



Human Rights Law Clinic Papers 2024

The Right to Identity: A memorandum investigating the existence of a right to identity

To: Fenix Humanitarian Legal Aid

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Introduction

This memorandum aims to explore the legal framework surrounding the right to identity in the context of Frontex, the European Union's border force and coast guard agency, assigning incorrect "estimated nationalities" to child and adult asylum seekers arriving in Lesbos. On the basis of these so-called 'estimated nationalities', asylum seekers' claims are being rejected. Furthermore, Fenix have reported that these decisions are being based on something as arbitrary as what language the asylum seeker can speak. This memorandum discusses the political context which the issue of estimated nationalities has arisen out of before identifying the human rights violations in the European and international realms which also result from these misidentifications. However, ultimately, there are two arguments that this memorandum puts forwards. Firstly, that there is an existing framework in international and European law for the right to identity. Indeed, the right can be read into other fundamental human rights instruments and so it can be seen how international law already acknowledges this right. Secondly, by examining human rights violations and societal issues stemming from inaccurate identifications, it can be seen how the right to identity is extremely important and so should be recognised in the international and regional realms as an explicit and independent right which needs to be afforded the utmost protection if asylum seekers' human rights are to be secured.

Current Situation

Since 2015, and the EU-Turkey deal which was agreed in 2016,¹ Lesbos has been described as a 'refugee warehouse' where the EU and the Greek government are testing their anti-immigration policies'.² It is considered an 'asylum hotspot', funded by the EU to act as a 'buffer zone between Turkey and Europe'.³ Unfortunately, due to the sheer number of asylum seekers that have arrived and have been subsequently trapped on the island, feelings of anger and hopelessness have increased amongst local residents as well as refugees.⁴ Indeed, in 2021, it was reported that parents of children at a local school in Lesbos were 'protesting the

¹ Philippe Perchoc, 'EU-Turkey Statement & Action Plan' (*Legislative Train Schedule: European Parliament*, 20 January 2024) <<https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>> accessed 21 February 2024.

² Anna Iasmi Vallianatou, 'Lesbos: How EU asylum policy created a refugee prison in paradise' (*Chatham House*, 28 July 2022) <<https://www.chathamhouse.org/2022/07/lesvos-how-eu-asylum-policy-created-refugee-prison-paradise>> accessed 21 February 2024.

³ *ibid.*

⁴ *ibid.*

enrolment of nine children with refugee background'.⁵ This rising hostility has contributed to the pressure now on the Greek authorities and the EU border force to try and curtail the numbers of asylum seekers arriving and staying on the island. It is against this background that the issue of estimated nationalities has appeared.

What do we mean by 'Identity'?

The question of identity is not straightforward due to the fact every single person has a slightly different understanding of what their identity means to them. In this instance, it is 'national identity' that we are focusing on which, although provides some clarity, is still an ambiguous concept. To effectively argue for the existence of a right to identity, it is important to define exactly what we mean in this memorandum when we say, 'national identity'. Firstly, a distinction is to be made between the idea of nationality and national identity. Indeed, in a report by the Secretary-General, requested by the Human Rights Council, the right to an identity was said to be 'intimately linked to the right to a nationality'.⁶ This was reiterated in the Human Rights Council 32nd Session.⁷ Thus, a distinction was made, and the two things cannot be used interchangeably though they do clearly have a close connection. National identity can be said to go further than nationality. For example, article 8 of the Convention on the Rights of the Child (CRC) protects the right of the child to 'preserve his or her identity, including nationality'.⁸ Therefore, in this instance, the right to identity *includes* nationality, but is not limited to and is not the same as nationality. Indeed, it has been argued that 'national identity...extends into the realm of culture and values'.⁹ Importantly, despite the CRC only relating to children, it would not make sense if the meaning of the term 'identity' changed for adults. As Amnesty International have said, this right 'lasts for life...as an enabler for our other

⁵ European Council on Refugees and Exiles, 'Greece: Growing Local Tensions and Hostility Towards Asylum Seekers and Refugees as Government Continues to Implement Permanent Camp Solutions' (*European Council on Refugees and Exiles*, 12 February 2021) <<https://ecre.org/greece-growing-local-tensions-and-hostility-towards-asylum-seekers-and-refugees-as-government-continues-to-implement-permanent-camp-solutions/>> accessed 24 February 2024.

⁶ Secretary-General, 'Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia of the country in which they are born, if they otherwise would be stateless' (2015) UN Doc A/HRC/31/29 [31].

⁷ Human Rights Council, 'Resolution adopted by the Human rights Council on 30 June 2016' (2016) UN Doc A/HRC/Res/32/5 [11].

⁸ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 8(1).

⁹ Francis Fukuyama, 'Why National Identity Matters' (2018) 29 *Journal of Democracy* 5, 8.

rights'.¹⁰ However, other than its distinction from nationality, this still does not answer the question of what we mean by national identity for the purposes of this memorandum.

