Focus on International Migration nº 5

Refugiados en movimiento: retos políticos, legales y sociales en tiempos de inestabilidad

«Refugees on the move: political, legal and social challenges in times of turmoil»

Alisa Petroff, Georgios Milios, Marta Pérez (eds.)

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REFUGIADOS EN MOVIMIENTO: RETOS POLÍTICOS, LEGALES Y SOCIALES EN TIEMPOS DE INESTABILIDAD

«REFUGEES ON THE MOVE: POLITICAL, LEGAL AND SOCIAL CHALLENGES IN TIMES OF TURMOIL»

Elaborated by:
Alisa Petroff, Georgios Milios, Marta Pérez (eds.)

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4.1 The ECAS' loopholes and the tensions within the EU when facing the 'refugee crisis' of 2014.

Between 2014 and 2016, the Syrian war and other political regional conflicts created a perfect storm for the EU by adding some 2'5 million additional refugees to the average number of refugees arriving yearly to the EU. Although not completely unexpected (Frontex, 2013), the so-called 'refugee crisis' soon became a formidable political crisis for the whole European Union. The paradox being that, at the same time, the EU was the only political actor with the capacity to mobilize the resources and the political will to offer a suitable and durable solution to hundreds of thousands of refugees. However, when analysing why the EU did not spoke (and acted) in a clear and coordinated manner, we should not forget the complex scenario in which such decisions were taken.

First, the crisis showed the deep structural limitations of the EU migration and asylum policies, as well as relevant loopholes in the EU legislation in force. Some of them were critical failures that conditioned the way the refugee crisis was confronted. Although the EU has relevant legislative powers (arts. 72 and 73 TFUE), which were essential to create the European Common Asylum System's (ECAS), the truth is that Member States have been reluctant to allocate stronger powers in the EU institutions when it comes to the management of migrant and refugee flows; the legislation needs to be transposed and complemented by Member States through national legislation, so that implementation is the Member States' realm. By the time of the crisis, the *European institutions found themselves vested with very limited executive powers*: on one hand, the European Asylum Support Office struggled to lay down standards on the interpretation of Dublin III, but mostly

acted in support of the Member States' national asylum systems; on the other hand, Frontex was still an Agency that was shifting from just producing intelligence on migratory flows and border crossing, to coordinate border control operations for which it still relied heavily on Member State's approval and support, both in terms of material (boats, planes, surveillance systems, etc..) and human means (officials, border guards). Additionally, the five or six key EU Directives and Regulations that composed the ECAS were grounded on the *logic of the Dublin* mechanism. Such a mechanism is based on the shared rule that all asylum applications are to be processed by the Member State where the foreigner made his/her initial entry, with very limited exceptions. Scholars and NGOs had harshly criticized the CEAS for several reasons, but the system could work as long as the figures were manageable and did not concentrate in a single Member State or a reduced group of border countries, which is what just happened in 2015.

Regarding its negotiation powers with third countries, let's remind here that the Union needs the approval from the Council to start any negotiation, and that usually takes some years before the talks can be concluded. And wondering about its spending powers, the EU has been lagging behind as compared to other countries in that it has very limited emergency funds, and not for sure in the quantity that was needed to face a crisis of such dimensions, the existing funds were too fragmented among different Directorates and subject to complex oversight procedures (Hooper, 2018). So, despite all its powers and its solid position as the natural entity to provide supranational solutions and relief, in practice the EU had very limited enforcing, funding and coordination powers to properly react to the crisis.

To make things worse, two key EU institutions in the legislative and executive area -notably the European Parliament and the European Commission- had just been elected in 2014, with Mr. Jean Claude Junker as the head of the Commission[1]. Although this new Commission wanted to put migration at the core of its action and immediately deployed a new *European Agenda on Migration*[2]. But in light of the Syrian conflicts' worsening and the surge of refugees reaching the Southeast of the European Union (first affecting Greece, Italy and to a lesser extent, Hungary, to later on spread to other European countries), a complete re-definition of the Commission's priorities in the field was conducted. Despite its quick reaction, the Commission was not at its best to correctly pull all strings and face such a great challenge.

Secondly, and even more relevantly, the crisis unveiled serious political divergences among Member States both on how to address such a challenge, and also on the degree of commitment to Fundamental Rights and EU values of certain Member States. The pressure at a handful of European entry points, mainly in Greece, Bulgaria and Hungary seriously questioned the efficacy of the Dublin mechanism, because it was undeniable that people fleeing from Syria, Eritrea and Iraq and their profiles (entire families, women traveling with children, old people) deserved some type of international protection. Thus, the system collapsed because it was obvious that those countries could not reasonably process and duly study hundreds of thousands of asylum applications because Greece, but also other Eastern European countries, had poorly funded asylum systems and staff (let's remind here that the European Court of Human Rights found Greece in STEDH *MSS v. Belgium and Greece* to show structural fails in its asylees protection system). In addition, the refusal to activate the Temporary Protection Directive, designed especially for cases of massive and unforeseen flows, but certain mandatory provisions and the stronger role acknowledged to the Commission did not please some States and the Coun-

1 The President of the European Commission had taken particular credit designing a new governmental structure of thematic Vice-presidencies, and had charged a former Greek defence minister as the new Commissioner for Migration issues hand in hand with the new head of the External Service, Ms. Mogherini, a key role player in this area.

