in the rhetoric of national politicians. Political narratives portraying migrants often oscillate between images of passive ›suffering refugees‹, exploited by smugglers, and refugees as a potential threat, portrayed as connected to terrorism, as potential perpetrators of (sexual) violence, or as smugglers (Hess et al. 2019; Karamanidou et al. 2020).

It is remarkable that the EU's push towards the punishment of smuggling<sup>11</sup> was also driven by humanitarian concerns about the deaths of illegalised migrants. In summer 2000, 58 Chinese people were found dead in a container of tomatoes in the harbour of Dover, UK, an incident that Bellezza and Calandrino refer to as a ›discursive watershed moment‹ (2017). Similar reactions can be found in other incidents, for example the October 2013 shipwreck off the coast of Lampedusa, where nearly 600 people died, an event that influenced the 2015 *European Agenda on Migration* (Kasperek 2017).

Criminalising smuggling networks is therefore often portrayed as a duty that saves human lives. The European Council, for example, describes the EU-NAVFOR MED Operation Sophia in the Mediterranean Sea, the FRONTEX Missions Poseidon in the Aegean Sea, and Themis (formerly Triton) in the Central Mediterranean Sea as having the mandate of ›Saving lives at sea and targeting criminal networks‹, stating that ›Operation Sophia saves lives at sea and hunts traffickers‹ (European Council/Council of the European Union 2020).

Many documents of the European Commission (c.f. European Commission 2016b), incorporate media and political narratives around ›the refugee crisis‹, mixing concerns over migration as a security threat with concerns about

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<sup>11</sup> As outlined above, this started in 2000 with the *Framework Decision on Strengthening the Penal Framework for Preventing the Facilitation of Unauthorised Entry and Residence*, and resulted into the adoption of the *Facilitators Package*.

the exploitation and deaths of migrants on the route in order to argue for the necessity of border controls and deportation operations. Analysing the narratives of an extensive body of EU documents on border management and migration control, Kamandiou and Kasperek point out how humanitarian narratives and references to human rights have been mobilised in order to argue for migration control to fight smuggling networks, also drawing on other research findings in the field of humanitarianism:

»References to preventing smuggling and irregular migration are frequently situated within broader humanitarian narratives [...] which act as legitimating devices (Fairclough & Fairclough, 2013; Van Leeuwen & Wodak, 1999) justifying the targeting of unauthorised forms of migration. A distinct objective is ›saving lives‹, in particular at the sea borders of the European Union. This objective is rooted in humanitarian disasters such as the Lampedusa shipwreck, and sea rescue operations implemented by EU agencies and member states. Protecting human life and dignity is a core humanitarian concern (Nyers, 2013) and reflects the overlap between control and humanitarian objectives which characterise EU migration policies (Pallister-Wilkins, 2015). More significantly, the most common legitimating narrative is one of compliance with human and fundamental rights« [...]. (Karamanidou/ Kasperek 2018: 32f.)

These narratives are also visible in Greek politics. In 2015, then-Prime Minister Alexis Tsipras visited Turkey's Prime Minister Ahmet Davutoğlu, in order to discuss improving joint migration control in the Aegean Sea during the long summer of migration. Referring to the deaths at sea, Tsipras explained: 'As both Greece and Turkey, our first priority should be to end the humanitarian tragedy in the Aegean Sea.' He called for joint efforts to combat human smugglers, stating that 'They [the smugglers] are [...] an insult, a threat to humanity. They do not hesitate to jeopardise people's lives' (EUbusiness 2015). Greece's current Prime Minister Kyriakos Mitsotakis praised the Greek Coast Guard as

'Helpers to our islanders, leaders in the fight against organised crime at sea, first in search and rescue operations' whose particular mission 'is both to save the lives of refugees and protect effectively Greece's sea borders, while also guarding over the country's national sovereign rights' (The National Herald 2020).

Fighting smuggling networks is in addition often portrayed as addressing the ›root causes‹ of migration and used to justify strengthening border controls and externalisation measures (Pro Asyl et al. 2017). When Turkey accused the Greek Coast Guard of carrying out pushbacks, Prime Minister Mitsotakis countered that Greece 'cannot carry the problems of three continents on its shoulders'. He called for more action to support countries of origin to prevent migration and to crack down on migrant smuggling networks, stating 'We need better coordination between the Europeans and the Arabs in order to manage the causes of migration' (Ekathimerini 2020).

Conservative and right-wing politicians also frequently refer to humanitarian narratives in order to criminalise civilian sea rescue missions. Often this is accompanied by a simplistic portrayal of flight migration as being caused or influenced by push and pull factors. This is exemplified in the attitude of Austrian Chancellor Sebastian Kurz:

»It is a very sensitive area because sometimes private sea rescuers support the smugglers without wanting to do so. And so the actions of private rescuers end up causing more deaths. The fact is that by saving in the Mediterranean and having a direct ticket to Europe, more and more people set off and more and more drown as a result.« (Ronzheimer, von Bayer 2020)<sup>12</sup>

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<sup>12</sup> Original: »Es ist ein sehr heikler Bereich, weil manchmal unterstützen > private Seenotretter, ohne dass sie es wollen, die Schlepper. Und so führt > das Vorgehen der privaten Seenotretter am Ende zu mehr Toten. Es ist doch > so: Durch das Retten im Mittelmeer und einem direkten Ticket nach Europa > machen sich immer mehr auf den Weg und immer mehr ertrinken dadurch.«

## *Narratives on ›Human Smuggling‹*

The outlined narratives are the backdrop to the criminalisation of migrants as human smugglers on the Greek hotspot islands, which will be discussed in detail in the following chapter. The perception of smugglers as a security threat, as well as the inclusion of humanitarian concerns in narratives around smuggling, legitimises the severe punishment of individuals crossing from Turkey into Europe, since the arrested are seen as criminals endangering the lives of migrants. The analysis shows that in fact anti-smuggling policies primarily hit those who are migrants themselves, marginalised and forced on illegalised routes.



Fishing boat confiscated at the port of Mytilene after a smuggling operation, sinking in the port of Mytilene, Lesbos. In the background, the passenger ferry leaves to Athens. Photo: Ralf Henning (January 2016).

## Chapter 5

# Implementation of Smuggling Law

The following chapter outlines the implementation of anti-smuggling law in policing and juridical practices in Greece, primarily looking at the EU hotspot islands of Lesbos and Chios. It is based on the observations and interviews of AMS between 2014 and 2019, including the statistical figures deriving from the monitoring of 48 court procedures between 2016 and 2019 (32 first-instance trials and 16 appeal trials). In addition, it draws on official data published by the Greek state.

The analysis demonstrates that the Greek anti-smuggling law plays a major role within the Greek court and imprisonment system, leading to the large-scale imprisonment of migrants. The court procedures show an alarming lack of procedural rights and fairness for people accused of facilitating illegal entry. In the following section the procedure from the arrest into the courtroom will be described drawing on empirical evidence derived from interviews and observations. It details how most individuals are accused of driving the boat and are then arrested without sufficient evidence; they are incarcerated for months in pre-trial detention; and when their case eventually goes to trial the conviction is determined in very short procedures that ultimately fail core standards of fairness and lack due process. Since the Greek legal framework – based on the EU’s *Facilitators Package* – has no upper limit on sentencing durations, the majority of defendants are convicted and sentenced to life imprisonment. The convicted individuals do not represent central figures within

smuggling networks. Instead, they are often migrants themselves, those who are marginalized and suffer most from the European border policies.

## **5.1 Quantitive Dimension of Smuggling Convictions**

The answer given by the Greek Ministry of Justice to a request submitted enquiring about the number of people convicted for human smuggling shows the significance of this charge in the Greek prison system:

»As of January 1, 2019, the number of people detained in Greek prisons was 10,654. Out of these, 3,317 were convicts serving time. More than half of the total people detained (5,822) are foreigners. People convicted for facilitating illegal entry were 1,905 – the largest group in prison after convicts for drug related offences. The number represents a more than 100% increase compared to the convicts serving time for the same offence in 2016 (951).« (Hellenic Ministry of Justice 2019)

Drawing on official data provided by the Greek state, the number of people arrested on the grounds of *facilitating irregular migration* is pictured below. The data mainly refers to people who have allegedly *facilitated illegal entry* at the Greek-Turkish borders, but also those who have *facilitated illegal exit*, especially in the Central and Western Macedonia region of Greece towards the Republic of Macedonia (with a few additional cases at the Albanian border). In addition, arrests for *illegal transport within the country* is also represented in the data set.

