

PROS AND CONS OF THE EU–TURKEY REFUGEE DEAL AND WHY THE CONS PREVAIL

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ABSTRACT

The ‘EU–Turkey deal’ is a catchy nickname of the official document the ‘EU–Turkey Statement’; a result of meetings between EU and Turkey leaders. Although the EU–Turkey deal served as a basis for actions taken in relation to migration both on the side of the EU with its member states and on the side of Turkey, its legal nature remains questionable. Accusations emerged that the EU–Turkey deal resulted in the EU states’ failure to comply with the obligations in the field of human rights, particularly the rights of refugees. Yet, according to the judicial review, the individual member states are the ones responsible for implementing the EU–Turkey deal. The purpose of this article is to examine migration-related issues of the EU–Turkey deal. As the EU–Turkey Statement deals mainly with the status of Syrian refugees, legal implications of their status after the deal are one of the main subjects of this research. This article focuses primarily on the deal’s legal effects and its predominantly negative effects.

KEYWORDS

*EU–Turkey Statement
legality
human rights
Syrian refugees
readmission
relocation
migration
solidarity*

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1. Introduction

Its geographical position makes Turkey a major reception and transit country for migrants coming to Europe from the Middle East or Africa. According to the 2021 UNHCR statistics,² Turkey was the major refugee hosting country, and Syria (Syrian Arab Republic) was ranked first among the major refugee source countries. The data show a significant evolution as Afghanistan was at the top of the major source countries for new asylum applications in 2021. Little has changed in relation to Turkey and Syria; Turkey remains the country hosting the largest refugee population (since 2014, when it replaced Pakistan), with the vast majority of refugees coming from Syria (replacing Afghanistan).³ These statistics confirm Turkey as a key European partner in the battle against smuggling and immigration. For the Member States of the European Union (EU), tackling the migration and refugee crisis is a common obligation which should be implemented in the spirit of solidarity and responsibility.⁴ However, Afailal and Fernandez⁵ warn against a new form of coloniality (also represented by the EU–Turkey deal) by classifying the population of migrants and EU citizens and countries on EU members and countries where the control of the borders has been externalised.

To handle the migration crisis, the EU and Turkey agreed on 15 October 2015 on the EU–Turkey joint action plan⁶ (hereinafter ‘the joint action plan’). This was one of the EU’s first steps towards cooperation with third countries to stem the flow of migrants to Europe. The joint action plan was negotiated by the European Commission, but its actions were to be implemented by the EU, its institutions, and Member States on one side, and Turkey on the other. The problem of solving the migration flow into Europe was externalised outside Europe. This joint action addresses the reasons for the massive exodus from Syria, primarily due to the country’s ongoing armed conflict. Actions based on this plan aimed to strengthen cooperation between EU Member States and Turkey to prevent irregular migration flows to EU Member States and help Syrians enjoy one form of international protection (temporary protection) as well as their host facilities in Turkey.

To achieve the goals of the action plan, the EU Member States and Turkey launched the plan at their first meeting on 29 November 2015. This plan was intended to facilitate active cooperation regarding migrants not enjoying

2 | UNHCR: Figures at a glance [Online]. Available at: <https://www.unhcr.org/about-unhcr/who-we-are/figures-glance> (Accessed: 17 July 2023).

3 | UNHCR: 2018 in Review: Trends at a Glance (20 June 2019) [Online]. Available at: <https://www.unhcr.org/media/unhcr-global-trends-2018> (Accessed: 17 July 2023). Compare with: UNHCR: 2014 in Review: Trends at a glance (18 June 2015). [Online]. Available at: <https://www.unhcr.org/media/unhcr-global-trends-2014> (Accessed: 17 July 2023). UNHCR: 2013 in Review: Trends at a glance (20 June 2014) [Online]. Available at: <https://www.unhcr.org/media/unhcr-global-trends-2013> (Accessed: 17 July 2023).

4 | European Council, 2015.

5 | Afailal and Fernandez, 2018, p. 215.

6 | European Commission: EU-Turkey joint action plan (2015) [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860 (Accessed: 17 July 2023).

international protection as they would not have been able to travel to Turkey and the EU. This was intended to ensure the proper application of readmission agreements and the quick return of irregular migrants to their countries of origin.

During the second meeting on 7 March 2016 to implement the action plan, heads of state discussed⁷ the fight against smuggling, protection of external borders, return of irregular migrants crossing from Turkey to Greece at the expense of the EU, conditions for the resettlement of one Syrian from Turkey to the EU for every Syrian readmitted by Turkey from the Greek Islands, implementation of the visa liberalisation roadmap and the accession negotiation of Turkey to the EU, and additional funding for refugee facilities for Syrians in Turkey. However, specific implementation measures have not been successfully negotiated between the European Council (EC) and Turkey.

The third meeting between EU Member States and Turkey's representatives resulted in the form of the EU–Turkey Statement,⁸ the 'EU–Turkey deal'.⁹ The joint statement of the EC and Turkey encapsulated the results of their meetings, focused on deepening relations between the EU and Turkey, and aimed to address the migration crisis. It was published on the EC website. Turkey's main commitment was the readmission of every irregular migrant from Greece, based on the rules of international and EU law (especially the prohibition of collective expulsion and the principle of non-refoulement), with the main goal of ending the suffering of migrants and maintaining public order. The Greek side of the commitment was to ensure that every migrant arriving in Greece would be duly registered and that Greek authorities would process every individual asylum application. Migrants not applying for asylum or whose applications were unfounded or inadmissible, would be returned to Turkey; the EU to bear the return costs. According to the statement, for every Syrian migrant returning from Greece to Turkey, another Syrian would be resettled from Turkey to the EU¹⁰ based on the UN's vulnerability criteria.¹¹ The EU–Turkey agreement deals in the form of a statement with narrower scope and does not apply to every irregular migrant; it covers only Syrian refugees.

