COVID-19, Asylum in the EU, and the Great Expectations of Solidarity

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‘Stay at home. Wash your hands frequently with soap and water.’ These simple instructions could help save lives and flatten the coronavirus curve. Unfortunately, things are not so simple for the almost 39,000 asylum-seeking men, women, and children,1 among them thousands of unaccompanied children,2 residing on the Greek Aegean islands. Asylum seekers on the islands’ ‘hotspots’,3 where most are accommodated, face unsanitary conditions. There is one shower for every 500 people, and one toilet for every 160.4 To collect their meals, they must queue in line for hours, with hundreds of other

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1 See UNHCR, ‘Aegean Islands Weekly Snapshot: 27 April – 3 May 2020’ (4 May 2020) <https://reliefweb.int/report/greece/greece-aegean-islands-weekly-snapshot-27-april-3-may-2020> accessed 11 May 2020.

2 See Greek National Center for Social Solidarity, ‘Situation Update: Unaccompanied Children (UAC) in Greece’ (30 April 2020) <http://www.ekka.org.gr/images/ΣΤΑΤΙΣΤΙΚΑ_2020/EKKA%20Dashboard%202020/4-2020.pdf> accessed 11 May 2020.

3 For a brief overview of the ‘hotspot approach to migration management’ and to ‘hotspots’ (the colloquial name for first-reception facilities), see European Parliamentary Research Service, ‘Hotspots at EU External Borders: State of Play’ (2018) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623563/EPRS_BRI(2018)623563_EN.pdf> accessed 11 May 2020. For a detailed list of the tasks to be performed at hotspots by different agencies, see D Neville, S Sy, and A Rigon, On the Frontline: The Hotspot Approach to Managing Migration (European Parliament 2016) 27–29.

4 Greek Council for Refugees and Oxfam, ‘Lesbos COVID-19 Briefing: Update on the EU “Hotspot” Moria by the Greek Council for Refugees and Oxfam’ (1 April 2020) <https://www.gcr.gr/en/news/press-releases-announcements/item/1420-oxfam-gcr-briefing-for-lesvos-amidst-the-coronavirus> accessed 11 May 2020.
people around them. The situation is no better on the mainland. Refugee camps and accommodation facilities in Ritsona, Malakasa, and Kranidi were placed into quarantine in the course of April 2020 after hundreds of asylum seekers tested positive for COVID-19.

The global coronavirus pandemic has brought asylum reception conditions in Greece back into the spotlight. The virus heightens the danger that living in squalid, overcrowded camps entails for the well-being and health of thousands of people seeking asylum. How is it possible that asylum seekers find themselves in such substandard conditions in Europe? What is being done, and what more should be done, to ensure their health and dignity?

IMPLEMENTING THE COMMON EUROPEAN ASYLUM SYSTEM

The European Union (EU) has been developing its asylum policy since 1999 with a view to creating a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union. The initial implementation design of the EU’s asylum policy foresaw that Member States would realize the Common European Asylum System (CEAS) largely through deploying their own resources. The CEAS was largely conceptualized as a ‘common system of national variants’. What is ‘common’ is the legislation adopted at the EU level; the implementation of that law is predominantly a matter of national concern. EU legislation, namely the Procedures Directive, imposes specific duties on Member States with a view to establishing functioning and well-resourced national asylum systems. Moreover, according to EU law and specifically the Reception Conditions Directive, Member States must provide asylum applicants with an adequate standard of living, which guarantees their subsistence and protects their physical and mental health.