## 5.1 Quantitative Dimension of Smuggling Convictions

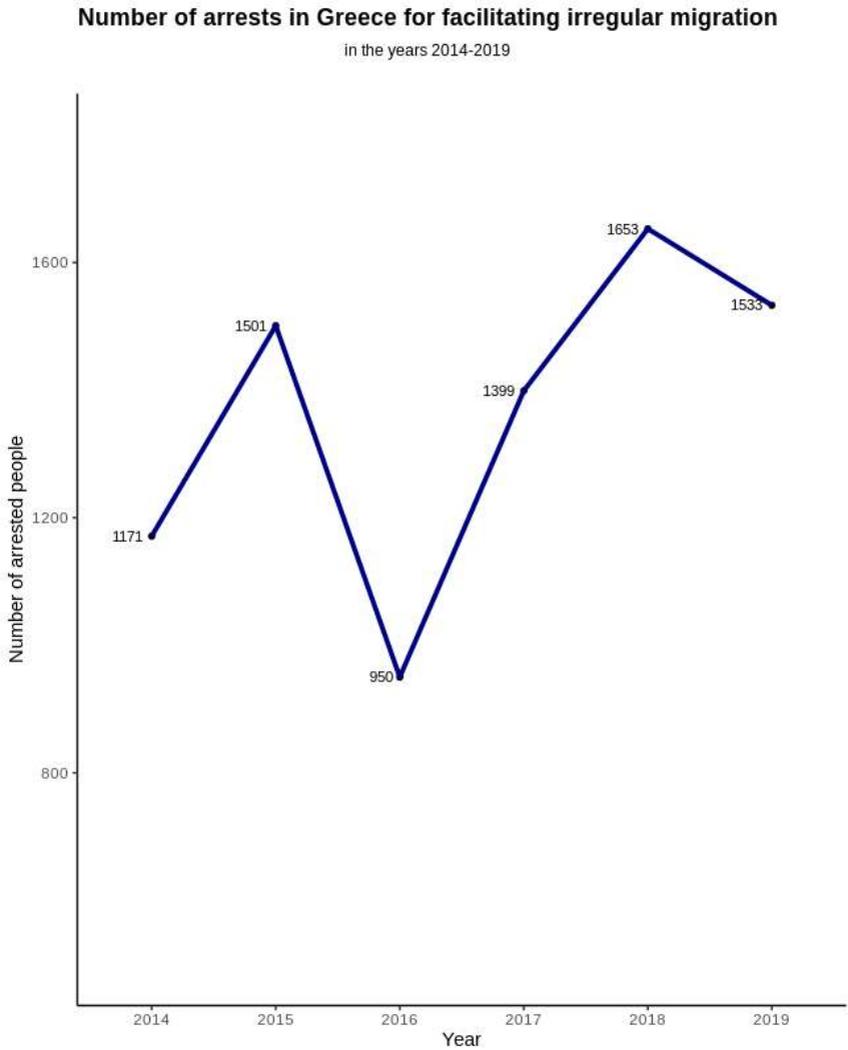


Figure I

## *Implementation of Smuggling Law*

The graph (Figure I) shows that in 2015 the number of people arrested for *facilitation of irregular migration* multiplied in conjunction with the increasing number of irregular migrants. After the EU-Turkey Joint Action Plan of 2015 and the EU-Turkey Statement in 2016, the number of arrests first declined when the borders were further secured along the Evros land border, the Aegean Sea, and the Macedonian-Greek border. However, although the number of irregular migrants remained comparatively low between 2016 and 2018, the number of arrests began to rise once again. The correlation here can be directly linked to the stance taken by the EU and Greek Government in their effort to combat human smuggling and irregular migration. The staggering increase in arrests for *facilitating irregular migration* is a product of the substantial number of Coast Guard, Police, and FRONTEX staff deployed along the borders.

## **5.2 Arresting the Marginalized**

The following section draws upon Aegean Migrant Solidarity's empirical observations. It describes how individuals, upon their arrival in Greece are identified as alleged smugglers and details the intrinsic motivation for crossing the Aegean Sea. Since the research was carried out on the Greek hotspot islands, the analysis focuses solely on the charge of *facilitating illegal entry* into the country, as such it does not focus on *facilitating illegal exit*, *illegal transport within the country* or *facilitating accommodation for concealment*. More precisely, the people arrested are often charged with the offenses of *illegal transportation in order to earn money*, *entry into Greece without permission*, *putting people in danger*, and *disobedience*.

### **5.2.1 The Arrest**

According to the empirical observations and in line with Greek law, any person who drives a migrant boat is automatically considered to be a smuggler.

There are even a few cases where people who have made a distress phone call to the Coast Guard in order to be rescued at sea have been accused of smuggling.

When a migrant boat arrives on the shoreline and the people are picked up by the Hellenic Police, or if FRONTEX / Hellenic Coast Guard pick them up at sea, the authorities are required to interrogate in order to find out who was driving the boat. Many people reported that FRONTEX / Hellenic Coast Guard identify individuals as smugglers when they pick up the migrants in the Aegean Sea, or the police arrest them once they arrive on shore to the Greek Islands. Sometimes, the group of migrants are directly asked who steered the boat and admit to having done so themselves as they are not aware of having committed an illegal offense. In other cases, the group of people on the boat are asked to identify the driver.<sup>13</sup> The person identified as 'guilty' is then taken directly from the arriving boat and is arrested.

The interviews and trial observations indicate that beyond the already mentioned identification methods, assumptions based on gender and nationality play a major role in the decision making process as to who is being accused and arrested. Summarizing the findings, people are most likely to be arrested if they have the following features (while being of male gender is a pre-condition):

- 1) Being of male gender or being perceived as such as well as
- 2) Being identified by the Coast Guard/FRONTEX personnel during the pickup operation
- 3) Being identified by others on board
- 4) Being of Turkish nationality or being perceived as such
- 5) Being of a different nationality to that of the majority on board

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<sup>13</sup> Not in every singular boat arrival, people are arrested for human smuggling, especially not in those cases, when the boat arrived in absence of police and Coast Guards.

## *Implementation of Smuggling Law*

This practice clearly contradicts Article 14 of the European Convention on Human Rights that outlines the prohibition of discrimination: ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

In addition, no explanation is provided to the individual detailing the reason for their arrest and for the most part there are no interpreters present, all of which breaches Article 5(2) of the ECHR outlining: ‘Everyone who is arrested shall be informed promptly, in a language which he or she understands, of the reasons for his arrest and of any charge against him.’

Within our research, we collected several testimonies that clearly indicate that the Hellenic Coast Guard and police used violence and severely beat people during their interrogation. Below are some testimonies from detainees who were interviewed by Aegean Migrant Solidarity in pre-trial detention on Chios and in the Mytilene police station. M. S. from Syria reported: »Thinking that I was Turkish, the Greek Coast Guard beat me, and later used violence during my interrogation.« Midga from Syria explained: »When we crossed into Greek waters, the Greek Coast Guard showed up and they arrested me [...] I was beaten from the moment I was arrested at sea until arriving at the police station. I was bleeding.« 17-year-old Y. Y. from Turkey reported on how he was treated after the arrest: »I was treated very badly and was beaten several times. I was treated worse than an animal.«

H. H. from Syria even explained in his court hearing on 19th of October 2016 that the Coast Guards were beating him. The general attorney asked the jury to reject all the allegations about the beating and it was not taken into account.



A confiscated rubber dinghy in the port of Mytilene, Lesvos. Photo: Knut Bry.

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The identification of the arrested and the obvious use of violence shows how the discursive construction of the ›smuggler‹ takes effect from the very first moment in the determination of who is considered as guilty. Authorities assume that the smuggler has to be male, because a female person does not coincide with the image of a dangerous criminal who exploits people. In addition, the category of gender also becomes relevant in the processes prior to the passage: patriarchal role distributions make a task like steering the boat more likely to be performed by men.

Furthermore, the assumed nationality plays a central role in the processes of identification of the ›guilty‹ person. The political situation between Greece and Turkey remains tense to date. Stereotypes about Turkish citizens, which are particularly prevalent in nationalist-oriented groups such as the border guard authorities, take effect in these situations. In some cases, the mere assumption that a person is a Turkish citizen is sufficient for arrest. It is assumed that people living in Turkey would have no reason to flee, which is obviously wrong given the political situation in Turkey. Discrimination based on nationality is also evident in cases in which individuals are arrested because their nationality differs from that of other boat passengers.

Contrary to the European Convention on Human Rights, which condemns discrimination, the analysis at hand shows that assumptions about gender and nationality play a decisive role in the criminalization of migrants – from the moment of arrest to the conviction. Ultimately, these failures of the legal system also contribute to cementing the discursive figure of the ›human smuggler‹, representing a self-fulfilling prophecy.

### **5.2.2 Motivations for Crossing the Aegean to Greece**

Following on from the testimonies and interviews conducted with individuals accused and charged for smuggling, we will outline the widespread reasons why people end up driving migrant boats. We identified three particular causes and motivations for people to drive the boats to Greece: (1) poverty, (2)

seeking Asylum, (3) by force or necessity. The following representation of motives is necessarily simplistic and incomplete regarding complex individual fates and decisions. For example, people also provide transport assistance driven by idealistic motives and as an act of solidarity. However, the presentation at hand intends to illuminate the fact that people who are criminalised for *facilitating illegal entrance* on the Greek islands do not correspond to the common image of a ›dangerous human smuggler‹.

### Poverty

People in a difficult financial situation are targeted by those working in the smuggling business and are offered the opportunity to make easy money by driving a boat to Greece. The terms of the agreement usually require the individual to drive the boat back to Turkey afterwards in order to collect their payment. Some individuals discover that they have no legal means to return, so that they have little choice but to drive the boat back to Turkey. This doubles their chance of getting caught, especially since the return trip usually occurs in daylight. In the following, some example cases will be outlined:

Isiktas B. is a Turkish national who worked in a shipyard. He is married and has three children, one of whom is suffering from leukaemia. Since he could not afford the medical treatment for his child, he accepted an offer to drive a boat with asylum seekers on board to Lesbos. He was promised to gain an equivalent of 3,000 EUR. Isiktas claimed that he was tricked and that he did not know driving the boat was an illegal offense. He was arrested on 11<sup>th</sup> November 2015 and was convicted for *facilitation of illegal entry* on 19<sup>th</sup> September 2016. The court accepted mitigating circumstances which argued that during the sea crossing the lives of migrants were not endangered. Isiktas was sentenced to 16 years and one month imprisonment of which he has to serve 10 years.

On 5th September 2016, Aegean Migrant Solidarity interviewed Y. Y. from Turkey, who was detained in the police station of Mytilene, Lesbos. He was

## *Implementation of Smuggling Law*

18 years old at the time. He used to work in a construction site and recently had an accident at work that required surgery. His doctor informed him that he could not return to work for twelve months. Unable to afford being out of work for a year, Y. Y. found a job in a cafe. While working in the café, someone visited him and offered the equivalent of 5,000 EUR to drive a boat across to Lesbos. Y. Y. agreed as it would provide him the opportunity to pay off his debts. When he arrived in Greece on the boat, he was arrested and sentenced to 16 years in prison.