The goals of the EU–Turkey deal have been tested by the practices of EU Member States. This contribution is divided into four main issues, while only

7 | European Council: Meeting of the EU heads of state or government with Turkey (7 March 2016) [Online]. Available at: <https://www.consilium.europa.eu/en/meetings/international-summit/2016/03/07/> (Accessed: 17 July 2023).

8 | European Council: EU–Turkey statement (18 March 2016) [Online]. Available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> (Accessed: 17 July 2023).

9 | The author decided to use the form 'EU–Turkey deal', as it is a mainstream name of the EU–Turkey Statement, to make the topic clearer and more interesting for the reader, with the acknowledgement that it is not a legally correct term.

10 | See Art. 33 of the Convention Relating to the Status of Refugees. UN General Assembly: Draft Convention relating to the Status of Refugees (14 December 1950), (A/RES/429) [Online]. Available at: <https://www.refworld.org/docid/3b00f08a27.html> (Accessed: 17 July 2023).

11 | See UNHCR: UNHCR-IDC Vulnerability Screening Tool – Identifying and addressing vulnerability: a tool for asylum and migration systems [Online]. Available at: <https://www.unhcr.org/media/unhcr-idc-vulnerability-screening-tool-identifying-and-addressing-vulnerability-tool-asylum> (Accessed: 17 July 2023).

the first (second part: numbers, routes, and living conditions) is dedicated to the pros and cons of the deal. As these advantages are not of a legal nature, they will be examined only briefly. The remainder of this paper is dedicated to legal issues which constitute the cons of the deal. The third part of the article discusses the legal nature of the EU–Turkey deal, and the fourth focuses on the rules of international law violated by the actions of EU Member States and Turkey in relation to the implementation of the EU–Turkey deal.

The main purpose of the article is to review legal implications of the EU–Turkey deal. The analysis shows that the EU–Turkey deal created a legal chaos and had a negative impact on the legal and de facto status of migrants and refugees, and relationships between the EU Member States. One may conclude that this study focuses mainly on the negative side of the deal’s implementation, but the deal had a few positive impacts too, e.g. the lower numbers of incoming migrants to Europe, changes in migration routes, and the very limited improvement of living conditions in refugee facilities in Turkey, all of which are not of a legal nature. Since this contribution focuses mainly on a legal analysis of the impacts of the EU–Turkey deal, it leads us to the conclusion that, from a legal point of view, cons fundamentally prevail.

2. Numbers, routes and living conditions

The EU–Turkey deal had a few positive effects. There is statistical confirmation that the number of irregular migrants coming to Europe decreased, migrants changed their routes to the EU Member States’ territories, and the conditions in the Turkish refugee camps have improved.

Eurostat statistics¹² show that the number of applications for asylum in EU Member States significantly dropped in 2017, mainly in Germany and Greece (mostly refugees who came to Greece via Turkey). Following the EU–Turkey deal, the number of refugees and migrants entering Europe via the Aegean Sea decreased. Pursuant to the deal, the EU sent Syrians to Turkey who did not meet the conditions for international protection as refugees in the form of asylum or subsidiary protection, and Syrians who met the conditions for granting asylum or subsidiary protection were resettled in EU countries from Turkey.¹³ It is unclear if the EU–Turkey deal was the main reason for the reduction of the numbers of migrants coming to Europe via Turkey. According to Kirişçi,¹⁴ the suspension of the asylum procedures by Greece and its forceful prevention of migrants crossing to the Greece, and the COVID-19 pandemic that forced Turkey to close its

12 | Eurostat: Asylum and first time asylum applicants – annual aggregated data (23 April 2023) [Online]. Available at: <https://ec.europa.eu/eurostat/databrowser/view/TPS00191/default/table?lang=en> (Accessed: 17 July 2023).

13 | DW: The EU–Turkey refugee agreement: A review (18 March 2018) [Online]. Available at: <https://www.dw.com/en/the-eu-turkey-refugee-agreement-a-review/a-43028295> (Accessed: 17 July 2023).

14 | Kirişçi, 2021.

borders in 2020, caused the reduced migration flow to Europe.¹⁵ It is clear that the EU–Turkey deal changed migration routes at least for the migrants who travelled from the African continent by the East African, Central Mediterranean or Western Mediterranean routes.¹⁶

Another positive of the EU–Turkey deal was the support of Turkish facilities for refugees. Turkey hosts some 4 million refugees, of which over 3,6 million are Syrians. Most are seeking resettlement outside camps, where they are vulnerable. Facilities for refugees provide support to those who flee their country of origin because of violence.¹⁷ According to the Facility’s Results Framework, the objectives of refugee facilities encompass education, health, protection, basic needs, livelihood, municipal infrastructure, migration management, and cross-cutting.¹⁸ EU financial support (up to €6 billion) for such facilities was allocated to projects meant to be finished by mid-2021, but which were extended to mid-2025.¹⁹

While the EU–Turkey deal had many imperfections, one can agree with Kirişçi²⁰ that facilities for refugees that operate as a result of cooperation of the EU Member States, organs and agencies and international organisations on one side, and governmental organs, agencies and civil communities in Turkey on the other side, proved to be a successful tool in providing protection to refugees in Turkey. It suggests that cooperation based on a problem-solving attitude is the key element in dealing with crises. However, the change must be from the ground up and not just because of political negotiations. Migration has strong social implications; society therefore is an essential aspect of migration management. Statistics for the preceding year show reduced numbers of the irregular migrants coming to Europe, change of the migration routes and improvement of the living conditions in Turkish refugee camps, being positive implications of the EU–Turkey deal.