In the international or regional realm, there does not seem to be a set definition of national identity. This makes sense given the lack of explicit protection for this right. Thus, attempting to find an internationally or even regionally accepted definition of national identity has proved impossible. For this reason, the definition which we have decided to use has had to come from the Office for National Statistics (ONS) in the UK, where they defined the concept in the 2021 Census as 'a self-determined assessment of their own identity, it could be the country or countries where they feel they belong or think of as home. It is not dependent on ethnic group or citizenship'.¹¹ Although not an EU or Greek specific definition, the definition seems more open to include the 'culture and values'¹² aspects which are not mentioned in the international instruments as a part of nationality. Furthermore, it distinguishes ethnicity and citizenship from national identity, but suggests that they are not entirely separated from the concept. Indeed, ethnicity and citizenship can play a part in national identity but is not *dependent* on them. This is important for the situation in Lesbos because if an asylum seeker does not have their citizenship documents with them, or identifies as a certain national identity, the Greek authorities, in the protection of the right to national identity, should conduct a proper investigation, not based entirely on ethnicity. Indeed, if accepted, this definition would ensure that the Greek authorities must go further than this in making their decisions as to identity in order for the right to national identity (which we argue exists) to be protected. Thus, this memorandum uses the definition of national identity from the ONS but adds the idea that national identity can include reference, but is not limited, to nationality, culture, and values:

'a self-determined assessment of their own identity...[with reference to] the country or countries where they feel they belong or think of as home. It is not dependent on ethnic group or citizenship'¹³ and could include, but is not limited, to references of legal nationality, culture, and values.

¹⁰ Nicky Parker, 'Why we have the right to an identity' (*Amnesty International*, 23 October 2014) <<https://www.amnesty.org.uk/blogs/stories-and-rights/why-we-have-right-identity>> accessed 13 March 2024.

¹¹ Office for National Statistics, 'National Identity (detailed) variable: Census 2021' (*Office for National Statistics*, 28 November 2023)

<<https://www.ons.gov.uk/census/census2021dictionary/variablesbytopic/ethnicgroupnationalidentitylanguageandreligionvariables/census2021/nationalidentitydetailed>> accessed 11 March 2024.

¹² Francis Fukuyama (n 9).

¹³ ONS (n 11).

The Existing Framework in International and European Instruments

Having now defined what we mean by identity, it is clear that there are multiple elements which come together and create a 'national identity' (culture, legal nationality, citizenship etc.). This section aims to argue that the right to national identity is already protected within the current existing international and European legal framework.

The International Realm

Firstly, it is important to mention that article 8 of the CRC legally protects the preservation of identity.¹⁴ It is true that this only relates to children which at first sight might appear unrelated to this memorandum given the direction to focus on adults. However, the articles do show that the importance of identity as a whole (which national identity is a part of), can be found in powerful international mechanisms already which is evidence that the right to identity does exist and there is clearly an understanding of it in international law which can be used as a basis for the right for adults. There is no adequate reason that would justify the removal of the right to an identity on the basis of age, as argued previously. Nothing changes when a child becomes an adult. In this way, the CRC is evidence that the right to identity and the importance of its preservation does already exist in the current international framework, albeit currently applied only to children.

Secondly, although not explicitly legally binding, it is important to discuss the Universal Declaration of Human Rights (UDHR)¹⁵ as it has been highly influential to the current international human rights framework, with many legally binding instruments drawing upon and referencing it. Indeed, it has been said to be 'even more significant today than when it was adopted'.¹⁶ Furthermore, many of its provisions are 'considered part of customary international law' and so do actually carry legal weight.¹⁷ The specific article in question here is article 15 which protects the 'right to a nationality' and the right not to be 'arbitrarily deprived' of it.¹⁸ This right has been drawn upon and implemented into legally binding international conventions such as article 24(3) of the International Covenant on Civil and Political Rights

¹⁴ CRC (n 8).

¹⁵ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

¹⁶ European Parliament, 'The Universal Declaration of Human Rights and its relevance for the European Union: At a Glance' (*Think Tank European Parliament*, 5 November 2018) 1.

¹⁷ *ibid.*

¹⁸ UDHR (n 14) art 15.

