

# THE RED LINE PROJECT

Challenging the Erosion of Asylum  
Seekers' Right to Liberty at the  
Borders of Europe

## / ABOUT

In February 2019 the **Hungarian Helsinki Committee** (HHC), together with several partner organisations, launched the final report of their joint initiative, the **Red Line Project**, whose objective is to document and raise awareness of how EU Border States increasingly employ the detention of asylum seekers in violation of existing legal obligations and fundamental rights. Initially launched in 2017, the project received financial support from the European Programme for Integration and Migration (EPIM) and involved NGOs in Hungary (HHC), Bulgaria (**Foundation for Access to Rights**), Greece (**Greek Council for Refugees**), and Italy (**Italian Council for Refugees**), as well as the Global Detention Project (**GDP**) and the **European Council on Refugees and Exiles** (ECRE).

The final report, *“Crossing a Red Line: How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry,”* is comprised of assessments made by project partners of how the morphing of “reception” into “detention” at the borders of their countries is undermining asylum seekers’ right to liberty. In addition, project partners employed the GDP’s online database, the Global Immigration Detention Observatory, to develop comprehensive data profiles on the immigration detention systems in their countries, which are included in the report. With support from ECRE and the GDP, the project liaised with institutions in Geneva and Brussels to bring attention to the report’s findings among key regional and international actors. The Red Line report was launched at an event hosted at Quaker House in Brussels on 6 February 2019, which included presentations by representatives from the UN Working Group on Arbitrary Detention and the European Parliament.

## / KEY FINDINGS

- **The use of detention upon entry increased in 2015**, with the increase in the number of migrant arrivals, but has continued to the present despite a significant decrease in asylum applications in Bulgaria, Hungary, and Italy.
- The research revealed **various practices of *de facto* detention**, such as the “protective custody” of children in Greece, hot spot detention in Greece and Italy, transit zone detention in Greece and Hungary, detention during pushback in Greece, detention on boats in Italy, and detention in pre-removal centres in Greece. The common element in these forms of detention is that “*de facto* detention” occurs when individuals are deprived of their liberty in the absence of a detention order. Their confinement is not classified as detention under domestic law, and their only possibility of release is by leaving to another country. Additionally, asylum seekers detained in these establishments have no procedural guarantees and no opportunity to seek judicial review of their detention. The research also looked into the official detention of asylum seekers upon entry, where the **legal grounds used to detain asylum seekers remain problematic**. These include “immigration detention of asylum seekers upon entry” and “short-term detention” in Bulgaria, and a “pilot project on detention upon arrival” in Greece.
- The increased frequency with which asylum seekers are detained upon entry is motivated by a range of practical, political, and legal considerations. It has been used as a general response to cope with unprecedented pressure on the reception and asylum processing systems in all of the countries studied (including as a response to the lack of open reception accommodation facilities in Bulgaria and Greece). Detention has also been promoted as a security measure (e.g. against terrorism) and used as a means to prevent asylum seekers from crossing external borders in a bid to gain political support for the ruling government (in Bulgaria, Hungary, and Italy). Finally, as in Greece and Italy, the increased rate of detention of asylum seekers at the border has also been a consequence of political action at the EU level – namely the need to enforce the terms of the EU-Turkey statement – as well as pressure exerted by the European Commission to ensure the ongoing operation of the Dublin system.

