

EOTVOS LORAND UNIVERSITY BUDAPEST
European Master's Degree in Human Rights and Democratisation
A.Y. 2015/2016

THE EU-TURKEY DEAL, A SOLUTION THAT CAN WORK

A legal analysis on the flaws of the EU-Turkey deal and its
viability under International and European Law

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ABSTRACT

The EU-Turkey Statement of the 18 March means the confirmation of the change of direction of the EU migration and asylum policy. The so-called EU-Turkey deal –more criticised than praised – casts serious doubts on its compatibility with international standards. This dissertation will try to identify the legal flaws of the deal and the challenges with its implementation. For this purpose, it will focus on three different aspects: the consideration of Turkey as a ‘safe’ country; the interpretation of the European Court of Human Rights of ‘collective expulsions’; and the capacity of Greece to pursue the implementation of the Statement.

Despite the challenges, the EU-Turkey deal goes in the good direction: It helps to retain the confidence in that a European solution is possible, notwithstanding the new nationalistic realities that seem to take over in the EU. If the Union is able to overcome the legal and material obstacles of the agreement with Turkey, despite of being far from becoming a new global system of refugee responsibility sharing, it can be a solution that works for the EU, and a silver lining for the future of international refugee protection.

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INTRODUCTION

The EU-Turkey deal has been motive of hope for the EU and reason of concern for human rights organisations. The context of urgency in which the deal has been negotiated can justify its poor preparation at the political level, but, in any case, can suppose a disregard for human rights. This dissertation will focus on the following question: Can the deal be viable under international and EU law, despite of its legal challenges? For this purpose, the following pages will try to provide arguments to the following hypotheses: Whether the deal can be considered as an international treaty; whether the returns under the agreement are compatible with EU standards; whether the swap foreseen in the deal can conflict with the prohibition on collective expulsions; whether the aspirations of the deal can be achieved by Greece, considering its factual circumstances.

It is said that the European refugee crisis started in 2014, with the high amount of refugees and migrants that began to arrive in the EU. This situation led to precipitated initiatives and discordant responses by member states. In September 2015, in an attempt to assist the overburdened Italy and Greece, the EU adopted the ‘Plan A’, consisting in a innovative ‘hotspot’ approach and a relocation scheme based in two decisions to distribute up to 160.000 asylum seekers from those countries amongst member states.¹ Unfortunately, this ‘Plan A’ supposed an affirmation of the lack of solidarity amongst member states even in times of imperative need. The ‘Plan A’ was ineffective and the relocation numbers are very low compared to the initial expectative.² The ‘Plan A’ seemed to work well on the paper, but failed in practice.

¹ See European Union: Council of the European Union, *Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, 14 September 2015. & European Union: Council of the European Union, *Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, 22 September 2015.

² European Union: European Commission, *Second report on relocation and resettlement*, 12 April 2016. See relocation numbers as of 12 April 2016.

In the meantime, in December 2015, many member states, afraid of mass arrivals reaching their territory as a consequence of the Balkans route and the porous borders of the frontline countries, opted to partially close borders and resume border checks between Schengen States.³ The failure of ‘Plan A’ brought a renewed emphasis on national solutions that alarmed Brussels and the capitals of Europe. After the successful closure of the Balkans route in February 2016, the pressure was now under Greece, which was named by the European Commission for not controlling its external borders.⁴ The whole Common European Asylum System (hereinafter CEAS) and Schengen area were about to collapse and politicians increased the pressure for the urgent need of a reduction in the number of arrivals in Europe. A ‘Plan B’ was needed.

On the 28 January 2016, the chief of the Dutch Labour Party, Diederik Samson, announced in a newspaper interview a proposal to drastically decrease the large number of people arriving from Turkey.⁵ This proposal was called the ‘Samson Plan’.

The initiative was based on offering Turkey the resettlement of 150.000-250.000 refugees from its territory to the EU member states that agreed voluntarily with the plan. Conversely, Turkey would be required to accept back all the persons that crossed the border in direction to Greece. The Samson plan involved an extremely rapid procedure for the purposes of returning people to Turkey as quickly as possible; then, Turkey would be responsible for the asylum seekers.⁶ The ‘plan B’ was starting to develop.

³ Steve Peers. 2016. *The Orbanisation of EU asylum law: the latest EU asylum proposals*. 6 May [ONLINE] Available at: <http://eulawanalysis.blogspot.hu/2016/05/the-orbanisation-of-eu-asylum-law.html>. [Accessed 15 June 2016].

⁴ Steve Peers. 2015. *Can Schengen be suspended because of Greece? Should it be?*. 2 December. [ONLINE] Available at: <http://eulawanalysis.blogspot.hu/2015/12/can-schengen-be-suspended-because-of.html>. [Accessed 31 May 2016].

⁵ Marc Peepers. 2016. *Nederland wil vluchtelingen 'per kerende veerboot' terugsturen naar Turkije*. 28 January [ONLINE] Available at: <http://www.volkskrant.nl/politiek/nederland-wil-vluchtelingen-per-kerende-veerboot-terugsturen-naar-turkije~a4233530/>. [Accessed 30 May 2016].

⁶ Steve Peers, Emanuela Roman. 2016. *The EU, Turkey and the Refugee Crisis: What could possibly go wrong?*. 5 February. [ONLINE] Available at: <http://eulawanalysis.blogspot.hu/2016/02/the-eu-turkey-and-refugee-crisis-what.html>. [Accessed 29 June 2016]. [Hereinafter Steve Peers, Emanuela Roman. 2016]

After a short period of negotiations, the ‘Plan B’ was put into operation by means of an agreement, which took form of a Statement, between the Council of the European Union and Turkey. The agreement was made public on the 18 March 2016⁷ and builds upon the Statement of the European Heads of State or Government of the 7 March 2016;⁸ the Commission Communication on the Next Operational Steps in EU-Turkey Cooperation in the Field of Migration from 16 March 2016;⁹ and the EU Summit Conclusion on Migration from the 18 March 2016.¹⁰ Together, these documents form the so-called EU-Turkey deal.

The deal pursues the cooperation between the EU and Turkey by containing concessions from both parts:¹¹

The EU part agrees to open a ‘negotiation chapter’ for the accession of Turkey to the EU process and preparatory work by the Commission on further chapters; to propose the lift of the requirements for Schengen visas by October 2016; to create a ‘Refugee Facility for Turkey’, with a total of 6 billion of euros, to improve the conditions of Syrian refugees in Turkey; and to implement a ‘Humanitarian Readmission Scheme’ aimed to Syrian refugees in the framework of the Commission Recommendation of 15 December 2015.¹²

⁷ European Council, 2016, EU-Turkey Statement, 18 March 2016, 18 March. [Hereinafter EU-Turkey Statement, 18 March 2016]

⁸ European Council, 2016, Statement of the EU Heads of State or Government 07/03/2016, 8 March.

⁹ European Union: European Commission, *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*, 16 March 2016, COM(2016) 166 final. [Hereinafter EC Next operational steps in EU-Turkey cooperation, 16 March 2016]

¹⁰ European Council, 2016, European Council conclusions, 17-18 March 2016, 18 March.

¹¹ *Supra* 6, Steve Peers, Emanuela Roman 2016.

¹² European Union: European Commission, 2015, *Commission Recommendation of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey*, C(2015) 9490.

In return, Turkey agrees to readmit the irregular migrants that crossed from its territory to the EU from June 2016; to prevent its high population of refugees from leaving to Europe; and to apply the newly agreed status of Syrian refugees in Turkey.

The following pages will focus on the legal flaws and implementation challenges of the EU-Turkey deal. After all, the deal sets a peremptory regime that has been negotiated under extreme pressure circumstances; however, adverse circumstances cannot serve as a justification to disregard human rights. If the deal is to succeed and serve as a founding block for future responsibility sharing systems, it has to comply with the law, both formally and at implementation level.

Firstly, since the document takes the shape of a ‘Statement’, the issue of its legal nature and whether the deal can be considered as an international treaty remains ambiguous. This is of fundamental importance due to the implications that can arise regarding its approval and supervision at EU level and the legal avenues to challenge its implementation. This situation will be analysed in Chapter 2.

Moreover, besides doubts to its legal nature, the EU-Turkey deal involves a number of substantive and procedural issues that should be discussed. The fundamental idea behind the deal is stated in the next provision:

“All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. [...] Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive. [...] Migrants not applying for asylum or whose application has been found unfounded or inadmissible [...] will be returned to Turkey.”¹³

¹³ *Supra* 7, EU-Turkey Statement, 18 March 2016.

The provision implicitly refers to the assumption of the Samson plan that Turkey can be considered a ‘safe third country’ and a ‘first country of asylum’, which are reasons for inadmissibility of asylum applications. If Turkey is considered ‘safe’, the EU will not breach the *non-refoulement* principle. In paper, it seems appropriate; however, there are serious concerns of whether Turkey can be actually considered ‘safe’. Chapter 3 will analyse the problem with the designation of Turkey as ‘safe’ under EU law.

Moreover, the wording “*All new arrivals [...] will be returned*” seems to go against “*excluding any kind of collective expulsions*”. Chapter 4 will discuss whether the returns can breach the prohibition on collective expulsions; especially, after the last judgment of the European Court of Human Rights (hereinafter ECtHR) increasing the protection of this right.

Finally, the structure of the CEAS implies that Greece will be in charge of most of the aspects of the implementation of the deal. Chapter 5 will question whether an individual examination of all asylum claims, including the stage of appeal, can be compatible with an extremely rapid procedure; especially, taking into account the systemic deficiencies of the extremely overloaded Greek asylum system.

In general, the reactions to the EU-Turkey deal have been extremely polarised: Most authors radically oppose to the deal claiming that it is a total regression in human rights protection while some others argue for closing EU borders and penalising irregular migrants. However, the truth usually lies somewhere in the middle. The conclusion sums up the suggestions to overcome the shortcomings of the agreement, before arguing for the relevance of the EU-Turkey deal for the future of Europe and, perhaps, for the future of international refugee protection.

1. THE LEGAL NATURE OF THE EU-TURKEY DEAL

1.1 Introduction

On the 22 March 2016, the European Parliament asked the Council of the Heads of the State and Government of the European Union (hereinafter Council), about the ‘EU-Turkey Statement’ made two days before.¹⁴ The Parliament expressed its concern about the lack of clear information regarding the character of the Statement and requested the Council for clarification about its legal and binding nature. The question refers to whether the Statement is binding according to International and European law and, if so, why the Council has not complied with article 218 of the Treaty of the Functioning of the European Union (TFEU) as regards to the conclusion of international agreements.¹⁵

Article 218 TFEU lays down the requirements for negotiating and concluding international agreements between the EU and third countries.¹⁶ Concretely, article 218(10) requires the Council to inform the Parliament about all the stages of the negotiation process¹⁷ and article 218(6)(a)(v) requires the Council to have the consent of the Parliament in matters covering the field of asylum and immigration.¹⁸ Apparently, the normal procedure to negotiate and conclude a treaty has not been followed in the EU-Turkey agreement, which has raised questions about its legal

¹⁴ *Supra* 7, EU-Turkey Statement, 18 March 2016.

¹⁵ European Parliament. 2016. *Question for oral answer to the Council Rule 128 Birgit Sippel, on behalf of the S&D Group*. [ONLINE] Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+OQ+O-2016-000053+0+DOC+XML+V0//EN>. [Accessed 29 May 2016].

¹⁶ Consolidated Version of the Treaty on the Functioning of the European Union art. 218, 2008 O.J. C 115/47, [hereinafter TFEU].

¹⁷ TFEU art. 218(10) states that “the European Parliament shall be immediately and fully informed at all stages of the procedure.”

¹⁸ TFEU art. 218(6)(a)(v) requires the consent of the European Parliament in “*agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is [also] required.*”

nature.¹⁹ As mentioned above, Art. 218 TFEU regulates the conclusion of treaties, but there is no disposition in EU law regulating non-binding agreements.

1.2 Is the EU-Turkey Statement an international agreement?

1.2.1 Formal questions

The form that the Council used for the EU-Turkey Statement of the 18th of March raises doubts about the legal basis of the agreement. The first impression is that the deal is not legally binding; therefore, not in need for the approval at European level by the European Parliament or at national level by national parliaments.

In Steve Peers' opinion, the deal is not a treaty. Peers argue that since the form of the agreement is not of a Treaty, it does not require any legal procedure to approve it and it cannot be legally challenged.²⁰ Karolína Babická supports Peers' opinion in the fact that the agreement is only a gentleman's pact without legal meaning.²¹

Indeed, the language used in the Statement seems to give the image of a mere voluntary pact rather than an international agreement. The words used ('Statement'; 'may'; or 'will') are not found in treaties, which usually use stronger words like 'shall' or 'should'.

¹⁹ Article 79 TFEU expressly establishes the EU's competence to enter into readmission agreements, which falls into the scope of the EU's "common immigration policy". In the field of common immigration policy, the ordinary legislative procedure applies, according to article 79(2).

²⁰ Steve Peers. 2016. *The final EU/Turkey refugee deal: a legal assessment*. 18 March. [ONLINE] Available at: <http://eulawanalysis.blogspot.hu/2016/03/the-final-euturkey-refugee-deal-legal.html>. [Accessed 1 May 2016].

²¹ Karolína Babická. 2016. *EU-Turkey deal seems to be schizophrenic*. 22 March. [ONLINE] Available at: <http://migrationonline.cz/en/eu-turkey-deal-seems-to-be-schizophrenic>. [Accessed 10 May 2016].

However, as Den Heijer and Spijkerboer suggest, the wording of the Statement cannot determine its legal nature; otherwise, it would compromise both the role of the Parliament and the Court of Justice of the European Union (CJEU) by easily side tracking their obligations.²² The form and terminology of the document cannot serve as a mean to neglect the safeguards provided by the law. According to Mauro Gatti, every international document stating what has been agreed between parties that enumerates the commitments consented by them, has to be regarded as an international agreement.²³

In conclusion, the form cannot be decisive to establish whether the Statement can be considered a Treaty or not; the analysis should be focused on its content. This is the opinion of the International Court of Justice (ICJ) in the *Qatar v. Bahrain* case²⁴ and the *Aegean Sea Continental Shelf* case,²⁵ where the Court stated that the key element to consider a text as a treaty is not the form, but the parties expressly intention to ‘bind themselves’. In order to consider whether a document is an international agreement, the ICJ urges to consider the “*actual terms*” and the “*particular circumstances in which it was drawn up*”.²⁶

1.2.2 Does the Statement create new obligations?

On the 7 May 2014, the European Union and the Republic of Turkey concluded the *Readmission Agreement of Persons Residing Without Authorization*.²⁷ This international

²² Maarten den Heijer, Thomas Spijkerboer. 2016. *Is the EU-Turkey refugee and migration deal a treaty?*. 7 April [ONLINE] Available at: <http://eulawanalysis.blogspot.hu/2016/04/is-eu-turkey-refugee-and-migration-deal.html>. [Accessed 1 May 2016].

²³ Mauro Gatti. 2016. *The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)*. 18 April. [ONLINE] Available at: <http://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>. [Accessed 1 May 2016].

²⁴ *Qatar v Bahrain*, [1994] ICJ Rep 112, ICGJ 81 (ICJ 1994), 1st July 1994, International Court of Justice [ICJ], para. 23-25.

