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Dornbirn, am 22. September 2020

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Information after article 15 of the Statute upon Moria, Lesbos, Greece

Part II

Madam Prosecutor,

further to my letter from September 16th I have the honour to additionally inform You as follows:

At first it is to state, that article 8 *bis* of the Statute, when it sets forth that the perpetrator must be "*in a position effectively to exercise control over or to direct the political or military action of a State*", does not necessarily mean that this state is the same as the one against which the aggression is undertaken.

Therefore, in this case, also high level functionaries of EU Member States other than Greece may be such perpetrators, especially, of course, members of their governments.

For an investigation, whether any of those members of government should be charged with the crime of aggression in this case of Moria, namely as a person who is responsible for the "*planning, preparation, initiation or execution*" of an act of aggression (article 8 *bis*), it is a precondition to proof whether European law would provide duties to the contrary, which by omission could be regarded as such planning, preparation, initiation or execution.

In the first place, the relevant provisions for the factual reception of asylum seekers into the European Union can be found in its directive 2013/33/EU¹.

¹ <https://eur-lex.europa.eu/legal-content/DE/TXT/?qid=1600598433019&uri=CELEX:32013L0033>

This directive sets forth a rather strict confinement of the freedom to move, restricting it to detention centres, where asylum seekers must wait on the decision upon their applications.

However, article 3 para. 3 of this directive provides as follows:

This Directive shall not apply when the provisions of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof are applied.

The purpose of said directive 2001/55/EC² is set forth in its article 1, and reads:

The purpose of this Directive is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons.

This purpose shall clearly protect refugees from being, for a time too long, exposed to adverse living conditions. It defines in its article 2 (d) as its central topic that of *mass influx*; it reads:

'mass influx' means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme.

Article 5 of the same directive sets forth that the state of a mass influx has to be established by a decision of the Council "adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council!"

In the Case of Moria, nor in those of the other Greek islands, such a decision never has been adopted, neither especially Greece has ever requested to do so.

It is important to say that cited directive 2001/55/EC grants to asylum seekers large freedoms of getting help with the attainment of visa (article 8 para. 3), access to the labour market (article 12), access to orderly accommodation and social relief (article 13), as well as access to the education system (article 14). Shortly spoken, you can say that this directive grants to asylum seekers a life which enables them to *find themselves* (again, after the stress by escape) in the countries of the European Union, as article 2 of the Geneva Convention 1951/1967³ assumes it for the duty of refugees to "*conform to its laws and regulations as well as to measures taken for the maintenance of public order*".

That the influx of refugees into the Greek islands especially since autumn 2015 was a massive, show the large numbers of them, on which, as well as on the inhuman living conditions in Moria, can be read up in diverse reports respectively press statements by the UNHCR.⁴

As said before, a decision establishing a mass influx, prompting the applicability of directive 2001/55/EC never has been adopted.

² <https://eur-lex.europa.eu/legal-content/DE/TXT/?qid=1600598875167&uri=CELEX:32001L0055>

³ 189 UNTS, 137.

⁴ For example the following: <https://www.unhcr.org/news/briefing/2015/6/55716fa56/unhcr-reinforcing-presence-greek-islands-amid-six-fold-increase-refugee.html>; <https://www.unhcr.org/news/briefing/2015/6/5576bd836/pressure-growing-greek-island-lesvos-2015-refugee-migrant-crossings-mediterranean.html2/4>; <https://www.unhcr.org/news/briefing/2015/11/563c934a6/update-on-lesvos-and-the-greek-islands.html>; <https://www.unhcr.org/news/press/2015/12/566049446/unhcr-concerned-violence-greek-border-calls-improved-security.html>; <https://www.unhcr.org/news/briefing/2017/1/586f5e9d4/unhcr-faster-movement-people-greek-islands-mainland-essential.html>; <https://www.unhcr.org/news/briefing/2017/9/59b24a377/unhcr-urges-action-ease-conditions-greek-islands.html>; <https://www.unhcr.org/news/briefing/2017/12/5a3cccd394/situation-greek-islands-still-grim-despite-speeded-transfers.html>; <https://www.unhcr.org/news/briefing/2018/2/5a7d67c4b/refugee-women-children-face-heightened-risk-sexual-violence-amid-tensions.html>; <https://www.unhcr.org/news/press/2019/11/5ddfc2ea4/head-unhcr-calls-urgent-response-overcrowding-greek-island-reception-centres.html>; <https://www.unhcr.org/news/press/2020/2/5e4fe4074/act-alleviate-suffering-reception-centres-greek-islands-unhcrs-grandi.html>;

However, commencing with September 2015, the EU organs adopted several decisions after article 78 para. 3 TFEU⁵, which reads:

*In the event of one or more Member States being confronted by an emergency situation characterised by a **sudden inflow** of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.*

The topic *sudden inflow* is different to the one discussed above (i. e. mass influx). Obviously the latter implies some looking ahead, some planning the future influx, too, whilst the former just means a factual, now happening inflow.

