



ELDH European Association of Lawyers for Democracy & World Human Rights

EJDM Europäische Vereinigung von Juristinnen & Juristen für Demokratie und Menschenrechte in der Welt
 EJDH Asociación Europea de los Juristas por la Democracia y los Derechos Humanos en el Mundo
 EJDH Association Européenne des Juristes pour la Démocratie & les Droits de l'Homme
 EGDU Associazione Europea delle Giuriste e dei Giuristi per la Democrazia e i diritti dell'Uomo nel Mondo

EJDM/ELDH | Platanenstrasse 13 | D - 40233 Düs



Càtedra UNESCO
de Desenvolupament
Humà Sostenible



www.observatoriodesc.org

Preliminary report of the international trial observers following the trial against four of the “Moria 6”

I Introduction

§1 From 8 to 12 September 2020, several fires completely destroyed the severely overcrowded Moria¹ camp on the Greek island of Lesbos.² One week after the fire, Notis Mitarakis, in his position as Greek Minister of Migration and Asylum, stated on CNN that six young men from Afghanistan had been arrested, and that these six young men were responsible for the fire³ – a public denunciation which clearly constitutes a violation of the presumption of innocence set out by Articles 6 §2⁴ European Convention on Human Rights (‘ECHR’), and 14 §2⁵ International Covenant on Civil and Political Rights (‘ICCPR’).

¹ Instead of many, see, HARRIET GRANT, ‘Moria is a hell’: new arrivals describe life in a Greek refugee camp, The Guardian, 17 January 2020; available at: <https://www.theguardian.com/global-development/2020/jan/17/moria-is-a-hell-new-arrivals-describe-life-in-a-greek-refugee-camp#:~:text=Around%2013%2C000%20of%20those%20are,rubbish%20run%20through%20the%20tents>.

² Instead of many, see, LAUREN MARKHAM, ‘A disaster waiting to happen’: who was really responsible for the fire at Moria refugee camp?, The Guardian, 21 April 2022; available at: <https://www.theguardian.com/world/2022/apr/21/disaster-waiting-to-happen-moria-refugee-camp-fire-greece-lesbos>; BORDER VIOLENCE MONITORING NETWORK (BVMN), Interactive Timeline on the Moria Fire; available at: <https://www.borderviolence.eu/interactive-timeline-on-the-moria-fire/>.

³ See, FRANZISKA GRILLMEIER, Die wahren Brandstifter sitzen nicht im Gerichtssaal, Die Wochenzeitung WOZ, 17 June 2021; available at: <https://www.woz.ch/2124/griechenland/die-wahren-brandstifter-sitzen-nicht-im-gerichtssaal>.

⁴ Article 6 §2 ECHR: Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

⁵ Article 14 §2 ICCPR: Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

§2 Following the call from Legal Centre Lesvos ('LCL')⁶, two international trial observers, representing the European Lawyers for Democracy and Human Rights ('ELDH')⁷, the Swiss Democratic Lawyers ('DJS')⁸, Observatori DESC⁹ and UNESCO Chair on Sustainable Human Development (University of Girona)¹⁰, followed the first instance trial held on Friday and Saturday, 11 and 12 June 2021 before the Mixed Jury Court for adults in Chios. Referring to Covid measures still in place for court proceedings, the court prohibited the international trial observers from entering the building (see, §§18-20 below). The international trial observers therefore conducted their observation from outside the building. Information obtained was shared with the public through DJS' Twitter account – some of the tweets are included in the present report. This preliminary report portrays the observations and conclusions after the first instance trial. A full report will be issued after the appeal judgment. The appeal trial is scheduled to start on 6 March 2023, and will be held before the appeal court for the north-Aegean region in Mytilene, Lesvos.

§3 The purpose of the trial observation was to monitor the proceedings in view of the right to a fair trial, in particular:¹¹

- prohibition on arbitrary arrest and detention;
- right to legal counsel;
- right of all persons to equality before the law and the courts;
- right to a competent, independent and impartial tribunal established by law;
- right to presumption of innocence;
- right to a public hearing;
- right to call and (cross-)examine witnesses;
- right to translation into a language the defendant understands;
- right to appeal;
- right to compensation for miscarriage of justice.

§4 Due to the prohibition to enter the court room, the international trial observers were not able to follow the trial personally. Therefore, the present preliminary report is based on:

- information provided by LCL;
- interviews with defence lawyers on the case;
- consultation of the case file, made accessible through defence lawyers on the case and facilitated by Greek-English interpreter provided by LCL;
- personal observations from outside the court, including conversations with different actors on site;
- indirect sources, in particular local and international media.