(ICCPR) which preserves the right to nationality for children,¹⁹ and article 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which protects the right against discrimination on the basis of nationality.²⁰ This memorandum argues that the right to identity, as defined in the previous section, can be indirectly read into these provisions, despite not using those explicit words. Firstly, the right to nationality has been described on the United Nations Human Rights website as a 'fundamental human right' given its close connection to 'many other human rights violations' that could occur if it is not protected.²¹ Furthermore, the UN Refugee Agency has also recognised the personal 'severe and lifelong impact' that denial of nationality has on individuals.²² This emphasis by UN agencies on the importance of the right, and the detrimental consequences that occur when it is not protected, is evidence that the right to nationality goes further than mere legal documentation, albeit indirectly. For example, in a study published in the *Journal of Political Sciences and Public Affairs*, it was argued that 'nationality plays a pivotal role in the construction of...a sense of belonging...[and] provides individuals with a framework through which they...express their...traditions and values'.²³ This memorandum argues that it is this that is being protected within the right to nationality, on an equal footing to the direct legal nationality documentation. In this way, the right to identity as defined earlier can be read into the right to nationality.

The European Realm

As a member of the European Union since 1981, Greece is obligated to adhere to EU law, including Directive 2011/95/EU of the European Parliament and of the Council.²⁴ By Presidential Decree 141/2013 the Directive 2011/95/EU, presently known as the Qualification Directive of Common European Asylum System (CEAS) of the European Parliament and of the Council was adopted as part of the domestic law.²⁵ According to Greek Constitution once ratified any resolution and directives of the European Parliament and of the Council become

¹⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 24(3).

²⁰ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD) art 5(d)(iii).

²¹ OHCHR, 'OHCHR and the right to a nationality' (*United Nations Human Rights Office of the High Commissioner*) <<https://www.ohchr.org/en/nationality-and-statelessness>> accessed 21 April 2024.

²² UNHCR, 'About statelessness' (*The UN Refugee Agency*, 2014) <<https://www.unhcr.org/ibelong/about-statelessness/>> accessed 21 April 2024.

²³ Natalia Croe, 'Importance of Nationality in the Formation of Personal Identity and a Sense of Belonging' 11 *Journal of Political Sciences & Public Affairs* 1.

²⁴ 'National Legislation – Greece' (e-justice.europa.eu) <https://e-justice.europa.eu/6/EN/national_legislation?GREECE&member=1> accessed on 22 April 2024.

²⁵ Aggelos Ilias, Nadina Leivaditi, Evangelia Papatzani & Electra Petracou, 'Border Management and Migration Controls in Greece'(2019) *Global Migration: Consequences and Responses Paper* 2019/22.

part of state laws.²⁶ This directive safeguards the right to identity by ensuring that refugees and beneficiaries of international protection in Greece maintain their legal status and identity documentation as prescribed by the directive, thereby facilitating their integration and access to rights within the EU framework. While Directive 2011/95/EU doesn't contain explicit sections solely dedicated to the "right to identity," it does encompass several articles that ensure proper identification procedures for asylum seekers.

Firstly, article 4 of the directive discusses regarding the assessment of facts and circumstances. This article mandates that EU member states examine all available elements, including applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection,²⁷ to determine their asylum claim. This article meaningfully showed the importance of identity in asylum granting process. Thus we can say right to identity is essential to access right to asylum.

Article 14 of Directive 2013/32/EU asks for applicants to present their case in a personal interview by a competent person according to laws of Greece²⁸ and such interviewer is qualified to consider both the specific and broader contexts of the application, including the applicant's cultural background, gender, sexual orientation, gender identity, or any vulnerabilities they may have.²⁹ Frontex made clear violation of Article 14 of the directive without arranging proper interview and giving an estimated nationality only based on what language they talk.³⁰ Here, Greece had the responsibility of appointing a 'competent person'. To handle a large number of third-country nationals or stateless persons applied for asylum Greece had to temporarily assign personnel from another authority and arrange proper training to make them competent to assist in conducting those interviews.³¹ The incompetency of the personnel who conducted the interviews resulted in providing 'estimated nationality' to asylum

²⁶ Constitution of Greece, Article 28.

²⁷ Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L 337/9, art 4.

²⁸ Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180/60, art 14.

²⁹ Ibid, art 15.

³⁰ Cecilia Manzotti, Nationality Status Determination in Asylum Procedures under the CEAS and the Potential Impact of the 'New Pact on Migration and Asylum', International Journal of Refugee Law, Volume 35, Issue 2, June 2023, Pages 194.

³¹ Ibid (n 28).

seekers. Providing so called estimated nationality which ruined the sole purpose of the asylum seekers application³². Also, Article 15 requires member states to arrange interview under proper condition which enables applicant to show their application grounds in a comprehensive manner.³³ Even Article 10 stipulates that Member States must guarantee that decisions made by the determining authority regarding applications for international protection are conducted following a thorough examination.³⁴ Thus, it is clear that the European Parliament and the Council have firmly established a comprehensive and robust statutory framework for the recognition and protection of the identity of the asylum seekers.