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5 ibid.
6 See respectively K Fallon, ‘Greece Quarantines Camp as 20 Refugees Test Positive for COVID-19’ (Al Jazeera News, 2 April 2020) <https://www.aljazeera.com/news/2020/04/woman-greece-refugee-test-positive-coronavirus-200401111738369.html> accessed 11 May 2020; R Maltezou, ‘Greece Quarantines Second Migrant Camp after COVID-19 Case Confirmed’ (Reuters, 5 April 2020) <https://uk.reuters.com/article/us-health-coronavirus-greece-camp/greece-quarantines-second-migrant-camp-after-covid-19-case-confirmed-idUKKBN21N06B> accessed 11 May 2020; L Papadimas and R Maltezou, ‘Coronavirus Hits Third Migrant Facility as Greece Plans to Ease Lockdown’ (Reuters, 21 April 2020) <https://www.reuters.com/article/health-coronavirus-greece/coronavirus-hits-third-migrant-facility-as-greece-plans-to-ease-lockdown-idUSL5SN2C90XN> accessed 11 May 2020.
7 Tampere European Council, ‘Presidency Conclusions, 15–16 October 1999’ (Tampere Conclusions) para 15.
8 See analysis in E Tsourdi, ‘The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System’ in F Bignami (ed), EU Law in Populist Times: Crises and Prospects (Cambridge University Press 2020) 191.
9 See Directive 2013/32/EU, OJ L180/60 (2013 Procedures Directive) art 2(f).
10 Directive 2013/33/EU, OJ L180/96 (2013 Reception Conditions Directive) art 17(2).
There is also dedicated EU legislation, the Dublin III Regulation, about determining which Member State is responsible for examining an asylum claim. Apart from limited cases related to unaccompanied minors and safeguarding family unity, the ‘responsible’ State is usually the one that the asylum seeker first entered. In practice, for those who arrived irregularly, this usually means Greece or Italy. EU’s Dublin system thus does not take into account the preferences of asylum seekers when assigning responsibility for the examination of claims. Regular entry channels to the EU for protection purposes, such as resettlement, are very limited and most asylum seekers arrive irregularly. This system does not result in fairly sharing responsibility among the 27 Member States, given the geographical bias when it comes to determining responsibility.

Once responsibility is assigned, it is for the ‘responsible’ Member State alone to provide for the asylum seeker; any further EU measures, such as EU funding, are limited. Nevertheless, Member States have different levels of economic development and different conceptualizations of welfare. This necessarily affects their protection capacity in practice. The CEAS does not currently incorporate people-sharing measures, namely to redistribute asylum seekers, refugees, or beneficiaries of subsidiary protection to other Member States. Once a person is found to be in need of international protection (as a refugee or a beneficiary of subsidiary protection), it is up to the Member State that granted status to issue the beneficiary with a residence permit on protection grounds. Beneficiaries do not enjoy the right of free movement to other Member States, unless they fulfil the conditions of the Long-Term Residents Directive, which include a five-year residence requirement and stable and regular resources. The design of the system thus pits Member States against one other and creates disincentives for compliance.

The case of Greece is an example in point, but is far from unique. As early as 2011, the European Court of Human Rights (ECtHR) identified structural deficiencies in the country’s asylum procedures and reception conditions. These were due to a mixture of Greece’s inability to protect (the country was hard hit by the financial crisis) and its unwillingness to protect and fully implement the CEAS norms. Greece has been slowly improving its national asylum system, for example through the establishment of a dedicated national administrative authority, the Greek Asylum Service, tasked with the examination of asylum claims at first instance. Supported by EU funding, it has implemented programmes to provide urban accommodation and cash assistance.

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11 Regulation (EU) 604/2013, OJ L180/31 (Dublin III Regulation).
12 See ibid ch II.
13 See Directive 2011/95/EU, OJ L337/9 (2011 Qualification Directive) art 24.
14 See Directive 2003/109/EC, OJ L16/44 as extended in 2011.
15 See MSS v Belgium and Greece App No 30696 (ECtHR, 21 January 2011).
16 First established through Law No 3907/2011 of 26 January 2011, Official Gazette of the Greek Government, Series A, Issue 7, 19ff.
17 See UNHCR Greece, ‘ESTIA Accommodation Capacity Weekly Update’ (4 May 2020) <http://estia.unhcr.gr/en/estia-accommodation-capacity-weekly-update-4-may-2020/> accessed 11 May 2020.
18 UNHCR Greece, ‘Cash Assistance Update: March 2020’ (15 April 2020) <http://estia.unhcr.gr/en/greece-cash-assistance-march-2020/> accessed 11 May 2020.
to growing numbers of asylum seekers in Greece. Nevertheless, deficiencies in asylum processing, and most notably in reception conditions, persist throughout the country.