These two examples illustrate that people who steer a boat out of financial incentives are not part of organised criminal networks. Members of networks that organise the passage of migrants to Europe know well that steering a boat into Greece involves huge risks. They would never take the position of the driver themselves. Therefore, the draconian penalties only hit the smallest link in a chain. They do not contribute to the fight against criminal networks as envisaged by European and Greek politics. Moreover, they hardly live up to the deterrent effect aimed at by the EU; still thousands of people in Turkey live in precarious employment who are potentially willing to take up well-paid offers if they do not fully know the risks.

## **Seeking Asylum**

The fee to cross the border can range from approximately 500 to 2,000 EUR or more, while a regular passenger ferry costs about 25 EUR. According to the information gained from interviews, this amount is calculated by factors such as the current market situation, the amount of attempts made to cross the maritime border, the conditions of travel (i.e. if the mode of transport is a speed boat or rubber dinghy, the number of people on board, whether or not life jackets are supplied), and other individual agreements. Therefore, many migrants attempting to travel into Europe cannot afford the border crossing for themselves or their family. Often, individuals have already incurred heavy financial expenses in their home country, in the process of fleeing, and on previous journeys where they had to pay smugglers or they were robbed. As

a result, they may be offered a reduced fee from the smuggler if they agree to drive the boat across. In other cases, families have been offered a reduced rate or to travel free of charge on the condition that one male family member agrees to drive over and back two times, thus bringing two groups of people across the border. This triples their chance of being arrested.

On 6<sup>th</sup> September 2016, AMS observed the case of Ansary N. A., a 17-year-old boy from Afghanistan. Ansary's family could not afford to pay the smuggler so he was offered a deal to drive a boat from Turkey to Lesbos. Upon dropping off a group of migrants on the Greek shore, he could then return to Turkey, collect his family and another group of migrants, and cross back over to Greece. This deal suggests that the task of driving the boat and the risk involved in crossing to Lesbos three times in a row is equivalent to the fee for Ansary and his family to cross the border. However, Ansary was not informed that he was taking on the role of the smuggler or consequences involved. He was intercepted by the Hellenic Coast Guard during his first attempt to cross the maritime border into Greece. He was tried as an adult and convicted of human smuggling. He was sentenced to 44 years in prison of which he will have to serve 25 years.<sup>14</sup>

AMS also observed the case of A. R. from Afghanistan, who was accused of human smuggling and entry into Greece without permission. In his defence, A. R. admitted to driving the boat with 21 people on-board. He stated that he did so in order to bring his wife and his father to Europe, the fee for which he could not afford. He transported 21 people to Greece with the intention of returning to collect his wife and his father. On 14th November 2017, A. R. was sentenced to 95 years in prison, of which he will have to serve 25 years. He also received a monetary penalty of 600,000 EUR.

These cases show that the people convicted of smuggling in Greece are often asylum seekers themselves, who are in an even more precarious situation than the other passengers on board. They are forced to take additional risks

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<sup>14</sup> The calculation method employed to determine sentencing is explained in 5.3.2. *Judgements and Penalties*. In general, the years of imprisonment cannot exceed a ›life‹ sentence consisting of 25 years (under the 2019 New Criminal Code it cannot exceed 20 years).

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because of financial difficulties. For them steering a boat is often the only way to finance their passage. Also in these cases, the anti-smuggling policy vastly misses its objective to reduce the number of crossings, as it directly criminalises those seeking protection themselves.

### **Force and Necessity**

It has been reported that people involved in the migrant smuggling business apply violent methods in order to force individuals to drive the boat, such as threatening people with firearms. In other such cases, smugglers would drive the boat themselves for a short distance away from the shoreline, after which they would either jump overboard and swim back to shore or they would arrange to be collected by another person in a second boat. In both cases, the people on board are forced into a situation where someone has to take over and drive the boat.

On 31st October 2016, AMS visited M. S. in prison who had been waiting three months for his court hearing. He was the only Syrian on a boat with 16 other people from Iran. He explained how a Turkish man had promised to drive the boat himself, but later he threatened the group at gunpoint and forced them to drive the boat themselves. M. S. was arrested when the boat was intercepted by the Hellenic Coast Guard. »Our boat was rescued by a Coast Guard vessel and I was accused of being the smuggler by the Iranians on the boat,« he explained. »Thinking I was Turkish, the Greek Coast Guard beat me, and later used violence during my interrogation.«



Rabi'e from Syria is treated by paramedics when he fainted after his conviction in court. Photo Source: AMS.

## *Implementation of Smuggling Law*

AMS also observed the case of Cetinkaya O., a Syrian who drove a boat with 27 Syrian passengers on-board. During the court hearing, a witness for the defendant claimed that he had been threatened by the smuggler and forced to drive the boat. The defence attorney added that the smuggler then abandoned the boat at sea and returned to Turkey. When Cetinkaya was arrested, the Coast Guard did not find any money on his person. Despite this he was charged with *illegal transportation in order to earn money (human smuggling)*, and *entry into Greece without permission*. On 17th October 2016, he was sentenced to 62 years and 1 month in prison, of which he will serve 25 years. He also received a monetary penalty of 56,500 EUR.

A similar pattern can be seen in the prosecution of Mohamed M.-Z., a Syrian national who was seeking political asylum in Greece. On 17<sup>th</sup> October 2016, he was convicted for *illegal transportation in order to earn money* and *entry into Greece without permission*. In his case he took over driving the migrant boat in order to save himself and the 46 passengers on board after the smuggler abandoned them at sea and returned back to Turkey. Mohamed was sentenced to 55 years and 1 month in prison, of which he will serve 25 years. He also received a monetary penalty of 75,500 EUR.

Likewise, Tosh G.-A. from Afghanistan was convicted of *illegal transportation in order to earn money* and *entry into Greece without permission*, despite the fact that threats were made against his life if he did not drive the boat. On 14th December 2017, he was sentenced to 90 years in prison, of which he will serve 25. He also received a monetary penalty of 950,000 EUR.

17-year-old Rabi'e from Syria tried to cross from Turkey to Greece in 2014. On 20<sup>th</sup> October 2014, he was arrested and accused of *facilitating of illegal entry* and *endangering human lives*. He turned 18 in pre-trial detention and was convicted in the juvenile court and sentenced to 7 years in prison. On hearing his conviction, he fainted.

Also in the cases outlined here, it is clear that those who are criminalised as smugglers do not in any way correspond to the discursive figure of the dan-

gerous human smuggler«. Instead, they are people on the move, who take an enormous risk by crossing the border in a boat that is unfit for sea in order to save themselves and their families. In some cases, they are driven to steer the boat by the circumstances, in others they are forced at gunpoint. Through the drastic criminalisation they are punished repeatedly. In other cases, the boat is steered by people who hope to earn money. However, even if they are aware of committing a crime, they usually do not know the extent of the possible punishment. As the crossing is very dangerous and the probability of being arrested and imprisoned is quite high, this task is often carried out by people in desperate situations who were offered this job by third parties. Of course, the transportation of migrants can also be undertaken from conviction, to help other people to exercise their right to asylum or to support them to lead a better life. But even in these cases, the ones aiding others can be sentenced to life imprisonment.

## **5.3 Pre-Trial Detention and Judgements**

Following the process in which an individual is accused of smuggling, detained, and tried in court, we will outline the extent to which the entire procedure is infused with injustice, violence and procedural shortcomings – breaching basic principles of human rights as outlined in the European Convention on Human Rights.

### **5.3.1 Pre-Trial Detention**

According to the European Convention on Human Rights, any person arrested or detained »shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial« (Article 5). However, Greece has

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violated this guarantee in several cases of which it was found guilty by the ECtHR.<sup>15</sup>

The research details that people arrested on suspicion of smuggling are held in pre-trial detention for months without their case being investigated. They are often moved between prisons and sometimes transferred to detention on the Greek mainland, such as the prison of Korydallos in Athens, or they are detained in the police stations on Chios and Mytilene. The graph (Figure II) based on data collected by AMS demonstrates the duration in which people are detained before the court procedure begins. In some cases, the trial is postponed once or even twice, resulting in a much longer period of detention. Analysing the 32 cases of first-instance trials monitored between 2015 and 2019, we found that the average time spent in detention before the first trial is **279 days**. If the trial takes place on the announced date, then the pre-trial detention is an average of **211 days**. If the trial is postponed once then the pre-trial detention is an average of **335 days**. If it is postponed twice, then the pre-trial detention is an average of **357 days**.

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<sup>15</sup> Greece was convicted of violating Article 5 in 2 cases between 2014 and 2016 of the obligation to provide the right to trial within a reasonable time or to release pending trial (Article 5 (3)) [Koutalidis v Greece [decided 2014] – App. No. 18785/13; Merkas v. Greece - Application No. 12863/14) - 09/09/2016]. Furthermore, the ECtHR held Greece in violation of Article 5 (4) in 5 cases, regarding the right to take proceedings to challenge the lawfulness of detention that have to be decided speedily by a court and result in the release of a person, if the detention is not lawful [Ha.A. v Greece (Application No. 58387/11) -21/07/2016; Amadou v. Greece (Application No. 37991/11) - 04/05/2016; Lavrentiadis v Greece [decided 2015] – App. No. 29896/13; Tsitsiriggos v Greece (No. 2) [decided 2015] – App. No. 18230/09; Christodoulou and Others v Greece [decided 2014] – App. No. 80452/12] (Fair Trials 2016, 2017). In addition, further reports suggest that there are ongoing severe violations of Article 5 regarding trials of migrants on the Greek Islands (Nicolet et al. 2018).