Aside from the procedural rules found in European asylum law which suggests the need to recognise the right to identity, the human rights violations of the EU Charter of Fundamental Rights and the European Convention on Human Rights are also clear reasons for the need for explicit recognition. Indeed, in the case of *Genovese v Malta*³⁵ it was held in the European Court of Human Rights (ECtHR) that depriving someone of their nationality could result in a violation of their ECHR article 8 right to respect for private and family life.³⁶ This is reminiscent of the case of *Karashev v Finland*³⁷ in which the ECtHR suggested that 'arbitrary denial of citizenship might...raise an issue under article 8...because of the impact of such a denial on the private life of the individual'.³⁸ It can be argued that this emphasis on the impact of depriving a person of their nationality or citizenship on their private life, is really an acknowledgement on the disastrous effects of stripping someone of their national identity as defined in this memorandum. It affects their private life because it affects their sense of belonging, their values, their culture, and where they think of as their *home*. It follows, then, that recognising an explicit fundamental right to national identity would realise and secure what has already indirectly been identified by the ECtHR. Indeed, the underlying principle to protect the right to identity is already there.

The Need to Explicitly Recognise an Independent Right to Identity

This section will show how assigning an 'estimated nationality' to asylum seekers has the potential to violate multiple international and regional human rights instruments, showing that the current framework is not working. Indeed, the notion of 'nationality' on its own appears

³² Ibid (n 30).

³³ Ibid (n 30).

³⁴ Ibid, art 10.

³⁵ *Genovese v Malta* App no 53124/09 (ECtHR 11 October 2011).

³⁶ Ibid [30].

³⁷ *Karashev v Finland* App no 31414/96 (ECtHR 12 January 1999).

³⁸ Ibid [1(b)].

far too rooted in legal documentation, meaning that if an asylum seeker does not have these on their person, border force agencies such as Frontex do not spend much time investigating further and instead assign an incorrect nationality based on language bias (for example). This limited view of nationality does not fully encapsulate all that is and should be protected under the right to nationality, as previously argued. Instead, this memorandum argues that what is meant is *national identity* as we have defined it and an independent and explicit right to national identity would be much more effective in protecting asylum seekers' fundamental human rights. It would show the importance of a person's sense of national belonging and everything that entails, reducing the ability, in this context, of registration agents to quickly assign nationality without having conducted a thorough investigation. They would need to take into consideration aspects of national identity other than legal nationality such as culture, belonging, and where the asylum seeker identifies as their 'home'. This is not to take away the difficulties these officers can face in determining a person's national identity. However, ensuring enough time is taken to thoroughly investigate the multiple facets of 'identity' can only help reduce the number of incorrect nationalities that are being assigned.

Indeed, the policy that traps people on the Greek islands and prevents them from reaching the European mainland³⁹ has caused a recurrent and endless cycle of overcrowding, substandard living conditions and extremely poor access to services.⁴⁰ The European "hotspots"⁴¹ persist in offering lodging and essential services, such as food and medical aid,⁴² significantly below acceptable standards.⁴³ Asylum seekers at Lesbos who are waiting for their decisions and getting rejected several times for an "estimated nationality"⁴⁴ are living the worst kind of life a life below the minimum standards. They are trapped in overcrowded camps with limited access to basic necessities.⁴⁵ Frontex's practice of misattributing nationalities exemplifies how the right to identity can be violated. This not only undermines asylum seekers' sense of self but also hinders their ability to exercise other crucial rights. Displaced migrants have the right to basic human rights protections concerning safety, healthcare, education, and

³⁹ Izza Leghtas, "Like a Prison" - Asylum-seekers Confined to the Greek Islands, Refugees International, August 2017,

⁴⁰ Nikos Kourachanis, "Asylum seekers, hotspot approach and anti-social policy responses in Greece (2015–2017)," *Journal of International Migration and Integration* 19 (2018), p 1160.

⁴¹ *ibid* p 1157.

⁴² *ibid* p 1157.

⁴³ Amnesty International, "European leaders must end the humanitarian and human rights crisis" (Amnesty International, [March 14, 2019]), <https://www.amnesty.org/en/latest/press-release/2019/03/european-leaders-must-end-the-humanitarian-and-human-rights-crisis-at-europes-borders/>.

⁴⁴ Pelizza, Annalisa, and Wouter Van Rossem. "Sensing European alterity: An analogy between sensors and Hotspots in transnational security network." In *Sensing In/Security: Sensors as Transnational Security Infrastructures*, pp. 275. Mattering Press, 2021.

⁴⁵ Natalia-Rafaella Kafkoutsou and Spyros-Vlad Oikonomou, "Tipping the Scales: The role of responsibility-and solidarity-sharing in the situation on the Greek islands" (2021), p 15.

housing as they strive to establish new livelihoods. These principles are foundational to the establishment of the EU and are upheld in both international and European legal frameworks.⁴⁶ Firstly, the right to asylum becomes jeopardized. Incorrect nationality can obstruct access to asylum procedures⁴⁷ and protection for genuine refugees fleeing persecution. This deprives them from the opportunity to seek safety and rebuild their lives. Furthermore, misidentified nationality can lead to deportation⁴⁸ to countries where the asylum seeker faces a real risk of harm. This disregard for their safety exposes them to further vulnerability.