COVID-19 has brought into sharp relief the suffering for asylum seekers and persisting violations of their human rights. This has led the European Commission,19 Members of the European Parliament,20 numerous civil society organizations,21 and the EU’s Fundamental Rights Agency,22 among others, to call for the evacuation of refugee camps in Greece and for the activation of intra-EU solidarity measures. They have been recently joined by the ECtHR, which ordered interim measures in the case of *Ev Greece*,23 requiring that several people be moved immediately out of Moria, a hotspot functioning in Lesbos, to obtain medical treatment and to ensure that they were not exposed to a risk of inhuman or degrading treatment.

**THE IMPERATIVE OF INTRA-EU SOLIDARITY: GREAT EXPECTATIONS?**

EU law contains a legally binding principle of solidarity and fair sharing of responsibility in article 80 of the Treaty on the Functioning of the European Union (TFEU). This principle profoundly impacts the goal of the CEAS: it dictates a certain ‘quality’ in the cooperation between the different actors, and arguably unsettles the CEAS’s implementation modes, for example the way responsibility is to be allocated.24 The provision’s wording not only permits, but in fact requires, the adoption of concrete measures whenever necessary, such as financial support or people-sharing arrangements. Special importance should be attached to its reference to ‘solidarity and fair sharing of responsibility’, which ratchets up the duty – ‘solidarity plus’.25 Notwithstanding the importance of inter-State solidarity and fair sharing, however, the CEAS currently lacks a genuine

19 See European Commission, ‘COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement’ (2020/C 126/02) OJ C126/12.

20 European Parliament, ‘MEPs Call for Solidarity and Measures to Prevent Covid19 Crisis in Refugee Camps’ (*News European Parliament*, 3 April 2020) <https://www.europarl.europa.eu/news/en/headlines/world/20200402STO76413/meps-call-for-measures-to-prevent-covid19-crisis-in-refugee-camps> accessed 11 May 2020.

21 ActionAid Hellas and others, ‘Immediately Honour Commitments to Relocate Unaccompanied Children from the Greek Islands’ (3 April 2020) <https://reliefweb.int/sites/reliefweb.int/files/resources/Open%20Letter_Renew%20efforts%20to%20relocate%20unaccompanied%20children%20April%202020%20FINAL%20V.pdf> accessed 11 May 2020.

22 FRA, ‘Relocation of Unaccompanied Children from Greece’ (17 March 2020) <https://fra.europa.eu/en/publication/2020/relocation-unaccompanied-children-greece> accessed 24 July 2020.

23 See information on the case in Refugee Support Aegean, ‘Evacuation of Overcrowded Island Camps a Legal Imperative’ (21 April 2020) <https://rasaegian.org/en/evacuation-of-overcrowded-island-camps-a-legal-imperative/> accessed 11 May 2020.

24 E Tsourdi, ‘Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System’ (2017) 24 Maastricht Journal of European and Comparative Law 667, 675.

25 ibid 673–74.
system for allocating responsibility among the Member States based on objective indicators. In addition, no structural change has been made to the EU’s responsibility allocation system, only temporary exceptions.