²⁵ *Aegean Sea Continental Shelf, Greece v Turkey, Jurisdiction, Judgment*, [1978] ICJ Rep 3, ICGJ 128 (ICJ 1978), 19th December 1978, International Court of Justice [ICJ], para. 96-97.

²⁶ *ibid.* para 96. "the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up".

²⁷ Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ L 134/3, 7 May 2014.

agreement supposed a closer cooperation with Turkey to fight irregular migration. The next developments set the scene for the Statement of 18th of March:

- 1) In September 2015, the European Commission proposed to include Turkey in the list of Safe Countries of origin.²⁸
- 2) In October, the EU-Turkey Action Plan of foresaw the possibility of offering financial support to Turkey for the effective implementation of the readmission agreement of May 2014.²⁹
- 3) In November, the Statement of the European Council affirmed the commitment by Turkey to fully implement its readmission agreement and the negotiation of the visa liberalization process for Turkey.³⁰
- 4) In December, the Commission published a recommendation for the 'Voluntary Humanitarian Admission Scheme' with Turkey.³¹
- 5) In February 2016, the member states approved the three billion facility for Turkey aimed to improve the conditions of refugees.³²
- 6) On the 4th of March, the Commission launched the communication "Back to Schengen - A Roadmap", which included the cooperation and readmissions to Turkey.³³

²⁸ European Commission (2016), Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and the European Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU, COM(2015)452 final, Brussels, 9 September.

²⁹ European Commission, *EU-Turkey joint action plan*, MEMO/15/5860, 15 October 2015; European Commission, *EU-Turkey Joint Action Plan: Third implementation report*, 4 March 2016, COM(2016) 144 final.

³⁰ European Council (2015), Meeting of the heads of state or government with Turkey – EU-Turkey statement, Brussels, 29 November.

³¹ *Supra* 12, Recommendation for a voluntary humanitarian admission scheme with Turkey. 15 December 2015.

³² Council of the European Union (2016), Refugee facility for Turkey: Member states agree on details of financing, Brussels, 3 February.

³³ European Commission (2016), Communication from the Commission to the European Parliament, the European Council and the Council, Back to Schengen – A Roadmap, COM(2016) 12 Final, Brussels, 4 March, P.3 and P.9.

Finally, the announcement of 7 March declared the one-for-one principle,³⁴ which was concluded by the European Council Statement of 18 March 2016³⁵ and the subsequent Operational Steps in EU-Turkey Cooperation.³⁶

Based on article 216 TFEU, someone could argue that the EU-Turkey Statement is not an international agreement due to the fact that it only reconfirms obligations already stated in that framework. Indeed, this reasoning supports the view that the Statement is filling the gaps of the common grounds that EU and Turkey agreed beforehand in their readmission agreement of May 2014. In accordance, the EU-Turkey Statement could be considered as a document related to the execution of the EU-Turkey readmission agreement.

This view does not seem credible. As Gatti points out, the subsequent documents that were signed after the readmission agreement did not create binding obligations; they only described the intention of the parties to work together and merely agreed to work to achieve certain goals. Thus, obligation cannot be derived from these documents.³⁷

Indeed, Den Heijer and Spijkerboer³⁸ are right when they argue that the March Statement provides with totally new legal avenues that are not based on pre-existing obligations. The swap established in the new agreement, consisting in returning “all irregular migrants” to Turkey; the Syrian resettlements from Turkey; and the increase of money provisions to improve the asylum conditions in Turkey are not found in the readmission agreement.

³⁴ European Council (2016), Statement of the EU Heads of State or Government 07/03/2016, 8 March.

³⁵ *Supra* 7, EU-Turkey Statement, 18 March 2016.

³⁶ European Commission (2016), 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, COM(2016) 166 Final, Brussels, 16 March.

³⁷ *Supra* 23, Gatti, 2016.

³⁸ *Supra* 22, Den Heijer; Spijkerboer, 2016

In definitive, the EU-Turkey readmission agreement created binding obligations between the parties. Those obligations were extended by a series of documents, widening the framework of this cooperation but without formally establishing legally binding commitments. The Statement confirms those extended obligations that were not contemplated in the readmission agreement. Thus, the March Statement provides legal commitments that were not based on pre-existing obligations.

1.2.3 Is the Statement producing legal effects?

Two days after the Statement of the 18 March 2016, the European Commission proposed to amend the *Council Decision (EU) 2015/1601 of 22nd September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*.³⁹ Concretely, paragraph four of the Preamble of the proposed amendment states:

*“The EU Heads of State or Government agreed on 7 March to work on the basis of a series of principles for an agreement with Turkey, including to resettle, for every Syrian readmitted by Turkey from Greek islands, another Syrian from Turkey to the member states, within the framework of the existing commitments.”*⁴⁰

The Commission seems to use the EU-Turkey Statement to amend the 22 September Council decision to avoid the critics that the Statement is in reality a treaty. As Den Heijer and Spijkerboer argue, the purpose of using this misleading language could be to give the statement an appearance of no binding effect in order to avoid the procedures established in article 218 TFUE for negotiating international agreements.⁴¹ Nevertheless, despite the efforts of the Commission, it seems clear that the amendment

³⁹ Commission Proposal for a COUNCIL DECISION amending Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, COM(2016) 171 final. [ONLINE] Available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementationpackage/docs/20160321/provisional_measures_area_international_protection_benefit_italy_and_greece.pdf

⁴⁰ *ibid.* Commission Proposal COM(2016) 171 final, p. 5.

⁴¹ *Supra* 22, Den Heijer; Spijkerboer, 2016.

in the Council Decision 2015/1601 has been done as a consequence of the Statement. Thus, the Statement is indeed producing legal effects and contradicts itself when declaring that its formal intention is not to produce them.

1.2.4 Why the Council wants to conceal the legal nature of the deal?

For the European Parliament, “*the EU-Turkey Statement is a treaty with legal effects, despite its name and despite internal EU rules not having been observed.*”⁴² Accordingly, the Parliament has already declared that if the Council does not consider the Statement as a treaty, the document is not legally binding and cannot produce legal effects, leaving the nature of the statement as a merely voluntary pact.⁴³

The main reason to conceal the deal seems to be a matter of time constraints. Urgent situations require urgent measures. As mentioned previously, this time constraints would not have allowed the CJEU to give its opinion according to article 218(11) TFEU, but, however, the Council could have asked at least for consent from the European Parliament through art 218(6)(a)(v) regarding "urgent situations".⁴⁴

Fundamentally, it seems that the Council wanted to negotiate the agreement only at intergovernmental level without the intromission of the EU institutions while concealing it from the scrutiny of the Parliament.

1.3 Is it possible to challenge the legality of the EU-Turkey deal?

Those who believe that the Statement is not a treaty will agree that, since it is unable to create binding obligations, it is not capable of being judicially review. A not legal instrument cannot be legally challenged for obvious reasons.

⁴² *Supra* 15, European Parliament. 2016. *Question for oral answer to the Council.*

⁴³ *Supra* 15, European Parliament. 2016. *Question for oral answer to the Council*

⁴⁴ Art. 218(6)(a)(v) TFEU states “The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent”.

On the other hand, starting from the premise that the Statement is considered to be a treaty – which is the opinion followed in this lines – it implies that it can be challenged as to the legality of its effects and conflicts with other rules. Even so, the following points should be mentioned:

First, it would not be possible to ask for clarification to the Court of Justice of the European Union (hereinafter CJEU) according to article 218(11) TFEU due to the fact that the Statement is currently signed and the article applies only to “*envisaged*” agreements.⁴⁵

Second, it would be possible for EU Institutions and member states to lodge an action of annulment before the CJEU for reason of a breach of the standard internal procedures. Being a binding act, it can be possibly annulled under article 263 TFEU.⁴⁶ Nevertheless, it is unlikely that the parliament or some member states would challenge the deal due to the difficulty of the situation and the interests at the stake. Moreover, an action of annulment would still leave the agreement intact due to article 46 of the Vienna Convention on the Law of the Treaties, which states that a violation of internal law in concluding treaties is not a sufficient reason to withdraw the consent.⁴⁷ The fact that the provisions of the EU were not followed does not imply that the Statement has no effect. The agreement was concluded by the Council, which Turkey considered in full powers to act. Lastly, an annulment of the deal would not have consequences in a short period

⁴⁵ Article 218(11) TFEU states “*A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties.*”

⁴⁶ Article 263 TFEU states “The Court of Justice of the European Union shall review the legality of legislative acts [...] of the European Council intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to its application, or misuse of powers”.

⁴⁷ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, art. 46(1). “*A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.*” [hereinafter VCLT]

of time since it would not stop Greece from regarding Turkey as a safe country, declaring any application as inadmissible, and resuming the returns.

Third, it would also be difficult to argue that the treaty should be annulled for conflicting with human rights instruments, like the European Convention of Human Rights (hereinafter ECHR), due to the principle of international law that states that all treaties are equal. The agreement could be challenged and leave it without effect only if there was a conflict with *ius cogens*.⁴⁸

In conclusion, the discussion about the legal nature of the Statement of the 18 March on whether it is, or it is not, a treaty is not relevant as regards to an immediate effective action to leave the deal without effect.

1.4 Interim conclusions

The Statement of 18 March aimed to transform general political negotiations into specific legally binding obligations. The content of the Statement includes an agreement where both parties commit themselves to end the route that migrants take from Turkey to Greece and its agreed on the consequent action plan; thus, establishing legal obligations. Moreover the deal has already created legal effects at the national level – Greece had to change the law to allow the returns to Turkey –. Even if the Statement declares that the agreement is a mere voluntary pact, the content reveals that both parties intend to bind themselves; thus, it is fair to affirm that, against the official version of the Council and the Commission, the EU-Turkey Statement is, in fact, a treaty. The reasons being the concealment of the deal to the Parliament involve the purpose of the Heads of the member states to exclude the European institutions from taking part in negotiating the deal and to prevent the deal to be scrutinised. In short, the EU-Turkey deal is fruit of the EU member states more than of the European Union. Finally, the discussion of legal nature of the deal does not have short-term implications

⁴⁸ VCLT art. 53. “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”

since the deal cannot be left without effects in any case. The only way to bring effective actions against the deal will be through the implementation of its particular aspects. In this regard, the ECtHR and the CJEU can have a lot to say if EU-member states or individuals affected pull the trigger.

2. IS TURKEY A ‘SAFE COUNTRY’ FOR REFUGEES?

2.1. The different ‘Safe country’ notions

The EU-Turkey Statement from 18 March 2016 declares:

*“All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law [...]. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement.”*⁴⁹

The Asylum Procedures Directive (hereinafter APD) sets the basis for the last statement. The APD provides for four instruments to be further analysed in this chapter to return persons seeking international protection to a third country. First, the Directive lists two inadmissibility grounds of applications for international protection: the concepts of ‘Safe third country’⁵⁰ and ‘First country of asylum’.⁵¹ Additionally, the APD also provides for a less-known notion of ‘European safe third country’,⁵² which allows states to take ‘no consideration’ of an asylum application. Finally, the concept of ‘Safe country of origin’⁵³ is aimed to create a ‘assumption of safety’ of the country that the asylum seeker has to rebut in an ‘accelerated procedure’.

⁴⁹ *Supra* 7, EU-Turkey Statement, 18 March 2016.

⁵⁰ European Union: Council of the European Union, *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)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU [Hereinafter recast Asylum Procedures Directive], article 38.

⁵¹ Article 35 recast Asylum Procedures Directive.

⁵² Article 39 recast Asylum Procedures Directive.

⁵³ Articles 36-37 recast Asylum Procedures Directive.

2.1.1. Returning Turkish nationals: the ‘Safe country of origin’ notion

The EU and Turkey are already bound by the readmission agreement through which Turkey is required to accept the returns of its own nationals. Turkish citizens who lack the right to stay in the EU can be returned under this regulation. Remarkably, the European Commission has suggested to incorporate Turkey in the common list of ‘safe countries of origin’, aimed to fast-track asylum applications lodged by Turkish nationals. This proposal is controverted due to the doubtful qualification of Turkey as ‘safe’.^{54 55}

2.1.2. Returning Non-Turkish nationals: the ‘safe third country’ and the ‘first country of asylum’ notions.

The notions of ‘Safe third country’ and ‘First country of asylum’, established in the APD, set the basis for the returns of asylum seekers to a third country.⁵⁶ Moreover, the Dublin Regulation grants member states with the right to return asylum seekers to ‘safe third countries’ (although there is no specific provision for the ‘first country of asylum’ provision).⁵⁷

The EU-Turkey deal will widen the extent of the readmission agreement between the EU and Turkey.⁵⁸ On the one hand, irregular migrants and rejected asylum seekers⁵⁹ in

⁵⁴ *Supra* 6, Steve Peers, Emanuela Roman. 2016

⁵⁵ For reasons of length and owing to the fact that the ‘safe country of origin does not directly fall into the scope of the EU-Turkey deal, the following pages will only analyse the framework for returning Non-Turkish nationals to Turkey.

⁵⁶ The notion of “safe country of origin is also a base for the returns although it cannot be considered as a inadmissibility cause for the reason that will be explained below.

⁵⁷ European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, article 3(3).

⁵⁸ *Supra* 6, Steve Peers, Emanuela Roman. 2016.

EU member states will be returned if it can be proved that the individuals have previously been in Turkey; for example, they crossed the border from Turkey to Greece. On the other hand, the most controverted aspect of the deal, applications for international protection from asylum seekers coming via Turkey can be deemed inadmissible: asylum seekers will not be rejected on the basis of their case – thus they can be still refugees – but on the basis that they:

- 1- could have applied for protection in Turkey ('safe third country');
- 2- or they already had protection there ('first country of asylum').⁶⁰

By declaring Turkey a 'safe third country' and a 'first country of asylum', the authorities are not required to assess on the merits⁶¹ of the asylum applications from applicants coming from Turkey. After considering those applications inadmissible and, if solicited, the effective remedies having been exhausted,⁶² the right to remain in a member state will expire and asylum seekers will become irregular migrants.⁶³

There are important legal issues that should be discussed regarding the consideration of Turkey as 'safe' and the declaration of asylum applications from people coming from Turkey inadmissible. The declaration of Turkey as a safe country plays a crucial role for the returns not to be considered in breach of the *non-refoulement* principle. On the following pages, these fundamental legal notions mentioned above will be discussed.

⁵⁹ Meaning rejected asylum on the merits: an applicant's claim that he has faced persecution or serious harm have not convinced the authorities of a member state in the first instance and neither the Courts in second instance.

⁶⁰ *Supra* 6, Steve Peers, Emanuela Roman. 2016.

⁶¹ Member- states are not obliged to carry out substantive assessment of the claims of an asylum seekers.

⁶² European Union: Council of the European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, articles 2-3.

⁶³ The European Commission implies that the 'safe third country' notion aims to declare inadmissible asylum applications of non-Syrians while the 'first country of asylum' aims to declare inadmissible applications of Syrians.

2.2. Is Turkey a ‘Safe third country’?

2.2.1. Legal background

The ‘Safe third country’ concept differs from the “Safe country of origin” notion in scopes and consequences. On the one hand, ‘safe country of origin’ is related to the definition of refugee, it affects the treatment of the person in his or her country of origin. On the other hand, ‘safe third country’ asserts that an asylum seeker should have search for asylum somewhere else, thus shifting the responsibility to the third state to determine whether the asylum seeker have enough grounds to be considered refugee.