International Consequences

The reported situation in Lesbos violates multiple international human rights instruments. These are important to consider as they provide evidence that the right to identity should exist explicitly. Firstly, as discussed earlier article 15 of the UDHR protects the 'right to a nationality'.⁴⁹ In the context of estimated nationalities, it is clear how this right is relevant. Indeed, providing a person with an incorrect nationality is 'arbitrarily depriv[ing]' them of their correct nationality, contrary to article 15 of the UDHR.⁵⁰ Another important human rights instrument (also discussed earlier) that is triggered in this situation is article 5 of CERD which requires states to 'undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone...in the enjoyment of...(d)(iii) The right to nationality'.⁵¹ Unlike the UDHR, CERD is legally binding in Greece since it ratified the Convention in 1970. Article 5 is important here because, given the information provided by Fenix, these incorrect nationalities are being assigned sometimes simply on the basis of what language asylum seekers can speak. Then, based on these incorrect decisions, the authorities are rejecting the asylum seekers' applications. This clearly constitutes a level of racial discrimination and lack of care which is affecting these asylum seekers' right to nationality, contrary to article 5 of the CERD. This is particularly clear given that it is predominantly happening to those specifically from Eritrea, Sudan, and Afghanistan. Furthermore, in a General Recommendation 'on preventing and combating racial profiling by law enforcement officials',⁵² the Committee on the

⁴⁶ V. Digidiki and J. Bhabha, "EU Migration Pact Fails to Address Human Rights Concerns in Lesbos, Greece," *Health Hum Rights*, vol. 22, no. 2, (December 2020), pp. 291-296. PMID: 33390714; PMCID: PMC7762917.

⁴⁷ Cecilia Manzotti (n 30), 203.

⁴⁸ De Vries, Leonie Ansems, and Elspeth Guild. "Seeking refuge in Europe: spaces of transit and the violence of migration management." *Journal of ethnic and migration studies* 45, no. 12 (2019): 2161.

⁴⁹ UDHR (n 14) art 15.

⁵⁰ *ibid* art 15(2).

⁵¹ CERD (n 20), art 5.

⁵² Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 36' (2020) UN Doc CERD/C/GC/36.

Elimination of Racial Discrimination noted that 'specific groups, such as migrants, refugees and asylum seekers...are the most vulnerable to racial profiling'.⁵³ The incorrect assumption that Sudanese, Eritrean and Afghan asylum seekers are from South Sudan, Ethiopia, and Iran respectively, without proper investigation, is a form of racial profiling which has a connection with racial discrimination – a relationship the Committee is 'exploring'.⁵⁴

Furthermore, in recent Concluding Observations the Human Rights Committee (HRC), focusing on the Bidoon people in Kuwait, made comments regarding the allegations that Bidoon people were being forced to 'accept a false identity'.⁵⁵ The HRC were 'alarmed'⁵⁶ by these reports and recommended Kuwait to 'refrain from requesting Bidoon people to accept another nationality'.⁵⁷ Although these observations and recommendations are not legally binding, the HRC noted that articles 2, 12, 24 and 26 of the ICCPR were relevant in this situation.⁵⁸ These articles cover anti-discrimination within the Covenant on the basis of 'national origin', freedom of movement, the right to nationality (for children), and prohibition of discrimination of all persons 'on any ground such as race...language, religion...national or social origin' respectively.⁵⁹ This suggests there is potential for a violation to be found in situations relating to the provision of false nationalities. An explicit right to identity would help to prevent further violations of these provisions and Frontex would be sent a clear message that the assignment of an incorrect nationality is a serious violation in and of itself.

Another damaging international human rights violation which the situation in Lesbos is perpetuating, regards the right to health - in this case, primarily mental health. Indeed, the asylum process is already an extremely stressful procedure, and it has been long accepted that 'asylum seekers are highly vulnerable to psychological disorders'.⁶⁰ In particular, asylum seekers have 'high persistent rates of PTSD and depression'.⁶¹ However, the discrimination faced by asylum seekers on Lesbos who have been provided with incorrect estimated nationalities face further obstacles and mental distress. Indeed, 'perceived discrimination has

⁵³ *ibid* [11].

⁵⁴ *ibid* [22].

⁵⁵ Human Rights Committee, 'Concluding Observations on the fourth periodic report of Kuwait' (2023) UN Doc CCPR/C/KWT/CO/4 [12].

⁵⁶ *ibid*.

⁵⁷ *ibid* [13(b)].

⁵⁸ *ibid*.

⁵⁹ ICCPR (n 19) arts 2, 12, 24, 26.