2 The Agenda was not particularly ambitious though, it stuck to the previous roadmap in this area (recast of the Researchers Directive and the Blue Card Directive, etc.

cil never voted to activate it. As the refugees seemed to become stranded in Greece *sine die*, the refugee routes subsequently moved to the Balkans for the refugees to gain access to the European central States, via Croatia and other neighbouring States. And here border Member States faced a relevant dilemma: they could not - and it was not in their interest, by the way - to allow people in if Germany, Sweden, the United Kingdom, etc., did not take responsibility for them, especially if refugees did not want to remain on the periphery of the Union; on the other hand, banning the entry of refugees to the Union and letting them stuck in the Balkans in the middle of an approaching winter was not a solution compatible with the degree of dignity, moral decency or respect for human rights to be expected from EU Member States. In such a crossroad, the decision by the German Chancellor, Mr. A. Merkel, to temporarily suspend the application of the Dublin rule and the declaration that Germany would admit all refugees arriving from Syria, helped to unblock the situation and also sent a message to the UE of high moral stance. This allowed hundreds of thousands of refugees to enter Germany, and offered a solution to the border countries, however, it put into question the sustainability of the whole system. In fact, some member States regarded with certain hostility the unilateral German action because it dismantled Dublin without bringing to the table solutions or working towards a shared consensus on the issue. Thus, while Germany's decision saved European dignity, by doing so unilaterally and without a European agreement to support it, such decision discouraged a stronger commitment of some member states. This became again problematic when, some months later, the policy of letting refugees enter the Union to settle in Germany showed growing signs of exhaustion, particularly after the arrival of almost one million refugees in Germany in a few months.

However, the German solution bought some extra time to discuss alternative measures at EU level to rationally organize the entry and reception of refugees. Here, a set of different measures were explored and/or undertaken. In the short term, through the adoption by the Council of a refugee relocation system (Council Decision agreed in June 2015 for some 40,000 refugees, and increased in September to some extra 120,000). Not without notable tensions among Member States, the temporary relocation mechanism transferred asylum applicants from overloaded countries - notably Greece, but also Italy and Hungary - to the remaining Member States; as a result of the formula applied a sort of quota system was laid down. Despite its limited ambition, the relocation system faced practical and political challenges. On one hand, it required quick processing capacities at the points of entry, thus leading to the creation of *hot spots* for the identification and processing of their asylum applications; on the other hand, it found serious opposition by certain countries, mainly Hungary, but also Chezc Republic and Poland, that in full institutional disloyalty tried to torpedo the agreement, despite the ridiculous quota of refugees it assigned to them. All those challenges, and the few incentives the majority of Member States had to fulfil the compromise brought a very low rate of success (less than 15% of the initial 160,000 refugees were relocated to other Member States).

In the medium term and long term, the Commission got some time to trigger in 2015 the complex and time-consuming legislative procedure necessary to reform the Dublin system, still far from having achieved any success nowadays, despite the very limited ambition of the reform. To be honest, the alternatives to reform Dublin showed quite complex and surely more ambitious proposals would have required a stronger political will on the side of the Commission and the Council, so at the end the most feasible option was to restore the Dublin mechanism with some significant changes – more flexibility regarding the family and other links that could be used to select the country responsible for the asylum application, coupled with harder measures aimed at banning secondary movements- along with a permanent system of internal distribution (permanent relocation

system) that is still the cause of heated debate (European Council, December 2017).

In this context, at the end of 2015 and in the face of the prospect of new refugee flows in 2016, the EU looked to its North African neighbours (Valetta summit) and Turkey (October 2015, Joint Action Plan) to involve them in a change - or openness - of its strategy in the management of flows of immigrants and refugees. In particular, the decision to involve Turkey more closely in reducing the flow of potential asylum-seekers to the Union was enthusiastically welcomed by that country, settling in November 2015 an *Action Plan 2015*, rapidly materialized in two Summits that took place in March 2016 that ended with a joint *EU-Turkey Statement*, that will be analysed in full detail in Section 2 of this chapter. In this new strategy, it was key the full entry into force of the *European Union and Turkey Readmission Agreement 2014*, shortly followed by a similar Agreement between Greece and Turkey, because it opened a new path for external cooperation with third countries in the field of refugees (something only explored in the immigration area), something that has been considered by some as an strategy to outsource EU's obligations. Officially, the cooperation was presented as a way to reduce deaths at sea (more than 10,700 at its peak in 2015). Let's analyse in detail its content.