Like in the first country of asylum notion, countries are allowed (not obliged) to declare an application for international protection inadmissible if the authorities consider that the applicant could have applied for asylum in a Non-EU country considered a ‘safe third country’.⁶⁴

A country can be regarded as safe third country for a concrete asylum seeker if “*the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned*”.⁶⁵

- a) *Life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion.*
- b) *There is no risk of serious harm as defined in Directive 2011/95/E*
- c) *The principle of non-refoulement in accordance with the Geneva Convention 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.*

⁶⁴ Article 33(1) and Article 33(2)(c) of the recast Asylum Procedures Directive

⁶⁵ Article 38(1) recast Asylum Procedures Directive.

e) *The possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*

Moreover, in order to be allowed to apply the ‘safe country notion’, member states are required to lay down specific rules in their national legislation. Concretely:⁶⁶

- a) *Rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country.*
- b) *Rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant, including case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe.*
- c) *Rules allowing the applicant to:*
 - a. *Challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances.*
 - b. *Challenge the existence of a connection between him or her and the third country in accordance with point (a).*

The assessment of whether there is a ‘sufficient connection’ between the third state and the individual plays a crucial role for considering a country a ‘safe third country’. In this regard, the Recital 44 of the recast APD introduces the concept of ‘sufficient connection’ but does not define it,⁶⁷ leaving its scope to be determined by national laws. The only requisite that the APD imposes on member states seems to be to a “*careful*

⁶⁶ Article 38(2) recast Asylum Procedures Directive.

⁶⁷ Recital 44 recast Asylum Procedures Directive.

and individualised case-by-case examination”⁶⁸ for assessing the link between the applicant and the third country.⁶⁹

When implementing a return by applying the ‘Safe third country notion’ – apart from providing information to the applicant on the characteristics of the procedure – member states are obliged “*to provide the applicant with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance*”.⁷⁰ This document is of crucial importance as it will inform the officials of the third country that the request for international protection has not been decided on the merits, thus transferring the responsibility of the assessment to the receiving country.

Additionally, “*where the third country does not permit the applicant to enter its territory*”, member states are [responsible for providing] *access to a procedure to the applicant [to apply for international protection] in accordance with the basic principles and guarantees.*”⁷¹

Finally, as regards to the procedural safeguards, the already analysed article 38(2)(c) requires member states to lay down specific norms in the national legislation that “*permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances, [and/or] the existence of a connection between him or her and the third country.*”⁷²

⁶⁸ UN High Commissioner for Refugees (UNHCR), *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept*, 23 March 2016 [Hereinafter UNHCR Legal Considerations on returns from Greece to Turkey, 2016], pp.3-4.

⁶⁹ most controversial interpretation of the term “sufficient connection” has to do with the consideration as “safe third countries” of Non-EU countries that applicants for international protection transited in their way to their final destination. UNHCR considers that the mere transit is just a result of accidental circumstances and cannot be considered as a meaningful link, therefore it cannot be considered as “sufficient connection to the third country.”

⁷⁰ Article 38(3) recast Asylum Procedures Directive.

⁷¹ Article 38(4) recast Asylum Procedures Directive.

⁷² Article 38(2)(c) recast Asylum Procedures Directive.

In conclusion – besides the individualised assessment for the sufficient connection between the person and the third country – the law seems to require the authorities of the sending country to make sure that, first, the individual will be readmitted to the third country; second, the individual will be permitted to apply for international protection and; third, if happened to be a refugee, the individual will receive protection in accordance with the Geneva Convention.⁷³ In this regard, UNHCR considers that if “*access to refugee status and to the rights of the 1951 Convention must be ensured in law and in practice, including ratification of the 1951 Convention and/or the 1967 Protocol.*”⁷⁴ The ratification of the 1951 Refugee Convention and the 1967 subsequent protocol is a critical requisite for a condition for a third country to be considered as ‘safe’. If these requirements are not met, the sending country is at risk to breach the principle of *non-refoulement*.

2.2.2. Does Turkey comply with the requirements of EU law?

In February 2016, the European Commission launched a State of Play under the European Agenda on Migration.⁷⁵ In the section of Priority Actions, foreshadowing the returns and readmissions scheme that was about to be implemented under the EU-Turkey Joint Action Plan, the European Commission urged member states to “*foresee in their national legislation the notion of safe third countries and to apply it when the conditions are met*”.⁷⁶

That being said, in the following paragraphs, the European Commission gave a highly controverted interpretation of the term ‘safe third country’:

⁷³ Article 2(A) of the recast Asylum Procedures Directive states that the “*Geneva Convention*’ means the Convention of 28 July 1951 Relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967.”

⁷⁴ UNHCR, UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, p. 36

⁷⁵ European Union: European Commission, *Communication on the State of Play on the Implementation of the Priority Actions under the European Agenda on Migration*, 10 February 2016, COM(2016) 85 final. [Hereinafter EC State of Play of the Priority Actions]

⁷⁶ *Supra* 75, EC State of Play of the Priority Actions, p. 18.

“In this context, the Commission underlines that the concept of safe third country as defined in the Asylum Procedures Directive requires that the possibility exists to receive protection in accordance with the Geneva Convention, but does not require that the safe third country has ratified that Convention without geographical reservation.

Moreover, as regards the question whether there is a connection with the third country in question, and whether it is therefore reasonable for the applicant to go to that country, it can also be taken into account whether the applicant has transited through the safe third country in question, or whether the third country is geographically close to the country of origin of the applicant.”⁷⁷

This statement contains two controversial aspects with regards to whether Turkey can be seen as a ‘safe third country’. The first aspect concerns the geographical limitation that Turkey maintains to the Geneva Convention. According to the European Commission, despite of this geographical restriction, Turkey can be a ‘safe third country’ under EU law. The second aspect deals with the interpretation of the term ‘sufficient connection’, in which the Commission seems to suggest that the mere transit of the individual through that country and the geographical proximity to the country of origin can amount to ‘sufficient connection’ between the applicant and the third country.

These two controversial statements will be analysed below for the purposes of assessing whether Turkey can be considered as a safe third country.⁷⁸

1) Is the geographical limitation “in accordance” with the Geneva Convention?

⁷⁷ *Supra* 75, EC State of Play of the Priority Actions, p. 18.

⁷⁸ The assessment only takes into account the legal circumstances of whether is Turkey can be considered ‘safe’.

Turkey has ratified the Geneva Convention of 1951 and the consequent Protocol of 1967. However, Turkey holds a geographical limitation that restricts non-EU asylum seekers to access refugee protection under the Geneva Convention.⁷⁹ In such a way, only refugees from Europe⁸⁰ can access to the protection afforded by the Geneva Convention in Turkey.⁸¹

Non-European asylum seekers have access to a limited type of protection called ‘conditional refugee status’ that basically does not offer the possibility to access to the integration scheme, which is only available to European refugees.⁸² Additionally, amongst all the nationalities, Syrians are given a special treatment under the ‘Temporary Protection Regime’ due to the Temporary Protection regulation⁸³ that came into force in October 2014.⁸⁴ However, the purpose of the ‘Temporary Protection Regime’ is also limited: It aims to set the scheme for a provisional protection by which Syrian nationals are allowed to stay in the territory only until the conflict in the country of origin is over.⁸⁵ In this sense, this status also provides with lesser rights than the Geneva Convention regarding the access to a long-term integration scheme. Therefore, Syrian refugees (like all non-European refugees) cannot enjoy the same level of protection than the ‘refugee protection’ granted in the Geneva Convention.

The fact that Turkey restricts the scope of the Geneva Convention to only European nationals generates the debate on whether Turkey can be seen as ‘safe third country’. In this regard, the wording of the APD is critical to determine whether Turkey fulfils the legal requirements of EU law.

⁷⁹ *Turkey: Law No. 6458 on 2013 of Foreigners and International Protection* [Turkey], 4 April 2013, [Hereinafter Turkish Law of Foreigners and International Protection] article 61(1).

⁸⁰ In this regard, European member states means member states of the Council of Europe.

⁸¹ *Supra* 6, Steve Peers, Emanuela Roman. 2016

⁸² *Supra* 6, Steve Peers, Emanuela Roman. 2016.

⁸³ National Legislative Bodies / National Authorities, *Turkey: Temporary Protection Regulation*, 22 October 2014. [Hereinafter Turkey: Temporary Protection Regulation]

⁸⁴ European Council on Refugees and Exiles (ECRE). 2016. *Asylum Information Database, National Country Report: Turkey*, December 2015. [ONLINE] Available at: http://www.asylumineurope.org/sites/default/files/report-download/aida_tr_update.i.pdf.

[Accessed 23 April 2016] [Hereinafter ECRE Report: Turkey, 2016] p. 106.

⁸⁵ *Supra* 6, Steve Peers; Emanuela Roman. 2016.

The most controversial provision is in article 38 of the recast APD. The provision states that in order to consider a country a ‘safe third country’, an individual has to be able “*to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*”⁸⁶ The APD gives no room for doubts regarding the meaning of “Geneva Convention”, which includes the Convention of 1951 Relating to the Status of Refugees and the amendment by the Protocol of 1967.⁸⁷ Nevertheless, that is not the case with the expression of ‘in accordance with’, which, despite of the efforts of the European Commission, it is object of debate as regards to its meaning.

As stated above, the European Commission is of the view that ‘acting in accordance’ with the Geneva Convention does not imply its ‘full’ ratification. Concretely, the Commission has declared, “*that the concept of safe third country as defined in the Asylum Procedures Directive requires that the possibility exists ‘to receive protection in accordance with the Geneva Convention’, but does not require that the safe third country has ratified that Convention without geographical reservation.*”⁸⁸

Nevertheless, the Commission is deliberately vague in its argumentation and seems to omit the rest of article 38(1)(e) of the Directive; which states, in full, that “*the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*”⁸⁹ It seems impossible for non-European nationals “*to request refugee status and to receive protection in accordance with the Geneva Convention*” if Turkey does not have such obligations under the Convention.⁹⁰

⁸⁶ Article 38(1)(e) recast Asylum Procedures Directive.

⁸⁷ In accordance to Article 2(a) recast Asylum Procedures Directive.

⁸⁸ *Supra* 75, EC State of Play of the Priority Actions, p. 18.

⁸⁹ Article 38(1)(e) recast Asylum Procedures Directive.

⁹⁰ E. Roman, T. Baird and T. Radcliffe, 2016. *Statewatch Analysis – Why Turkey Is Not A “Safe Country”*, February 2016. p.12. [ONLINE] Available at: <http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf> [Accessed 1 June 2016]

Indeed, according to the wording of the APD, it is highly unlikely that Turkey can be a ‘safe third country’ and meet the threshold of article 38. However, some scholars like Daniel Thym and Thomas Hailbronner, still find arguments to support the view of the Commission.

Thym⁹¹ and Hailbronner,⁹² agree on the fact that a prior full ratification of the Geneva Convention cannot be a requisite for a country to be ‘safe’ since acting in accordance with a rule does not require *per se* to ratify the rule. According to Thym, the fact that Turkey did not ratify the Protocol does not mean that it cannot act in accordance with it.⁹³

Thym brings up two arguments to support his view. Firstly, the EU is obliged to respect the Geneva Convention, despite of not having ratified it, through article 78 of the Treaty of Functioning of the European Union (TFEU).⁹⁴ Secondly, the terms ‘refugee status’ and ‘refugee protection’ do not belong exclusively to the Geneva Convention, as the concept of ‘refugee’ is already defined in the APD ‘for the purposes of this Directive’; thus, ‘refugee status’ and ‘refugee protection’ under the Geneva Convention can be offered without the ratification of the Convention just by observing the APD.⁹⁵

Hailbronner also bases his argument on the comparison of article 38 with article 39 of the APD. In article 39, the Directive explicitly states the need for ratification of the Geneva Convention in order to be considered as ‘European safe third country’; whereas article 38 only requires to “*act in accordance with the Convention*”. Hailbronner argues

⁹¹ Daniel Thym. 2016. *Why the EU-Turkey Deal is Legal and a Step in the Right Direction*. 9 March. [ONLINE] Available at: <http://verfassungsblog.de/why-the-eu-turkey-deal-is-legal-and-a-step-in-the-right-direction/>. [Accessed 31 March 2016]. [Hereinafter Thym 2016]

⁹² Kay Hailbronner. 2016. *Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway*. 11 March. [ONLINE] Available at: <http://verfassungsblog.de/legal-requirements-for-the-eu-turkey-refugee-agreement-a-reply-to-j-hathaway/>. [Accessed 31 March 2016]. [Hereinafter Hailbronner, 2016]

⁹³ *Supra* 91, Thym 2016.

⁹⁴ TFEU, article 78.

⁹⁵ *Supra* 91, Thym 2016.

that, if a full ratification would be required for the latter, this would have been expressly stated in the article 38, as it happens in article 39.⁹⁶

Ultimately, both scholars leave the legal arguments apart and argue that if the requirements of the Geneva Convention are fulfilled in practice, the fact that Turkey has not fully ratified the Convention is irrelevant. If Turkey respects the rights of non-European refugees, it does not matter that Turkey has no formal obligations towards them; thus the geographical limitation is irrelevant.⁹⁷

Nevertheless, Thym and Hailbronner acknowledge that there are serious doubts whether Turkey is actually meeting those material standards regarding the rights of non-European refugees.⁹⁸ In any case, as Thym argues, “*since article 38(2) states that applicants can rebut the presumption of security, this means that 100% security is not needed*”.⁹⁹ Moreover, they argue that it cannot be said that Turkey is not providing for durable solutions to refugees; especially when the UNHCR recognises that Turkish authorities are offering protection to asylum seekers and refugees regardless their country of origin, despite its national law.¹⁰⁰ In this regard, both authors agree that Turkey is making relevant efforts to comply with its obligations as a ‘safe third country’.¹⁰¹

Generally, Thym and Hailbronner seem very optimistic. However, it is not clear whether this optimism carries a true belief that Turkey is, in fact, legally and factually safe or, if it responds to the need to justify an agreement that remains crucially important for the future of the EU.

⁹⁶ *Supra* 92, Hailbronner, 2016.

⁹⁷ *Supra* 91, Thym, 2016; *supra* 92, Hailbronner, 2016.

⁹⁸ Non-European nationals from other countries than Syria are allowed to apply for ‘conditional refugee status’ under the New Turkish Law on Foreigners and International Protection of 2014.

⁹⁹ *Supra* 91, Thym 2016.

¹⁰⁰ *Supra* 92, Hailbronner, 2016.

¹⁰¹ *Supra* 91 Thym, 2016; Hailbronner, 2016.

On the opposite side, the view that Turkey is legally not ‘safe’ is supported by James Hathaway¹⁰² and Steve Peers¹⁰³. They share the view that, against the Commission, the term of ‘safe third country’ can apply only to those who have ratified the Geneva Convention; therefore, it cannot apply to Turkey.