3. Contested legal nature of EU–Turkey deal

The EU–Turkey deal and its implications were subjected to judicial review by the European Court of Justice (ECJ) in cases based on the claims of violation of persons’ rights regarding actions of EU Member States and EU institutions taken in consequence of the EU–Turkey deal.

First, we can analyse the order of the ECJ in joint cases C-208/17P to C-210/17 P.²¹ In these cases, three applicants (NF and NM residing on the Island of Lesbos,

15 | Ergin, 2020; Psaropoulos, 2020; Jones, 2020.

16 | Frontex: Monitoring and risk analysis: Migratory MAP [Online]. Available at: <https://frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-map/> (Accessed: 17 July 2023). Conant, 2023.

17 | European Commission, 2022a.

18 | European Commission, 2022b.

19 | European Commission, 2023b.

20 | Kirişçi, 2021.

21 | Order of the Court of 12 September, NF and Others vs. European Council, Joint cases C-208/17 P to C-210/17 P (ECLI:EU:C:2018:705).

HG residing in Athens) appealed against the order of the General Court of the European Union (General Court) of 28 February 2017 (NF vs. European Council (T-192/16, EU:T:2017:128), NG vs. European Council (T-193/16, EU:T:2017:129) and NM vs. European Council (T-257/16, EU:T:2017:130)). The General Court dismissed the application seeking the annulment of the EU–Turkey Statement on the grounds of the Court’s lack of jurisdiction to hear and determine it. Applicants argued that the EU–Turkey Statement was an act attributable to the EC, establishing an agreement contrary to EU law. However, the EC considered their actions inadmissible under Art. 130 of the Rules of Procedure of the General Court.

As the judgements of the General Court in cases NF, HG, and NM all have the same reasoning, we examine only one, the case of NF (T-192/16).²² NF, a Pakistani national, fled Pakistan because of fear of persecution and serious physical harm due to assassination attempts to prevent him from inheriting his parents’ property. He entered Greece from Turkey by boat on 19 March 2016. After forced submission of an application for asylum to the Greek authorities in April 2016, he was detained for seven days, after which he fled to the Island of Lesbos. He claimed he never wanted to submit the application because of the length of the asylum procedure and deficiencies in the implementation of the European Asylum System, which was confirmed by the rulings of the ECJ and the European Court of Human Rights. He submitted a claim for asylum only to prevent his return to Turkey, with the risk of being detained there or expelled to Pakistan. In NF’s application to the General Court, the applicant asked the Court to annul the agreement between the EC and Turkey dated 18 March 2016 titled the ‘EU–Turkey Statement’ and to order the EC to pay the costs.

The EC explained that to the best of its knowledge, no agreement or treaty in the sense of Art. 218 of the Treaty on the Functioning of the European Union (TFEU) or Art. 2 of the Vienna Convention on the Law of Treaties had been concluded between the EU and Turkey. The EU–Turkey Statement was merely the fruit of dialogue between EU Member States and Turkey without intending an agreement with legally binding effects (Para. 27). The Statement was not a legally binding agreement but a political arrangement by members of the EC, heads of states or governments of Member States, president of the EC, and president of the Commission (Para. 29).

The General Court pointed out that the action for annulment must be available in the case of all measures adopted by entities of the EU regardless of their nature or form, provided they were intended to produce legal effects (Para. 42). The General Court mainly examined Art. 263 of the TFEU, which gives the Court the power to review the legality of the act of the EU institution and order its annulment. Such an act must have been adopted by an EU entity and have legally binding effects. The court does not have the power to review the legality of the acts of national bodies, heads of EU Member States, or governments (Para. 44). If the act represented an international agreement, the Court’s power to review its legality would only refer to the measures by which an EU institution sought to conclude the international

22 | Order of the General Court of 28 February 2017, NF vs. European Council, T-192/16 (ECLI:EU:C:2018:705).

agreement at issue, not to the agreement per se (Para. 46). The role of the General Court was only to consider if the EU–Turkey deal presented a measure attributable to the EC and if it had been concluded as an international agreement (Para. 47). The court concluded that the Statement and other official documents worked with the terms ‘members of the EC’ and ‘EU’ which refer to the ‘heads of the states or governments of the EU’. Therefore, the EC did not conclude the agreement with Turkey in the name of the EU, and it could not be considered as a measure adopted by the EC (Para. 71). If the meeting of 18 March 2016 represented the conclusion of the international agreement, it would be the agreement concluded between the heads of states or governments of the EU Member States and Turkey’s Prime Minister (Para. 72). However, the Court did not consider that the European Commission itself presented the EU–Turkey deal (statement) as an ‘EU–Turkey agreement’ on its website.²³