4.2 The Statement's content: analysis of six key issues

The EU-Turkey Statement contains nine key points, which will be examined separately in the present section. These nine points of the agreement can be divided into two categories. From one side, the statement contains obligations, which concern the Turkish authorities as regards the return of migrants from Greece to Turkey but also resettlement of Syrian refugees to the EU. From the other side, the statement incorporates certain commitments from the EU towards Turkey and/or Turkish citizens. The Statement reads as follows (European Council, 2016):

'1) 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. It will be a temporary and extraordinary measure, which is necessary to end the human suffering and restore public order. 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. Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey. Turkey and Greece, assisted by EU institutions and agencies, will take the necessary steps and agree any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these arrangements. The costs of the return operations of irregular migrants will be covered by the EU'.

The first point undoubtedly constitutes the most controversial one of the entire agreement and the one that has provoked a rather extended public and academic debate (Peers, 2016; Peers and Roman, 2016; Thym, 206). Except for the issue whether Turkey constitutes a 'safe country' for refugees, which is analysed in detail below, the following comments should be made concerning the first point of the agreement. The first comment concerns collective expulsions and the contradiction, which appears to be in the first two sentences of the agreement. Indeed, the agreement provides that *all* migrants will be returned to Turkey and, at the same time, it mentions that this should be in accordance with EU and international law rules. It appears difficult to imagine how the Greek authorities will comply with their obligation to return *all* irregular migrants respecting the prohibition of collective expulsions, which is guaranteed both at EU and international level[3]. The same is true as regards their obligation to process *individually* any application for asylum, which is also provided for by the agreement. In any event, the agreement provides that migrants who do not apply for asylum or whose asylum application is rejected on the merits or as inadmissible will be returned to Turkey. The agreement seems to imply that people returned to Turkey will be divided into migrants who will not apply for asylum in Greece because they do not have the right to do so, or for whatever reason, and asylum seekers whose application will be rejected on the merits or as inadmissible. The crucial issue of inadmissibility of the asylum applications and, consequently, whether Turkey can be regarded as a 'safe country' for refugees is as mentioned above examined extensively below in a separate section. As regards migrants who do not apply for asylum, the question which remains to be answered is whether these migrants will be given the actual opportunity to apply for asylum or they will merely be returned in accordance with the first sentence of the agreement. The temporary and extraordinary character of the said measure is mentioned in the agreement without further clarification. Alternatively, the text could be construed differently if taking as a key aspect the date of March 2016, so that before that date no expulsion to Turkey would be made on immigrants and asylum seekers alike but since that date migrants would be returned to Turkey on the basis of the advanced application of the EU-Turkey Return Agreement 2014, and potential asylum seekers too on the basis of Turkey being considered as a safe country of transit, once Turkey will make some legal adjustments to fully comply with the condition of safe country of transit.

'2) For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly. On the EU side, resettlement under this mechanism will take place, in the first instance, by honouring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015, of which 18.000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54.000 persons. The Members of the European Council welcome the Commission's intention to propose an amendment to the relocation decision of 22 September 2015 to allow for any resettlement commitment undertaken in the framework of this arrangement to be offset from non-allocated places under the decision. Should

3 The said prohibition is contained both in the European Convention on Human Rights and in the Charter of Fundamental Rights of the EU. See Art. 4 of Protocol 4 of the ECHR and Art. 19 (1) of the ECFR respectively.

these arrangements not meet the objective of ending the irregular migration and the number of returns come close to the numbers provided for above, this mechanism will be reviewed. Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued'.

The first point of the Statement is combined with the second one that introduces a one-for-one rule according to which, for every Syrian which is returned from Greece to Turkey another one will be resettled from Turkey to the EU. The agreement provides that UN Vulnerability Criteria will be taken into consideration in the resettlement procedure as well as that priority will be given to migrants who have not previously entered or attempted to enter the EU irregularly. The second point seems to explicitly concern Syrians although in the priority clause the word 'migrants' has been chosen. In any event, it becomes apparent that the resettlement procedure will co-exist with the relocation scheme that was decided on 22 September 2015[4]. In that respect, the said agreement suggests that any compliance with resettlement obligations should be compensated with non-allocated places under the Council decision. It should be underlined that unlike it is the case with the first point of the agreement, the second one contains a maximum number of resettlements which amounts to a total of 72.000 persons (18.000 places for resettlement that remained at the time the agreement was signed from the resettlement commitment taken by Member States in 2015 and 54.000 additional resettlements). As it will be shown below, resettlement targets have fallen far from the goals lied down in the agreement[5].

'3) Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighbouring states as well as the EU to this effect'.

Pursuant to the third point of the agreement, Turkey is committed to prevent new routes from Turkey to the EU.