This argument is supported by the legislative story of the text. The draft of the APD in 2002 stated explicitly that article 38 could have applied to those states that did not ratify the Geneva Convention. However, the revision of the draft removed this clause for the actual wording “in accordance”. Some member states expressed their intention to include in the provision alternative forms of protection but they were not successful.¹⁰⁴

Moreover, the word ‘refugee status’ makes references to the ‘Convention on the Status of Refugees’. It is impossible to offer access to ‘refugee status’ and to offer ‘refugee protection’ in accordance with Geneva Convention without having ratified the Convention. Additionally, the definitions clause of the Directive refers to member states regarding ‘refugee’ and ‘refugee status’.¹⁰⁵

Finally, when the Directive allows different kinds of protection than the ones granted by the Geneva Convention, it does it explicitly. As a matter of example, article 35 establishes two requirements for ‘first countries of asylum’: the wording of the first clause: “*been recognised in that country as a refugee and he or she can still avail himself/herself of that protection*”,¹⁰⁶ seems to refer to the protection granted by the

¹⁰² James C. Hathaway. 2016. *Three legal requirements for the EU-Turkey deal: An interview with JAMES HATHAWAY*. 9 March. [ONLINE] Available at: <http://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/>. [Accessed 13 April 2016]; James C. Hathaway. 2016. *Taking refugee rights seriously: A reply to Professor Hailbronner*. 12 March [ONLINE] Available at: <http://verfassungsblog.de/taking-refugee-rights-seriously-a-reply-to-professor-hailbronner/>. [Accessed 13 April 2016].

¹⁰³ *Supra* 6, Steve Peers, Emanuela Roman. 2016.

¹⁰⁴ *Supra* 6, Steve Peers, Emanuela Roman. 2016.

¹⁰⁵ *Supra* 6, Steve Peers, Emanuela Roman. 2016.

¹⁰⁶ Article 35(a) recast Asylum Procedures Directive.

Geneva Convention while the term “*sufficient protection*” of the second clause¹⁰⁷ allows specifically other forms of protection.¹⁰⁸

Above all, article 38 of the APD is written in ambiguous terms. In this regard, the preamble of the Qualification Directive states that the ‘refugee status’ is purely a declaratory act.¹⁰⁹ In this sense, the refugees removed to Turkey are already right holders at international level. If Turkey cannot grant these rights, the returns would be unlawful.¹¹⁰

The Geneva Convention provides for refugee rights, in articles 2 to 34,¹¹¹ that should be granted in order to act “*in accordance with the Convention*”. Turkey has ratified the Convention with a geographical limitation, this means that the EU and Turkey are not bound by the same obligations; thus the EU cannot lawfully share obligations with Turkey if the last is not bounded by those obligations. Consequently, Turkey must ensure the recognition of refugees under the Geneva Convention, including refugee rights stated in articles 2 to 34, which, according to Hathaway, is a matter of enforcing facts rather than promises.¹¹² As Hathaway and Foster explain in *The Law of Refugee Status* “*a non-party state is under no duty to deliver to arriving refugees the more sophisticated rights due them under the Convention once they are lawfully staying or durably residing there (eg. the right to work)*”¹¹³

¹⁰⁷ Article 35(b) recast Asylum Procedures Directive.

¹⁰⁸ *Supra* 6, Steve Peers, Emanuela Roman. 2016.

¹⁰⁹ European Union: Council of the European Union, *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 (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, [Hereinafter recast Qualificaiton Directive] Preamble Recital 21.

¹¹⁰ *Supra* 102, Hathaway, 2016.

¹¹¹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189. [Hereinafter Refugee Convention], arts. 2-34.

¹¹² *Supra* 102, Hathaway, 2016.

¹¹³ Hathaway, J.C.; Foster, M., 2014. *The Law of Refugee Status*. 2nd ed. Cambridge: University Press: p. 35.

As a conclusion, leaving apart the interpretation of a clause of the Directive that remains purposely written in ambiguous terms, and the meritorious efforts from the part of Thym and Hailbronner to justify the EU-Turkey agreement, the truth is that: First, legally speaking, it seems to be clear that to act in accordance with the Geneva Convention, a full ratification is needed. Second, materially speaking, it would be possible for a non-party state to abide with all the obligations of the Geneva Convention; however, the refusal of Turkey to withdraw the geographical provision is definitely a reason for scepticism. These conclusions lead to the solution: Turkey has to withdraw the geographical limitation.

2) *Is there a sufficient connection between the asylum seeker and Turkey?*

The assessment of the requirement for ‘sufficient connection’ between the third state and the applicant plays a crucial role to consider a country a ‘safe third country’. It is relevant that the European Commission only focuses on whether an applicant has transited through a safe country and whether that country is near to the country of origin of the applicant to establish the ‘sufficient connexion’. It does not mention explicitly the only requisite that the Directive imposes to member states for assessing the link between the individual and the third country, which is a “*careful and individualised case-by-case examination*”¹¹⁴

The European Commission’s interpretation of the term ‘sufficient connection’ seems deliberately vague and simplistic in this regard and can be conflictive. According to the Commission, in order to analyse whether sufficient connection exists, “*it can also be taken into account whether the applicant has transited through the safe third country in question, or whether the third country is geographically close to the country of origin of the applicant.*”¹¹⁵ It seems remarkable that the Commission, being aware of the lack of a concrete definition of the term “sufficient connection”, suggests the mere transit and

¹¹⁴ UNHCR Legal Considerations on returns from Greece to Turkey, 2016, p. 6.

¹¹⁵ Supra 75, EC State of Play of the Priority Actions, p. 18.

the geographical proximity of the third country as enough proves for establishing a ‘sufficient connection’ between the applicant and the third country.

In this regard, the position of the UNHCR it is clear and should be followed: the mere transit of an applicant of international protection through a non-EU third country is just a result of accidental circumstances and cannot be considered as a meaningful link, therefore it cannot be enough reason to be considered as ‘sufficient connection’ to the third country to justify the returns.¹¹⁶ Concretely, just the fact that an asylum seeker has the right to entry to Turkey, does not mean that he or she has a meaningful link with Turkey.¹¹⁷

3) Can Turkey be considered as a ‘safe third country’?

Turkey maintains a geographical limitation that restricts the recognition of refugees to only those arriving from Europe. If we read carefully the full article 38(1)(e) of the APD, it seems impossible for non-European asylum seekers to “*request refugee status, to obtain recognition of a refugee and to ‘receive protection in accordance with the Geneva Convention’*” if they do not fall within the scope of Turkish obligations under the Convention.

Non-European refugees are afforded with a ‘conditional refugee status’, which grants lesser rights than those afforded by the Geneva Convention. Additionally, Syrian nationals are subjected to a temporary protection regulation, which allows them to stay in the country until the conflict is ceased. However, due to the ambiguity of the new Turkish law and its inconsistencies in its implementation, it remains highly unlikely that the ‘conditional refugee status’ and the ‘temporary protection regulation’ provide with the same level of rights that the Geneva Convention offers.

¹¹⁶ UNHCR Legal Considerations on returns from Greece to Turkey, 2016, p. 6.

¹¹⁷ UNHCR, UNHCR comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009), August 2010, p. 34.

For these reasons, it does not seem that Turkey can legally be a ‘safe third country’ at the moment. Moreover, the prospect of a future change does not seem optimistic considering that Turkish authorities, even if willing to make some material concessions through diplomatic promises, are reluctant to modify domestic law to remove the geographical limitation and treat non-European refugees as European refugees.

Above all, it remains critical for the successful implementation of the EU-Turkey deal that Turkey withdraws its geographical limitation to the Geneva Convention.

Additionally, it should not be forgotten that, for declaring a request for asylum inadmissible by applying the ‘safe third country’ notion, the APD requires an individual assessment of the case, with attention to the personal circumstances of the applicant. In this regard, Greece will be responsible to assess the returns to Turkey on a case-by-case basis since there is currently no mechanism in the CEAS to execute this task.

Finally, the inconsistencies with the interpretation of legal terms, like the ‘sufficient connection’ between the applicant and the third country, seem to require Greek courts to make a referral to the CJEU to comment on this case, or for individuals to bring their case to the ECtHR regarding their particular circumstances to remove the doubts and create a consistent interpretation of crucial terms.

2.3. Is Turkey a ‘super safe country’?

2.3.1. Legal background

The APD also lays the foundations for a specific category of safe third countries called “European safe third countries”. Many EU law experts have sarcastically renamed this subgroup as ‘super safe third countries’.¹¹⁸

¹¹⁸ *Supra* 6, Steve Peers, Emanuela Roman. 2016

In this regard, a member state can have “no, or no full, examination of an application for international protection” from a country that complies with the legal conditions to be considered as a ‘European safe third country’.¹¹⁹

The requirements for a country to be considered as a ‘European safe third country’ include:¹²⁰

- (a) *The ratification and implementation of the provisions of the Geneva Convention without any geographical limitations.*
- (b) *The existence of an asylum procedure prescribed by law; and*
- (c) *The ratification and full implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, including the standards relating to effective remedies.*

2.3.2. Does Turkey comply with the requirements under EU law?

Turkey put in place an asylum procedure appointed by the *Law on Foreigners and International Protection adopted in April 2013*. Moreover, Turkey is a member state to the European Convention of Human Rights and thus bound by the ECtHR. Nevertheless, even if Turkey has ratified the Geneva Convention, as said above, it holds a geographical limitation restricting non-European asylum seekers to access to the ‘refugee status’ and to the ‘refugee protection’ afforded by the Convention. For these reasons, all scholars agree to accept that Turkey cannot be regarded as a ‘European safe third country’.

¹¹⁹ Article 39(1) recast Asylum Procedures Directive. The qualification of a country as a European Safe country from which applications of international protection are “no, or no full” considered seems to be incompatible with human rights law.

¹²⁰ Article 39(2) recast Asylum Procedures Directive

2.4. Is Turkey a ‘first country of asylum’?

2.4.1 Legal background

The term of first country of asylum plays a crucial role in the procedure since it serves together with the concept of ‘safe third country’ as a ground for inadmissibility for applications for international protection. Member states are allowed to declare an application inadmissible if they consider that a non-EU country is a first country of asylum for a concrete person.¹²¹ Consequently, that application will not be further assessed on the merits of the case.

A country can qualify as a first country of asylum for a specific person under the following conditions:^{122 123}

- a. *He or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or*
- b. *He or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement, provided that he or she will be readmitted to that country.*

In this regard, “*the applicant must be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances.*”¹²⁴

The APD requires an individual examination; however, it does not define the term ‘sufficient protection’; this situation creates a divergent interpretation by member states

¹²¹ See article 33(1) and article 33(2)(b) recast Asylum Procedures Directive.

¹²² Article 35 recast Asylum Procedures Directive.

¹²³ Additionally, the Directive also gives an open door to apply the principles settled in article 38 (1) regarding ‘safe third country’ to assess the ‘first country of asylum’. Article 35 of the recast Asylum Procedures Directive follows: In applying the concept of first country of asylum to the particular circumstances of an applicant, Member States may take into account Article 38(1).

¹²⁴ Article 35 recast Asylum Procedures Directive.

given the ambiguity of the term as it leads to an unclear meaning of the term ‘First country of asylum’.

According to UNHCR, the term ‘sufficient protection’ must be beyond the protection for *non-refoulement* and requires that “*protection in the first country of asylum is effective and available in law and practice*”. Concretely, the enjoyment of this ‘sufficient protection’ must include:¹²⁵

- a. *No risk of persecution within the meaning of the 1951 Convention or serious harm in the previous state.*
- b. *No risk of onward refoulement from the previous state.*
- c. *Compliance, in law and practice, of the previous state with relevant international refugee and human rights standards, including adequate standards of living, work rights, health care and education; access to a right of legal stay.*
- d. *Assistance of persons with specific needs.*
- e. *Timely access to a durable solution.*

2.4.2 Does Turkey comply with the requirements of EU law?

Last paragraph of article 35 of the APD also opens the possibility to apply the criteria set in article 38 of the Directive, regarding the requirements for a ‘safe third country’, in deciding whether a third country can be a ‘first country of asylum’.¹²⁶ As analysed above, Turkey does not seem to qualify as a ‘safe third country’ as it does not seem to comply with the conditions set in article 38; consequently, Turkey cannot be considered as a ‘first country of asylum’ according to last paragraph of article 35. Nevertheless, since this provision is optional and states are not obliged to observe it, it can just be ignored.¹²⁷

¹²⁵ UNHCR Legal Considerations on returns from Greece to Turkey, 2016, p. 6.

¹²⁶ Article 35 recast Asylum Procedures Directive.

¹²⁷ *Supra* 6, Steve Peers, Emanuela Roman. 2016.

In addition, as mentioned previously, article 35 of the APD states that a country can be a ‘first country of asylum’ under two conditions: a) “*if the individual has been recognised as refugee in accordance to the Geneva Convention*”¹²⁸ or b) if the individual “*enjoys sufficient protection and benefits from the principle of non-refoulement.*”¹²⁹

1) *The person must be “recognised as refugee in accordance to the Geneva Convention.”*

As for the reasons given in the previous sections regarding the interpretation of the term ‘in accordance with’, the first formal condition refers only to ‘refugee status’ granted by the Geneva Convention; thus, it is only applicable to European refugees; however, this does not mean that non-European refugees are not granted protection.¹³⁰

In Turkish law, non-European refugees, including Syrians, do not fall within the scope of refugee protection under the Geneva Convention due to the geographical restriction that Turkey imposes to the Convention.¹³¹ On the other hand, the Temporary Protection Regulation that applies only to Syrian nationals explicitly confirms that persons “*benefiting from temporary protection shall not be deemed as having been directly acquired one of the international protection statuses as defined in the Law.*”¹³² Therefore, under the Turkish national law, the protection afforded to Syrians cannot be regarded as international protection either under EU law or under international law. In short, non-European refugees in Turkey, including Syrians, are not recognised as refugees “*in accordance*” with the Geneva Convention; consequently, Turkey cannot be regarded as ‘first country of asylum’ based on the first condition, on account to its geographical limitation. However, the second condition remains more doubtful.

¹²⁸ Article 35(a) recast Asylum Procedures Directive

¹²⁹ Article 35(b) recast Asylum Procedures Directive

¹³⁰ *Supra* 84, ECRE Report: Turkey, p.19.

¹³¹ *Supra* 79, Turkish Law of Foreigners and International Protection, Article 61(1).

¹³² *Supra* 83, Turkey: Temporary Protection Regulation, Article 7(3).

2) *The person must enjoy “sufficient protection and benefits from the principle of non-refoulement.”*

As regards to the principle of *non-refoulement*, Turkey is party to the European Convention of Human Rights and has incorporated this principle into its national legislation (included in Article 4 of its Law on Foreigners and International Protection¹³³ for non-European nationals as well as in Article 6 of its Temporary Protection Regulation for Syrian nationals.¹³⁴) Thus, it can be said that Turkey is formally subjected to the principle of *non-refoulement*.¹³⁵

The interpretation of whether Turkey provides non-European refugees sufficient protection is more problematic due to the vagueness of the term. The Turkish system of international protection is hierarchy-based according to the level of protection afforded:¹³⁶ First, the well known ‘refugee status’ based on the Geneva Convention afforded only to European refugees; second, the ‘conditional refugee status’ designed for non-European refugees; third, the ‘temporary protection regime’ aimed to Syrian refugees; fourth, the European-based ‘subsidiary protection’.¹³⁷

According to UNHCR “[...]‘sufficient protection’ goes beyond protection from refoulement. In UNHCR’s view, ‘sufficient protection’ requires that protection in the first country of asylum is effective and available in law and practice, allowing the person who has enjoyed asylum in a previous state to reavail him- or herself of that protection. This includes a number of critical elements: No risk of persecution within the meaning of the 1951 Convention or serious harm in the previous state; no risk of

¹³³ *Supra* 79, Turkish Law of Foreigners and International Protection, Article 4.