This is the court building in #Chios where the trial against the #FreeTheMoria6 will start tomorrow. DJS and @EldhLaw are present with a joint trial observer. Information on the course of the trial will be shared through this account.

II Charges

§5 The six people arrested subsequent to the Moria fires were jointly charged with the following offences:

- arson with intent to endanger life, including property damage – Article 264 §1(b-c)¹² Greek Penal Code;
- membership in a criminal organization – Article 187 §3¹³ Greek Penal Code.

⁶ LEGAL CENTRE LESVOS ('LCL'): <https://legalcentresvos.org/>.

⁷ EUROPEAN LAWYERS FOR DEMOCRACY AND HUMAN RIGHTS ('ELDH'): <https://www.djs-jds.ch/de/djs>.

⁸ SWISS DEMOCRATIC LAWYERS ('DJS'): <https://www.djs-jds.ch/de/djs>.

⁹ OBSERVATORI DESC: <https://observatoridesc.org/ca/qui-som>.

¹⁰ UNESCO CHAIR ON SUSTAINABLE HUMAN DEVELOPMENT (UNIVERSITY OF GIRONA): <https://www.udg.edu/en/catedres/UNESCO-Huma>.

¹¹ See, ELDH, *Trial Observation Guide*, 2013; available at: https://eldh.eu/wp-content/uploads/2018/01/ELDH_Guide_on_Trial_Observation_2013.pdf.

¹² Article 264 - Penal Code (Law 4619/2019) - Arson: §1 Whoever causes a fire, shall be punished: (b) with imprisonment of up to ten (10) years, if the act may result in danger to a human being / (c) with imprisonment, if in the case of subparagraphs (a) or (b) the act caused significant damage to public utility installations or resulted in serious bodily injury to a human being; available at: <https://www.lawspot.gr/nomikes-pirotfories/nomothesia/n-4619-2019/arthro-264-poinikos-kodikas-nomos-4619-2019-emprismos>.

¹³ Article 187 - Penal Code (Law 4619/2019) - Criminal organization: §3 Whoever, except in the case of the first paragraph, organizes with another or others to commit a felony shall be punished by imprisonment for a term of not less than six months.

§6 Two of the six defendants were recognized as minors, and were therefore charged in a separate procedure according to the Greek Code for Juvenile Penal Procedure. The present preliminary report does not cover this part of the criminal procedures against the “Moria 6”, but focuses solely on the trial held before the Mixed Jury Court in Chios against the four defendants who were charged as adults.

III Case file

§7 Based on the information provided by defence lawyers, and the consultation of the case file the international trial observers identified three elements as particularly relevant for the case which will be separately discussed in the following paragraphs:

- written witness statement by a camp resident, including photo identification (1);
- report issued by the fire department (2);
- determination of the age (3).

1 Written witness statement by camp resident, including photo identification

§8 The key role of the written statement in the file is clear, as it is the only evidence incriminating the four defendants. The document constitutes a computer typed statement, including an introductory remark that two police officers are taking the witness’s statement through an interpreter. The statement therefore is not a testimony personally written by the witness, but the transcript of an oral statement, facilitated by a translator. The international trial observers have no knowledge as to how much of the written statement is a word-by-word transcript of the translation of the oral testimony. Additionally, the international trial observers have no knowledge as to whether an audio tape or an audio-visual recording of the witness’s questioning at the police station exists or not. In any case, no such recording is in the file. The written statement in the file is signed by two police officers, the interpreter and the witness himself.

§9 The witness was a resident of the Moria camp at the time of the fire, as were the defendants. Furthermore, the defence pointed out, that the witness, firstly, with regards to the defendants, is not only a member of a rivalling group, but also the community leader of said rivalling group. Secondly, the witness was apparently transferred from the island of Lesbos to the Greek mainland after giving his testimony, despite the travel restrictions for the refugee population in place due to Covid at the time. In any case, the witness could not be summoned to testify in court, as his whereabouts were unknown at the time of the trial in June 2021. Therefore, the defendants and their defence lawyers were never able to cross-examine this witness.