To date, solidarity initiatives have been emergency-driven. A temporary shift to the normal workings of the EU’s responsibility allocation system took place in 2015–17. This was meant to respond to the increased numbers of asylum seekers, with 1.82 million irregular border crossings detected in 2015, mainly as a result of armed conflict in Syria. Emergency relocation, meaning intra-EU transfer of asylum seekers between Member States, was established through two Council decisions to benefit Italy and Greece. This initiative was undercut by several factors, including its own legislative and administrative set-up. Both emergency decisions numerically capped the number of beneficiaries concerned, restrictively defined the eligible applicants for relocation, and expired after two years. As a result, Member States at the external borders were given very little assurance that there would be the requisite level of solidarity and that it would be sustainable over the long term. Finally, in the same way as the general Dublin III Regulation, both decisions failed to take into account the preferences of asylum seekers. They thus failed to ensure their full cooperation. In addition, certain Member States simply refused to relocate asylum applicants. The Court of Justice of the European Union recently found this refusal to violate EU law. Nevertheless, that time-limited scheme included binding obligations for Member States, in the form of relocation quotas, and led to the relocation of around 35,000 asylum seekers from Greece and Italy to other Member States.

The EU’s asylum agency, EASO, and its external border control agency, FRONTEX, also act as indirect vessels of solidarity as they draw from the EU budget

26 P De Bruycker and E Tsourdi, ‘In Search of Fairness in Responsibility Sharing’ (2016) 51 Forced Migration Review 64, 65.
27 Frontex, Risk Analysis for 2016 (2016) 6.
28 Decision (EU) 2015/1523, OJ L239/146 (1st Emergency Relocation Decision) and Decision (EU) 2015/1601, OJ L248/80 (2nd Emergency Relocation Decision).
29 See B De Witte and E Tsourdi, ‘Confrontation on Relocation: The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v Council’ (2018) 55 Common Market Law Review 1457, 1459–67; E Guild, C Costello, and V Moreno-Lax, Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (European Parliament 2017).
30 See 1st Emergency Relocation Decision, art 4 and 2nd Emergency Relocation Decision, art 4(1).
31 See 1st Emergency Relocation Decision, art 3(2) and 2nd Emergency Relocation Decision, art 3(2), establishing the notion of applicants ‘in clear need of international protection’.
32 The first relocation decision applied until 17 September 2017 and the second until 26 September 2017. See respectively 1st Emergency Relocation Decision, art 13(2) and 2nd Emergency Relocation Decision, art 4.
33 CJEU, Joined Cases C-715/17, C-718/17, Case C-719/17, Emergency Relocation [2020] ECLI:EU:C:2020:257.
34 See European Commission, Progress Report on the Implementation of the European Agenda on Migration COM(2018) 301.
35 Regulation No 439/2010, OJ L132/11 (EASO Regulation).
36 See Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624, 2019 OJ L295/1.
and their functioning includes operational deployments in Member State territory. For example, EASO has been involved in asylum processing in Greece. EASO-deployed experts conduct interviews on admissibility and in the merits stage and issue formally non-binding opinions; their participation in asylum processing is regulated by Greek national law. While the final decision formally remains with the Greek Asylum Service, evidently EASO has a significant, if not decisive, impact on the outcome of applications. Nevertheless, current deployments by EU agencies are not at a sufficient scale or of sufficient duration to effectively counter structural deficiencies in national asylum systems.

The lack of effective solidarity and fair sharing of responsibility does not absolve Member States from their responsibilities. It does not constitute a valid excuse for violating asylum seekers’ human rights or dignity. Greece is responsible for ensuring the human dignity, health, and well-being of asylum seekers present in its territory. In this vein, the Greek government has announced the gradual transfer of 2,380 asylum seekers and their families from island camps to facilities on the mainland. The European Commission has welcomed these efforts. Nonetheless, implementation is slow. This is due both to the limited availability of additional places on the mainland, and the hostile reaction of local communities into which asylum seekers are to be transferred. More broadly, in my view, this constitutes a necessary, but insufficient, measure. The announcement of the expansion of the United Nations High Commissioner for Refugee’s ESTIA accommodation scheme, which provides reception places in apartments, by an additional 5,000 places in 2020 and another 10,000 throughout 2021 (on top of the existing 25,496 such places) is more promising. It remains to be seen, however, whether these plans will materialize.