¹³⁴ *Supra* 83, Turkey: Temporary Protection Regulation, Article 6.

¹³⁵ Note that the requirement goes further than to be legally bound by the *non-refoulement* principle; it needs to be ensured that Turkey is materially complying with the principle.

¹³⁶ *Supra* 84, ECRE Report: Turkey, 2016 pp. 16-24.

¹³⁷ The Turkish refugee protection system replicates the European subsidiary protection in accordance with the Qualification Directive granted to persons in real risk of serious harm, concretely death penalty or torture and indiscriminate violence due to armed conflict. This type of protection affords family reunification but does not grant with integration rights. See *Supra* 84, ECRE Report: Turkey, 2016, pp. 16-24.

*onward refoulement from the previous state; compliance, in law and practice, of the previous state with relevant international refugee and human rights standards, including adequate standards of living, work rights, health care and education; access to a right of legal stay; assistance of persons with specific needs; timely access to a durable solution.”*¹³⁸

In analysing whether Turkey can be a ‘first country of asylum’, attention should be paid to the two levels of protection afforded to non-European refugees: the general ‘conditional refugee status’ and the particular ‘temporary protection regime’ afforded only to Syrian refugees. As Peers states, these two different types of protection afforded in Turkey grant lesser rights than those provided to European refugees by the Geneva Convention.¹³⁹ The debate concerns whether these two types of protection can be regarded as ‘sufficient’. In this regard, the interpretation of the UNHCR of ‘sufficient protection’, even if not binding, should be taken into account.¹⁴⁰

- *Do non-Syrians enjoy ‘sufficient protection’ under the ‘conditional refugee status’ in Turkey?*

Non-European refugees do not have access to protection under the Geneva Convention but they benefit from an alternative model of protection called ‘conditional refugee status’, a provision that differentiates in treatment refugees coming from ‘non-European’ states and refugees from ‘European’ states.

The ‘conditional refugee’ status entered into force in April 2014 and applies to asylum seekers that come from non-European countries but would qualify for refugee

¹³⁸ UNHCR Legal Considerations on returns from Greece to Turkey, 2016, pp. 3-4.

¹³⁹ *Supra* 6, Steve Peers, Emanuela Roman. 2016.

¹⁴⁰ JRS EUROPE: Jesuit Refugee Service, 2016. *The EU-Turkey Deal Analysis and Considerations* Jesuit Refugee Service Europe Policy Discussion Paper1. 29 April. [ONLINE] Available at: http://jrportugal.pt/images/memos/JRS_Europe_EU_Turkey_Deal_policy_analysis_2016-04-30.pdf [Accessed 20 February 2016], [Hereinafter Jesuit Refugee Service, *The EU-Turkey Deal*, 29 April 2016] p. 17.

protection under the Geneva Convention. The applicants that fall under the ‘conditional refugee status’ are granted with less protection than those individuals falling within the scope of the Geneva Convention.¹⁴¹ Most fundamentally, conditional refugees do not benefit in fact from the possibility of durable solutions and ‘family unification’ rights.¹⁴²

In this sense, even if the Turkish authorities seem to be gradually more open for changes as regards to the protection of non-European refugees¹⁴³ – as evidenced by the diplomatic statements assuring a closer monitoring towards them,¹⁴⁴ – mere promises cannot be regarded as sufficient protection for refugees. According to UNHCR’s interpretation, Turkey would not provide ‘sufficient protection’ under the ‘conditional refugee status’.

- *Do Syrians enjoy sufficient protection in the light of the Temporary protection regulation?*

As a complement to the Turkish refugee protection regime, the Turkish government introduced in October 2014 the so-called ‘Temporary Protection Regime’, aimed to Syrian refugees. This status is based on a *prima facie* evaluation, where a formal status assessment is not made.¹⁴⁵ The temporary Protection regulation further states expressly that persons “*benefiting from temporary protection shall not be deemed as having been directly acquired one of the international protection statuses as defined in the Law.*”¹⁴⁶

¹⁴¹ *Supra* 84, ECRE Report: Turkey, 2016, pp. 16-24.

¹⁴² *Supra* 84, ECRE Report: Turkey, 2016. p. 16.

¹⁴³ N. Nielsen. 2016. *Turkey vows better protection of non-Syrian migrants*, EU Observer. 26 April. [ONLINE] Available at: <https://euobserver.com/migration/133211> [Accessed 5 April].

¹⁴⁴ Barker. 2016. *Turkey to boost legal protection for migrants, easing EU returns*, Financial Times. 25 April. [ONLINE] Available at: <https://next.ft.com/content/b60b3afe-0af9-11e6-b0f1-61f222853ff3> [Accessed 5 April].

¹⁴⁵ *Supra* 84, ECRE Report: Turkey, 2016, pp. 15-16.

¹⁴⁶ *Supra* 83, Turkey: Temporary Protection Regulation Article 7(3).

As compared to the rights granted to Convention refugees, the regulation explicitly states that persons granted with temporary protection are excluded from long-term legal integration,¹⁴⁷ which is required for the assessment of ‘sufficient protection’ by UNHCR. Moreover, the temporary protection regime does not provide for a validity period, which means that the government can discretionarily terminate the protection at any time.¹⁴⁸

In this regard, the European Commission and the UNHCR have shown their concern about the legal uncertainty of Syrians to “*reavail themselves of temporary protection under the Temporary Protection Regulation in Turkey*”.¹⁴⁹ The European Commission has urged the Turkish government to change its domestic legislation in order to renew the temporary protection status of Syrians returned to Turkey from Greece.¹⁵⁰ However, Turkish government sources have declared that Syrians “sent back from Greece to Turkey would retain their temporary protection status”.¹⁵¹

Additionally, for the implementation of the temporary protection for Syrian refugees, attention should be paid to the wording of the APD. Article 35(b) requires that the “individual previously enjoyed” protection in the country in order to consider that country as ‘first country of asylum’. The APD does not accept the mere existence of the ‘Temporary Protection Regime’ for Syrians; they have to actually enjoy effectively that status before requesting asylum in a member state.¹⁵²

Although the reluctance of the Turkish government to increase the level of protection of non-European refugees (Turkish officials had initially declared that they “were not willing to change its asylum legislation regarding non-European refugees”),¹⁵³ it has

¹⁴⁷ *Supra* 84, ECRE Report: Turkey, 2016, pp. 15-16.

¹⁴⁸ *Supra* 84, ECRE Report: Turkey, 2016, pp. 126-127.

¹⁴⁹ UNHCR Legal Considerations on returns from Greece to Turkey, 2016, p. 5.

¹⁵⁰ EC Next operational steps in EU-Turkey cooperation, 16 March 2016, p. 3.

¹⁵¹ N. Nielsen (2016), *Turkey will not give in to EU on refugee laws*, EU Observer. 23 March. [ONLINE] Available at: <https://euobserver.com/migration/132779> [Accessed 5 April].

¹⁵² *Supra* 140, Jesuit Refugee Service, *The EU-Turkey Deal*, 29 April 2016, p.17.

¹⁵³ *Supra* 151, Nielsen *Turkey will not give in to EU on refugee laws*, 23 March 2016.

been rumoured that Turkey may propose to bring to a common level the protection afforded to Syrians and non-Syrians.¹⁵⁴ In any case, Turkey does not seem to comply at the moment with the requirements set by UNHCR for the assessment of ‘sufficient protection as regards to Syrian nationals. In this regard, it is highly unlikely that Turkey can grant ‘sufficient protection’ to Syrian refugees.

3) *Can Turkey be considered as a ‘First country of asylum’?*

As seen above, against the opinion of the European Commission, there are important legal circumstances that throw serious doubts about the designation of Turkey as a ‘first country of asylum’ under EU law. Like for the ‘safe third country’, these doubts emanate from the fact that Turkey provides a different level of protection for European refugees and for non-European refugees. Turkey could solve this situation easily by withdrawing the geographical limitation of the Geneva Convention and establishing a uniform legal status for all refugees. However, this does not seem to be the intention of Turkey.

Nevertheless, Turkey could be considered as a ‘first country of asylum’ due to its legal compliance with the principle of *non-refoulement* and the wide margin of interpretation that involves the term ‘sufficient protection’. However, it should be mentioned once again that such assessment would have to be carried out on a case-by-case basis after an individual consideration of the circumstances of each applicant. The analysis of whether there is a risk of *refoulement* and the enjoyment of ‘sufficient protection’ has to be conducted individually. If Greece complies with the law, a case-by-case examination will have to be carried out before declaring an application for international protection inadmissible due to considering Turkey as a ‘first country of asylum’.

Lastly, the vagueness of the term ‘sufficient protection’ and the consequences that its wrong interpretation can cause to refugees makes recommendable for Greek courts to

¹⁵⁴ *Supra* 144, Barker, 2016; *Supra* 151, Nielsen 2016.

refer a question in this regard to the CJEU, or for individuals to bring their case to the ECtHR

2.5. Excuse: Foreshadowing the creation of ‘safe zones’ in Syria

In addition to the concepts analysed above, a mention should be made of the so-called safe zones that the EU-Turkey agreement foresees to create in Syria, allowing “refugees to live in areas which will be more safe”.¹⁵⁵

Indeed, it seems that the EU intends to create a ‘safe zone’ in Syria. This can conflict with international refugee law and the Refugee Convention: article 1A provides that a person must be “*outside the country of his or her nationality or, if not having a nationality, be outside his or her country of habitual residence*” in order to fall within the definition of ‘refugee’.¹⁵⁶ However, even if a ‘safe zone’ is possible in theory¹⁵⁷, the surveillance mechanisms should play a crucial role to monitor these zones to prevent an infringement of the principle of *non-refoulement*. In this regard, account should be taken of the Qualification Directive, which, in the light of internal protection, requires not only the safety of the applicant regarding well-founded fear of persecution and/or serious harm in the ‘safe zone’ but also that the person “can reasonably be expected to settle there.”¹⁵⁸ Finally, it must not be forgotten that the asylum-seeker will have to be able to rebut, “that the third country is not safe in his or her particular circumstances”.¹⁵⁹ In any case, the analysis about whether Syrians returned to these foreshadowed safe zones are, in fact, safe will have to be analysed at the time that it happens.¹⁶⁰

¹⁵⁵ European Commission (2016), 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, COM(2016) 166 Final, Brussels, 16 March, p. 9.

¹⁵⁶ Refugee Convention, article 1A.

¹⁵⁷ *Supra* 20, Steve Peers, 18 March 2016.

¹⁵⁸ article 8(1) recast Qualification Directive.

¹⁵⁹ Article 38(2)(c) recast Asylum Procedures Directive.

¹⁶⁰ *Supra* 20, Steve Peers, 18 March 2016.

2.6. Interim conclusions

As analysed above the legal doubts on the consideration of Turkey as ‘safe third country’ and ‘first country of asylum’ involve its limitation to the ratification of the Geneva Convention. This limitation creates legally and materially, to different levels of protection amongst Turkish refugees. Therefore, the withdrawal of the geographical limitation would allow Turkey to be legally considered as ‘safe’ and would send the message that Turkish authorities are willing to eliminate the differences between the two levels of protection. The withdrawal of the restriction plus an effort for more transparency in the implementation of the deal – especially for the returns –, together with the invitation of UNHCR to supervise the whole procedure should be enough for Turkey to be seen as formally ‘safe’. In this regard, the EU should encourage Turkey to put more efforts by, for example, including it as a requisite for negotiating the lift of the visa restrictions for Turkish nationals.

3. COLLECTIVE EXPULSIONS

3.1. Introduction

At first glance, the sentence found in the agreement of 18 of March¹⁶¹ stating that “*All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey*” raises questions about the compatibility with article 19(1) of the European Charter of Fundamental Rights and article 4 of Protocol 4 and related jurisprudence as regards to the prohibition of collective expulsions. Nevertheless, the agreement follows: “[...] *this will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion*”; which appears to be in contradiction with the first one.¹⁶²

Many scholars share this opinion. Amongst them, Steve Peers¹⁶³ argue that the first sentence of the statement is in breach of EU and international law and the second sentence is a contradiction in itself. Indeed, returning “*all*” persons does not seem to be – at least *prima facie* – “*excluding any kind of collective expulsions*” and consequently neither “*in full accordance with EU and international law*”.

Additionally, other scholars like Henry Labayle and Philippe de Bruycker,¹⁶⁴ argue that the wording of the statement implies that the returns to Turkey are framed in the readmission agreements previously concluded between Europe and Turkey.¹⁶⁵

¹⁶¹ *Supra* 7, EU-Turkey Statement, 18 March 2016.

¹⁶² The Action Point 1 of the deal further states: “*Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR*”

¹⁶³ *Supra* 20, Steve Peers. 18 March 2016.

¹⁶⁴ Henri Labayle, Philippe de Bruycker. 2016. *The EU-Turkey Agreement on migration and asylum: False pretences or a fool's bargain?*. 1 April [ONLINE] Available at: <http://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-and-asylum-false-pretences-or-a-fools-bargain/print/>. [Accessed 20 April 2016].

¹⁶⁵ See European Commission, Factsheet – EU-Turkey Agreement: Questions and Answers MEMO/16/963, 19 March 2016 [ONLINE] Available at: http://europa.eu/rapid/press-release-MEMO-16-963_en.htm [Accessed 1 April 2016]

Nevertheless, according to the Returns Directive, the only instrument that can be used as a legal basis for returning people is a return decision.¹⁶⁶ Consequently, by using the readmission agreement and not an individual return decision as a legal basis for the returns, the Greek authorities would not assess individually the returns in a manner that article 4 of Protocol 4 requires. Accordingly, this line of thought argues that the 18 March statement is in breach of law.

Undoubtedly, the wording of the Statement is not the most appropriate to remove doubts about the conformity of the deal with international law. Nevertheless, whether the returns to Turkey could suppose a violation of the prohibition on collective expulsions requires a further and more specific analysis. In this sense, the role of the case law of the ECtHR should not be forgotten, especially with the recent *Khlaifia* case¹⁶⁷, which widens the scope of the definition of collective expulsion and poses a threat, not only to the legality of the deal but also to the further implementation of solidarity mechanisms in refugee law.

3.2 The evolution of the prohibition of collective expulsions in European law

The international legal basis of the prohibition on collective expulsions is found in different regional human rights instruments: At the African level, the African Charter on Human and Peoples' Rights¹⁶⁸ prohibits the “mass expulsion of non-nationals”;¹⁶⁹ at the

¹⁶⁶ *Supra* 62, European Union: Council of the European Union, *Directive 2008/115/EC*, article 2(4). “‘return decision’ means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return”.

¹⁶⁷ *Khlaifia et autres c. Italie*, Requête no 16483/12, Council of Europe: European Court of Human Rights, 1 September 2015. Note that the case currently pending review before the Grand Chamber due to referral made by Italy.