The Court concluded it was not within its powers to review the legality of the international agreement concluded by EU Member States (Para. 73), and dismissed the action on 28 February 2017 on the grounds of the Court’s lack of jurisdiction to hear and determine it. According to Idriz,²⁴ the General Court, with its predetermined goal, selectively chose evidence that supported its findings that the statement was not an act attributable to an EU institution and hence was subject to review. Idriz pointed out that even though the Court referred to the principle that substance overrides form in Para. 42 of its own order, it considered the form and did not analyse the substance of the EU–Turkey Statement – contrary to previous rulings of the ECJ as well as the International Court of Justice. Idriz referred to the ERTA case²⁵ which had not been considered by the General Court. According to this case, ERTA doctrine (implied external powers doctrine) means that each time the Community adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. Moreover, under international law, not the formal designation of an instrument is decisive, but decisive are the content of the instrument and the intent of the parties. Idriz highlighted the rules of international law for the legal assessment of the statement. First, Art. 2 (1) (a) of the Vienna Convention on the Law of Treaties defines a treaty as an international agreement, whatever its designation. Second, in the case of Qatar versus Bahrain,²⁶ the International Court of Justice ruled that the minutes of foreign ministers’ meetings are not mere records of meetings. They do not simply summarise the points of agreement and disagreement. They enumerate the commitments to which the parties have consented and create rights and obligations in international law for the parties, and constitute international agreements. It should be sufficient for the statement

23 | European Commission, 2016b.

24 | Idriz, 2017b.

25 | Case 22/70 Commission vs. Council (ERTA) (ECLI:EU:C:1971:32, Para. 36), ERTA doctrine is now codified under Art. 3 (2) TFEU.

26 | ICJ: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *Jurisdiction and Admissibility*, Judgment of 1 July 1994, ICJ Reports 1994, p. 112, Para. 25.

to be an act intended to produce legal effects vis-à-vis third parties. However, this contradicts the position of European courts and thwarts any possibility of an EU–Turkey deal review.

The ECJ's opinion that the EU–Turkey deal was an agreement concluded between EU Member States and Turkey was followed by the European Court of Human Rights in the case of *J.R. and Others*.²⁷ Yet neither court answered the question if the EU–Turkey deal itself was capable of producing legal effects and if the EU–Turkey deal had a legal nature.²⁸ Although the EU–Turkey deal does not use terms such as shall or should, which would indicate obligations of result or effort,²⁹ an analysis of its terminology reveals the parties' intention to be bound by its terms. As Heijer and Spijkerboer³⁰ pointed out, the EU–Turkey deal contains Turkey's commitment to accept returned migrants, and the EU's commitment to accept one Syrian for resettlement for every Syrian returned to Turkey. This indicates both parties' intent to bind themselves, and the EU–Turkey deal should therefore be considered a treaty with legal effects.

The said three applicants lodged appeals on 21 April 2017 against the General Court's orders to the ECJ, which considered all three cases in a joint proceeding. Applicants sought the annulment of the orders of the General Court of 28 February 2017 *NF vs. European Council*, *NG vs. European Council* and *NM vs. European Council*, by which the General Court had dismissed their actions for annulment of the EU–Turkey agreement. The applicants claimed to set aside the orders under appeal and refer the cases back to the General Court for adjudication, and accepting jurisdiction.

The ECJ pointed out that every appeal must precisely indicate the contested elements of the appealed order and legal arguments that specifically support the appeal; otherwise, the appeal or its grounds would be dismissed as inadmissible (Para. 12). Arguments supporting the appeal must be sufficiently clear and precise to enable the Court to exercise its powers of judicial review without running the risk of ruling *ultra petita* because the essential elements of the argument were not sufficiently coherent and intelligent (Para. 13). An appeal with general statements without specific indications of the points of the appealed decision must be dismissed as manifestly inadmissible (Para. 14). In this case, the appeals were incoherent and contained eight pleas in law, but the reasoning was not clear and apparent from the elements which they set out in a vague and confused manner, with general assertions that the General Court had disregarded a certain number of EU Law principles, without the precision of the contested elements in the orders or legal arguments in support of the annulment (Para. 16). Therefore, by 12 September 2018, the ECJ dismissed the appeals as manifestly inadmissible.

By an overly formalistic approach to the EU–Turkey Statement, the Court took the case out of the broader context of the EU–Turkey cooperation in the field of

27 | ECHR: *J.R. and Others v Greece* (application 22696/16).

28 | Pijnenburg, 2018.

29 | den Heijer and Spijkerboer, 2016.

30 | *Ibid.*

migration. Idriz contested³¹ the logic of the General Court's justification, which contradicted the division of competencies between the EU and its Member States, as the EU legal order was based on the principle of the rule of law and conferred powers (Arts. 2 and 5 TEU). To determine the right procedure for concluding the deal, the content and aim of the Statement must be defined, which is the return of all irregular migrants to Turkey with effect from 20 March 2016. This falls within the area of freedom, security, and justice, in which the EU and its Member States exercise shared competence, while visa liberalisation is a matter of exclusive EU competence. As regards the EU–Turkey Readmission Agreement, which covered the issue of readmission of the third nationals by Turkey, the EU had conferred powers to conclude such agreement (Art. 79 (3) TFEU). Once the EU exercised its competence, Member States were not allowed to conclude any agreement in that area or take any action leading to acts with legal effect (Art. 3 (2) TFEU). Leino-Sandberg and Wyatt³² describe the actions of European courts as a new trend of siding with institutional opacity. It seems that for European courts, the political sensitivity of reviewed matters is decisive and constitutes a specific concern pertaining to relocation and the fundamental rights of people escaping persecution or armed conflict.

Some authors³³ opine that the EU–Turkey cooperation on migration started long ago when the EU–Turkey Readmission Agreement³⁴ was signed and the Visa Liberalisation Dialogue was launched on 16 December 2013. The EU–Turkey Readmission Agreement was a legal basis for the EU's exclusive competence to act in readmission cooperation with Turkey. Consequently, the EU–Turkey deal must be considered part of the implementation of the EU–Turkey Readmission Agreement. It must be examined in light of the European Commission's clarification published on its official website, dedicated to answers about the EU–Turkey Statement,³⁵ which points out that legal framework for the returns according to the EU–Turkey deal was a bilateral readmission agreement between Greece and Turkey, and was succeeded by the EU–Turkey Readmission Agreement from 1 June 2016.