§10 The content of the witness statement was translated to the international trial observers by an interpreter provided by LCL. In essence, the witness stated what follows: At the time of the fire, the witness and his family lived in zone 12 of Moria camp. In March 2020 first Covid restrictions were announced at the camp. The witness claimed that prior to the fire, and in connection with these restrictions there had been a rumour at the camp that Moria was soon to be completely closed off, and the residents prohibited from leaving the camp in order to prevent the spreading of the virus. Apparently, single asylum seekers (comment added by the authors: as are the defendants) would have been especially affected by such a rigid restriction of their right to freedom of movement. The witness further stated that, on the night of 8/9 September 2020, he was outside his tent (comment added by the authors: located in zone 12) when he realised that there was a fire nearby. As a couple of minutes later, the fire was already close to his own tent, the witness with other people tried to help put out the fire. According to the statement in the file, the witness at this point saw a group of 15-20 young Afghans disburse and light fires within zone 12. Due to the windy weather conditions, and given the magnitude of the fire the flames could not be put out. The witness claims, he therefore took his family and ran. Upon being questioned by police officers leading the interrogation, the witness states that he recognized some members of the group of 15-20 people he allegedly had seen, and gave the police five first names* which are rather common among the Afghan community. According to a comment added to the statement by the police, the officers presented the witness with five photos from the database “PoliceOnline” (comment added by the authors: based on the information received from defence lawyers, this database contains asylum seekers and refugees registered in Greece, and therefore includes countless people). The witness claimed that

The perpetrator shall be punished with imprisonment of up to three years if the association referred to in the preceding subparagraph was made for the purpose of committing a misdemeanor with the aim of financial or other material gain or the violation of life, physical integrity or minors; available at: <https://www.lawspot.gr/nomikes-plirofories/nomothesia/n-4619-2019/arthro-187-poinikos-kodikas-nomos-4619-2019-egklimatiki>.

* The international trial observers know the names given to the police, as well as the names of the defendants. In order to protect the personal information of the defendants, however, these names are not disclosed here.

he could recognize the people on the five images shown to him without any doubt, and verifies that the photos and the full names he was given by the police correspond with the first names he had mentioned before.

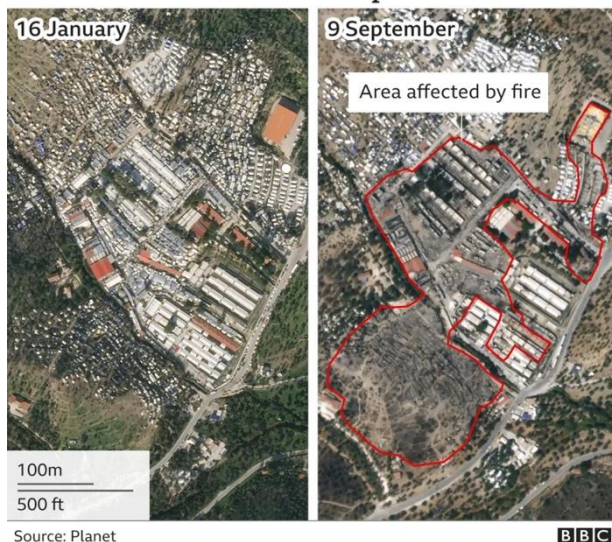
§11 The international trial observers have no knowledge as to how the identification was conducted in detail, as there was no respective documentation in the file made available to the international trial observers. Based on the information accessible to the international trial observers it seems at least questionable how – given that the witness exclusively provided first names – in a short period of time only five photos would be extracted from a database which includes thousands of names, and probably hundreds of people sharing the defendants’ common first names and subsequently shown to the witness. This seems all the more questionable, given that all photos shown to the witness in the present case supposedly were a hit, while – at the same time – no one was ruled out as a suspect.

2 Report issued by the fire department

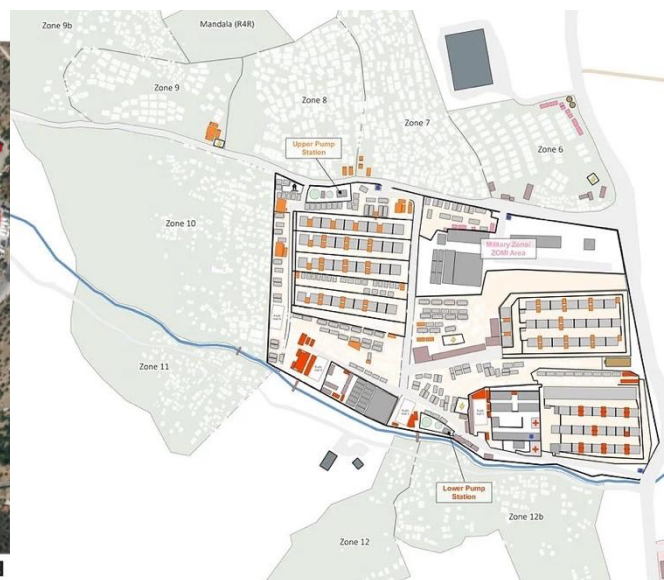
§12 The fire department’s investigation of the course of the fires which destroyed Moria camp is based on observations made from 8 to 13 September 2020. The content was translated to the international trial observers by an interpreter provided by LCL. In essence, the report states what follows: The fire department’s exploration begins with a description of the camp prior to its destruction. On 8 September 2020, at 23:28 at night, the fire department was informed about the severe fire at Moria camp. The fire department declares that they had difficulties in approaching the fire with their vehicle due to the commotion at the surrounding scene. The fire department staff on site were able to identify flames at several places outside and around the camp. Due to the windy weather conditions, the flames grew and quickly merged to a big fire. On 9 September 2020, at 00:30 at night, the fire department staff found many fires to be inside the area of the camp. To the knowledge of the international trial observers, the report includes no detailed time line of the fire. However, the report states that in the night of 8/9 September 2020 the fire started near the north entrance, and subsequently spread to the left (phase 1), and started inside near the former European Asylum Support Office (‘EASO’) and spread from there to the south, including to zone 12 (phase 2) respectively (comment added by the authors: zone 12 is not mentioned as a starting point of the fires). In addition, the report mentions further fires in the following days until 12 September 2020.