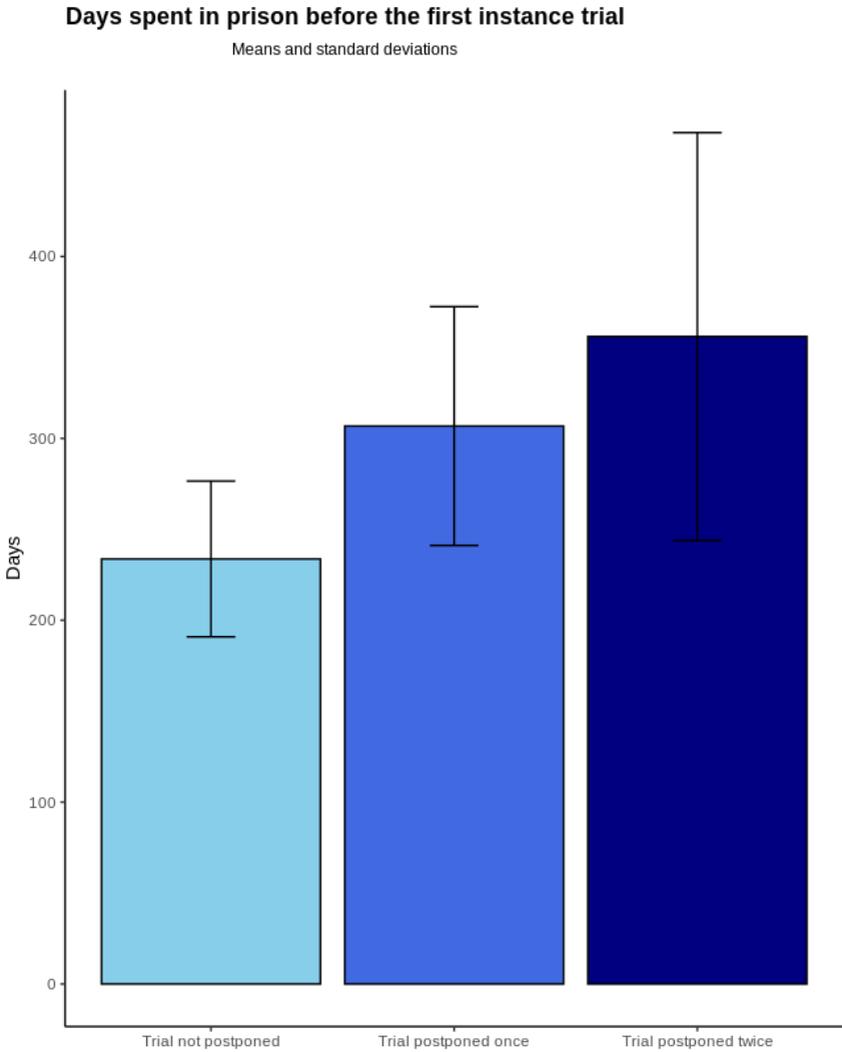


Figure II

## *Implementation of Smuggling Law*

While Greek law guarantees special detention conditions for asylum seekers, which include the right to medical care and legal representation, several reports highlight that detention conditions for third-country nationals in Greece fail to meet basic standards (GCR 2019). In June 2017, the European Court of Human Rights ruled that the Greek Government was in violation of Article 3 ECHR upon hearing an applicant's conditions of detention (Council of Europe 2017). The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) ascertained that even after the ruling by ECtHR, the conditions have hardly improved (Council of Europe 2020). Additionally, CPT criticized the ill-treatment of foreign-national prisoners by prison guards – an observation also made in several interviews conducted by AMS. For instance, A. R. from Afghanistan explained: »The police regularly beat prisoners for no reason. I was beaten many times since my arrest.«

In particular, CPT highlights the deficient system of health care, explaining:

»The widespread deficiencies regarding the state of health care services in prisons persist. Problematic issues such as access to health care, medical screening upon arrival or medical confidentiality are all compounded by the severe shortage of health care staff and the continued lack of integrated management of health care services.«

In addition, CPT demanded that detainees have to be »provided with adequate and appropriate food, and the manifest lack of cleaning, hygiene and maintenance in the police detention areas visited must be remedied« (Council of Europe 2020). The conditions in the Pre-Removal Detention Centre in Moria camp, Lesbos, have been described as particularly problematic by CPT. Similarly, legal monitors working on the island have described the conditions as amounting to »inhuman and degrading treatment« in regards to standards of hygiene and medical care (Saranti 2019).

### 5.3 Pre-Trial Detention and Judgements

This criticism is reflected in the experiences presented by migrants detained in Greek prisons under the accusation of smuggling. Interviews conducted by AMS reveal several accounts in which individuals spoke out about the poor quality of food, the small portions, and the difficulties in eating enough food in prison. As Y. Y. explained to AMS, »The food is full of bugs.« Similarly, A. R. and M. G. who were interviewed by AMS prior to their appeal in Mytilene said: »There is very little food provided and no breakfast at all.«

In regards to health care, M. G. and A. R. stated: »You have to pay for everything, for all hygienic products, for extra food. The medical personnel treat all health issues with a painkiller pill, even broken legs and stab wounds.« Y. Y. also explained that »the doctors don't treat the prisoners, they just give out pills.«



Moria Pre-Removal Centre. Photo: Knut Bry.



Protests in front of the court of Komotini on 4<sup>th</sup> February 2020 by a group of supporters for two men from Morocco accused of smuggling. Photo: Julia Winkler (Rollhäuser & Winkler 2020).

Many people who are accused of smuggling are not incarcerated in prisons or detention centres, rather they are detained for months in police stations, particularly on Chios. This practice is carried out despite the fact that the ECtHR has consistently denounced prolonged detention in police stations and has stated that is not in line with guarantees provided under Article 3 ECHR (Ahmade v. Greece, Application No 50520/09, Judgment of 25 September 2012, para 101; ECtHR, S.Z. v. Greece, Application No 66702/13, Judgment of 21 June 2018, para 40). The CPT report published on February 2019 states that »[c]onditions of detention in most police and border guard stations visited remain unsuitable for holding persons for periods exceeding 24 hours, and yet

they were still being used to detain irregular migrants for prolonged periods« (Council of Europe 2019). During an interview at Chios police station, one individual in pre-trial detention told AMS that the sun has not touched his skin for more than four months as he had been prevented from going outside. That individual also pointed out that without being able to afford a phone card, it was almost impossible to call his family in Syria.

#### 5.3.2 Judgements and Penalties

As outlined above, Greek Law 4251/2014 in line with EU legislation does not limit the number of years of conviction. Financial gain is not a precondition for criminal liability, it is merely an aggravating circumstance. The law defines a sentence for *facilitation of illegal entry* or *facilitation of illegal exit* of »up to ten (10) years of imprisonment and a fine of twenty thousand (20,000) EUR as a minimum« (Article 29). If the act was carried out »with a view to making a profit or by profession or habit, or if two (2) or more persons acted jointly, the above shall be sentenced to **at least** ten (10) years of imprisonment and a fine of fifty thousand (50,000) EUR as a minimum« (Article 29, emphasis added).

In addition, the number of passengers involved in the operation of *facilitation of illegal entry/exit* is calculated into the punishment with »imprisonment of up to ten (10) years and a fine from ten thousand (10,000) to thirty thousand (30,000) EUR for each transported person,« of which these numbers are further increased in the case of aggravating circumstances. For example, in the case of *endangering human life* (i.e. if there is a shipwreck or if the people on board are not given a life vest) the conviction shall be »at least fifteen (15) years of imprisonment and a fine of two hundred thousand (200,000) EUR as a minimum for each transported person«. In the case where people die during the crossing, then a conviction of »life imprisonment and a fine of seven hundred thousand (700,000) EUR as a minimum for each transported person« is delivered.

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Mitigating circumstances are factored into the verdict under the following conditions: good behaviour after arrest, young age, extreme poverty, state of necessity, no prior convictions, being honest, showing remorse, or diminished responsibility.

Of the 48 trials monitored (first-instance and second-instance) between 2014 and 2019, not a single defendant was acquitted of their charges. Rather, each defendant was convicted, sentenced to serve time in prison, and received high money penalties. In most cases, the defendants were not simply convicted with the charge of *facilitating illegal entry / human smuggling* (HS), but they were also convicted for additional offenses such as *entry without permission* (EWP), *endangering human lives / putting people in danger* (PPD), and *disobedience* (DO).

The data indicates that the **average sentence administered for every conviction that includes human smuggling** (HS; HS+EWP; HS+EWP+DO; HS+PPD; HS+PPD+EWP) within our data set is **48.65 years**, with an average prison sentence of **19.09 years**. Looking only at the 32 first-instance trials, the average sentence administered is **45.28 years**, with an average mandatory prison sentence of **17.76 years**. Looking only at the convictions for *facilitation of illegal entry / illegal transportation (human smuggling)*<sup>16</sup> which amounts to 15 out of 48 cases, the average sentence administered is **48.19 years**, with an average mandatory sentence of **17.08 years** (counting only first-instance trials: **16.58 & 7.69**).

The average money penalty administered for the offence of *human smuggling* in addition to the other related offenses is **396,687.50 EUR**.

The table below shows the convictions of all 48 trials monitored by AMS, including appeals:

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<sup>16</sup> Facilitation of illegal entry and illegal transportation are both crimes under Article 30 (1) L 4251/2014. Facilitation of illegal entry is also criminalized under Article 29 (5) L 4251/2014. In the following, both offenses are summarized under human smuggling.