⁶⁰ Katrin Schock, Rita Rosner and Christine Knaevelsrud, 'Impact of asylum interviews on the mental health of traumatized asylum seekers' (2015) 6 *European Journal of Psychotraumatology* 1.

⁶¹ Rebecca Blackmore et al., 'The prevalence of mental illness in refugees and asylum seekers: A systematic review and meta-analysis' (2020) 17 *PLoS Medicine* 1, 2.

been found to predict depression, distress and anxiety...among ethnic minority...groups'.⁶² Furthermore, once the asylum seeker has been provided with the incorrect nationality, Fenix reported that the asylum seekers are then having their applications rejected and being forced to leave the island, or being left in limbo, with nowhere to turn and no means of remedying the error. This waiting game is understandably incredibly detrimental to asylum seekers' mental health, as studies have shown that 'there is...evidence that mental health deteriorates over time as asylum seekers await an outcome'.⁶³ This can only be exacerbated when the outcome one is waiting for will be based on incorrect information. In this way, the situation in Lesbos is violating asylum seekers' human right to 'the highest attainable standard of...mental health' as protected in the International Covenant on Economic, Social and Cultural Rights (ICESCR) which Greece ratified in 1985.⁶⁴ Therefore, an explicit right to identity is required in order to strengthen the protection of asylum seekers' mental health, and stop estimated nationalities make an already stressful process even worse.

Regarding article 8 of the CRC, as stated previously, it legally protects the preservation of identity in children.⁶⁵ We argued that this shows there is a legal understanding of the right to identity in international law which can be used as a basis for the right for adults. However, we would like to push that further now. The fact the authorities are actually providing these estimated nationalities to children as well as adults shows that article 8 is not even protecting the children. Therefore, this memorandum argues for an explicit right to identity. If a right to national identity were independently recognised for both adults and children, it would provide stronger protection as it incorporates more than just legal documents, for example, and would show the importance of one's identity no matter the age.

Finally, and most importantly, the situation in Lesbos is having an impact on the crucial right to seek asylum, as stated in article 14 of the UDHR, and further protected in the 1951 Convention relating to the Status of Refugees ('Refugee Convention').⁶⁶ As stated previously, asylum seekers are being turned away and their claims rejected on the basis of these incorrect

⁶² Inga Jasinskaja-Lahti, Karmela Liebkind and Erling Solheim, 'To Identify or Not To Identify? National Disidentification as an Alternative Reaction to Perceived Ethnic Discrimination' (2009) 58 *Applied Psychology: An International Review* 105, 106.

⁶³ Dermot Ryan et al., 'Mental Health Among Persons Awaiting an Asylum Outcome in Western Countries' (2009) 38 *International Journal of Mental Health* 88, 105.

⁶⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (ICESCR), art 12.

⁶⁵ CRC (n 8).

⁶⁶ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

nationalities which means their right to claim asylum is being severely impeded upon. Of particular note is article 33 of the Refugee Convention which protects refugees from refoulement.⁶⁷ Indeed, once an asylum seekers' application is rejected based on these incorrect nationalities, they are being forced to leave Lesvos which could result in them having to return to their *actual* country where they will face the persecution they were attempting to flee in the first place. In this way, an explicit and independent right to identity would protect these internationally recognised fundamental human rights.

Regional Consequences

Article 13(1) of the Directive (Directive 2013/32/EU) underscores the obligation of asylum seekers to cooperate in establishing their identity.⁶⁸ However, Frontex's estimation process may undermine this cooperation by imposing a nationality without fully considering the applicant's input or potential evidence. Furthermore, article 31(2) implicitly guarantees the right to be correctly identified through a thorough adequate and complete examination⁶⁹, yet Frontex's estimations bypass this right by assigning nationalities without proper scrutiny. This undermines the core of an asylum claim, as an accurate identity is crucial for applicants. Misidentification not only prevents a proper examination by potentially overlooking relevant details about the applicant's origin and persecution fears but also leads to delays and unfair outcomes, as disputes over assigned nationalities can prolong the asylum process and result in unjust decisions. For instance, individuals seeking international protection, who were initially refused, find themselves stuck in the hotspots for extended periods, awaiting the outcome of their appeal against the initial decision.⁷⁰ Moreover, Frontex's blanket estimations violate the directive's emphasis on individual assessments Article 4 of Directive 2011/95/EU⁷¹ and the requirement to consider all available elements Article 13 of the same directive⁷², potentially disregarding the applicant's own account regarding nationality. In conclusion, Frontex's practice contradicts the spirit of the Asylum Procedures Directive, jeopardizing the right to identity and nationality, and leading to procedural delays, unfairness, and a violation of the right to a thorough examination of asylum claims.

⁶⁷ *ibid* art 33.