31 | Idriz, 2017a.

32 | Leino-Sandberg and Wyatt, 2018. They justify this trend with another case-law of the General Court (Case T-851/16 *Access Info Europe vs. Commission*) in which Access Info Europe as NGO in concern of compatibility of the EU-Turkey deal with the international human rights claimed the access to documents relating to the meeting of 7 March 2016 which should have been generated or received by Commission containing legal advice and/or legality of the actions to be carried out by EU and its member states implementing the statement (deal). Commission argued that release of such documents would undermine the public interest relating to international relations, the protection of court proceedings and legal advice. The General Court held that documents were covered by the legal advice exception and as merely interdepartmental consultations they did not constitute legal advice definitively fixing the institution's position, therefore there was no overriding public interest in disclosure.

33 | Idriz, 2017b; Leino-Sandberg and Wyatt, 2018.

34 | Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation (OJ L 134, 7.5.2014, pp. 3–27).

35 | European Commission, 2016a.

4. The EU–Turkey deal violating international law?

To analyse the EU–Turkey deal from the point of view of international law, we need to determine fields of international law that may be violated by the deal and (non)legal measures adopted in its correlation. As the deal covers the area of migration, specifically the status of Syrian refugees, the main areas of law covering relations between the EU, the states concerned, and individuals are the rights of refugees and human rights in general.

The legal basis of refugee rights is the UN Convention Relating to the Status of Refugees (1951) (Refugee Convention) and its Protocol Relating to the Status of Refugees (1967) (Refugee Protocol).³⁶ As the office of the UNHCR stated in the introductory note, the Convention and Protocol are status- and rights-based instruments built on numerous fundamental principles, mainly the principles of non-discrimination, non-penalisation, and non-refoulement. Duarte's analysis confirms³⁷ that all these principles may be violated by the EU–Turkey Statement. The principle of non-discrimination (Art. 3 of the Refugee Convention) is that the EU–Turkey Statement was designated mainly for Syrian refugees, which constitutes discrimination based on the country of origin. From Turkey's point of view, the EU–Turkey Statement allowed Turkey to grant refugee status only to those fleeing Europe. Hattaway³⁸ pointed out that, while all refugees were to be returned by the EU to Turkey, only Syrians could benefit from EU protection in the form of resettlement, which could be the cause of discrimination.

The principle of non-penalisation (Art. 31 of the Refugee Convention) means that contracting states should not impose penalties on account of illegal entry or the presence of refugees who enter or are present in their territory without authorisation, such as immigration or criminal offences to refugees or their detention based only on the grounds of them seeking asylum. This principle was undoubtedly violated by conditions in which refugees stayed in facilities and camps in Greece, Italy and Turkey by the militarisation of these areas, not to forget 'pushbacks' at their borders.³⁹

These pushbacks violate the principle of non-refoulement (Art. 33 of the Refugee Convention). It is a basic principle under international law dealing with forced return and covers the right of asylum claimants or refugees not to be sent back to their country of origin to face persecution.⁴⁰ Violation occurs when states—Greece, Turkey, or any other contracting state—do not allow refugees to apply for asylum since the asylum procedure is crucial for the determination of an irregular migrant and asylum seeker. The principle of non-refoulement was violated,

36 | UNHCR: Convention and Protocol relating to the Status of Refugees [Online]. Available at: <https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees> (Accessed: 17 July 2023).

37 | Duarte, 2020.

38 | Hathaway, 2016.

39 | Smith, 2023. Push-back of migrants on boats by the Greece are also subject of the judicial review of the European Court of Human Rights. See e.g. report of HRW: Cossé, 2022.

40 | Poon, 2016, p. 1196.

considering that Turkey is not a safe third country anymore when it comes to threats of life and freedom; as reports show, Turkey sent refugees, including unaccompanied children and pregnant women, back to Syria, which is a country with an ongoing armed conflict.⁴¹ The conclusion that Turkey cannot be considered a third safe country is also based on the fact that it applies⁴² geographical limitations to the Refugee Convention, under which it has no obligations for non-European refugees.

Turkey is not an EU member state; therefore, it cannot be presumed that it will apply for and guarantee rights in compliance with EU law. Turkey does not have the same substantive and procedural rules and procedures for the protection of asylum claimants and refugees, e.g. claimant records.⁴³ Even the European Commission⁴⁴ expressed the need for provision changes within Greek and Turkish domestic legislation according to procedural safeguards, as the inconsistency of the domestic legislation of these states had been established before the EU–Turkey deal.

This shows that EU representatives had to be aware of Turkey's struggles with the protection regime for migrants/refugees. This regime is based on the new domestic order for asylum seekers, the Law on Foreigners and International Protection⁴⁵ adopted in 2013. It provides permanent protection by refugee status for applicants coming from Europe as protection of refugees according to the definition of the 1951 Refugee Convention (Art. 61) and two forms of international protection for non-Europeans;⁴⁶ a 'conditional refugee status' for persons under direct personal threat (until completion of the refugee status determination process (Art. 62), and subsidiary protection for persons coming to Turkey from countries where a general situation of violence prevails (Art. 63). Art. 91 applies the 'temporary protection' to foreigners who were forced to leave their countries and unable to return, arrived at or crossed Turkey's borders in masses to seek urgent and temporary protection and whose international protection requests cannot be taken under individual assessment. Turkey's Temporary Protection Regulation⁴⁷ defines specific conditions for temporary protection, implementation of laws on foreigners, and international protection. Per the regulations, Syrian refugees who arrived at or crossed Turkey's borders after 28 April 2011 may enjoy only temporary protection (Art. 1 of the Temporary Protection Regulation). Individual applications

41 | See e.g.: HRW: Turkey: Hundreds of Refugees Deported to Syria: EU Should Recognize Turkey Is Unsafe for Asylum Seekers (24 October 2022) [Online]. Available at: <https://www.hrw.org/news/2022/10/24/turkey-hundreds-refugees-deported-syria> (Accessed: 17 July 2023).