- **No clear evidence confirms that detention reduces the flow of arrivals as a response to an increased migratory pressure.** While the Hungarian solution of automatically detaining almost all asylum seekers for the duration of their asylum procedure reduces asylum seekers' secondary movement across the EU, the flagrant infringement of their right to liberty cannot be balanced against the policy objective of halting such movements. Instead, the use of *de facto* detention can be counter-productive to refugee integration, and can contribute to the increase in secondary movement of beneficiaries of international protection towards Western Europe.
- The research shows that **conditions in several of the examined detention centres are not adequate.**
- In certain cases, **structural difficulties put an end to *de facto* detention practices,** since systems could no longer cope with related challenges (e.g. most of the hotspots in Italy and Greece ceased to operate as closed centres). In December 2018, Italy adopted a new law that regularises the *de facto* detention of asylum seekers at hotspots. Bulgaria also enacted legislative amendments to remedy *de facto* detention practices: it introduced a new legal regime of "short term detention" to regularise the practice of *de facto* detaining irregular migrants in the so-called "Distribution Centre" in Elhovo. While it is definitely to be welcomed that the practice of *de facto* detention is being abolished, research shows that the compatibility of this form of detention, believed to be used for purely administrative convenience, with international law is questionable to say the least. In Hungary the authorities still refuse to admit that transit zones are places of detention, despite several statements from UN bodies, the CPT and ECtHR *Ilias and Ahmed* judgment (not final).
- **Domestic litigation brought success in Bulgaria,** where the Supreme Administrative Court ordered the immediate release of an asylum seeker from immigration detention, stating that the submission of an application for international protection is a statutory fact that puts an end to immigration detention. In another case, the Sofia City Administrative Court found short-term detention unlawful, as detention did not serve a legitimate purpose and was not proportionate. In Greece, challenging geographic restriction to the islands brought only partial success, as despite the Council of State decision annulling the restriction, a new administrative decision signed by the new Director of the Asylum Service imposed *ad novo* a general geographical restriction upon all asylum seekers on the islands only few days later. Several successful cases were reported challenging the detention of asylum seekers in the Evros region, pending their transfer to Reception and Identification Centres. In Hungary, domestic courts have on several occasions declared unlawful the placement of applicants in the transit zone and ordered their release.
- **Litigation at the European Court of Human Rights** regarding problematic forms of detention has already brought important results. In *Khlaifia and Others v. Italy*, the *de facto* detention of migrants on a boat was found to be in breach of Articles 5(1), 5(2) and 5(4), in *Ilias and Ahmed v. Hungary* (not final) the applicants' confinement in the Rösztke transit zone was found to have amounted to detention, in breach of Articles 5(1) and 5(4) and in *H.A. and others v. Greece* (not final), the "protective custody" of children in police stations was found in breach of Articles 5(1), 5(4), 3 and 13. Several other cases relevant for this research are still pending.
- Despite the recast Reception Conditions Directive providing extensive grounds for the introduction of a specific detention regime for asylum seekers, certain countries examined in this study deemed it necessary to resort to *de facto* detention instead, depriving certain asylum seekers of all detention-related human-rights safeguards. **Any motives behind the use of these problematic detention practices, despite the existence of a dedicated legal framework, cannot be accepted as a legitimate basis for the infringement of asylum seekers' right to liberty.**

# / RECOMMENDATIONS

## To All EU member states

1. Where asylum seekers are not allowed to leave the transit zones or other border facilities to access other parts of the host state's territory, states should qualify those measures as deprivation of liberty rather than a mere restriction on freedom of movement.
2. Where asylum seekers are detained or subject to restrictions on freedom of movement, states should:
  - conduct an individualised assessment of each case to establish whether the measure is necessary and proportionate;
  - assess the viability of non-custodial alternatives to detention;
  - inform the person concerned about the legal and factual grounds for detention or restriction of freedom of movement, and the procedures to appeal the decision;
  - ensure effective judicial review of detention;
  - ensure access of legal representatives, UNHCR, UNWGAD and specialised civil society organisations to places of detention.

## To the EU

1. The proposed mandatory border procedure under Article 22 of the draft recast Return Directive should be suppressed, as its implementation would exacerbate the systematic use of detention at borders, contrary to international and EU human rights and refugee law standards.
2. The recast Reception Conditions Directive should clarify that stay in a transit zone or a border facility amounts to deprivation of liberty if the applicant is not allowed to freely enter and exit the facility into the territory, and consequently detention-related safeguards should apply accordingly.
3. The idea of establishing “controlled centres” in Member States for processing persons in need of international protection, and rapidly returning other undocumented third country nationals, which has been put forward by the Commission and some Member States, should be abandoned because it remains ambiguous and risks increasing the frequency of *de facto* detention at borders.

## To the Government of Bulgaria

1. Bulgaria should cease its longstanding practice of detaining asylum seekers as irregular migrants under the Return Directive. It is worth highlighting that numerous authoritative human rights bodies have also issued recommendations urging the country to refrain from detaining asylum seekers, including the UN Human Rights Committee, the UN Committee against Torture, the UN Committee on the Rights of the Child, the UN Committee on the Elimination of Racial Discrimination, and the European Committee for the Prevention of Torture.
2. The government should examine all asylum applications fairly, and end the practice of processing asylum applications in pre-removal detention, to comply with national legislation and international standards.
3. The government should make an account of all detention orders that have been found to be unlawful by the courts, hold officials who have issued these orders accountable, and conduct regular training sessions to prevent future unlawful orders.
4. Asylum-seekers and migrants in Bulgaria should be empowered to seek compensation for unlawful detention in accordance with Article 5(5) of the European Convention on Human Rights.
5. The country should implement all recommendations made by the European Committee for the Prevention of Torture concerning its immigration-related detention policies and practices.