'4) Once irregular crossings between Turkey and the EU are ending or at least have been substantially and sustainably reduced, a Voluntary Humanitarian Admission Scheme will be activated. EU Member States will contribute on a voluntary basis to this scheme'.

'5) The fulfilment of the visa liberalisation roadmap will be accelerated vis-à-vis all participating Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016, provided that all benchmarks have been met. To this end Turkey will take the necessary steps to fulfil the remaining requirements to allow the Commission to make, following the required assessment of compliance with the benchmarks, an appropriate proposal by the end of April on the basis of which the European Parliament and the Council can make a final decision'.

'6) The EU, in close cooperation with Turkey, will further speed up the disbursement of the initially allocated 3 billion euros under the Facility for Refugees in Turkey and ensure funding of further projects for persons under temporary protection identified with swift input from Turkey before the end of March. A first list of concrete projects for refugees, notably in the field of health, education, infrastructure, food and other living costs that can be swiftly financed from the Facility, will be jointly identified within a week. Once these resources are about to be used to the full, and provided the above commitments are met, the EU will mobilise additional funding for the Facility of an additional 3 billion euro up to the end of 2018'.

4 See 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.

5 The same is true for the relocation commitments. See, Report from the Commission to the European Parliament, the European Council and the Council, COM(2017) 74 final.

The deployment and allocation of the money is made through the *EU Facility for Refugees in Turkey*, a funding scheme for enlargement and neighbourhood countries. In this sense, provides for a joint coordination mechanism to cover in a comprehensive and coordinated manner "the needs of refugees and host communities in Turkey". As a result, it not only supports refugees, the Facility takes a broader approach to include humanitarian assistance, education, migration management, health, municipal infrastructure, and socio-economic support.

In 2016 and 2017, the Facility managed to compromise and contract the amount of €3 billion included in the Statement for some 72 projects, but the distribution took more time than initially calculated, with only two-thirds (€1.93 billion) having been disbursed as of beginning of April 2018.[6]

'7) The EU and Turkey welcomed the ongoing work on the upgrading of the Customs Union'.

'8) The EU and Turkey reconfirmed their commitment to re-energise the accession process as set out in their joint statement of 29 November 2015. They welcomed the opening of Chapter 17 on 14 December 2015 and decided, as a next step, to open Chapter 33 during the Netherlands presidency. They welcomed that the Commission will put forward a proposal to this effect in April. Preparatory work for the opening of other Chapters will continue at an accelerated pace without prejudice to Member States' positions in accordance with the existing rules'.

First, point 4 makes reference to the Voluntary Humanitarian Admission Scheme which was agreed on 15 December 2015 regarding Syrian refugees in Turkey. According to the agreement, this scheme will be activated once the irregular crossings are coming to an end or are *substantially* and *sustainably* reduced. It is not required that irregular crossings end entirely. Second, point 5 refers to the visa liberalisation for Turkish citizens in the Schengen zone by the end of June 2016, issue which seems to have been a priority for the Turkish government. The agreement provided that Turkey should fulfil all remaining requirements and that the Commission should make a proposal in that respect by the end of April. It should be underlined that the EU was only committed to make a proposal for liberalisation. This proposal should still be approved by the Parliament and the Council according to EU decision making procedures. It should be noted that until today, visa liberalisation for Turkish citizens has not yet taken place. Third, the EU has been committed to mobilise funding of 3 billion euros which were already agreed under the Facility for Refugees in Turkey and an additional 3 billion up to the end of 2018. Funding will be addressed to cover refugee needs in the field of health, education, infrastructure, food and other living costs. Fourth, a commitment was made to upgrade the existing Customs Union. Fifth, as regards the Turkey accession to the EU, the two sides agreed to open Chapter 33 during the Netherlands presidency[7].

'9) The EU and its Member States will work with Turkey in any joint endeavour to improve humanitarian conditions inside Syria, in particular in certain areas near the Turkish border which would allow for the local population and refugees to live in areas which will be more safe'.

The last point of the agreement is a rather controversial one which calls for actions from both sides to try to find a solution inside Syria, with the possibility of creating a 'safe zone' for Syrians in areas near the Turkish

6 The Commission states that on April 2018 the operational envelope of the EU Facility for Refugees in Turkey had been fully committed and contracted (except for ongoing administrative expenditure, ECHO technical assistance, and monitoring, evaluation and audit expenditure that may be committed and contracted during the life of the Facility). See updated information at https://ec.europa.eu/neighbourhood-enlargement/news_corner/migration_en

7 The total number of Chapters that need to be agreed for the accession to take place is 35. In the agreement both sides agree to open one of the 35 and start preparatory work for opening more Chapters in the future. It is noted that all the above was agreed without prejudice to Member States' positions according to existing rules.

border. Whether such a possibility actual exists will depend on how the situation in Syria evolves. In any event, it should be highlighted that this last point should be read in light of the *non refoulement* principle which is not only mentioned in the agreement but it constitutes an obligation that both Turkey and the EU Member States have undertaken by signing the Geneva Convention.