42 | Hathaway, 2016.

43 | Poon, 2016, p. 1198.

44 | Communication from the Commission to the European Parliament, the European Council and the Council: Next operational steps in EU-Turkey cooperation in the field of migration (Brussels, 16.3.2016, COM (2016)166), p. 3.

45 | UNHCR: Turkey: Law on foreigners and international protection, Law No : 6458, Acceptance Date : 4/4/2013 [Online]. Available at: https://www.unhcr.org/tr/wp-content/uploads/sites/14/2017/04/LoFIP_ENG_DGMM_revised-2017.pdf (Accessed: 17 July 2023).

46 | Heck and Hess, 2017, p. 43.

47 | UNHCR: Turkey: Temporary Protection Regulation [Online]. Available at: <https://www.refworld.org/docid/56572fd74.html> (Accessed: 17 July 2023).

for international protection should not be implemented during temporary protection, meaning that applicants coming from Europe may apply for the status of 'convention refugee', but applicants coming from non-European states may gain refugee status only via the UNHCR.⁴⁸

It must be stated that although Syrians are only eligible for temporary protection, Turkey's Temporary Protection Regulation allows them access to basic healthcare services, education and work permits, and they are not forced to be present in camps like most asylum-seeking refugees in Europe. However, this temporary status implies constant legal and social insecurity in the future.⁴⁹ Persons deported from Greece to Turkey reported that national authorities tried to prevent them from seeking asylum, and they were able to submit the application only after a lawyer's intervention after weeks of imprisonment. They may apply for refugee status only at the UNHCR, and as asylum seekers, they must settle in a satellite city where they have access to basic health care, education and employment, but very limited economic possibilities. These people gave up their international protection status, moved to Istanbul, and left the country for Europe.⁵⁰

To protect refugees and their human rights, it is important to examine whether Turkey can be considered a safe third country. By negotiating the EU-Turkey deal, the EU assumed that Turkey was indeed a safe third country. Tunaboylu and Alpes⁵¹ point to the EU-Turkey deal's conditions, according to which asylum seekers should be returned from Greece to Turkey: a) if they do not apply for asylum or withdraw the application, b) if they choose assisted return, c) if the application for asylum is assessed negatively, and d) if the asylum application is inadmissible according to formal Greek conditions. Thus, Turkey is considered a safe first country for asylum and a safe third country.

Such differentiation is important for the possibility that EU Member States would declare an asylum application inadmissible; i.e. they would reject it without examining its substance. Art. 35 of the 'Asylum procedures directive'⁵² defines the 'first country of asylum' as the country where the person has already been recognised as a refugee or otherwise enjoys sufficient protection, and Art. 38 of this directive defines 'safe third country' as the country where the person has not already received protection in the third country but the third country can guarantee effective access to protection to the readmitted person. This article also defines conditions (procedural safeguards) under which the EU member state may apply the concept of the safe third country to the third country concerned only if the competent authorities are satisfied that within this country: a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion, b) there

48 | Heck and Hess, 2017, p. 41.

49 | *Ibid.*, p. 47.

50 | *Ibid.*, pp. 49–50.

51 | Tunaboylu and Alpes, 2017.

52 | Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (OJ L 180, 29.6.2013, pp. 60–95).

is no risk of serious harm,⁵³ c) the principle of non-refoulement is respected, d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected, and e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection according to the Refugee Convention.

Application of the concepts of the first country of asylum and third safe country in relation to Turkey means that the asylum applications submitted by a person arriving through Turkey under the EU–Turkey deal may be declared as inadmissible and rejected if such a person already enjoyed protection in Turkey (with Turkey in the position of the first country of asylum) and if such a person was able to apply for protection in Turkey (with Turkey in the position of a safe third country). Both these concepts—the first country of asylum and a safe third country—are applicable to non-Turkish nationals, where for the purposes of the EU–Turkey deal and the return of non-Turkish nationals, the concept of a safe third country is crucial. The concept of a safe country of origin is critical for Turkish nationals returning from Europe to Turkey.

Humanitarian organisations are calling for the termination of EU cooperation with Turkey on refugee protection. Amnesty International⁵⁴ called on the EU to adopt an independent resettlement plan and work with Turkey towards ending the abuse of refugee rights after reports of forced deportations (covered by the forced signing of documents ‘agreeing’ to voluntary return to their home countries), detentions without access to lawyers, denial of access to phones or their confiscations, all relating to the nationals of Syria, Afghanistan and Iraq. Amnesty International declared the day of the EU–Turkey Statement as a ‘dark day for humanity’.⁵⁵ Human Rights Watch⁵⁶ called on the EU to recognise Turkey as unsafe for asylum seekers due to forced deportations of Syrians and the appalling conditions of their detention centres. Refugees International⁵⁷ reports reaffirm these concerns. Greece noticed the abysmal conditions of Syrian refugees after their return to Turkey, and in May 2016 stopped the deportation of some Syrian refugees to Turkey, reasoning that Turkey was not a safe country.⁵⁸

53 | Serious harm consists of the death penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Art. 15 of the Directive 2011/95/EU of the European Parliament and of the Council 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).