¹⁶⁸ Organisation of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

¹⁶⁹ Article 12(5) of the *Banjul Charter* states: “The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups”.

American level, the American Convention on Human Rights¹⁷⁰ bans “collective expulsions of aliens”;¹⁷¹ and finally, at the European level, collective expulsions are prohibited by article 4 of Protocol 4 of the European Convention on Human Rights (ECHR)¹⁷² and article 19(1) of the Charter of Fundamental Rights of the European Union.¹⁷³

The prohibition on collective expulsions in EU law is based on two principles, the principle of non-discrimination and the prohibition of arbitrariness.¹⁷⁴ Beyond these two principles, neither the ECHR nor the Charter of Rights provides a definition of collective expulsions. In order to find its scope, the term should be interpreted in accordance with the jurisprudence of the ECtHR.¹⁷⁵

The first decision issued by the ECtHR on collective expulsions is *Andric v Sweden*,¹⁷⁶ from 1999. The Court defined collective expulsion as “*any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group [...] in a way that allow[s] to put forward [the] case against expulsion.*”¹⁷⁷

Since this first decision, the ECtHR has been developing its jurisprudence in a

¹⁷⁰ Organisation of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969.

¹⁷¹ Article 22(9) of the American Convention on Human Right states: “The collective expulsion of aliens is prohibited”

¹⁷² Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, [hereinafter ECHR], article 4 Protocol 4 “Collective expulsion of aliens is prohibited.”

¹⁷³ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, [hereinafter Charter of Rights], article 19(1) “Collective expulsions are prohibited.”

¹⁷⁴ Dzehtsiarou, Konstadinides, Lock, O'Meara, 2014. *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR*. 1st ed. United Kingdom: Routledge. p.160.

¹⁷⁵ The CJEU have not yet pronounced on the scope of the prohibition on collective expulsions as regards to article 19(1) of the Charter of Rights.

¹⁷⁶ *Vedran Andric v. Sweden*, 45917/99, Council of Europe: European Court of Human Rights, 23 February 1999.

¹⁷⁷ *Vedran Andric v. Sweden*, rep. 1.

consistent manner around two different situations that can be regarded as collective expulsions. This was changed by the recent *Khlaifia case*, which supposes a radical extension of the prohibition on collective expulsions that can pose a threat to the legality of the returns under the EU-Turkey deal.

3.2.1 The first conception of collective expulsions: *Conka v. Belgium* and *Georgia v. Russia*

Firstly, an expulsion qualifies as ‘collective’ when the expulsion's aim is to remove from the territory a group of persons who share same characteristics. This prohibition had its origins in the prevention of measures called “mass expulsions” connected to preventing practices related to ethnic and racial discrimination and genocide.¹⁷⁸ This first type of collective expulsions has evolved from its original context, and currently involves situations where the expulsion of individuals is based on their origins or group membership. This is the case of *Conka v. Belgium* and *Georgia v. Russia*, which concerned expulsions of minority groups due to ethnic discrimination.

The case *Conka v. Belgium*,¹⁷⁹ in 2002, concerned a group of expellees from a minority group, concretely of Romani origin, fleeing from Slovakia. The individuals were expelled due to ethnic discrimination through an expulsion procedure held by Belgium. The expulsion was carried after a general identification of the origins of the returnees; before their asylum procedures were terminated; and without the possibility to contact a lawyer. In particular, the Court took into account that “*in view of the large number of persons of the same origin who suffered the same fate as the applicants, the Court considers that the procedure followed did not enable it to eliminate all doubt that the expulsion might have been collective.*”¹⁸⁰

¹⁷⁸ Which is clearly the purpose of the African Charter on Human and Peoples'. See Article 12(5) of the *Banjul Charter*.

¹⁷⁹ *Conka v. Belgium*, 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002

¹⁸⁰ *Conka v. Belgium*, section 61.

On the one hand, the case *Georgia v. Russia*¹⁸¹ dealt with a series of arrests, detentions and collective expulsions in 2006, as a consequence of an administrative practice of an ethnic campaign against the Georgian minority group. The Russian authorities carried out a general identification of the nationality of the applicants. The Court stated, first, that the prohibition of collective expulsions applied to all individuals, lawfully residing or not, and, second, that the short procedure and the big amount of expulsion orders issued, around 4600, during only four months were enough proofs to decide that no individual assessment was carried out.¹⁸²

3.2.2 The second conception of collective expulsions: *Hirsi Jamaa v. Italy* and *Sharifi v. Italy and Greece*

Secondly, the case law detached another conception of collective expulsions. An expulsion can be considered collective when, even if it is not specifically targeted to ethnic minorities, the authorities carry out individual identifications but do not assess the individual circumstances of the individuals before expelling them. The Court seems to believe that the simple identification is not enough if it does not imply a proper individual assessment of the risks that the returnee can face if he is expelled. The second type of expulsions generally refers to automatic decisions to return large groups of aliens, without a proper individual assessment to determine whether the individuals can be in need of international protection.¹⁸³ This is the case of *Hirsi Jamaa and Others v. Italy* and *Sharifi et autres c. Italie et Grèce*.

¹⁸¹ *Georgia v. Russia*, Application no. 13255/07, Council of Europe: European Court of Human Rights.

¹⁸² *Georgia v. Russia*, para. 168.

¹⁸³ Ana Rita Gil. 2016. *Collective expulsions in times of migratory crisis: Comments on the Khlaifia case of the ECHR*. 11 February. [ONLINE] Available at: <http://eumigrationlawblog.eu/collective-expulsions-in-times-of-migratory-crisis-comments-on-the-khlaifia-case-of-the-echr/>. [Accessed 11 May 2016].

In *Hirsi Jamaa and Others v. Italy* case,¹⁸⁴ in 2012, the Court found a breach of article 4 of Protocol 4. The case concerned the return to Libya of a migrant's boat intercepted at the sea by Italy. Italian authorities directly embarked the migrants on their boat and disembark them in Libya, without individual identification and without offering them the possibility to apply for asylum. The Court determined that article 4 of Protocol 4 also applies extraterritorially and specifically to migrants intercepted at the sea.¹⁸⁵

In the case *Sharifi and Others v. Italy and Grece*¹⁸⁶, the Court found that Italy had violated again article 4 of Protocol 4. The case involved the immediate return to Greece of individuals from Afghanistan, Sudan and Eritrea without providing them first with the possibility to apply for asylum or to an effective remedy to challenge their deportation. The Court held “*that it shared the concerns of several observers with regard to the automatic return, implemented by the Italian border authorities in the ports of the Adriatic Sea, of persons who, in the majority of cases, were handed over to ferry captains with a view to being removed to Greece, thus depriving them of any procedural and substantive rights.*”¹⁸⁷

3.2.3 Extending the scope of collective expulsions: *Khlaifia v. Italy*

In September 2015, right in the middle of the migration crisis in Europe and in the context of the mass movement of Syrians across Europe, the ECtHR decision on the *Khlaifia* case extended the scope of the prohibition on collective expulsion of aliens. The ECtHR found that an exhaustive identification procedure was not yet sufficient to skip Article 4 prohibition on collective expulsions. On 1 February 2016, the case was

¹⁸⁴ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights.

¹⁸⁵ *Hirsi Jamaa and Others v. Italy*, para.178.

¹⁸⁶ *Sharifi et autres c. Italie et Grèce*, Requête no 16643/09, Council of Europe: European Court of Human Rights, 21 October 2014.

¹⁸⁷ European Court of Human Rights, Press Unit, Factsheet – Collective Expulsion of Aliens, February 2016 [Hereinafter ECtHR Collective Expulsions Factsheet][ONLINE] Available at: http://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf [Accessed 3 June 2016].

referred to the Grand Chamber at the request of the Italian Government and it is now pending review before the Grand Chamber.¹⁸⁸

The case *Khlaifia and Others v. Italy* involved three Tunisian non-asylum seekers who landed at the Italian coast during the Arab spring in 2011. The applicants were transferred to a detention centre in Lampedusa, registered, transferred again to Palermo and sent back to Tunisia due to a bilateral agreement between Italy and Tunisia.

The Chamber found that Italy violated article 4 of Protocol 4. The Court emphasised that although the applicants were duly identified and presented individual deportation orders, these orders contained identical wording, without a reference to their personal circumstances and without an individual interview. The Court also noted that, unlike the case *Hirsi Jamaa v. Italy*, the Italian authorities undertook individual identification procedures, but this was not enough to exclude the presence of collective expulsions.

The Court relied on the following elements to find a violation of article 4 Protocol 4: The fact that a large number of people sharing the same identity could be subjected to the same treatment; the announcement of the authorities of the simplified expulsion measures due to a bilateral agreement between Italy and Tunisia and; the issue of deportation orders in identical terms.¹⁸⁹

The controversy over the wide interpretation of the term collective expulsion is reflected in the “Partly dissenting opinion of Judges Sajó and Vucinic”.¹⁹⁰ The judges are on the opinion that a violation of article 4 of Protocol 4 cannot be contemplated since the Italian authorities undertook a detailed individual identification of the returnees. Moreover, the judges also argue that the use of identical words in deportation

¹⁸⁸ *Supra*, 187 ECtHR Collective Expulsions Factsheet.

¹⁸⁹ *Supra* 167, *Khlaifia et autres c. Italie*, para. 172-173. The ECHR further found a violation of Article 13, the right to an effective remedy, in conjunction with Article 4 Protocol 4 because the available judicial review did not provide for a stay of the order of deportation.

¹⁹⁰ *Khlaifia et autres c. Italie*, Requête no 16483/12, Council of Europe: European Court of Human Rights, 1 September 2015, OPINIONS SÉPARÉES [hereinafter OPINIONS SÉPARÉES]

orders, the number of people subjected to the same treatment and the implementation of a bilateral agreement cannot *per se* amount to violation of article 4 of Protocol 4.¹⁹¹ Lastly, the judges remarkably pointed out that the individuals were not asylum seekers and were returned to a considered ‘safe country’, thus skipping the risk of *non-refoulement*.¹⁹²

In short, the jurisprudence of the Court as regards to the prohibition on collective expulsions has been evolving uniformly by widening the scope of the prohibition in two circumstances: where the expulsion is carried out due to ethnic discrimination – the so-called ‘mass expulsions’ – and where the expulsion of a large number of people takes place immediately; without a proper individual examination; and without an individual assessment of whether the return can pose a danger to the individual. However, the *Khlaifia* case supposes a radical new view on the definition of collective expulsions: The Court found violation of article 4 Protocol 4 where only three people were subjected to expulsion procedures; the expulsion did not take place immediately after landing on the Italian coast; a detailed individual identification was carried out by Italian officials; and the individuals were not asylum seekers and were returned to a ‘safe country’.

Moreover, the arguments that the Court give to support its view – the large number of people that could share the same fate; the bilateral agreement between Italy and Tunisia; and the identical wording use in the deportation orders – can conflict with the returns procedure foreseen in the EU-Turkey deal.

3.3 Is the prohibition on collective expulsions in conflict with the deal?

While the Geneva Convention only bans expulsions when are related to *refoulement* to the country of origin until the refugee status determination of the applicant is finalised,

¹⁹¹ OPINIONS SÉPARÉES para.16

¹⁹² OPINIONS SÉPARÉES para.17

the ECtHR goes further and also bans collective expulsion of aliens which, even if objective and reasonable, is not carried out assessing the individual circumstances of the returnees.

Moreover, the fact that a large number of people sharing the same identity could be subjected to the same treatment; the announcement of the authorities of the simplified expulsion measures due to a bilateral agreement and; the issue of deportation orders in identical terms are also circumstances for the Court to declare an expulsion ‘collective’.

In this sense, the case law on collective expulsions, especially the above-mentioned *Khlaifia* case can raise doubts about whether the returns under the EU-Turkey deal are in accordance to international law.

In the opinion of Hathaway, these requirements for a collective expulsion to be lawful are unwise and irresponsible. Even if the case law could have developed in a different way under the current circumstances of a clearly ‘protection-oriented scheme’ under the EU-Turkey deal, the reality is that, to date, the jurisprudence of the ECtHR seems to go further than an individualised analysis to consider the expulsion lawful. In Hathaway’s opinion, “*the ECHR seems to take away the flexibility that the Refugee Convention intended that states should enjoy in ensuring that all refugees get protection.*”¹⁹³

Hailbronner seems to agree with Hathaway in the “*unreasonableness of this jurisprudence with respect to responsibility sharing agreements*”.¹⁹⁴ In words of Hailbronner “*the Court’s application of the prohibition of collective expulsion to border control and rejection largely ignores the wording and purpose of the provision.*”¹⁹⁵ Moreover, Hailbronner argues, against the opinion of the ECtHR, that article 4 of Protocol 4 should only apply to legal residents; therefore, the assessment of the individual circumstances must be put in place only for legal residents. The procedural

¹⁹³ *Supra* 102, Hathaway, 2016.

¹⁹⁴ Hailbronner, 2016.

¹⁹⁵ Hailbronner, 2016.

requirements for returning rejected migrants at the borders should not require an individualised assessment. The only procedural requirement for the cases of irregular migrants at the borders should be the *non-refoulement* principle and not article 4 of Protocol n°4.¹⁹⁶

Hathaway also shows some doubts as regards to whether the swap of the EU-Turkey deal would breach protocol 4. In Hathaway's view, it is possible that the swap would help providing asylum to those more vulnerable rather than those who have the money to pay the smugglers. On paper, the deal establishes that the EU will help improving the conditions and enhancing the protection of refugees already in Turkey. In this context it is not clear that the ECtHR would reach the same conclusion than in *Hirsi Jamaa and Others v. Italy* and *Khlaifia and Others v. Italy*. Indeed, in the opinion of Hathaway, it should not reach the same conclusions considering the need refugee responsibility-sharing in the global refugee regime.¹⁹⁷

Above all, the Grand Chamber accepted the petition by Italy to review the case; the final decision will definitely set the way forward as regards to the interpretation of article 4 Protocol 4. Moreover, it is quite probable that, sooner or later, the Court will have to deal with a concrete case of expulsions under the EU-Turkey deal. In this sense, it remains to be seen whether the Court will follow the same line of not.

3.4 Interim conclusions

In 2015, the ECtHR already warned that the migratory crisis could not justify a lower level of Protection afforded by article 4 Protocol 4.¹⁹⁸ In this regard, the *Khlaifia* case

¹⁹⁶ Hailbronner, 2016.

¹⁹⁷ *Supra* 102, Hathaway, 2016.

¹⁹⁸ See *Sharifi et autres c. Italie et Grèce*, para. 224 “while states have the sovereign right to control immigration and uphold obligations flowing from EU membership, the challenges of addressing mass influxes of migrants do not justify violating the Convention or its Protocols” and *Georgia v. Russia*, para.177 “even if member states have the sovereignty to “establish their

supposes the reaffirmation that the Court will keep widening the scope of collective expulsions even in the times of a compelling crisis. However, the development of the jurisprudence and the controversy between the majority of the judges, who argue for a wider interpretation of collective expulsions, and a minority, who argue for a stricter interpretation, shows the difficulty to establish a clear definition of the term. In this sense, the *Khlaifia* case is controversial. The ECtHR raised the level of protection of collective expulsions right at the moment when the immigration policies of the member states were being revised in order to be implemented more effectively and more quickly.