So, who wins with the deal? Of course, Turkey improved its positioning at the beginning of a pre-accession phase, which nevertheless still seems very far away; and the Union, for its part, was able to introduce a mechanism that in combination with the relocation system, were intended to reduce the pressure Greece was suffering in order not to fully collapse. The formula is worrying in that it admits for the first time the return of refugees from European soil to Turkey without ensuring individual resolutions and procedures with all the guarantees.

4.3 Some problems regarding the legal nature and implementation of the EU-Turkey Statement.

The *EU-Turkey Statement* was highly questionable in its respect for international and European Asylum Law (Peers, 2016). Some authors argued that despite its form and the arguments provided denying it is an international treaty, there are also solid reasons in line with the European Parliament to question whether it was not, regardless of its form, a legal international text that created mutual obligations and deployed binding effects for the EU and Turkey, subject to the provisions of International Law (den Heijer and Spijkerboer, 2016). Other authors argued it was a political decision but not a legal one, because the obligations were assumed unilaterally and thus the text was not binding; this would be the official interpretation by the European Council and the Commission.

An intermediate approach supported the idea it was a non-binding political decision that included political compromises, however the implementation of the compromises it included would not be conducted without resorting to the Law, or as one author put it *"however, the individual elements of it – new new Greek, Turkish and EU laws (or their implementation), and the further implementation of the EU/Turkey readmission agreement – will have to be approved at the relevant level, or implemented in individual cases if they are already in force"* (Peers, 2016). Moving beyond its controversial nature, the Statement was strongly opposed for its flaws, its shortsighted approach to fundamental rights and European values, as well as for the externalization to Turkey of refugee protection duties that the EU should have born itself (Labayle and de Bruycker, 2016; **Chetail, 2016**; Collet, 2016).

Fortunately, the ECJ soon had the chance to make things clear. On its *Order ECJ NM v European Council* 28 February 2017 (First Chamber, Extended Composition), T.257/16, the General Court had to deal with an appeal asking for the annulment of the EU-Turkey agreement that the Statement embodied, whereas the Council pleaded for the inadmissibility of the appeal, with Belgium, Greece and the Commission seeking leave to intervene in support of the Council. The Commission in agreement supported the European Council in its argument that there was no agreement or treaty in the sense of Article 218 TFEU or Art. 2(1) Vienna Convention 1969. The Council contended that nothing in the wording of the Statement indicated a legally binding agreement but a political arrangement and that it was a meeting of the Heads of State or Govern-

ment with Turkey together with the Presidents of the European Council and the Commission what was held in Brussels, and not an European Council meeting with a third country, that the COREPER preparatory works on the issue only concerned the European Council but not that meeting of Heads of State or Government. The applicant contested that the word "agree", "decided" or "reconfirmed" indicated an agreement of binding nature and that no mention was made in the text to "Member States" but instead to the "EU" (see Press Release Num. 144/16).

The Court admitted that, in order to ascertain whether it was a meeting of Heads of State and Government or the European Council, it was necessary to analyse the content and all the circumstances in which it was adopted, having regard it was conducted by the representatives of Member States physically gathered in the premises of the European institutions. Whereas in previous meetings the representatives participated in their capacity of Heads of State or Government at the March 2016 meeting the Press Releases differed from the previous statements describing the meeting as being held by "Members of the European Council" and that the "EU and the Republic of Turkey agreed" under the heading indication "Foreign affairs and international relations" as typically related to the work of the European Council. Against that the same Press Release in PDF format indicated "International Summit", thus leading to differing versions and no conclusion being able to be attired from that. All in all, the ECJ follows the reasoning from the Council, backed by the Commission, and acknowledged that the evidence presented showed the statement was adopted by the States and Turkey, and not the Council:

> "65. Those documents (...) thus establish that, notwithstanding the regrettably ambiguous terms of the EU-Turkey statement, as published by means of Press Release No 144/16, it was in their capacity as Heads of State or Government of the Member States that the representatives of those Member States met with the Turkish Prime Minister on 18 March 2016 in the premises shared by the European Council and the Council, namely, the Justus Lipsius building.

As a result, the Court dismissed the action brought before it on the ground of the Court's lack of jurisdiction. Clearly, declaring the statement out of the European Union range of actions, the Court had no jurisdiction to ascertain its compatibility with EU Law. But the reasoning of the European Court of Justice decision raises several doubts and questions.