54 | Amnesty International, 2016; Amnesty International: Europe’s Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey (16 December 2015) [Online]. Available at: <https://www.amnesty.org/en/documents/eur44/3022/2015/en/> (Accessed: 17 July 2023).

55 | Rösner, 2016.

56 | HRW: Turkey: Hundreds of Refugees Deported to Syria: EU Should Recognize Turkey Is Unsafe for Asylum Seekers (24 October 2022) [Online]. Available at: <https://www.hrw.org/news/2022/10/24/turkey-hundreds-refugees-deported-syria> (Accessed: 17 July 2023).

57 | Leghtas, 2019.

58 | Gkliati, 2017, pp. 217–219.

A state bound by the Refugee Convention⁵⁹ must obey the principle of non-refoulement in all asylum proceedings. Art. 33 of the Refugee Convention establishes, for every contracting state, the prohibition of the expulsion or return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion. Although Turkey is one of the Refugee Convention's original contracting parties, it has seriously breached the principle of non-refoulement by repeatedly shooting Syrians along the border, even after the earthquake of February 2023.⁶⁰ Information emerged about refugees (Afghan nationals) who had been detained in deportation centres after arriving in Turkey and were forced to sign documents in Turkish confirming their consent to voluntarily return to Afghanistan. All without the possibility of applying for asylum and access to fair asylum proceedings or the submission of a claim for international protection,⁶¹ and despite acknowledging the human rights situation in Syria, Afghanistan and Iran.

Contracting parties to the Refugee Convention received only one exception for non-compliance with the principle of non-refoulement, which is the case when there are reasonable grounds for regarding refugees as a danger to the security of the country in which they are or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. Therefore, the EU–Turkey deal heightens Turkey's massive expulsion risk. It violates international law, especially the principle of non-refoulement, and Protocol No. 4 of the European Convention on Human Rights, Art. 3, which defines the prohibition of the collective expulsion of aliens.

The situation in Greece is under the radar of the European Court of Human Rights (ECHR). Among the case law related to Greece's current situation, the *Safi* case⁶² may serve as an example. The ECHR concluded that Greece violated Art. 2 of the European Convention on Human Rights (ECTHR)—the right to life—as to refugees' loss of life after oversights and delays caused by national authorities in conducting and organising their rescue from a capsized boat, and insufficiently and ineffectively investigating the boat's sinking which had turned out fatal for some of the refugees. The ECHR also confirmed violations in relation to Art. 3 of the ECTHR—the prohibition of torture—about degrading treatment by law enforcement personnel, particularly the body searches of refugees brought from capsized boats to Greek islands, e.g. an order issued to refugees to disrobe as a group in front

59 | UNHCR: Convention and Protocol relating to the Status of Refugees [Online]. Available at: <https://www.unhcr.org/media/28185> (Accessed: 17 July 2023).

60 | Group: Turkish troops shooting Syrian civilians along border (27 April 2023) [Online]. Available at: <https://apnews.com/article/turkey-syria-border-shooting-refugees-7a2fbc48d61e67a95ab3c7583c345d2> (Accessed: 17 July 2023).

61 | Refugees International: The Return of Thousands of Afghans from Turkey back to Afghanistan is Cause for Alarm (7 May 2018) [Online]. Available at: <https://www.refugeesinternational.org/statements-and-news/the-return-of-thousands-of-afghans-from-turkey-back-to-afghanistan-is-cause-for-alarm/> (Accessed: 17 July 2023). Dawi, 2022.

62 | ECHR: *Safi and Others v. Greece*- 5418/15.

of at least 13 people. It is questionable whether these Greek proceedings are related to the EU–Turkey deal or were just demonstrations of Greek practice after years of inadequate EU migration policies.

Accusations were levelled against the Dutch government, which held the presidency of the Council of the EU. A press release by the Boat Refugee Foundation on 20 March 2023⁶³ stated that the Netherlands government, as the then president of the EC, was responsible for the consequences of the EU–Turkey deal. Diederik Samsom, leader of the Dutch Labour Party, announced the ‘Samson plan’—a plan to resettle 150 000–250 000 migrants from Turkey in EU Member States—in a newspaper interview in January 2016.⁶⁴ Thus, the Dutch government played an important role in creating and implementing the deal in spite of warnings from NGOs, in particular Amnesty International, that the EU–Turkey deal would lead to the violation of human rights.

In conclusion, the EU should acknowledge Turkey’s unfriendly attitude towards refugees. The last presidential elections uncovered a nationalist and anti-refugee narrative of the opposition when Kemal Kilicdaroglu, opposition candidate to the recently re-elected president Erdogan, promised ‘to send 10 million refugees back home if he won’.⁶⁵ Even though statistics from the UNHCR show that Turkey hosts up to four million people needing international protection,⁶⁶ this fuels further populist abuse of migration issues.

Turkey, despite its status as a (non)safe country, has trouble handling millions of migrants and refugees in its own territory. The EU’s cooperation with Turkey should be limited to economic, material, or personnel improvement of refugee facilities in Turkey, at least until Turkey ratifies the Refugee Convention with its protocol expanding protection to all refugees without territorial or temporal limitations. European states should stay true to their international obligations, at least in the field of human rights and the rights of refugees, as well as to their values, and not turn a blind eye to blatant human rights violations or, even worse, to cause them.