Notwithstanding Greece’s obligations, the EU also needs to do more in line with the EU principle of solidarity. Several EU Member States and Switzerland have announced their willingness to relocate 1,600 unaccompanied children from island hotspots. The first such transfers have taken place, with 12 children relocated to Luxembourg and

37 E Tsourdi, ‘Holding the European Asylum Support Office Accountable for Its Role in Asylum Decision-Making: Mission Impossible?’ (2020) 21 German Law Journal 506.
38 See Law 4346/2019 of 1 November 2019, Official Gazette of the Greek Government, Series A, Issue 169, 4827ff, art 76(1) (admissibility), art 76(2) (merits), art 90 (border procedures).
39 ‘More than 2,300 Refugees to be Transferred to Mainland after Easter’ (E-kathimerini, 16 April 2020) <https://www.ekathimerini.com/251769/article/ekathimerini/news/more-than-2300-refugees-to-be-transferred-to-mainland-after-easter> accessed 12 May 2020.
40 See eg AP News, ‘Greece: Locals Stop Migrants from Camps Reaching New Housing’ (AP News, 6 May 2020) <https://apnews.com/b33549ef4977ea619c0af8553734262> accessed 13 May 2020.
41 Greek Council for Refugees and Oxfam, ‘Lesbos COVID-19 Briefing: Update on the EU “Hotspot” Moria by the Greek Council for Refugees and Oxfam’ (22 April 2020).
42 IOM, UNICEF, and UNHCR, ‘UN Agencies Welcome First Relocation of Unaccompanied Children from Greece’ (15 April 2020) <https://www.iom.int/news/un-agencies-welcome-first-relocation-unaccompanied-children-greece> accessed 12 May 2020.
47 to Germany. Further to these initial transfers, Portugal has made concrete relocation pledges for 500 unaccompanied children, while Finland has pledged to relocate 100 unaccompanied children. Unlike the previous relocation mechanism that was operational from 2015 to 2017, this is a smaller-scale operation based on voluntary pledges. Other measures include in-kind assistance through the EU Civil Protection Mechanism and additional EU funding of €700 million for the construction of five multipurpose reception and identification centres on the Greek islands.

These initiatives are welcome. However, they follow the previous emergency-driven trajectory of intra-EU solidarity, rather than structurally embedding solidarity and fair sharing of protection responsibilities in the EU’s asylum policy. Until there is a permanent redesign of the CEAS, it will arguably be impossible to realize the legally binding principle of solidarity and to ensure human health and dignity, in the time of coronavirus and beyond.

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43 See respectively L Papadimas, ‘Greece Transfers First Group of Young Refugees to EU Countries’ (Reuters, 15 April 2020) <https://www.reuters.com/article/us-europe-migrants-greece-unaccompanied/greece-transfers-first-group-of-young-refugees-to-eu-countries-idUSKCN21X1L9> accessed 12 May 2020; F Jordans and D Nellas, ‘47 Children from Greek Refugee Camps Arrive in Germany’ (AP News, 18 April 2020) <https://apnews.com/b5c9e3daef75a78b533f009e14312c52> accessed 13 May 2020.

44 C Demony, ‘Portugal to Take in 500 Unaccompanied Migrant Children from Greek Camps’ (Reuters, 12 May 2020) <https://www.reuters.com/article/us-health-coronavirus-portugal-migrants/portugal-to-take-in-500-unaccompanied-migrant-children-from-greek-camps-idUSKBN22O30D> accessed 13 May 2020.

45 ‘Finland to Take 130 Refugees, Mostly Children, from Greece’ (AP News, 30 April 2020) <https://apnews.com/f1ed0e35d580a06db619fd93a3e3bc6> accessed 13 May 2020.

46 On the workings of the EU Civil Protection Mechanism, see <https://ec.europa.eu/echo/what/civil-protection/mechanism_en> accessed 14 May 2020.

47 European Parliamentary Research Service, ‘Tackling the Coronavirus Outbreak: Impact on Asylum-Seekers in the EU’ (April 2020) 4.