§13 For a better understanding of the location, including the references to key points and directions, two open sources pictures are included in this report:

Extent of fire at Moria camp



Source: <https://www.bbc.com/news/world-europe-54125761>.



Source: <https://www.zorenboehmer.com/gis-officer>.

3 Determination of the age

§14 Three of the four defendants have ID documents showing that they were, in fact, minors at the time of the alleged offences: A copy of an Afghan passport, and two original Tazkiras (Afghan identification documents) including official translations to English and Greek. However, the court chose to rely on the age assessment conducted in an earlier stage of the procedure, arguing that the authenticity of the ID documents in the file couldn't be confirmed, as it was not possible to contact the Ministry of Foreign Affairs in Afghanistan.

§15 The international trial observers were unable to receive a translation of the age assessment in the file. Based on the information provided by defence lawyers, the age assessment was ordered by the investigator judge, and was issued by an anthropologist/criminologist who solely examined the defendants' wrist X-rays imagery. Based on the age assessment the three defendants whose age is in question were classified as adults at the time of the alleged offences, with the consequence that all the defendants are tried as adults.

IV First instance trial held before the Mixed Jury Court in Chios

1 The court

§16 The case was placed before the Mixed Jury Court for adults in Chios. Therefore, the trial was held on the Greek island of Chios, not Lesbos where the alleged offences were said to have taken place. The court consisted of three judges, and four jury members.

§17 The defence objected to the court's jurisdiction for three of the four defendants in relation to their age. However, as already stated before, the court rejected the probative value of the original identification documents.

2 Trial behind closed doors

§18 The right to a public trial is one of the particular aspects of the right to a fair trial: "The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 §1¹⁴ [ECHR], namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society"¹⁵. The same right is guaranteed by Article 14 §1¹⁶ ICCPR.

§19 The trial was scheduled to begin on Friday, 11 June 2020 at 09:00 in the morning. The international trial observers, as well as four journalists had arrived early in front of the court, but were prohibited from entering the building. Referring to Covid measures still in place for court proceedings, the court rejected the defence's subsequent request to admit a small observation delegation with one translator. Due to Covid the number of people allowed in the courtroom was limited to fifteen. With the three judges, the four-member jury, the prosecution, the defendants and their defence, this number had already been exceeded. However, there were at least six police officers in the courtroom. Even the lawyer that came on behalf of UNHCR to



1) We are now standing in front of the court building, and we are waiting for the decision whether the international observers will be allowed in the courtroom.

2) The rules related to Corona give reason for a de facto exclusion of the public. Neither the journalists present, nor we, the trial observers, are permitted to enter the courtroom.

¹⁴ Article 6 §1 ECHR: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

¹⁵ EUROPEAN COURT OF HUMAN RIGHTS ('ECTHR'), *Guide on Article 6, Right to a fair trial (criminal limb)*, updated on 31 August 2022, §278; further referencing the following case law: *Riepan v. Austria*, No. 35115/97, 14 November 2000, §27; *Krestovskiy v. Russia*, No. 14040/03, 28 October 2010, §24; and *Sutter v. Switzerland*, No. 8209/78, 22 February 1984, §26; available at: https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

¹⁶ Article 14 §1 ICCPR: All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

observe the trial was ordered to leave the courtroom, and prohibited from following the procedure in person. The trial thus took place under de facto exclusion of the public.