63 | Netherlands liable for human rights violations in Greek refugee camps (27 March 2023) [Online]. Available at: <https://www.statewatch.org/news/2023/march/netherlands-liable-for-human-rights-violations-in-greek-refugee-camps/> (Accessed: 17 July 2023).

64 | Rumeli Observer: Interview with Diederik Samsom on his plan (translated) – 28 January. (29 January 2016) [Online]. Available at: <https://www.esiweb.org/rumeliobserver/2016/01/29/interview-with-diederich-samsom-on-his-plan-translated-28-january/> (Accessed: 17 July 2023).

65 | Aljazeera: Turkey’s Kilicdaroglu promises to kick out refugees post-election (18 May 2023) [Online]. Available at: <https://www.aljazeera.com/news/2023/5/18/turkeys-kilicdaroglu-promises-to-kick-out-refugees-post-election> (Accessed: 17 July 2023).

66 | UNHCR: Refugee Data Finder [Online]. Available at: <https://www.unhcr.org/refugee-statistics/download/?url=oy3YY0> (Accessed: 17 July 2023); See also: UNHCR: Türkiye fact sheet (February 2023) [Online]. Available at: <https://www.unhcr.org/tr/wp-content/uploads/sites/14/2023/03/Bi-annual-fact-sheet-2023-02-Turkiye-.pdf> (Accessed: 17 July 2023).

5. Conclusion

The EU–Turkey deal aimed to solve the migration crisis in 2015 caused mainly by the armed conflict in Syria, and focused on the closure of the Western Balkans route leading to Europe through Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia.⁶⁷ These temporary solutions were not effective as they were not designed to provide a universal framework to deal with future migration crises. Scientific studies had recommended the preparation of migration and protection policies on global warming, ongoing armed conflicts, and radicalism. In response to migration, the EU is trying to externalise migration management.⁶⁸

This contribution provides a brief list of the positive impacts of the deal, namely a reduced number of incoming migrants to Europe, changes in migration routes, and the marginal improvement of conditions in Turkish refugee facilities. Statistics confirm that the number of incoming irregular migrants dropped after the EU–Turkey deal, partially because of improved Turkish border controls owing to commitments per the EU–Turkey deal, and also as the result of border closures due to COVID-19. Better control at Turkey’s borders led to changes in migration routes, and irregular migrants now enter Europe through the African continent via the East African, Central Mediterranean, or Western Mediterranean routes. Paradoxically, Eastern European states eliminated the pressure of the migration crisis, whereas the Mediterranean frontline states are now facing pressure. If the EU–Turkey deal had a positive impact on refugees, it must have been an improvement of their living conditions in Turkey’s facilities, where they now have access to education, health, protection, basic needs, etc. Despite this improvement, many of the four million refugees in Turkey are seeking resettlement outside the camps and other improved facilities because staying there still means being vulnerable and without access to economic possibilities.

From a legal viewpoint, it appears that the form of the EU–Turkey deal was well chosen. Its form represents pros for the EU, including its institutions and Member States, but cons for refugees, as they have very limited legal possibilities for legal review of their proceedings. Based on this observation, this contribution firstly examined the legal nature of the EU–Turkey deal. It is apparent that the ECJ focused only on the form of the EU–Turkey deal when the Court agreed with the Council’s opinion that the deal was not an actual agreement between the EC and Turkey but just a statement of the institutions of the EU, its Member States and Turkey, sans legal effects. Had the Court considered that the intent of the meeting of 18 March 2016 had been to conclude an agreement, the EU–Turkey deal would now be recognised as an agreement with concomitant legal effects. The court’s ruling failed to distinguish between the competencies of the EU and its Member States and the rules of international law regarding treaties, notably the content of the instrument and the intent of the parties.

67 | European Council, 2023.

68 | Wesel, 2021.

A judicial review of the EU–Turkey deal stemmed from accusations of violations of refugee rights and human rights by the actions adopted regarding the EU–Turkey deal’s implementation. Close examination reveals that the actions of the states represented violations of the principle of non-discrimination as the EU–Turkey deal covered mainly Syrians, the principle of non-penalisation because migrants were detained in the frontline countries, and the principle of non-refoulement as many migrants were not allowed to apply for asylum, which was a precondition for determining their status as asylum seekers. Further, Turkey, as a state of resettlement, should no longer be considered a safe third country, not only for the limited application of the Refugee Convention, but also due to forced returns of Syrians to Syria despite the ongoing armed conflict there, detentions without access to lawyers, denial of access to phones, etc. The malfunctioning of the EU migration policy is attested to by Greece’s practices and its forced return of migration boats to the open sea where migrants were abandoned.⁶⁹

The EU’s Migration Policy is in dire need of improvement. It must ensure support for frontline states without the violent relocation of migrants to unwilling states and a strong protection of human rights, especially the basic right to life. After the EU–Turkey deal, the accusations of human rights violations, issues related to EU Member States’ solidarity, and the weakening of the rule of law within the EU all confirmed that the EU–Turkey deal was an expensive and ineffective tool for solving the migration crisis in Europe. The main goals of the EU–Turkey deal were not met and numerous principles, including the prohibition of collective expulsion, principle of non-refoulement and stopping migrants’ human suffering, were broken. As examples teach us (e.g. the UK refugee deal with Rwanda⁷⁰), any attempt by a state to transfer its obligations stemming from the Refugee Convention is unlawful and contrary to refugee rights and human rights law.⁷¹ It is time for every state to accept its own responsibility and fulfil its obligations in light of basic human rights.

69 | Smith, 2023.

70 | Hardie et al., 2023.

71 | For more about European human rights see: Karska et al., 2023, p. 431.

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