## To the Government of Greece

1. Greece should respect the principle of non-refoulement and cease alleged unlawful summary push-backs and the *de facto* detention of persons entering its territory without documents.
2. Greece should not place children in immigration detention, as per recommendations made by the UN Committee on the Rights of the Child and numerous other human rights bodies, including the European Committee for the Prevention of Torture and the UN Committee against Torture, both of which have called on Greece to amend its laws and abolish the immigration detention of children.

3. Greece should abolish the “protective custody” of children in police stations and other places of detention, as such detention was found in breach of Articles 5(1), 5(4), 3 and 13 of the Convention in the recent case *H.A. and others v. Greece* (Appl. no. 19951/16).
4. The geographical restrictions imposed on asylum seekers on the Aegean islands should be removed.
5. Greece should ensure that all immigration detainees are afforded adequate procedural guarantees, including improving detention appeals procedures, as the UN Special Rapporteur on the Human Rights of Migrants has urged the country to do during successive visits to the country. The *ex officio* review procedure should be made more effective, and courts should see it as a duty to properly review detention orders. The objection procedure should offer a genuine possibility of challenging detention, and legal aid to challenge (asylum) detention should be effectively guaranteed.
6. Greece must improve the conditions of detention at all its immigration detention centres, as numerous European and international rights agencies have repeatedly called upon it to do.
4. Hungary should emphasise the use of non-custodial measures when treating vulnerable asylum seekers, especially single women, people with disabilities, or ill people.
5. Children and their families should never be detained, and should instead be provided appropriate care in facilities especially designed for the purposes of assisting children, as per guidelines provided by UNHCR and the UN Committee on the Rights of the Child, among others.
6. The government should reverse its decision to block access to detention centres by experts and civil society organisations with relevant experience, so they may conduct monitoring visits and inspections, including at transit zones.

## To the Government of Hungary

1. Hungary should implement recommendations made by the UN Human Rights Committee calling on the country to refrain from automatically confining asylum applicants in transit areas.
2. Hungary should accept the view of the UN Working Group on Arbitrary Detention that it operates transit zones as places of detention for arriving asylum seekers, and thus begin conducting individual assessments before ordering detention in these zones. It should ensure detainee access to procedural guarantees and judicial review, and impose statutory time limits on how long people may be held in these areas while ensuring that such detention measures are used only as a last resort and for the shortest period of time necessary.
3. The government should improve the conditions of detention in transit zones, including – but not limited to – making sure that detainees at these facilities have effective and meaningful contact with the outside world, eliminating carceral features from these areas, making meaningful activities and outdoor space available, providing at a minimum 4m<sup>2</sup> of living space per person in a multiple-occupancy cell (excluding furniture), ensuring proper ventilation, offering living quarters that ensure the right to a private life, giving single women accommodation in a separate sector, and offering adequate services for victims of sexual- or gender-based violence.

## To the Government of Italy

1. Italy should ensure that maximum detention terms for identity and nationality verification at hotspots are limited, as per recommendations made by the UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination. Asylum seekers should never be confined at these sites for more than 30 days, and they should be released into the community upon expiration of that time limit.
7. Law Decree 113/18 turned the *de facto* detention at hotspots into a *de jure* one. Thus, officials must promptly establish detailed rules on the implementation of this new form of detention, and lawyers must be granted access to the facilities in the same manner as at pre-removal detentions centres (CPRs). Additionally, the government must take steps to ensure that the guarantees and protections provided at CPRs in line with the recast Reception Conditions Directive are observed at the hotspots. The identification of vulnerability shall be carried out prior to detention and identified vulnerabilities exhibited by newly arriving people at these facilities shall be taken into account when considering detention measures.
2. The government must allow entry and identification of persons arriving at all ports of entry, as per its obligations under the UN Refugee Convention, and not repeat the practice of preventing the disembarkation of boats on the Italian coast, which resulted in rescued people being detained on board for extended periods of time.