§20 It is undisputed that the requirement to grant the public access to a hearing is subject to exceptions. The reasons to hold a criminal trial in camera, however, must stem from “the circumstances of the case”¹⁷. Security concerns alone, for example, only in rare cases “justify excluding the public”¹⁸. Rather, “security measures should be narrowly tailored and comply with the principle of necessity”¹⁹. While the Covid-pandemic could be a legitimate reason for a temporary exclusion of the public, the decision to hold a trial in camera still must adhere to the principle of necessity, and therefore requires prior consideration of less strict measures. Specifically, the international trial observers identified less strict measures the court could have implemented in order to comply with its obligations to a fair trial: first, provide a sufficiently large courtroom; second, admit a limited number of representatives of the public – such as (legal) trial observers, journalists, supporters, or interested individuals; third, assign a limited number of seats to the public, allowing the audience to rotate; fourth, the use of technical means to enable the public to follow the trial remotely – such as audio-visual transmission to another room. Considering this, the de facto exclusion of the public does not appear to be necessary for the protection of public health interests related to the pandemic. This applies all the more as the restaurants in front of the courtroom had already resumed their business allowing customers to gather. In light of what seemed to be an excessive presence of police officers in the court room, the international trial observers got the impression that the court did not want to have audience to witness the proceedings. In conclusion, the fact that the trial took place behind closed doors violated the defendants’ procedural rights protected by the fair trial principles.

3 Objections by the defence

§21 The defence team submitted three objections to the court. Namely the defence:

- requested three of the defendants to be recognized as minors, and challenged that an anthropologist/criminologist is a competent expert to provide an age assessment (3.1);
- requested that the written witness statement by the former resident of Moria camp should not be taken into consideration, given that the witness was never cross-examined due to his absence in court (3.2);
- stated that important documents in the case file, such as the indictment or the summons to appear in court, were not translated to the defendants, rendering them unable to defend themselves against the accusations brought against them (3.3).

§22 All three objections were rejected by the court.

3.1 Substandard age assessment

§23 Based on the information made available to the international trial observers, the age assessment was solely based on an examination of the defendants’ wrist X-ray imagery conducted by an anthropologist/criminologist. Although the wrist X-ray examination is a method to estimate a person’s age not only used in Greece,²⁰ note needs to be made that it is highly imprecise – which is confirmed by the UN Committee on the Rights of the Child’s (‘CRC’) case law: “there is ample information ... to suggest that this method lacks precision and has a wide margin of error, and is therefore not suitable for use as the sole method for determining the chronological age of a young person who claims to be a minor and who provides documentation attesting to [their] claim”²¹. Correctly, such an examination needs to be conducted scientifically, and therefore by a specialist, for example, a radiologist who is specialised on working with children.²²



The court adheres to the age assessment in the file: The defense’s motion to try the cases of three of the four defendants before juvenile court was rejected.

¹⁷ Ibid.; further referencing the following case law: *Welke and Białek v. Poland*, No. 15924/05, 1 March 2011, §74; and *Martinie v. France* [GC], No. 58675/00, 12 April 2006, §40.

¹⁸ Ibid.; further referencing the following case law: *Riepan v. Austria*, No. 35115/97, 14 November 2000, §34.

¹⁹ Ibid.; further referencing the following case law: *Krestovskiy v. Russia*, No. 14040/03, 28 October 2010, §29.

²⁰ See, EUROPEAN UNION AGENCY FOR ASYLUM (‘EUAA’), *All you need to know about age assessment*, January 2022, pp. 18-19; available at: https://euaa.europa.eu/sites/default/files/publications/2022-01/2022_Booklet_Age_assessment_children_EN.pdf.

²¹ Views adopted by the COMMITTEE ON THE RIGHTS OF THE CHILD (‘CRC’) in the case of *A.L. v. Spain*, CRC/C/81/D/16/2017, 31 May 2019, §12.6.

²² See, EUAA, *All you need to know about age assessment*, fn. 20; CRC, *General Comment No. 6*, CRC/GC/2005/6, 1 September 2005, §31(i); CRC/C/81/D/16/2017, fn. 21, §12.4.