The first doubt is whether the Court really believed what it was stating. Bound by the statements from the Council and the Commission that described the meeting as a submit between Member States and Turkey, it was very difficult for the Court to rule the opposite. It is notwithstanding, quite difficult to believe that a meeting that formally and substantially had all the features of a Council's meeting with the high representatives of a third country was not an act of the Council. Formally, the meeting was held at the Council's premises that was presented publicly as a Council meeting, printed with the Council's logo, and was attended by the president of the Commission and the president of the Council. Substantially, during the meeting the parties attending the meeting agreed on a list of issues that could only be agreed if they were acting on behalf of the European Union in their capacity as the Council and not of the different Member States, for example compromising EU funds to support Turkey or taking decisions that affected EU norms, above all the advanced entry into force of the *EU-Turkey Readmission Agreement 2014*.

The second question is the surprisingly hyper-formal approach the Court adopted to describe the statement as an act external to the EU institutional umbrella, despite the attendance of the Presidents of the Commission and the European Council to the meeting. However, a more substantial analysis of the content of the statement would have clearly shown that the obligations coming from that deal went far beyond the competences of the Member States

acting only on their own. Take for example, the compromise to economically support Turkey with EU money, or the opening of new negotiation chapters regarding Turkey's accession to the EU, etcetera. Only an exceedingly formal approach to those kind of compromises would describe them as mere unilateral compromises and the act of transferring them to the EU decision-making process as a free and political decision, instead of an European Council agreement with a third country that had the authority to be implemented by EU officials afterwards.

The third question is related to the domestic implication of the Court's decision. Although the Court does not provide any hint to half-guess its opinion on the legal nature of the Statement, if follows from its reasoning that the meeting between Heads of State or Government with the Turkish Prime Minister was subject to the domestic laws of each country. That being so, if we consider it a mere political and unilateral statement with no binding consequences, no objection can be attired, but if we consider it some kind of international agreement, then the question is whether Member States followed the constitutional and legal procedures to adopt such international compromise. In Spain, international agreements with an impact on fundamental rights would have to be approved by Parliament by majority, under art. 94.1 Spanish Constitution, or at least be formally communicated to it under art. 94.1 Spanish Constitution, if such agreement is considered not to have a relevant impact on fundamental rights. However, this has not been the procedure followed either.

Regarding the implementation of the agreement, several problems rose too.

Since the entry into force of the agreement, the European Commission has adopted seven reports on the progress made in the implementation of the EU-Turkey agreement[8].

According to the last report published on 2 March 2017 and covering the period from the entry into force of the agreement until the end of February 2017, the current situation as regards implementation of the agreement may be described as follows. The total number of persons that has been returned from Greece to Turkey on the basis of the agreement is 1,487. Among these migrants, the majority are Syrians[9], whereas other nationalities include, Pakistanis, Algerians and Iraqis. The reports make clear that even though returns take place, the number of new arrivals to the Greek islands is much higher. According to the last Commission's report, the number of new arrivals from Turkey to Greece only in the period 8 December 2016 to 26 February 2017 was 3,449, whereas 151 have been returned in the framework of the agreement in the same period. It should be noticed that the number of new arrivals in the last three-month period corresponds to a daily arrival of 43 persons to the Greek islands, number which significantly lower than in the month preceded the agreement, when arrivals exceeded 1.700 per day.

As regards the relevant data on resettlements, the fifth report provides that the total number of Syrians resettled from Turkey to EU Member States was 3,565, whereas in the period covered by this report this number amounts to 954. As regards the countries that have so far received resettled Syrians in the framework of the agreement, these include Belgium, Estonia, Finland, France, Germany, Italy, Latvia, Luxemburg and the Netherlands. Ultimately, it should be highlighted that the Commission notes that since the agreement, 70 fatalities and missing persons have been recorded in the Aegean Sea[10], number which is lower than the 1,100 persons who died over the same period in 2015-2016.

8 See COM(2016) 231 final, COM(2016) 439 final, COM(2016) 634 final, COM(2016) 792 final, COM(2017) 204 final.

9 For instance, among the 151 migrants covered by the fifth Commission's report, 64 were Syrians

10 The report uses the data provided by the International Organisation for Migration covering the period 1 April 2016 until 23 February 2017.

4.4 The implications of the Common European Asylum System to the agreement: Turkey as a safe third country for refugees?

Since the agreement was signed, the debate turned around the issue of whether Turkey constitutes a 'safe third country' or a 'first country of asylum' for asylum seekers mainly coming from Syria. Indeed, this is a crucial issue as from a legal point view a country may return an asylum seeker to a 'safe third country' or to the 'first country of asylum' without being held responsible for bringing any asylum law rules. In any event, as mentioned above the agreement provides that the asylum seekers that will be returned to Turkey will be those who do not apply for asylum or whose application has been found 'unfounded' or 'inadmissible' in accordance with the Asylum Procedures Directive[11]. An application is considered 'unfounded' when it is rejected on the merits and 'inadmissible' when some of the reasons mentioned in Art. 33 of the Asylum Procedure Directive occur. The most relevant for the agreement at hand is case b) and c) of the said article which provides that Member States may consider an asylum application inadmissible in case a non-EU country is considered a 'first country of asylum' or a 'safe third country' for the applicant. The present section examines whether Turkey may be considered as either a 'first country of asylum' or a 'safe third country' for refugees. Furthermore, the issue of whether it constitutes a 'European safe third country' is also discussed.