⁶⁸ *Ibid*, art 13(1).

⁶⁹ *Ibid*, art 13(2).

⁷⁰ Martina Tazzioli, 'The temporal borders of asylum. Temporality of control in the EU border regime.' (2018) *Political Geography* 12.

⁷¹ *Ibid*, art 4.

⁷² *Ibid*, art 13.

Frontex potentially infringed upon human rights as outlined in the EU Charter of Fundamental Rights, particularly evident in Greece where migrants were transferred to detention facilities characterized by inhumane conditions.⁷³ In Lesbos asylum seekers are living within the detention camp boundary waiting for their decision which is often a refusal because of the wrong information of their identity. Such circumstances hinder their right to personal development and they have no relation with the outside world. Article 8 of the European Convention of Human Rights protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.⁷⁴ A fundamental principle guiding the understanding of Article 8 protections is the right for individuals to engage with others to foster and nurture relationships, both within their personal circles and with the broader community, commonly referred to as the right to a "private social life".⁷⁵

The practice of Frontex assigning estimated nationalities to asylum seekers arriving in Lesbos raises profound concerns regarding potential violations of the EU Charter of Fundamental Rights, particularly the fundamental human right to dignity (article 1) and Respect for private and family life (article 5). Moreover, while the Charter doesn't explicitly mention the right to identity and right to nationality, both of which are bypassed by Frontex's estimations, potentially leading to unfair treatment, this approach, seen as depersonalization, strips asylum seekers of their individuality, directly undermining the principles of human dignity enshrined in Article 1 by attributing wrong identity⁷⁶. The charter serves as a potent reference point in legal challenges, providing a basis for advocating fair treatment and challenging practices that violate asylum seekers' fundamental rights.

Beyond Legality

Beyond these legal implications, the invalidation of asylum seekers' identities inflicts deep psychological wounds, causing mental health distress.⁷⁷ "Asylum seekers on Samos and Lesbos endure inhumane & degrading treatment, including poor material conditions, poor

⁷³ 'International Migration' (2020) The International Organization for Migration <<https://doi.org/10.1111/imig.12729>> accessed 22 April 2024.

⁷⁴ *Niemietz v. Germany* App no 13710/88 (ECHR 1992).

⁷⁵ *Bărbulescu v. Romania* App no 61496/08 (ECHR 12 January 2016).

⁷⁶ The Charter of Fundamental Rights of the European Union [2012] OJ C 326/396.

⁷⁷ Peggy A Thoits, 'Self, identity, stress, and mental health' in *Handbook of the sociology of mental health* (2013) 357.

food, and lack of medical care.”⁷⁸ In one case, the European Court of Human Rights mandated Greece to furnish medical treatment for a six-month-old infant afflicted with congenital heart disease, along with suitable housing for her mother, who is grappling with heart and gastrointestinal issues. It was contended that the duo had been unlawfully confined in the camp for over 30 days without adequate medical attention, contravening the provisions of the European Convention for Human Rights.⁷⁹ This trauma can have long-lasting consequences, hindering their ability to integrate and contribute meaningfully to society. ‘Everyone has the right to respect for his or her physical and mental integrity’⁸⁰ The European Charter of Fundamental Rights utters the importance of right to mental integrity. At the camps of Lesbos there is no respect for this right at all.

The lack of trust in the asylum system due to such practices is another significant upshot. When asylum seekers feel their identities are disregarded, they are less likely to engage with the system, ultimately discouraging legitimate claims and hindering cooperation. This weakens the entire asylum framework, leaving vulnerable individuals further unprotected.⁸¹ Finally, misattributing nationality can fuel discrimination and social exclusion. Individuals may be ostracized based on their perceived nationality rather than their individual circumstances.

The routine and implicit detention of asylum seekers contravenes EU regulations and the European Convention on Human Rights. Detention should only be employed as a last resort measure.⁸² At the detention camp the life became so hard for the asylum seekers. They are being deprived of their right to lead a normal life with their family while living within the boundary of the detention camps. The example of Anis, a young afgani woman yearning for education and a normal life, highlights the broader impact .⁸³ Anis’s application got rejected several time and she couldn’t attend normal school like other girls at her age. Her right to education should be protected by the authority according to article 14 of Charter of the Fundamental Rights of European Union. Here we can find that the wrong identification has

⁷⁸ Human Rights Legal Projects, 'Over 4,000 asylum seekers unlawfully detained on Samos' (humanrightslp.eu Sep 19, 2023) <<https://www.humanrightslp.eu/post/over-4-000-asylum-seekers-unlawfully-detained-on-samos>> accessed on 17/04/2024.

⁷⁹ Lydia Emmanouilidou, "This is inexcusable": What's behind deteriorating conditions in Greek island asylum camps?' (The Humanitarian 04/12/2023) <<https://shorturl.at/mDMX2>> accessed on 17/04/2024.