§24 The general obligation of State parties, to always take the best interests of the child into account as primary consideration as laid out in Article 3 §1²³ of the Convention of the Rights of the Children ('CRC'), also applies to the assessment of the age of a person claiming to be a minor. Related to the protection of the best interest of a child, the CRC has stipulated a "presumption of minority"²⁴ – meaning that, if contested, the person "claiming to be a child should be treated as such"²⁵. In the context of a criminal procedure, this presumption is further required by the in dubio pro reo principle – component of the presumption of innocence²⁶ – establishing that doubts should benefit the accused.²⁷

§25 Following the above, the international trial observers, based on their information, come to the conclusion that the rights provided by the CRC, the ECHR, and the ICCPR of the three defendants' who claim to be minors, and who provided the court with evidence to support their claim have been violated: first, by limiting the age assessment to the use of one single unreliable method; second, there is reason to believe that the examination was not conducted by a specialised expert; third, through the dismissal of the probative value of the identification documents provided. Taken together the best interests of the child were not a primary consideration in the age determination process undergone by three of the four defendants in the present case, which constitutes a violation of Articles 3 and 12²⁸ CRC.²⁹ By not considering the submitted identification documents, the court at the same time disregarded the in dubio pro reo principle, in breach of Articles 6 ECHR and 14 ICCPR. Furthermore, the attribution of an age that does not match the information on the identification documents on record – the copy of a passport regarding one of the defendants, and original Tazkiras regarding further two – amounts to a violation of Article 8³⁰ CRC.³¹

3.2 Unlawful consideration of the written witness statement by camp resident

§26 The right to a fair trial includes the defendants' right to examine, or have examined, a witness against them as set out in Articles 6 §3(d)³² ECHR and 14 §3(e)³³ ICCPR. In this context the ECtHR has established in its case law the so-called Al-Khawaja and Tahery test, containing of three steps: first, whether there was a good reason for the non-attendance of a witness at the trial; second, whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction; third, whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured.³⁴

²³ Article 3 §1 CRC: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

²⁴ COUNCIL OF EUROPE, *Age Assessment for Children in Migration, A human rights-based approach*, December 2019, p. 11; available at: <https://rm.coe.int/ageassessmentchildrenmigration/168099529f>.

²⁵ COMMITTEE ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES ('CMW')/CRC, *Joint General Comment No. 3/22*, CMW/C/GC/3-CRC/C/GC/22, §32(h).

²⁶ See, fn. 4-5.

²⁷ ECtHR, *Guide on Article 6, Right to a fair trial*, fn. 15, §388; further referencing the following case law: *Barberà, Messegue and Jabardo v. Spain*, No. 10590/83, 6 December 1988, §77; and *Tsalkitzis v. Greece* (No. 2), No. 72624/10, 19 October 2017, §60.

²⁸ Article 12 CRC: §1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. / §2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

²⁹ See, CRC/C/81/D/16/2017, fn. 21, §12.9.

³⁰ Article 8 CRC: §1 States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. / §2 Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

³¹ See, CRC/C/81/D/16/2017, fn. 21., §12.10.

³² Article 6 §3 ECHR: Everyone charged with a criminal offence has the following minimum rights: (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

³³ Article 14 §3 ICCPR: In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

³⁴ See, *Al-Khawaja and Tahery v. the United Kingdom* [GC], Nos. 26766/05 and 22228/06, 15 December 2011.

§27 The international trial observers have no knowledge either to the reasons for the witness's absence, or the efforts made by the court to ensure the witness's presence in court, and therefore this report cannot make any statement whether or not there were "good reasons"³⁵ for the prosecution's witness's absence. In any case, the ECtHR in its case law does not consider "that the absence of good reason for the non-attendance of a witness [can] of itself be conclusive of the unfairness of a trial"³⁶. Rather, "the lack of a good reason for a prosecution witness's absence is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of Article 6 §§1³⁷ and 3(d)³⁸"³⁹.

§28 While the ECtHR doesn't absolutely prohibit the admission of incriminating testimony provided by a witness whom the defendant never had the opportunity to examine or to have examined, the ECtHR has held that where a "conviction is based solely or to a decisive degree"⁴⁰ on such a witness testimony, "the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6"⁴¹. Based on the information accessible to the international trial observers, the conviction of all four defendants was, in fact, based solely or to a decisive degree on the written witness statement by the former camp resident. Therefore, the Al-Khawaja and Tahery test's third step, in the present case, is of particular relevance: whether there were sufficient counterbalancing factors which permitted "a fair and proper assessment of the reliability"⁴² of the written witness statement. Based on the information available to the international trial observers, however, the untested witness evidence was admitted at the trial without such sufficient counterbalancing factors: first, there is no audio-recording or video-tape in the file made accessible to the international trial observers which would comprehensively demonstrate the course of the questioning, including the photo-identification process; second, the international trial observers have no knowledge of any corroborating evidence – on the contrary, the evidence summarised above (see, §12) doesn't point to zone 12 as a starting point of the fires; third, overall, the domestic court's approach to the untested evidence of an absent witness doesn't appear to be cautious.