### 5.3 Pre-Trial Detention and Judgements

<b>Conviction</b>	<b>Cases</b>	<b>Sentence</b>	<b>Prison</b>	<b>Penalty</b>
<b>HS</b>	15	48.19	17.08	410,000
<b>HS + EWP</b>	24	47.69	18.75	340,958.30
<b>HS + EWP + DO</b>	5	36.7	22.00	51,000
<b>HS+PPD</b>	2	49	25	N.A.
<b>HS + PPD + EWP</b>	2	93.08	25	1,370,500

HS: Human Smuggling, EWP: Entry Without Permission, DO: Disobedience, PPD: Putting People in Danger; Sentence and Prison time in years (mean value); Penalty in EUR

The following two graphs (Figures III and IV) outline the prison sentence (in years) and the money penalty administered in relation to the convictions in the 48 court cases observed by AMS. The graphs demonstrate how Greek law facilitates the calculation of an additional number of years to be served in prison and the monetary penalties for every individual transported (smuggled) which results in extremely high sentences, far beyond the 25-year maximum life sentence. The cases in which the accused were also convicted of *endangering human lives*, the sentence on average exceeds 80 years.

Since a life sentence cannot exceed 25 years (under the 2019 New Criminal Code it cannot exceed 20 years), the mandatory time served in prison is in fact much lower than the original conviction.<sup>17</sup> Nevertheless, due to their ruthless nature, these drastic punishments are extremely conspicuous within the context of the Greek justice system, particularly when compared to the sentencing of other offenses (such as murder). When the judges consider mitigating circumstances, the mandatory time to be served in prison is usually

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<sup>17</sup> Several amendments were made to Law 4251/2014. Article 95 (2) of Law 4623/2019 defined that the penalty of imprisonment (κάθειρξη) for specific criminal laws (including the above law for human smuggling) was set to at least 10 years of imprisonment and up to 15 years of imprisonment (before the maximum was 20 years). However, in case of a life sentence it can exceed this up to 25 years (under the 2019 New Criminal Code up to 20 years).

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reduced to ten years. If the total sentence administered is less than 25 years then the convicted individual will serve a mandatory 10-year prison sentence regardless of mitigating circumstances. Sentences that are less than 10 years remain the same without any reduction.<sup>18</sup> The research does not cover how long the condemned individuals are de facto imprisoned. However, there are ways in which to reduce the duration of the sentence while serving time in prison, which is mostly through labour.

In relation to Figure III and IV, it must be noted that the data set for several criminal offences is less reliable as only a small number of cases were observed, notably HS+PPD, HS+PPD+EWP and HS+EWP+DO. For instance, the data in Figure III implies that the penalty for HS+EWP+DO is less than that of HS+EWP. However, this data is derived from a small sample size and important aspects required to determine the conviction are not illustrated, notably the number of people transported, mitigating circumstances and the various judges and juries involved.

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<sup>18</sup> AMS observed 11 cases in which the mitigating circumstances of the defendants were taken into consideration: Five cases for good behaviour, three cases for young age, one case for extreme poverty, one case for diminished responsibility, and one case for not causing any danger to other people's lives.

### Years in prison sorted by criminal offence

Means and standard deviations

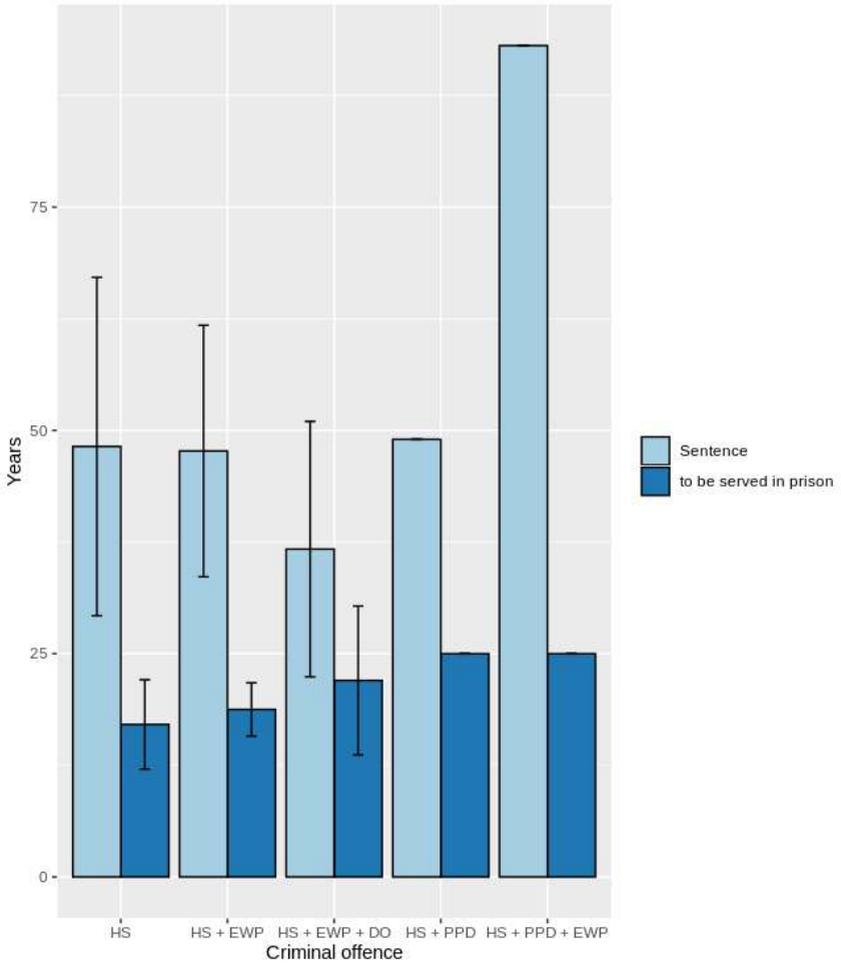


Figure III

### Money penalty sorted by criminal offence

Means and standard deviations

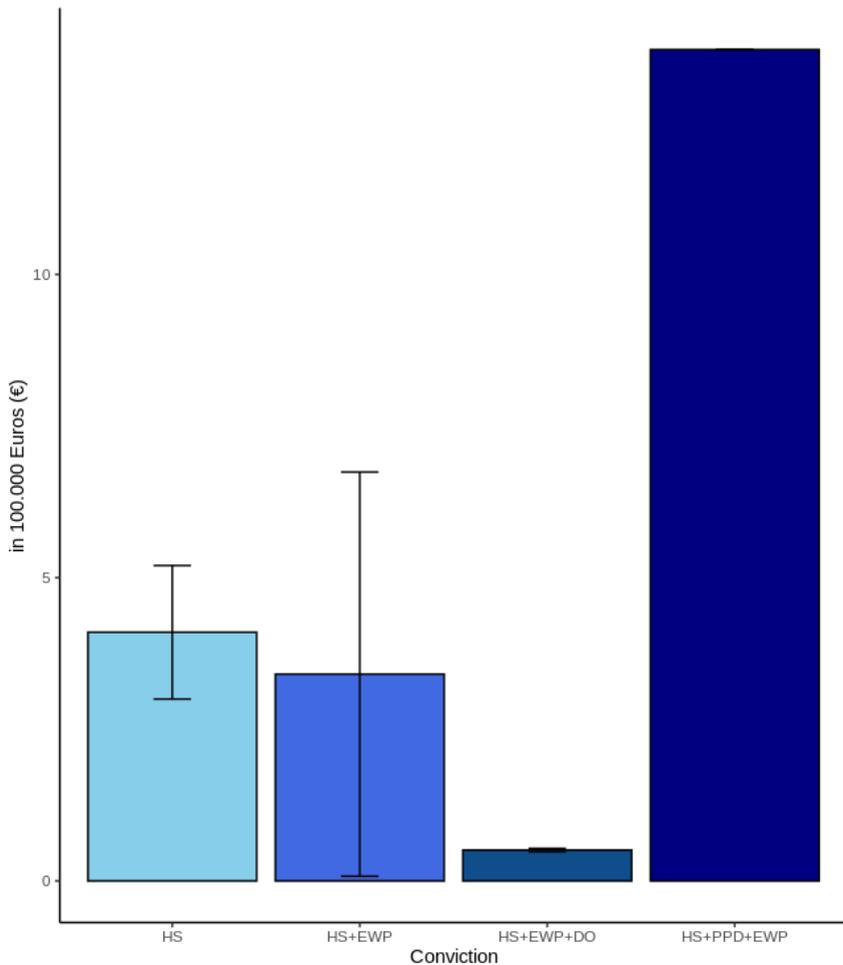


Figure IV

## 5.4 Procedural Shortcomings and Rights Violations

The European Convention on Human Rights outlines the right to a fair trial. However, this research reveals drastic violations of several aspects of the convention that will be outlined in the following section, with a particular emphasis on the severe shortcomings within the Greek Justice System that has resulted in violations of procedural rights. The findings are in line with former judgements of the ECtHR which found violations of Article 5 and 6 of the ECHR.<sup>19</sup>

### 5.4.1 Lack of Due Process and Superficial Investigation

In monitoring the trials against individuals accused of smuggling, it was revealed that many of the trials resulted in convictions higher than that of murder, with sentences exceeding human lifetime. The duration of these trials is particularly striking as they only lasted between 15 and 75 minutes. Below, Figure V presents the duration (in minutes) of both the individual and joint trials (two people tried together) which form the sum of the 48 trials monitored by AMS. From the data presented it is evident that joint trials tend to last longer: The average duration of all 48 trials was **38 minutes**. The average duration of a **single trial** was **27 minutes** and the average duration of a **joint trial** was **48 minutes**.