Thus it is clear, that the adoption of decisions⁶ after article 78 para. 3 TFEU could not and must not substitute the adoption of an establishment after article 5 of the directive 2001/55/EC. Moreover, all these decisions contain, on the one hand, the following precondition of applicability (article 3 para 2 of the respective decision):

Relocation pursuant to this Decision shall only be applied in respect of an applicant belonging to a nationality for which the proportion of decisions granting international protection among decisions taken at first instance on applications for international protection as referred to in Chapter III of Directive 2013/32/EU is, according to the latest available updated quarterly Union-wide average Eurostat data, 75 % or higher. In the case of stateless persons, the country of former habitual residence shall be taken into account. Quarterly updates shall only be taken into account in respect of applicants who have not already been identified as applicants who could be relocated in accordance with Article 5(3) of this Decision.

Besides this, in an preambular paragraph (22) of the decision 2015/1523 it reads:

*On 20 July 2015, reflecting the specific situations of Member States, a Resolution of the representatives of the Governments of the Member States, meeting within the Council, on relocating from Italy and from Greece 40 000 persons in **clear need of international protection**, was adopted by consensus. Over a period of two years, 24 000 persons should be relocated from Italy and 16 000 persons should be relocated from Greece.*

Meant is the draft decision proposed to the Council by the Commission⁷, which the former adopted informally on July 20th, 2015, submitting it to the European Parliament for commentary⁸, scheduled for September 2015 (!).

Accordingly, in the decisions 2015/1523 after article 78 para. 3 TFEU of September 15th, 2015⁹, mentioned above, there can be found the following provision, article 4:

*Following agreement reached between Member States through the Resolution of 20 July 2015 of the Representatives of the Governments of the Member States meeting within the Council on relocating from Italy and from Greece 40 000 persons in **clear need of international protection**:*

- (a) 24 000 applicants shall be relocated from Italy to the territory of the other Member States;*
- (b) 16 000 applicants shall be relocated from Greece to the territory of the other Member States.*

⁵ <https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=OJ:C:2016:202:TOC>

⁶ These are the following: <https://eur-lex.europa.eu/legal-content/DE/TXT/?qid=1600602586445&uri=CELEX:32015D1523>; <https://eur-lex.europa.eu/legal-content/DE/TXT/?qid=1600602696257&uri=CELEX:32015D1601>.

⁷ <https://data.consilium.europa.eu/doc/document/ST-10831-2015-REV-2/en/pdf> respectively <https://data.consilium.europa.eu/doc/document/ST-11131-2015-INIT/en/pdf>.

⁸ See the declaration on the Council's meeting of July 20th, 2015, in: <https://www.consilium.europa.eu/en/meetings/jha/2015/07/20/>.

⁹ I could not find any commentary on that at the Parliaments homepage.

Due to both the preconditions of 75% (see above) on the one, and, on the other hand, of being *in clear need of protection*, many refugees remained behind. Moreover, the fact, that only refugees in clear need should be concerned, opens a *circulus vitiosus*, since the purpose of the measure should be to take the burden of Greece and transfer the competence for proving the conditions of the applicability of the Geneva Convention 1951/67 to other Member States, so that it is absolutely incomprehensible, why and who should proof the precondition of *clear need* before the relocation. This seems to open possibilities of social selection!

However, it's a fact, that in September 2020, when Moria burnt down, there have been some 11.000 refugees in this camp¹⁰, which extremely strains Greek faculties and abandons all those refugees to inhuman living conditions, for years.

The reason for all this disaster obviously is a political one. Governments and national parliaments want to be re-elected, and voting peoples are infiltrated by nationalist and racist, i. e. fascist opinions. The rights of the refugees, granted by binding international laws, stay behind.

In my sight, all this facts of governmental behaviour, in the EU's Council as well as nationally, constitute the crime of aggression, because it was obviously planned, and served to the preparation of the immediate commission of the crime by Greek authorities, as described in the first part of my information of September 16th.

The question now is, dear Madam Fatou Bensouda, whether human rights and especially refugees' rights will be taken for serious or not.

Should I could be of any further helpful action to You in this case, please let me know.

Sincerely,

Arthur Lambauer

¹⁰ <https://www.unhcr.org/news/briefing/2020/9/5f6073db4/unhcr-scales-immediate-shelter-support-moria-asylum-seekers-urges-long.html>