For answering the question whether Turkey can be considered as a 'first country of asylum' or a 'safe third country', special focus should be given to the definition of these concepts contained in the Asylum Procedures Directive. According to EU rules[12] a 'safe third country' is a country where 'life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion'; there is no risk of serious harm as defined in the Qualification Directive; the non-refoulement rule is applied in accordance with the Geneva Convention; 'the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected'; and 'the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention'.

Given that the criteria should according to the literal and more correct interpretation of this provision be met in an accumulative way, this article will focus on the last of the applicable principles which concerns the applicability of the Geneva Convention in Turkey. In that respect, it should first be noted that Turkey retains a geographical limitation to the ratification of the Geneva Convention. This means that Turkey gives Geneva refugee protection only for 'events occurring in Europe' and not to refugees coming from Syria or other Asian countries[13]. However, it should be underlined that Turkey is bound by the principle of *non-refoulement* as the said provision is one of the provisions of the Geneva Convention that cannot opt out[14].

The said EU rule which provides that there should exist the possibility to receive protection in accordance with the Geneva Con-

11 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

12 See Art. 38 (1) of the Asylum Procedures Directive

13 Turkey maintained the geographical limitation acceding to the New York Protocol of 1967, which generally withdrew the geographical and temporary restrictions of the 1951 Convention. See declarations and reservations of the 1967 New York Protocol: 'The instrument of accession stipulates that the Government of Turkey maintains the provisions of the declaration made under section B of article 1 of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, according to which it applies the Convention only to persons who have become refugees as a result of events occurring in Europe, and also the reservation clause made upon ratification of the Convention to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey'.

14 See Art. 42 (1) which reads as follows: 'At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive'.

vention can be given two different interpretations. According to the literal and more correct interpretation, a country should apply the Geneva Convention as such to an asylum seeker in order to be considered as a safe third country. Given that this is not the case in Turkey, at least as regards Syrian or other asylum seekers coming from Asia, it cannot be considered as 'safe' according to EU rules on asylum law. On the contrary, the same provision can be given a different interpretation according to which a country does not necessarily need to apply the Geneva Convention but protection of equivalent standards. This view has been adopted by the EU institutions, in particular by the European Commission at the time the agreement was signed[15]. Even if the latter interpretation is correct, it is rather questionable whether Turkey applies equivalent standards to asylum seekers. The exact protection that is granted to refugees in Turkey is discussed below in the framework of the question whether Turkey can be considered as a 'first country of asylum'.

Next, Art. 33 of the Asylum Procedures Directive further provides that an asylum application may be inadmissible if a non-EU country is considered a 'first country of asylum' pursuant to Art. 35 of the same Directive. According to the said article, a country may be considered as a 'first country of asylum' if the asylum seeker has been recognised in that country as a refugee and 'he or she can still avail himself/herself of that protection' or 'he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*'. It is important to underline that the same provision provides that Member States may take into account the principles regarding 'safe third country' which were explained above, applying the concept of 'first country of asylum' to the particular circumstances of an applicant.

Let us examine the two different options provided for by Art. 35 of the Asylum Procedures Directive. The first option does not apply to Turkey due to the geographical restriction to the Geneva Convention. The second option might become applicable in the case of Turkey depending on the interpretation that should be given to the term 'sufficient protection'. In any event, it is worth briefly explaining the protection that non-European asylum seekers may receive in Turkey. To start with, it should be mentioned that Turkey disposes of a national asylum system and grants some protection to non-European asylum system. In the Turkish system, there exist four types of protection, namely, 'conditional refugee protection', 'subsidiary protection', 'temporary protection' and humanitarian protection status for those who cannot be removed due to a number of reasons including non-refoulement, health issues and vulnerability. Temporary protection only applies to those who have fled Syria and sought refuge in Turkey including Syrian nationals as well as refugees and stateless persons in Syria. These four categories provide protection to non-European asylum seekers but of lower standards comparing to the ones benefitting from the Geneva Convention in Turkey or elsewhere[16]. The most important differences concern access to labour market, which is limited especially for the beneficiaries of temporary protection. Significant differences may be found in other areas as well, such as the access to nationality, and duration of residence permits. Regardless of the above, it should be underlined that the second point of Art. 35 (1) (b) of the Asylum Procedures Directive which refers to the application of the principle of *non-refoulement* is, at least in theory, applicable in Turkey.