One could agree that the mere identification cannot remove all the doubts of an expulsion from being considered collective. Nevertheless, the case law seems to go too far in its definition and scope: The prohibition of collective expulsions has developed, from its original aim to prevent ‘mass expulsions’, into a stricter interpretation which aim is to prohibit expulsion of aliens without a detailed analysis on their individual circumstances.

The final aim of the prohibition of the second group of collective expulsions is to take proper account on the risks that the individuals could face in the receiving country if expelled. However, one should not forget that this very situation is already well protected by the international principle of *non-refoulement*. In fact, article 38(2) of the APD already requires an individual assessment in order to declare a third country as safe in order not to breach the principle of *non-refoulement*. In this regard, the requirement of an individual assessment for collective expulsions is redundant. Therefore, one could argue that the main purpose of the prohibition on collective expulsions should be narrowed to its original purpose. For the second group, the *non-refoulement* principle should apply.

own immigration policies”, their “problems managing migratory flows cannot justify [to] recourse to practices which are not compatible with its obligations under the Convention.”

The development of the case law of the Court regarding collective expulsions poses, on the short term, a threat to the legality of the EU-Turkey deal and, on the long term, an obstacle to the solidarity principle in international refugee law. The ECtHR is creating legal barriers to the implementation of resettlement programs and responsibility-sharing systems that are needed to make the international refugee regime effective. Nevertheless, it remains to be seen whether the ECtHR will follow this line of thought when the menacing cloud of collective expulsions looms over the EU-Turkey deal.

4. THE CHALLENGES OF GREECE

4.1. Introduction

The EU-Turkey agreement was followed by a wave of optimism under the risk of failure of European core norms like the Schengen rules and the Dublin system. Previously, the political statements towards a new policy in the European Asylum context together with the hotspot approach and relocation/resettlement schemes supposed a silver line towards a better managing of the refugee protection in Europe. However, as Daniel Thym explains, “*legislative acts do not always translate into success on the ground.*”¹⁹⁹ This seems to be the case with the EU Turkey deal.

This chapter will focus on the challenges on implementing the deal. In this sense, the structure of the CEAS implies that Greece is in charge of processing the asylum applications and delivering the returns.²⁰⁰ For this purpose, Greek officials have to guarantee to the asylum seekers proper reception conditions, an access to a fair asylum procedure and the right to an effective legal remedy to challenge the decision of the authorities. The CJEU²⁰¹ and ECtHR²⁰² should be providing more guidance in this regard.

4.2 The situation of refugees in Greece

Due to its particular location in the Mediterranean Sea and as a frontline member state at the EU external borders, Greece has been under overwhelming migrant pressure as a consequence of mass influx of migrants trying to reach the EU: The Greek authorities

¹⁹⁹ Supra 91, Thym, 2016

²⁰⁰ The CEAS does not provide with a supranational body to implement decisions on asylum.

²⁰¹ See *Opinion of Advocate General Kokott: Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal*, C-695/15 PPU, European Union: Court of Justice of the European Union, 8 March 2016.

²⁰² See *supra* 167, *Khlaifia et autres c. Italie*, especially as regards to collective expulsions.

are not capable alone to re-establish control over the unprecedented humanitarian crisis in the country.

The pressure faced by Greece is not new: Before the peak of this crisis, the situation of the Greek asylum system was already critically damaged. In 2011, the ECtHR and the CJEU identified “systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers;”²⁰³ for this reason, member states stopped Dublin transfers to Greece. In February 2016, the European Commission proposed urgent measures to be taken by Greece and envisaged the resume of the Dublin transfers to Greece for June 2016, which seemed unrealistic due to the increase of refugees.²⁰⁴

The majority of migrants in Greece are held in the so-called hotspots, situated along the Greek islands. The rest of the migrants are on the mainland, in facilities run by the government or in temporary makeshift camps or settlements next to any facility. There are currently around 47.000 migrants on the mainland (even though the facilities only have a capacity for 34.000) and around 8.000 migrants are estimated in the hotspots on the islands.²⁰⁵

In summer 2015, the large number of people that took the journey from Greece to the Western Balkans urged some member states to reintroduce short-term border checks under articles 23 to 25 of the Schengen rules and led to the closure of the Balkan

²⁰³ See *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011 and *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011, para. 89.

²⁰⁴ European Parliament, LIBE Committee, Policy Department for Citizen's Rights and Constitutional Affairs, May 2016. *On the frontline: the hotspot approach to managing migration*. [Hereinafter LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016], p. 19.

²⁰⁵ United Nations High Commissioner for Refugees (UNHCR), *Refugees/Migrants Emergency Response – Mediterranean*, data updated, [ONLINE] Available at: <http://data.unhcr.org/mediterranean/country.php?id=83> [Accessed 1 June 2016] [Hereinafter UNCHR, *Refugees/Migrants Emergency Response – Mediterranean*]

route.²⁰⁶ At present, some member states maintain border control for six months at some selected points.²⁰⁷ Additionally, other countries not part of Schengen, like Serbia, FYROM and Croatia, established border controls or even closed parts of their borders.

Before the closure of the Balkans route, the majority of people arriving in Greece continued their journey to other member states. Among the extremely high number of arrivals in 2015 (more than a million), only 13.000 migrants applied for asylum in Greece.²⁰⁸ Nevertheless, some reports state that those 13.000 asylum seekers face grave problems.²⁰⁹ Particularly, the closure of FYROM borders left many migrants and refugees at the border with Greece, which sparked a grave humanitarian crisis in Idomeni, where more than 11.000 refugees waited to be resettled under very challenging conditions.²¹⁰

Apart from the substantial support that Greece receives (up to 464 million euros for 2016), on the 13 April 2016, the EU Parliament approved an extra 100 million euros of emergency aid for refugees as part of 700 million emergency assistance instrument proposed by the European Commission on 2 March 2016.²¹¹ However, besides the financial aid, what Greece critically needs is to rescue the Greek asylum system to end with the deadlock of pending asylum applications.

²⁰⁶ European Union: Council of the European Union, *Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, 15 March 2006, OJ L. 105/1-105/32; 13.4.206, (EC) No 562/2006, art. 23-25.

²⁰⁷ Austria, Germany, Denmark, Sweden and Norway introduced internal border controls at some selected points for six months. See Proposal for a Council Implementing Decision setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, COM(2016) 275, 4 May 2016.

²⁰⁸ *Supra* 205, UNHCR, *Refugees/Migrants Emergency Response – Mediterranean*.

²⁰⁹ Rights Watch. 2016. *EU/Greece; Share Responsibility for Asylum Seekers*, Press Release. 28 January. [ONLINE] Available at: <https://www.hrw.org/news/2016/01/28/eu/greece-share-responsibility-asylum-seekers> [Accessed 1 June 2016]

²¹⁰ *Supra* 205, LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016, p. 21.

²¹¹ *Supra* 205, LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016, p. 23.

4.3 The hotspots in Greece

4.3.1 The ‘hotspot approach’

The ‘hotspot approach’ consists of the deployment of coordinated operational support on the ground for member states to deal with large scales of arrivals. The hotspot idea was foreseen in the Agenda of Migration of May 2015. Later in June, the hotspot approach was endorsed by the European Council as a landmark of the EU response strategy to the migration challenge. The hotspots’ official main goal is to support the effective implementation of the resettlement/relocation scheme and the returns policy together with improving the security and law enforcement by integrated and systematic security checks. Member states in a situation of crisis, due to migratory pressure at their external borders, can request the hotspot response.²¹²

Although being a keystone of the new EU-migration strategy, the hotspots are regulated under a very loose policy framework: there is no legal instrument referred to the hotspots. Its functioning is based on a multiagency approach, where Frontex; the European Asylum Support Office (EASO); Europol; and the Fundamental Rights Agency (FRA) have different tasks under the supervision of a Committee chaired by the European Commission that oversees the implementation of the hotspots.

On the one hand, Frontex assists in screening and registering migrants; gets information of smuggling networks together with Europol and Eurojust; and coordinates the returns of migrants without right to remain in the EU. On the other hand, EASO provides asylum support and processes the asylum applications jointly with the authorities of the member state. Finally, the roles of Europol and FRA are not well defined.²¹³

²¹² *Supra* 205, LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016, pp. 26-32.

²¹³ *Supra* 205, LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016, pp. 26-32.

The hotspot approach, together with the ‘Emergency Relocation Scheme’, reflects the substantive change of the EU in the migration and asylum policy. This new approach is laudable: it is based on the solidarity between member states to face the high burden of migration at the EU at frontline while offering legal channels to relief this pressure by a relocation scheme between member states. The system seems undoubtedly good on paper. However, it must not be forgotten that these measures are addressed, ultimately, to people. In this regard, the EU – more concretely its member states – seems to be losing perspective about which should be the main priorities. Especially worrying is the lack of legislation behind the hotspots, which implies a legal limbo that where responsibilities are not defined and a threat to the protection of rights of migrants and asylum seekers.

4.3.2 The role of the hotspots in Greece

There are currently five planned hotspots along the Greek Islands, four of them operational at the moment, with a capacity for around 1000 people in each one.²¹⁴ As regards to the personnel, although the policy documents state a multi-agency deployment, the number of staff amongst the two primary agencies – Frontex and EASO – show the lack of balance between them: The number of Frontex personnel is far larger than the EASO personnel, which is extremely low and has no presence at all in two hotspots out of the four operational hotspots. The disproportion between agencies is also reflected in their budget: while Frontex has 60 millions euros available for managing the returns, EASO has only 1.9 million available in its budget to cope with the asylum procedure expenses.²¹⁵

In fact, the disproportion in budget and personnel between Frontex and EASO is justified: the European Commission has recognised that the hotspots “*will [...] focus on*

²¹⁴ *Supra* 205, LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016, pp. 33-36.

²¹⁵ *Supra* 205, LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016, p. 34.

*registration and screening [...] by the objective of implementing returns to Turkey,*²¹⁶ with the consequent need to extend the number of personnel to carry out the return.²¹⁷

In definitive, according to the Commission, the main goal of the hotspots is to fingerprint and return people instead of offering access to asylum to the persons in need. However, these returns have to be carried out after a full assessment on the asylum claims of the applicant. Therefore, asylum officials are as needed as Frontex officials, especially taking into account the deadlock of pending asylum applications. There is no logic behind the words of the Commission and the disproportion between Frontex and EASO at the hotspots. Member states should provide with more asylum resources; otherwise, one could think that there is a deliberate purpose of maintaining the overcrowded conditions in Greece as a repelling situation to prevent more people to come.

4.3.3 Reception conditions at the hotspots: prolonged detention for all asylum seekers

While NGOs concede that the hotspots have contributed to re-establish certain order in Greece, they object to the reception conditions in the hotspots.²¹⁸ Concretely, NGO reports show very poor conditions of hygiene and sanitation and overcrowded facilities in Lesbos.²¹⁹ Amnesty International also reported poor quality of food, bad medical conditions and lack of blankets.²²⁰

²¹⁶ EC Next operational steps in EU-Turkey cooperation, 16 March 2016, p. 4.

²¹⁷ *Supra* 187, European Commission, Factsheet – EU-Turkey Agreement: Questions and Answers MEMO/16/963, 19 March 2016.

²¹⁸ *Supra* 205, LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016, p. 37.

²¹⁹ *Supra* 205, LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016, p. 37.

²²⁰ Amnesty International. 2016. *Greece: Refugees detained in dire conditions amid rush to implement EU-Turkey deal.* 7 April. [ONLINE] Available at: <https://www.amnesty.org/en/latest/news/2016/04/greece-refugees-detained-in-dire-conditions-amid-rush-to-implement-eu-turkey-deal/>. [Accessed 1 June 2016].

The newly Greek asylum law regulating the proceeding of the hotspots contains a provision that limits detention in hotspots for a maximum of three days for the purpose of identification. This detention could be extended up to 25 days in exceptional circumstances. However, the adoption of this provision is on hold due to the changes in the Greek legislation after the EU-Turkey deal. In practice, all applicants are detained for the whole asylum/return process.²²¹

The fact that the biggest hotspot facility, situated in Lesbos, was transformed into a detention centre was the reason for all NGOs to suspend their activities there. The UNHCR made a statement on the 22 of March 2016, right after the beginning of the implementation of the EU-Turkey agreement, withdrawing its cooperation from the hotspots due to their transformation into detention centres.²²² This was followed by many NGOs in the field withdrawing their support in the hotspots. The conditions in Lesbos are even worse since the NGOs provides services that are no longer provided available.²²³

Finally, the consequences of the EU-Turkey deal have impacted gravely on families and the principle of family unit. As JRS informs, 41% of people travelling through the Balkans route have children. Moreover, the percentage of women and children rose from 27% to 60% between September 2015 till March 2016, which could be in relation with the fact that some countries limited family reunification rights; thus encouraging the families to travel together to Europe.²²⁴

²²¹ AIDA: Asylum Database Information. 2016. *GREECE: ASYLUM REFORM IN THE WAKE OF THE EU-TURKEY DEAL*. 4 April [ONLINE] Available at: <http://www.asylumineurope.org/news/04-04-2016/greece-asylum-reform-wake-eu-turkey-deal>. [Accessed 1 June 2016].

²²² United Nations High Commissioner for Refugees (UNHCR). 2016. *UNHCR redefines role in Greece as EU-Turkey deal comes into effect*. 22 March [ONLINE] Available at: <http://www.unhcr.org/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>. [Accessed 1 June 2016].

²²³ *Supra* 205, LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016, p. 36.

²²⁴ *Supra* 140, Jesuit Refugee Service, *The EU-Turkey Deal*, 29 April 2016, p. 18.

The situation that asylum seekers experience in the hotspots is extremely worrying. Moreover, the detention and the poor conditions at the hotspots pose bigger challenges for vulnerable people, families and children. In this regard one could question whether the conditions in Greece are better than the conditions in Turkey and whether this conditions could amount to inhuman and degrading treatment following the doctrine of the ECtHR. The lack of legislation regarding the hotspots has achieved its main goal of providing a loose framework where the hotspots could face the extraordinary situation in Greece; however, the situation has gone to far. The EU has the duty to provide a legal basis to control reception conditions of the hotspots.

4.4 The lack of procedural safeguards for asylum seekers

The implementation of the deal invoked many criticisms and human rights issues. Concretely, the fact that the overwhelmed Greek asylum system will be in charge of providing procedural guarantees to the applicants for international protection is cause of concern.

On the 23 March 2016, the UNHCR complained about the lack of implementation by Greece of the procedural safeguards established in the APD: mainly, about the assessment of the sufficient connection between the applicant and the third country and the methodology about the application of the safe third country. The UNHCR also put emphasis on the requirement of an individual examination procedure in light of the modification of the Greek law to accommodate the EU-Turkey deal.²²⁵

As mentioned above, Greece approved the new law 4375/2016 by urgent procedure for the purpose of implementing the EU-Turkey deal. The law pursues the transposition of the recast APD; sets forth the concepts of ‘safe third country’ and ‘first country of asylum’ and introduces the fast-tracked procedures in examining international

²²⁵ UNHCR Legal Considerations on returns from Greece to Turkey, 2016, p. 6.

protection applications in the first instance and in instance of appeal.²²⁶ In this regard, it is important to mention that, against the interpretation of the European Commission,²²⁷ the application of the ‘safe third country’ and ‘first country of asylum’ notions cannot justify the fast-tracked procedures.²²⁸

Under the new Greek law, an application being analysed on the merits can be fast-tracked at the border: This includes one day for the interview at first instance and three days for the appeal decision. While the APD only mentions a ‘reasonable time’,²²⁹ the time provided by the Greek law seems extremely tight. The undermined capacity of the Greek asylum system is clearly unable to process the applications within this ‘reasonable time’.²³⁰ The situation is extreme, with suggestions that Greek authorities have forgotten to process asylum applications of persons returned to Turkey.²³¹

Finally, Greek law does not provide for automatic suspensive effect in appeals against the returns lodged at the borders. In this regard, applicants have to appeal before the Court of the region to obtain the right to stay during the appeal process. This is nearly impossible due to lack of information in this respect; the limited access to legal

²²⁶ *Supra* 205, LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016, p. 24.