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<sup>19</sup> In 2016, Greece was accused of violating Article 5 ECHR in 7 decided cases (relating to pre-charge, pre-trial, or pre-sentence detention) and in violation of Article 6 in 2 decided cases (Fair Trials 2017).

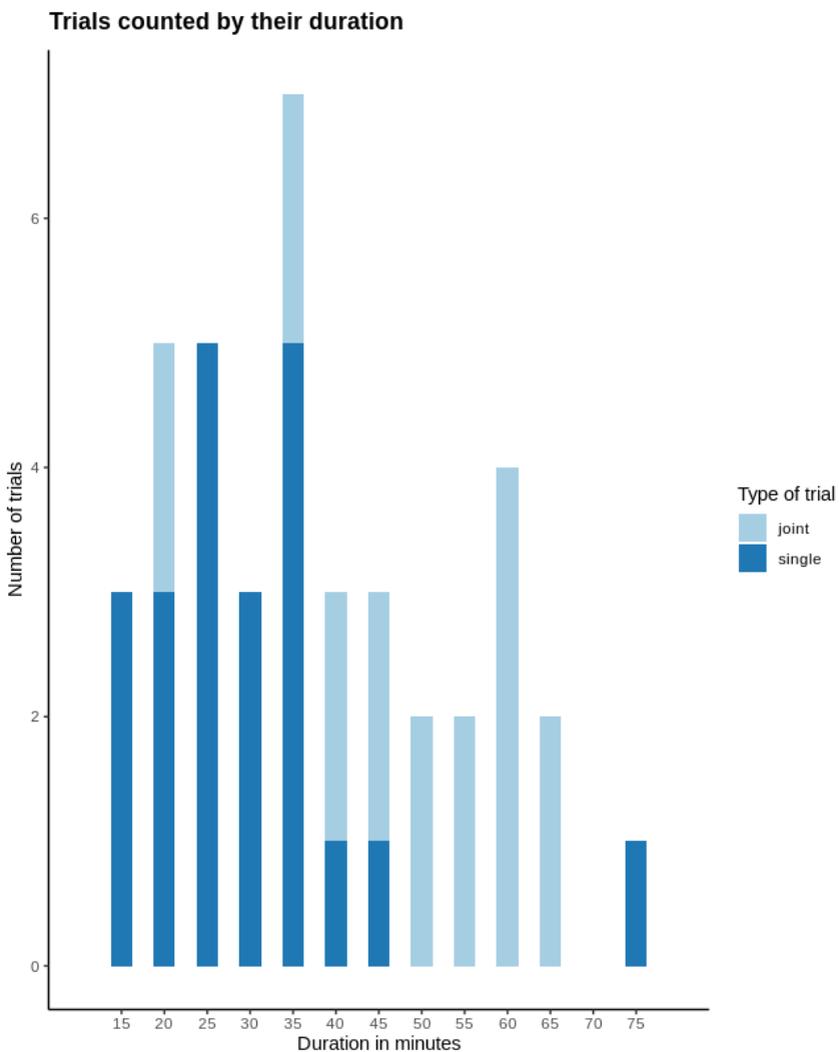


Figure V

#### 5.4 Procedural Shortcomings and Rights Violations

With the average individual trial lasting 27 minutes, it is evident that the trial does not live up to basic juridical standards. There is neither time for in-depth processing of the evidence or for the examination of witnesses, nor is there enough time to develop an in-depth comprehension of the defendants' personal circumstances.<sup>20</sup>

The superficial nature of the investigation is especially concerning in cases where people are convicted in joint trials where the same sentence is administered to two defendants without thorough assessment of their individual guilt. The treatment of these individual defendants as a ›guilty group‹ is highly problematic when considering Article 14 ECHR which upholds the protection from discrimination. AMS observed seven joint trials in total. In every procedure that AMS monitored, two individuals were tried and convicted with the same charges. The defendants were together on the same boat; yet neither the Greek Coast Guard, FRONTEX, nor any of the passengers on-board identified either of the defendants as the ones driving the boat. Despite the differences between their cases, including their motivation and the nature of their defence, both defendants received the same conviction. The examples provided below summarise three joint trials in order to explain show the superficiality of the court investigation:

Both Fadi M. from Egypt and Alijelam M. from Turkey were simultaneously accused of *illegal transportation in order to earn money* and for *entering Greece without permission*. They were arrested on the 24th November 2015. Fadi M. explained that he paid 400 USD to get on board a boat due to cross the Aegean

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<sup>20</sup> The ECtHR has exposed similar issues in various other cases in Greece. The court found violations of the right to a fair public hearing within a reasonable time by an independent and impartial tribunal established by **Article 6 (1) in 4 cases** [Kapetanios and Others v Greece [decided 2015] – App Nos 3453/12, 42941/12 and 9028/13; Vamvakas v Greece (no. 2) [decided 2015] – App. No. 2870/11; Sik v Greece [decided 2015] – App. No. 28157/09; Nikolitsas v Greece [decided 2014] – App. No. 63117/09]. Breaching the right to be presumed innocent until proven guilty (**Article 6 (2)**), Greece was held accountable in **1 case** [Kapetanios and Others v Greece [decided 2015] – App. Nos 3453/12, 42941/12 and 9028/13] (Fair Trials 2016, 2017).

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Sea from Turkey to Greece. After he reached Greece, he then had to return to Turkey to collect his family and children who were waiting for him. Alijlam M. declared in his examination by the judge that he decided to pay a smuggler to bring him to Greece with the intention of applying for asylum. He described how the smuggler threatened him at gunpoint on the Turkish shoreline and forced him to board the rubber dinghy. During the trial, which only lasted twenty minutes, only one witness was examined – a member of the Greek Coast Guard. While both defendants pleaded not guilty, the public lawyer from the Chios Bar Association requested the court to consider mitigating circumstances for both: Fadi M., for poverty and his young age (23 years-old); Alijlam M. for being an honest man, who had no prior convictions, who did not take any money, and who was threatened at gunpoint and forced to board the boat. Nevertheless, they were both sentenced to 53 years and one month in prison (25 years mandatory) and to a money penalty of 73,500 EUR.

Okur K. and Kose M. from Turkey were tried simultaneously in Mytilene, Lesbos, on 19th September 2016. They were arrested together on 15th December 2015. The Greek Coast Guard found their fishing boat in Greek waters close to Molyvos, Northern Lesbos. According to Okur, who was driving the boat, their GPS did not work, as such they got lost and ended up in Greek waters. During the trial, a member of the Coast Guard was called to give a witness testimony. He stated that at the time he suspected a smuggling operation was taking place and guided the fishing boat to the port of Mytilene. Upon their arrival, the authorities discovered an Afghan man hiding in the boat. The Coast Guard explained that both he and his colleagues did not know if the Afghan man had entered the boat with or without the knowledge of Okur K. and Kose M.. Neither of the defendants provided an explanation as to how the third person got into the boat. However, Kose's sister, the only witness for the defence, explained that her brother, who usually works as a fisherman and who looks after her, received 1000 TRL for the trip. Despite the limited evidence, they were found guilty. The testimony presented by Kose's sister was the only element indicating that Kose knew about the Afghan man. Additionally, 1,300 lira and 200 USD were found on the boat. However, there

#### 5.4 Procedural Shortcomings and Rights Violations

was no clarification as to who owned the money and whether or not it was used as a form of payment. The sentence was comparably low, which is also due to the fact that only one person was transported. On 17th October 2016, they were sentenced to three years and one-month in prison.

Two men from Syria, Hussein S. and Saad M.<sup>21</sup> were accused of *illegal transportation in order to earn money, entry into Greece without permission and disobedience*. The trial took place in Chios on 16th October 2016. Three witnesses were called for the prosecution, all of them Coast Guard officers. According to the testimony of the first witness, Dutch FRONTEX officers arrested the two Syrian men on Chios Island when a boat arrived with 44 passengers on board. Both defendants, Hussein S. and Saad M., were represented by lawyers from Chios Bar Association. The lawyers were assigned the cases only 30 minutes before the trial began – a common practice in the court procedure.

According to the testimony of the three witnesses for the prosecution, Saad M. was driving the boat. The first Coast Guard witness outlined that upon disembarking the boat, the two defendants attempted to escape, were stopped and arrested. The second witness explained that the migrants on board told him that they paid 1000 USD each for the journey. However, no information was provided as to whether the money was paid to Saad and Hussein or to someone else. The written testimony of two witnesses on-board described how they had paid for the transportation in Turkey, but did not specify to whom. Furthermore, they recognised Saad as the captain of the boat.

Saad M. and Hussein S. were both found guilty of all three accusations. They were convicted to 32 years and 2 months in prison of which they will serve a mandatory sentence of 25 years. They were also fined 52,500 EUR. No mitigat-

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<sup>21</sup> AMS interviewed the defendants while they were in pre-trial detention in Chios. Saad M. explained that he did not know that driving the boat into Greek waters was a criminal offence. He explained that he paid 1200 USD to the smugglers and that he did not have any money left to call his family in Syria, although he was very worried about his sick father. 23-years-old Hussein S. explained that his passport and belongings were confiscated by the Coast Guard and had gone missing when he was arrested along with Saad M.

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ing circumstances were taken into consideration. Their trial lasted a total of 35 minutes.



The High Court of Chios convicts migrants in a routine manner for human smuggling, often sentencing the accused to life in prison. Photo: Anonymous.

### **5.4.2 Lack of Adequate Legal Representation**

According to Article 6 (3) of the ECHR, anyone charged with a criminal offence has the right to the following:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and the facilities for the preparation of his defence;

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- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

While only a small number of violations have been sanctioned by the ECtHR,<sup>22</sup> the standards outlined in Article 6 (3) are far from the reality faced by defendants who are accused of human smuggling and other related charges. For instance, several practical barriers prevent defendants from accessing adequate legal support. Furthermore, in relation to other severe violations in trials against asylum seekers facing criminal charges, it is reasonable to assume a racist bias in the detention and court system (Nicolet et al. 2018).