⁸⁰ Ibid, Article 3(1).

⁸¹ Valenta, Marko, and Kristin Thorshaug, 'Asylum-seekers' perspectives on work and proof of identity: The Norwegian experience,' (2012) Refugee Survey Quarterly 31 no.2, 80.

⁸² Ibid.

⁸³ Anna Iasmi Vallianatou (n 2).

impacted the right to education and the right to develop relationships with others. Thus we can say right to identity is the key to secure other fundamental rights. In 2019, fewer than 25% of child asylum seekers on the Greek islands had the opportunity to attend school.⁸⁴ When one right is violated, it creates a ripple effect, hindering the enjoyment of others. Right to personal development and the right to establish and develop relationships with other human beings and the outside world is protected by article 8.⁸⁵ But the asylum seekers of Lesvos have no protection under it as the law is not being followed and right to identity has not given enough importance by the Greece government and Frontex.

In this way, the right to identity is not an isolated concept but a cornerstone for upholding a web of human rights.⁸⁶ Recognizing an individual's identity fosters inclusion, empowers individuals to claim their rights, and strengthens the social fabric. Violations of this right, as seen in Lesvos, have a cascading effect, hindering access to basic rights and well-being. By recognizing and protecting the right to identity, we can create a more just and equitable society where everyone has the opportunity to thrive.

Conclusion

In conclusion, regarding the right to identity, this memorandum has shown two things. Firstly, that there is a legal basis in international and European law which the right to identity can be read into. Indeed, our analysis has elucidated compelling arguments for its indirect existence. Secondly, that due to the dire consequences of the infringement of this indirect right, an overt and independent right to identity should be argued for. There is a compelling case for its future development, offering a stronger legal foundation to protect asylum seekers. The current lack of explicit protection of the right has allowed multiple violations of fundamental human rights, shown through Frontex's practice of assigning "estimated nationalities" to asylum seekers in Lesvos. Indeed, this memorandum has shown that Frontex's actions likely contravene asylum seekers' rights under several international instruments including the International Covenant on Civil and Political Rights, and the Refugee Convention. Furthermore, the wider consequences of providing wrong nationalities includes endless suffering for the distressed asylum seekers, impediments to accessing asylum procedures,

⁸⁴ 'Stepping up: Refugee Education in Crisis' (2019) UNHCR, 13.

⁸⁵ *Oleksandr Volkov v Ukraine* Application no. 21722/11 (ECHR 2013).

⁸⁶ Claire Fenton-Glynn, 'Children and the European Court of Human Rights' (2021) Oxford University Press, USA, 57.

risks of deportation to unsafe countries, mental health distress, erosion of trust in the asylum system, and perpetuation of discrimination and social exclusion.

In this way, Fenix can and should utilise this legal framework to challenge Frontex's practices and/or advocate for the independent recognition of a right to national identity. Doing so would bolster the protection of asylum seekers' rights and ensure their dignity while simultaneously ensuring more transparency and accountability within the system. Indeed, the right to identity is not an isolated concept but a cornerstone for upholding a web of human rights.⁸⁷ Recognizing an individual's identity fosters inclusion, empowers individuals to claim their rights, and strengthens the social fabric. Violations of this right, as seen in Lesvos, have a cascading effect, hindering access to basic rights and well-being. By recognizing and protecting the right to identity, we can create a more just and equitable society where everyone has the opportunity to thrive.

Recommendations

- One of the strongest lines of reasoning which Fenix should take would be to draw upon the Concluding Observations of the HRC regarding the Bidoon people in Kuwait. Here, a UN Treaty body has explicitly addressed the issue of estimated nationalities and has suggested the situation has the potential to violate multiple ICCPR articles. The HRC asked Kuwait to refrain from the practice. Given the similarities to what is happening in Lesvos, it is reasonable to believe the HRC could and would do the same here if Fenix wanted to take this to the HRC directly. Alternatively, Fenix can use this reasoning when interacting with the Greek authorities or the EU, to add international weight to the argument that Frontex needs to stop assigning asylum seekers incorrect identities.
- Fenix can argue that Frontex are clearly violating the EU Directive 2011/95 on the Asylum procedure. Arbitrarily attributing an incorrect nationality based on language, and using that incorrect nationality to reject an asylum claim is a direct violation of article 4 of the directive.
- Although this memorandum has presented the legal basis for the right to national identity, it is, unfortunately, rather unlikely that Fenix would be successful in attempting to argue that the attribution of incorrect estimated nationalities has violated adult

⁸⁷ *ibid.*

asylum seekers' direct and independent right to identity, given that there is no explicit recognition of this right for adults yet.

- Fenix should advocate for efficient monitoring mechanisms to watch over the hotspots in Greece particularly over the fundamental rights violations occurring in them.

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