§29 Taken together, the international trial observers come to the conclusion that the defendants' right to a fair trial was violated. Mainly basing the defendants' conviction on evidence provided by a witness who never was cross-examined at any stage of the proceedings, without sufficient counterbalancing factors at the same time rendered the trial as a whole unfair in breach of Articles 6 ECHR and 14 ICCPR.

3.3 Failure to provide translation of the case file

§30 Based on the information provided by defence lawyers, the case file was not translated to the defendants, including essential documents like the indictment and the summons to appear in court. In any case, Articles 6 §3(a)⁴³ ECHR and 14 §3(a)⁴⁴ ICCPR guarantee the right of every person charged with a criminal offence to be informed in a language which they understand. In practice this means that authorities must provide a defendant with a translation if there are – as in the present case – "reasons to believe that the accused has insufficient knowledge



1) The right to cross-examine a witness is a key aspect of a fair trial and is protected by Article 6 ECHR.

Without ever giving [the defense] the opportunity to ask the witness questions, is written testimony should not be admissible in the #FreeTheMoria6 trial – we are waiting for the court's ruling on this matter.

2) The court has denied the defense' motion rendering the written testimony admissible evidence. The statement was read out loud in the courtroom, despite the fact that the defense never got to ask the witness questions.

³⁵ *Schatschaschwili v. Germany* [GC], No. 9154/10, 15 December 2015, §113.

³⁶ *Ibid.*

³⁷ See, fn. 14.

³⁸ See, fn. 32.

³⁹ *Schatschaschwili v. Germany* [GC], fn. 35.

⁴⁰ *Hümmer v. Germany*, No. 26171/07, 19 July 2012, §42.

⁴¹ *Ibid.*

⁴² *Schatschaschwili v. Germany* [GC], fn. 35, §125.

⁴³ Article 6 §3 ECHR: Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

⁴⁴ Article 14 §3 ICCPR: In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

of the language”⁴⁵ of the proceedings. While there is no right to have the court file fully translated,⁴⁶ the relevant information must nevertheless be provided to a foreign defendant, either by written or oral translation.⁴⁷ The failure to translate the most essential documents of the file, including the charges and the reason for the charges, constitute an infringement of the right to a fair trial as set out by Articles 6 ECHR and 14 ICCPR

4 Witnesses heard in court

§31 To the knowledge of the international trial observers the prosecution had listed around 30 witnesses, of which 15 were present for questioning in court. Among them were: members of the local police, including the chief of police at Moria camp at the time of the fires; the supervisor of the asylum office in Lesbos at the time; the director of Moria detention centre at the time; several fire fighters present at the scene; representatives of EASO and an NGO; as well as residents of the Moria village who had lost land to the fires. According to defence lawyers, none of the witnesses who testified in court claimed to identify the defendants as culprits according to the alleged offences.

§32 Among the witnesses who did not appear for their testimony in court were, for example, the commander of the Moria camp at the time, and – most importantly – the former resident whose written statement contains incriminating assertions.

§33 On the other hand, the defence had called the following four witnesses who were all heard on Friday, 11 June 2021 after a short break from approximately 18:30 to 19.00 in the evening:

- the Médecins Sans Frontières’ (‘MSF’) supervisor for hygiene measures at Moria camp prior to the fires;
- a journalist;
- the president of the Greek Forum of Refugees in Greece;
- a professor at the Aegean University.

§34 After a full day of witness testimonies, the court adjourned in the late evening of 11 June 2021 until the next day.

V. Judgment

§35 On Saturday, 12 June 2021 the court announced its verdict: the defendants were convicted of arson with intent to endanger life, including property damage; but at the same time were acquitted from the second offence, membership in a criminal group. After rejecting all mitigating circumstances, the court followed the prosecution’s proposal, and sentenced all four defendants to 10 years of imprisonment.

VI. Conclusion

§36 In summary, four young people were unanimously sentenced to 10 years imprisonment for allegedly causing the Moria camp fires in early September 2020. When examining the proceedings, the international trial observers identified several breaches of different aspects of the fair trial principle:



1) In #Chios it is now 20:30... the last defense witness is being questioned.

2) The court adjourned the proceedings for tomorrow, Saturday at 10:00 in the morning,



1) Verdict in the #FreeTheMoria6 #FreeMoria6 trial: the four defendants were convicted of arson, and acquitted of the allegation of being member in a criminal group. The sentence is not decided yet – the defendants face up to 20 years imprisonment.

2) The consideration of mitigating circumstances was rejected – the prosecutor requests 10 years imprisonment for all 4 defendants each.



1) The verdict was unanimous. This means that all 3 judges and the 4 jurors based their conviction on the written witness statement as sole incriminating evidence. The defense concluded: “They didn’t listen to us at all”.