In a number of cases, migrant detainees are neither »informed promptly, in a language which [they] understand [...] and in detail of the nature and cause of the accusation against« them, nor are they adequately informed about their right to a lawyer in advance of their hearing in order to prepare their defence. In the Greek prison system, no telephone service is provided free of charge for the inmates. Should a detainee wish to contact the outside world, they need to obtain a phone card, which can only be purchased. In many cases, individuals whose belongings are confiscated cannot afford a telephone card and therefore are deprived of any contact with the outside world. These people can neither contact their family to find out their whereabouts, to update them re-

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<sup>22</sup> Between 2014 and 2016 one violation of the right to defend yourself through legal assistance of your own choosing was found (Article 6 (3) (c)), [Vamvakas v Greece (No. 2) [decided 2015] – App. No 2870/11] and one violation of the right to examine witnesses against you (Article 6 (3) (d)) [Nikolitsas v Greece [decided 2014] – App. No. 63117/09] (Fair Trials 2016, 2017).

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garding their capture, nor to ask for help (i.e. to attain basic goods in prison or to organize their legal defence).

As detailed in chapter 5.3., an individual can be incarcerated in pre-trial detention for up to one year before their case goes to trial. During this time it is very unlikely that the person is able to access legal advice or prepare a defence strategy. The court appoints a lawyer for the defendant from the bar association in the location where the trial takes place. As such, in most cases the respective lawyer is only appointed to a case on the day in which it is scheduled to go to trial. For the cases scheduled in the morning, the public attorney is only granted access to the defendants file approximately 30 minutes before the trial commences. This makes it impossible for the lawyer to gain sufficient knowledge of the case, to do any investigation, to get to know the defendant, or to develop a defence strategy.

This is visible in the case of Kose M. who appeared before the court in a joint trial with Okur K. During the proceedings, Kose's sister gave testimony as a witness for the defence. However, since there was no prior coordination between the lawyer, the defendant, and the witness, her testimony contradicted the defence of her brother. In most of the cases witnessed by AMS in which a lawyer from the bar association was provided by the court, the defence strategy was simply to emphasize that mitigating circumstances should be taken into account.

A similar inadequate defence can also be observed in the case of Alijelam M. According to the Coast Guard witness, the other migrants onboard the boat (44 in total) pointed to Alijelam as the driver. However, Alijelam M. pleaded not guilty and explained that he was seeking asylum in Greece. The only line of defence provided by the lawyer was that Alijelam claimed not to have driven the boat. The lawyer did not challenge the fact that no written testimony or witness testimony from the group of migrants onboard was presented to the court to support the claims made by the Coast Guard.

These examples show that the lack of qualified defence lawyers equipped with necessary resources strongly contributes to convictions lacking a fair trial. Usually lawyers do not know their clients, they only get access to the case files right before the trial, they have no time to prepare a defence strategy and summon witnesses to the trial. This deprives the accused of the right to a fair account of their situation and a qualified legal defence.

### **5.4.3 Lack of Appropriate Interpretation**

It is almost impossible for third-country nationals to follow court proceedings that take place in the Greek language. As such, many of the trials monitored by AMS reveal dramatic shortcomings by the court system to provide adequate and professional interpretation. This systematic disregard for translation in the court procedure undermines the crucial right for the accused to participate in their own defence, a core principle of the right to a fair trial. Similar findings were presented in detail in a report presented by an international legal committee who monitored a court procedure against 35 migrants in the high court of Chios in April 2018 (Nicolet et al. 2018: 21ff). To name a few examples: Y. Y. told AMS that he did not understand much of the interrogation due to very bad translation. He explained that the translator was Greek and had learnt Turkish over the course of a few months while visiting Turkey. Partners of AMS who speak Turkish and who were present with the team at several court procedures pointed out that they could not understand the Turkish interpretation as the interpreter simply did not speak Turkish. In a similar case, the lawyer appointed to Comeri E. M., whose trial took place in Chios on 18th October 2016, requested that the translator be replaced. However, both the public prosecutor and the judge rejected the request and Comeri was convicted and sentenced to 86 years in prison.

#### **5.4.4 Personal Influence of the Judge and Presumption of Innocence**

According to Article 6 (1) ECHR the tribunal must be impartial and the presumption of innocence outlined in Article 6 (2) requires that the burden of proof rest upon the prosecution to substantiate the allegations made against the accused. A court may not convict unless guilt has been proved beyond reasonable doubt. In individual cases, the ECtHR found the Greek state in violation and it was also outlined in the above mentioned report of an international legal committee regarding the case of the Moria 35 (Nicolet et al. 2018).

The observations conducted by AMS raise doubts about the impartial nature of the tribunal and the presumption of innocence. It revealed a severe difference in the judgement of the case depending on the respective juries appointed. This is especially visible in cases where the sentence exceeds far beyond the recommendations provided by the public prosecutor. In some cases, the public prosecutor suggested a portion of the charges be acquitted or that mitigating circumstances be taken into consideration. However, these suggestions were rejected by the judges. This is made particularly clear in the data set when AMS monitored several trials in one day (17th October 2016 on Chios), when the judges' sentencing was especially harsh. On that day, the judges refused to take mitigating circumstances into account in five cases as suggested by the prosecutor (Case No. 1: Cetinkaya O.; Case No. 5: Karakas S.; Case No. 8: Sirinbacak H., Seren O.; Case No. 14: Mohamed M.-Z.; Case No. 16: Hussein S., Saad M.). On the same day, the penalties imposed by the jury far exceeded the recommendations of the public prosecutor in four cases (Case No. 4: Basar S.; Case No. 8: Sirinbacak H., Seren O.; Case No. 10: Fadi M., Alijelam M.; Case No. 18 Khazei M.). In three of these cases, the defendants were accused of *illegal transportation in order to earn money*. Although the public prosecutor determined that the defendants did not receive any money for the transportation, and suggested the indictment be adjusted to *illegal transportation*, the defendants were convicted of *Illegal transportation in order to earn money* in all three cases.

#### 5.4 Procedural Shortcomings and Rights Violations



Poster in the court of Mytilene, Lesvos, with the slogan: »Give us back our islands, give us back our lives.« Photo: Valeria Hänsel, January 2020.

## **5.5 Summary**

The implementation of anti-smuggling law in Greece leads to life sentences in prison for third-country nationals. Not in a single one of the 48 trials monitored by AMS was a defendant acquitted of his charges, instead all were convicted to an average sentence of **48.65 years** in prison, with an average mandatory sentence of **19.09 years**. The average money penalty administered for the offence of human smuggling and other such related offenses was **396,687.50 EUR**.

The people most affected are those who drive the boat and who are already marginalized by society and racialized, and therefore are not advocated for. All of them are male and third country nationals. Either they are migrants attempting to seek asylum in the European Union and/or are people living in poverty. In some cases, these individuals are forced to drive the boat and are ultimately unaware that in doing so they are committing a felony crime that can lead to life imprisonment. They do not have access to lawyers or translators and once they are labelled as smugglers they are forgotten in prison and ostracized – as alleged threats to the state and organized criminals who exploited others.

In some of the cases monitored, migrants reported suffering ill-treatment and abuse during and after their arrest. They are incarcerated, transferred to pre-trial detention in prisons or police stations for months on end, of which the average duration was **279 days** in the cases monitored by AMS. Legal monitors such as CPT and the ECtHR have repeatedly condemned the inadequate detention conditions that violate the standards for basic human rights. The accused are left in these circumstances and conditions without access to information or legal aid until they are brought before the court.

The entire court procedure is infused with severe procedural failures that violate Article 5, 6 and 14 of the ECHR regarding the grounds of a fair trial. As observed by AMS, the average duration of the court procedures for the individual trials lasted **27 minutes**. During these trials, the defendant was rarely pro-

vided the opportunity to adequately explain their situation or their defence, nor could they understand the procedure due to incomprehensible translation and a system that intentionally disempowers the defendant. It should also be emphasised that there is no thorough presentation and assessment of evidence in the court procedure. Convictions are often based on the account of one single witness, usually a Coast Guard who claims to recognize the defendant in an event that happened many months ago, and who was potentially not even involved in the arrest. The judges hardly take the personal situation and motivation for committing the offense into account, which is especially concerning in joint trials. Furthermore, the courts refrained from investigating allegations brought up by the defendants of beatings by the Coast Guard or the Greek police. This shows that the implementation of anti-smuggling legislation on the Greek islands is characterised by glaring violations of fundamental rights – from the moment of arrest to the courtroom. The people affected are those who already suffer from exclusion and racist discrimination.

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Although the distance from Lesvos to the Turkish shore is only about twelve nautical miles wide but the crossing in a rubber dinghy is life-threatening. Foto: Knut Bry.

# Chapter 6

## Conclusions

This report presents an analysis of the criminalization and incarceration of migrants on the Greek Aegean Islands within the framework of Europe's fight against human smuggling along its external border. It outlines the way in which anti-smuggling law has evolved and presents core discourses within the framework of the securitization of EU border policies which have resulted in criminalizing the facilitation of entry for migrants into Europe with severe consequences. However, the draconian punishments not only materialise out of the discourse and legal framework provided by the EU, they also emerge from punitive anti-smuggling legislation prescribed by the Greek justice system which ultimately fails to adhere to requirements of a fair trial and adequate detention conditions as outlined by the ECHR.