²²⁷ EC Next operational steps in EU-Turkey cooperation, 16 March 2016, p.3. “*The Directive recognises that in certain circumstances an expedited procedure can apply whereby there is no need to examine the substance of an application. Instead, in these cases asylum applications can be considered inadmissible, in particular where it can be expected that another country would carry out the examination or provide sufficient protection. This would arise, for example, if a person has been already recognised as a refugee or would otherwise enjoy sufficient protection in a ‘first country of asylum’, or if a person has come to the EU from a ‘safe third country’*”.

²²⁸ See article 31(1) recast Asylum Procedures Directive in conjunction with article 43 of recast Asylum Procedures Directive. The concepts of ‘safe third country’ and ‘first country of asylum’ are not included in the grounds for accelerated procedures.

²²⁹ Article 43 recast Asylum Procedures Directive.

²³⁰ Council of Europe, 2016, *The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016*, Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons, Doc. 14028, 19 April, p.8.

²³¹ Patrick Kingsley. 2016. *Greece may have deported asylum seekers by mistake, says UN*. The Guardian. 5 April [ONLINE] Available at: <https://www.theguardian.com/world/2016/apr/05/greece-deport-migrants-turkey-united-nations-european-union?CMP=tw t b-gdnnews>. [Accessed 1 June 2016].

assistance on the hotspots;²³² and the fact that the time limit to appeal under Greek law is only 5 days.²³³

In conclusion, high amounts of workload require high amount to workers: In order to provide with a proper individualised assessment in a short period of time, more asylum workers are required. On the other hand, the poor appeal procedure granted at the border is more worrying. In this regard, the Greek authorities seem to be violating the right to an effective legal remedy to asylum seekers by not extending the right to remain during the appeal procedure. The suspensive effect during the appeal shall be granted no matter the urgency needed for the returns procedure. The need of control and fast tracking procedures cannot imply the disregard for human rights.

4.5 Interim conclusions

All in all, the hotspots in Greece have satisfied their main purpose of re-establishing the order that was lost in migration management. The main focus of the hotspots: identification and registration of migrants, has been achieved. The European Commission pointed that fingerprinting has increased from 8% in September 2016 to 100% in March 2016.²³⁴

However, the prospect of the implementation of a very ambitious plan based on a procedure where asylum applications have to be classified as quickly as possible while respecting the human rights safeguards of EU and international law seems highly unrealistic. Especially considering the serious systemic problems the Greek asylum system. These speedy procedures could likely result in human rights violations, as for

²³² European Council on Refugees and Exiles, (ECRE). 2016. *EU must face up to risks of dirty deal with Turkey*. 1 April [ONLINE] Available at: <http://www.ecre.org/eu-must-face-up-to-risks-of-dirty-deal-with-turkey/>. [Accessed 1 June 2016].

²³³ *Supra* 205, LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016 p. 25; *supra* 221, AIDA: Asylum Database Information. 2016. *GREECE: ASYLUM REFORM IN THE WAKE OF THE EU-TURKEY DEAL*. 4 April.

²³⁴ *Supra* 205, LIBE Committee, *On the frontline: the hotspot approach to managing migration*, 2016 p. 40.

example improper consideration of the asylum applications and unavailability of legal remedies.

The Commission's will to create a loose legal background for the implementation of the hotspots can be understood for practical and operational purposes, but creates a climate of insecurity about the interaction of rules, which derives in an undue focus on border control of the hotspots instead of the obligations owed to refugees. This situation derives in poor reception conditions for refugees and inefficiency to the assessment of asylum applications. Moreover, this unclear legal framework makes the agencies operating in the hotspots unaccountable for possible human rights violations

Although the arrival numbers have dropped very significantly after the deal, the deadlock of asylum application is overwhelming and the number of people stuck on the Greek island and the mainland is disproportionate. This deadlock of asylum application has to be resolved as soon as possible to provide legal channels to migrants and refugees.

For this purpose, The EU has to give more responsibilities to EASO within the framework of CEAS: The agency should have the role of supporting the Greek asylum system by a significant deployment of asylum officers to work in cooperation with Greek officials. This should be negotiated between the EU and Greece.

Finally, it is cause of concern that member states do not seem to respond to the call of the Commission and deliver caseworkers to work together with Greek asylum officials. An evil mind could believe that this lack of action; the indiscriminate detention; the extremely poor detention conditions; and the legal limbo, respond to a deliberate aim to make Greece the European Nauru.

In this context, the political background of the implementation of the deal does not bring optimism. The rise of nationalistic movements in the member states and the will to protect their national interests pose a threat to the EU and its principle of solidarity,

which is reflected in the difficulty to establish a mandatory quota system for the Greek relocation scheme amongst member states.

CONCLUSIONS: The legal viability of the EU-Turkey deal

What is needed for the EU-Turkey deal to be viable?

The fact that the EU Turkey deal is a temporary instrument agreed under especial circumstances cannot serve as an excuse to disregard the rights of migrants and refugees. Firstly, the EU-Turkey deal presents a number of legal flaws that cast doubts about its compatibility with EU law; concretely, the doubtful consideration of Turkey as 'safe', and the legal obstacles put by the ECtHR pose a threat to the legality of the deal. Secondly, Greece alone seems to be incapable to observe basic human rights standards in implementing the deal without cooperation. In this regard, the viability of the EU-Turkey deal is in danger unless the issues with its legality are solved and the doubts on its implementation are removed. The following recommendations pursue this objective:

1. The EU should encourage Turkey to remove the legal doubts about its considerations as 'safe third country' and 'first country of asylum' in order to carry out the returns in accordance with the non-refoulement principle.

These legal doubts are based on the geographical limitation that Turkey imposes to apply the Geneva Convention only to European refugees. In this regard, the returnees are afforded with a different level of protection depending to its nationality. Even if the new Turkish national law offers, on paper, a wide range of rights to non-European refugees, the reality is that European refugees enjoy a higher level of protection based on the Geneva Convention for the reasons explained in Chapter 3. Thus, the EU should encourage Turkey to withdraw the geographical limitation in its law to eliminate doubts about violating the *non-refoulement* principle in carrying out the returns. By withdrawing from the limitation to the Geneva Convention, Turkey would also send a clear political message of its willingness to observe the international standards.

Finally, the EU has to persuade Turkey to be fully transparent with the returns. For this purpose, the EU and UNHCR should monitor the conditions of the returnees with frequent reports on the situation of the returnees, with emphasis on the progress of implementation of the asylum procedure under the new Turkish law, especially as regards to Syrians and non-European refugees. The new Turkish law needs time to be fully operational; the material conditions of refugees can be improved considerably with the help from the international community. This openness and willingness to receive not only economic help could be set as a key condition to grant the visa liberalization to Turkey.

2. The ECtHR has to stop widening the scope of the collective expulsions, which should be meant to apply in the most severe circumstances. The current interpretation by the Court in the Khlaifia case can threaten the legality of the returns under the EU-Turkey deal.

The ECtHR seems to require an individual assessment of the circumstances of the individuals in order not to incur in a violation on the prohibition on collective expulsions. However, this situation is already well protection under the international and EU principle of *non-refoulement*, as explained in Chapter 4. In this regard, the prohibition on collective expulsion should be narrowed to its first purpose, that is, to prevent mass expulsions where individuals are not duly individually identified. Otherwise, it can annulled the flexibility intended by the Refugee Convention with the principle of *non-refoulement*.

The widening of the concept of collective expulsions, concretely the conditions set by the Court for a expulsion to be regarded as collective, can conflict with resettlement programs – like the swap proposed by the EU-Turkey deal – that pursue the aim of improving the conditions of refugees. The referral to the Grand Chamber of the Khlaifia case is a good opportunity for the ECtHR start clarifying its position in this regard.

3. The EU should establish a EU Support Mission led by EASO to rescue the Greek asylum system and end up with the bottleneck situation that creates the deadlock of pending asylum applications in Greece.

Greece has been under overwhelming pressure as a consequence of mass influx of migrants trying to reach the EU. The Greek authorities are not capable alone to re-establish control over the unprecedented humanitarian crisis in the country. The solidarity mechanisms of the EU should take action to improve the situation that risks to stagnate. Although the arrival numbers have dropped very significantly after the deal, the deadlock of asylum application is overwhelming and the number of people stuck on the Greek island and the mainland is disproportionate. As explained in chapter 5, this situation, together with the poor framework of the hotspots, creates a number of problems regarding the reception conditions and the access to a fair asylum procedure. The deadlock of asylum application has to be resolved as soon as possible to provide legal channels to migrants and refugees and relief Greece from the migratory pressure, for this, more personnel is needed.

It is believed that a caseworker can issue an asylum case per day. An effective asylum support mission carried out by EASO to work together with the caseworkers could solve the problem with the deadlock of pending asylum cases. The agency should deploy a significant number of EASO asylum officers to work in cooperation with Greek officials to solve this situation. Those who get their asylum application rejected, after exhausting the legal remedies, can be ‘safely’ returned. Those granted with refugee status can be relocated to a member state.

4. Lastly, the difficulty to establish a mandatory quota system for relocations from Greece and the poor resettlement numbers from Turkey show the lack of solidarity between member states. The EU should prepare technically and politically for a serious relocation scheme and voluntary resettlement.

The political background that involves the implementation of the deal does not help: The rise of nationalistic movements across member states and the will to protect their national interests has created a block of ‘anti-refugees’ and ‘anti-Brussels’ member states

The failed relocation scheme supposed an affirmation of the lack of solidarity even in times of imperative need. Some member states explicitly refused to cooperate, while others, like Slovakia and Hungary, filed actions of annulment to the CJEU against the relocation decision. The numbers are very low compared to the initial proposed relocation: from the 160.000 relocations available, only 615 people had been relocated until the beginning of the deal. This makes around 1% of the expectative in seven months.²³⁵

Finally, the resettlements under the EU-Turkey deal was initially proposed only for Germany and further extended to ‘willing’ countries. However, due to the voluntary nature of the resettlement scheme and the lack of willingness by some member states, the number of people resettled is very low compared to the expectative. From only 511 people have been resettled in three months out of 150.000 expected resettlements in one year.²³⁶

The EU should prepare politically and technically for a viable relocation and resettlement mandatory quota. The political speech must be hardened and higher sanctions have to apply to reluctant member states. A fail of readmission mechanisms, both from inside and outside Europe, goes against the conception of the EU as a leading organism in Human rights promotion.

²³⁵ European Union: European Commission, *report on relocation and resettlement, Relocation and resettlement - State of Play*, 3 March 2016.

²³⁶ European Union: European Commission, *Fourth report on relocation and resettlement*, 15 June 2016. P 11.

Why the EU-Turkey deal needs to be viable?

The new realism reflected in the EU-Turkey deal responds to an effort of the EU to retain the confidence that a European solution is possible more than a victory of the new nationalistic realities in EU. In this regard, the failure of solidarity amongst member states in managing the refugee crisis has showed the critical political situation that the EU is experiencing. The EU-Turkey deal, despite its flaws, has to be seen as a solution that has to work.

The European refugee crisis has highlighted many critical issues:

The refugee Convention is questioned. Despite of the critics, the Convention, landmark for the protection of refugees, remains fundamentally important. Concretely, the principle of *non-refoulement* and its principle international cooperation of Preamble 4 are more important than ever. The refugee Convention has proved very efficient during years in a very hostile environment and has contributed to improve the conditions of many refugees. The current crisis cannot question the main instrument of Refugee law; however, a more refugee rights oriented interpretation is needed.

On the other hand, the stability in South East Europe is in danger. The *de facto* open borders of the Balkan countries and the instability of Macedonia allowed a mass influx of refugees to enter Europe without control and creating a humanitarian catastrophe. The closure of the Balkan group redirected the influx to Greece. The stability o the south east of Europe involves Greek support.

The growing national identity movements across member states are also cause of concern. Those who see the refugee crisis as an opportunity to close borders, stop immigration, and make Greece the European Nauru, based on the Australian migration policy, threaten the liberal identity of the EU.

Under this situation, one can only hope that the EU-Turkey deal will work: Its failure would suppose the failure of the CEAS; an important regression of the Schengen system; and the loss of hope in the prospect of effective refugee protection in Europe. Indeed, despite of the excessive criticisms that the EU-Turkey has received, the facts show that the deal goes in the right direction.

Fundamentally, the deal has also contributed to near stopping of the crossing to Greece, and thus prevents deaths at the Aegean sea: The months before the beginning of the implementation of the deal, 1740 migrants daily crossed the Aegean Sea to Greece while the average is only 47 migrants per day since the 1st of May. Remarkably, since the beginning of the implementation of the deal, only 7 people died in the sea compared to, for example, 89 deaths at the sea in January.²³⁷ The detractors will argue rightly that it has re open more dangerous channels to Europe, like the Italian route. In this regard, the EU-Turkey deal cannot be judged – and was not made – as a definitive solution for the migration problem of EU. The different migration channels that will arise are not only consequence of the deal but, fundamentally, of the European migration policy and borders control. In this regard, the deal has a lot to say as a foundation for a new conception of migration management.

Moreover, the number of resettlements foreshadowed in the EU-Turkey deal (72.000) has been criticised for being small in comparison to the number of refugees in Turkey; however, in 2014, the total number of resettlements in the world amounted to 73.000.²³⁸ Therefore, even if the numbers are still modest, the EU-Turkey deal goes in the right direction in the circumstances.

²³⁷ European Union: European Commission, *Second Report on the progress made in the implementation of the EU-Turkey Statement*, 15 June 2016, p. 2.

²³⁸ UN High Commissioner for Refugees (UNHCR), *UNHCR Resettlement Fact Sheet 2014*, June 2015.

Finally, The EU has planned to spend 6 billion euros in improving the living conditions of 2.5 million refugees in Turkey;²³⁹ even if the ‘Balkans route’ is closed, the EU plans to deliver massive additional resources to support Greece and its asylum system to prevent the CEAS from collapsing. In this regard, member states are ultimately in charge of deciding upon these measures: A failure of its implementation is the responsibility of member states more than the EU institutions.

Above all, the EU-Turkey deal is far from becoming a new global system of refugee responsibility sharing but it is a solution that needs to work: The EU-Turkey deal can recover the lost control without disregarding the human rights of migrants and refugees. However, for this purpose, the EU-Turkey deal should comply with international refugee standards.

²³⁹ *Supra* 165, European Commission, Factsheet – EU-Turkey Agreement: Questions and Answers MEMO/16/963, 19 March 2016.

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