2) A political verdict in a political trial – 10 years imprisonment for all four defendants considered as adults.

⁴⁵ ECtHR, *Guide on Article 6, Right to a fair trial*, fn. 15, §415; further referencing the following case law: *Brozicek v. Italy*, No. 10964/84, 19 December 1989, §41; and *Tabai v. France*, No. 73805/01, 17 February 2004.

⁴⁶ See, *ibid.*, §418; further referencing the following case law: *X v. Austria*, No. 6185/73, 29 May 1975.

⁴⁷ See, *ibid.*, §416-417; further referencing the following case law: *Hermi v. Italy* [GC], No. 18114/02, 18 October 2006, §68; *Kamasinski v. Austria*, No. 9783/82 19 December 1989, §§79, 81; *Husain v. Italy*, No. 18913/03, 24 February 2005).

§37 First, following their arrest, the defendants were publicly portrayed by the Greek Minister of Migration and Asylum as the culprits for the fires which destroyed Moria camp.⁴⁸ For one, this representation in the media constitutes a violation of the presumption of innocence as set out by Articles 6 §2 ECHR, and 14 §2 ICCPR. Given that the public statement in question was made by the Greek Minister of Migration and Asylum, and therefore by one of the most high-ranking government officials in Greece, this preconception conveyed through media, for two, might even interfere with the right to an independent and impartial tribunal as established in Articles 6 §1 ECHR, and 14 §1 ICCPR.

§38 Second, based on their information, the international trial observers for three of the four defendants question the first instance court's jurisdiction, as three of the four defendants claimed to be minors. This all the more so, as they provided the court with identification documents as evidence to support their claim. As discussed in detail above, the age assessment conducted in the present case violated Articles 3, 8 and 12 CRC. By not considering the submitted identification documents, the court at the same time disregarded the *in dubio pro reo* principle, in breach of Articles 6 ECHR and 14 ICCPR.

§39 Third, the first instance trial was, in fact, held *in camera*, as the public was not prohibited from following the trial in the courtroom. The international trial observers, journalists, UNHCR, supporters, and interested individuals were denied access to the court building based on a capacity limit due to Covid. While the Covid-pandemic could be a legitimate reason for a temporary exclusion of the public, the principle of necessity still must be respected. Given that several less strict measures exist which could have been easily implemented, and taking into account that the Covid-restrictions in other sectors of society, such as gastronomy, had already been lifted at the time of the first instance trial, the decision to hold the trial behind closed doors violated the defendants' procedural rights protected by the fair trial principles. Overall, the international trial observers got the impression that the court did not want to have any audience for the trial.

§40 Fourth, the verdict was mainly based on the written witness statement of a former Moria camp resident, although neither the defendants themselves, nor the defence ever had the opportunity to question the witness during the entire procedure. Furthermore, based on the information accessible to the international trial observers the course of the photo identification procedure appears to be questionable. Taken together, the fact that the conviction was mainly based on evidence provided by a witness who never was cross-examined at any stage of the proceedings, while the court at the same time did not provide for sufficient counterbalancing factors, amounts to a breach of Articles 6 ECHR and 14 ICCPR rendering the trial as a whole unfair.

§41 "The Scapegoats of Moria" was the title of a news article in the online magazine 'Republik' following the trial held in Chios citing, among others, a migration researcher who stated that this trial never was about truly investigating the facts. Rather, the focus was on presenting people who can publicly be held accountable for the fire⁴⁹ – and at the same time, on re-directing the responsibility away from the inhuman conditions at Moria camp prior to its destruction.⁵⁰ In other words, the defendants' conviction might be interpreted as an attempt to consolidate the migration policy of border control and deterrence.

§42 In light of the above, the international trial observers come to the conclusion that the defendants' right to a fair trial was repeatedly violated. "They didn't listen to us at all", said the defence as they left the courtroom, "this verdict was already determined when the defendants were arrested in mid-September 2020". Immediately after the verdict was announced, the defence filed an appeal.

5 March 2023; a full report will be issued after the appeal judgment.

⁴⁸ See, FRANZISKA GRILLMEIER, *Die wahren Brandstifter sitzen nicht im Gerichtssaal*, fn. 3.

⁴⁹ See, WILLIAM STERN, *Die Sündenböcke von Moria*, Republik, 30 June 2021, available at: <https://www.republik.ch/2021/06/30/die-suendenboecke-von-moria>.

⁵⁰ See, FRANZISKA GRILLMEIER, *Die wahren Brandstifter sitzen nicht im Gerichtssaal*, fn. 3.