On the Greek hotspot islands, these draconian punishments are imposed by the criminal justice system on third-country nationals accused of driving a boat from Turkey to Greece with migrants onboard. These individuals are systematically sentenced to life imprisonment with additional money penalties soaring into the hundred-thousands (EUR). According to the Greek Ministry of Justice, in 2019 1,905 people were imprisoned in Greece on the charges of *facilitating illegal entry*. This research revealed that these policies merely target the smallest link in the chain. The people accused of human smuggling are migrants themselves who opted to drive the boat in order to access the European asylum system, consequently they were then arrested and sentenced to life in prison or people pushed into driving the boat due to their socio-economic background. Therefore, it can be deduced that the policies designed and im-

## Conclusions

plemented by the EU and the Greek State to prevent human smuggling and to stop irregular migration ultimately cannot achieve their goal. The incarceration of migrants and the normalisation of such oppressive practices does not hit the people involved in organizing the crossings and does not present any visible impact on the numbers of illegalized crossings into Europe.

The EU's practice of impeding all safe and legal means of crossing into European territory has instead contributed to a thriving smuggling business. Migrants can only apply for asylum in the EU if they receive escape aid. The anti-smuggling measures adopted by the Greek state do little more than penalize the underprivileged, the marginalized (who rely on smuggling networks to cross into EU territory in order to seek safety), and those who are forced to drive a boat due to their financial situation. No one is advocating for these people simply because they are constructed as ›the others‹, migrants or Turkish citizens who have been labelled as criminals; they are not seen as *white* or they are affected by orientalist stereotypes; they do not hold a European passport; they are male and in many cases they come from a low socioeconomic background. After prolonged incarceration in pre-trial detention, the vast majority of these individuals are convicted in court procedures that breach the fundamental standards established for a fair trial. There is no in-depth investigation, it is structurally impossible for the defendant to interact and communicate with their lawyer, no information is provided for the defendant, and often the translation is entirely inadequate. In the worst case, defendants are convicted and sentenced to a life in prison within a mere 15 minutes.

The basis for these exceptionally harsh punishments is ratified by Greek Law 4251/2014 and its amendments, which endorse the sentencing of those accused of *facilitation of illegal entry* to an unlimited number of years in prison, although the actual time served in prison cannot exceed a life sentence (25 years, since 2019 20 years under the New Criminal Code). The regulations established to fight human smuggling at the level of the European Union are rather ambiguous and thus provide the Member States with a broad range

from which to implement the directives. In fact, the Greek transposition of this EU legal framework is one of the harshest of all EU Member States.

The EU regulations also provide a framework in which to punish the *facilitation of illegal entry*, that goes far beyond the regulations provided by the United Nations. Within the framework of EU law, the definition of illegal entry has been expanded upon to include a broad range of people, so much so that the EU *Facilitators Package* sanctions the criminalization of facilitating a border crossing without financial gain (Article 27 (1a)). Most importantly, migrants themselves can be criminalized and convicted as ›human smugglers‹, a practice which has been institutionalised within the Greek court system. While the UN Convention against Transnational Organized Crime leaves no doubt that individuals should not be criminalized for being subjected to a smuggling operation (Article 5), the EU *Facilitators Package* does not provide any protection for migrants who rely on the smuggling system. This is clearly evident in the 48 cases monitored by AMS, where the defendants did not profit in any way from the smuggling business.

This aggressive nature of the EU regulations is directly linked to the political perception of migration as a security threat to the European Union. The figure of the ›human smuggler‹ is constructed around securitizing narratives, which stress the necessity of anti-smuggling operations. However, the fight against ›human smugglers‹ is connected to humanitarian arguments, where the loss of lives, exploitation, and mistreatment of vulnerable people can be prevented through strict anti-smuggling policies. This narrative primarily developed by means of obscuring and blurring the definition of ›human smuggling‹ and ›human trafficking‹. This is clearly evident in the EU *Facilitators Package* that does not differentiate between the terms, while the UN Convention against Transnational Organized Crime clearly separates both offenses.<sup>23</sup> While both

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<sup>23</sup> The UN Convention defines human smuggling as the facilitation of border crossing for undocumented third-country nationals “in order to obtain, directly or indirectly, a financial or other material benefit” (Article 6, UNODC 2004: 55). Human trafficking is however not linked to border crossings but involves coercion like threat or force, abduction, fraud, decep-

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phenomena can overlap and smuggling can in fact involve exploitation and violence against those being smuggled, the request of the individual to participate in a smuggling operation in order to cross a border is voluntary and necessary in order to exercise the legal right to apply for asylum (since there is no safe passage for asylum seekers to enter the European Union). The obfuscation of both terms provides an explanation as to why people who are labelled as ›human smugglers‹ and perceived (counterfactually) as an exceptional threat – violent criminals intentionally exploiting others – and as such severely punished. This manifests in racist discrimination of the accused who are denied the opportunity to present their perspective and personal situation to the court. In addition, they receive much less support and advocacy than European citizens who are accused of *human smuggling*.

The trials on the external border of the EU in the Aegean amount to a tragic border spectacle (De Genova 2013). They appear to secure the European border, punish criminals for the exploitation of human beings and for putting lives at risk, and act as a deterrent to crack down on the smuggling business. In reality they ruthlessly destroy hundreds of people's lives who have already been pushed to the margins of society, the very people that these ›anti-smuggling‹ laws claim to protect. However, there is no visible effect on the movement of people and the number of arrivals into Greece. Instead, the European Union shares responsibility for the oppression of migrants through the prevention of safe passage, for fostering a discourse around criminalisation, and for providing a legal framework in which to penalise for the offences outlined in this report. Additionally, the European Union tacitly accepts the human rights violations conducted by the Greek justice system towards those accused of ›human smuggling‹. The entire legal system, throughout the different levels, supports these rights violations experienced by migrants on a regular basis in the Greek courts in trials masquerading the delivery of justice. These severe rights violations seem to be possible only because the people af-

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tion or abuse of power (Article 3(a), UN Protocol to Prevent, Suppress and Punish Trafficking in Persons).

affected are not considered *white* or are affected by orientalist stereotypes, do not hold European passports, and have no advocacy efforts to defend their rights in Europe.



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# **bordermonitoring.eu e.V.**

The non-profit, charitable association bordermonitoring.eu e.V. was established in Munich in 2011. The association documents and analyses the negotiations and conflicts around the politics, practices and events relating to the European border regime and migration movements. To this end the association combines academic research, civil engagement, a practice of critical publication with concrete support for refugees and migrants. In this way the association contributes towards a change in the realities at the borders and in their consequences for European society.

## **Support the activities of the association!**

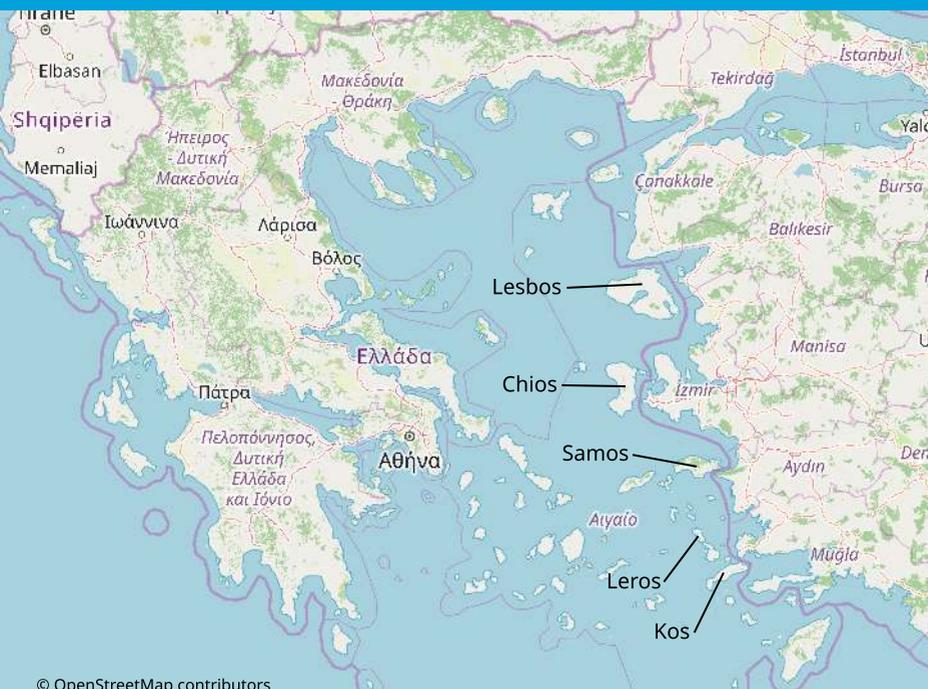
The activities of the association are financed through donations and membership fees. Due to its status as a charitable, non-profit organisation, donations and membership fees are tax-exempt. Members receive all of our printed reports for free by mail.

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The fight against ›illegal entry‹ and ›human smuggling‹ is one of the core priorities of the European Union's border policies. ›Smugglers‹ are considered criminals exploiting human beings and putting their lives at risks. In widespread discourses and EU documents, people facilitating border crossings are equated with human traffickers. This leads to the draconian punishment of those labelled as smugglers, justified through both border security policies and allegedly humanitarian concerns to protect human lives.

This report shows the impact of these policies at the EU-external border in Greece. It analyses how EU and Greek policies and laws hit exactly those who they supposedly aim to protect: the people convicted are marginalised and excluded from society, often refugees themselves, who are forced to steer the boat from Turkey to the Greek Islands to seek asylum or whose socio-economic situation forces them to do so.

The analysis follows the fate of 48 people from their arrest to the courtroom. All of them were convicted in trials failing even basic standards of fairness. In most cases they are sentenced to life-long imprisonment and incarcerated as scapegoats of the failed European migration policy.



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