Whether the refugee statuses granted in Turkey may be considered as 'sufficient' for the purposes of Art. 35 of the Directive will depend on what interpretation one may desire to give to this term. It is reminded that the Directive provides that Member States may optionally decide to apply the higher standards of 'safe

15 See 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.

16 For a more extended analysis of the refugee protection in Turkey see, Turkey country report at the Asylum Database Information.

third country' to the definition of 'first country of asylum'. In this case, Turkey could not be considered as a 'first country of asylum' either. It should be highlighted that shortly after the entry into force of the EU-Turkey agreement, Greece reformed its asylum legislation[17] dropping the optional clause[18] which calls for equivalent standards in the definition of 'safe third country' and 'first country of asylum' from its national provision that has implemented Art. 35 of the Asylum Procedures Directive[19]. As a result, the Greek authorities can now reject as inadmissible applications even though the country does not satisfy the criteria of a 'safe third country'. It should be mentioned that the same Law does not explicitly name Turkey, or any other country, as a 'safe country'.

Regardless of this reform in the Greek legislation, it is at least questionable whether Turkey qualifies as a 'first country of asylum' especially taking into consideration recent development in the country such as the temporary suspension of the European Convention on Human Rights which constitutes another *non-refoulement* safeguard for asylum seekers, as well as the derogation from the International Covenant on Civil and Political Rights. It should be mentioned that even if Turkey is considered as a 'first country of asylum' this should be decided on a case-by-case basis pursuant to the Directive which speaks about 'first country of asylum' for a *particular* applicant.

After having concluded that Turkey cannot be considered as a 'safe third country' and, although questionably, also not a 'first country of asylum' it should be added that it can also not be regarded as a 'European safe third country'. In particular, the Asylum Procedures Directive provides that a Member State may have no, o no full consideration of an application in case an applicant has entered or is seeking to enter to its territory from a European safe third country which fulfils the following requirements: '(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations; (b) it has in place an asylum procedure prescribed by law; and (c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies'[20]. For the same reason of maintaining geographical limitations to the Geneva Convention, Turkey can also not qualify as a 'European safe third country'.

Lastly, a reflection regarding general standards of human rights protection in Turkey deems necessary. In principle, from a legal point of view, the level of protection of human rights in Turkey is not directly relevant as regards its classification as a 'safe country' for refugees or asylum seekers. Indeed, as it has been explained above, whether a country constitutes a 'safe country' for asylum seekers or refugees solely depends on issues related to the refugee protection that is likely to be obtained in that country and not with the general level of protection of human rights. That being said, it should be concluded that violations of other rights such as the freedom of expression is in principle an irrelevant factor from a legal point of view. It might, however, be relevant in individual cases of asylum seekers who may suffer persecution in Turkey for political opinions or religious beliefs. The last remark is important and should be kept in mind, especially if we take into consideration that Turkey is one of the countries of the Council of Europe with high number of convictions from the European Court of Human Rights. In any case, it should be also reminded that the Asylum Procedures Directive provides that the applicant shall be allowed to challenge the first country of asylum and/or the safe third country concept to his or her particular circumstances[21]. The same is true as regards the concept of European safe third country[22].

17 Law 4375/2016

18 It should be noted that the Presidential Decree 113/2013 which was in force before its recent reform by Law 4375/2016 had incorporated this optional provision of the Asylum Procedures Directive

19 Art. 55 of Law 4375/2016

20 Art. 39 (2) of the Asylum Procedures Directive

21 See last subparagraph of Art. 35 and Art. 38 (2) (c) of the Asylum Procedures Directive respectively

22 See Art. 39 (3) of the Asylum Procedures Directive

4.5 Conclusions

The 2014-2016 refugee crisis evidenced the limited margin of action of the EU when trying to deal with complex regional crisis like the one in Syria that produce a large influx of refugees and happen in the EU's backyard. After a while, neighbouring countries could not be able to undertake more refugees, nor the refugees wanted to get stuck on those countries and, together with other mixed flows of immigrants and people fleeing from the region attempted to arrive to EU soil, in the hope of better protection, support services and, at the end of the day, better living chances for them and their children. The crisis showed that the Dublin system was not ready for a mass inflow of refugees through a few entry points (Greece, Hungary, Italy), some of them with poorly funded systems of asylum processing and refugee protection. And that there was very few will among Member States to activate the emergency brake, the Temporary Protection Directive, because it included coercive measures and a stronger role by the European Commission.

Thus, the EU-Turkey Joint Statement represents the recognition that dealing at its borders with a major refugee crisis requires: firstly, a strong commitment of all Member States to act in good faith and coordination; and secondly, the involvement of the relevant transit countries. It is in this sense that the EU agreed with Turkey, a major and key player in the region, a set of measures in order to support Turkey's involvement in the patrolling of the EU borders and the protection of refugees in its own territory. The downside of any agreement with a border country on these topics is that the Joint Statement made the EU even more dependent on Turkey management of the refugee crisis. In addition, the way it was conducted raised several problems not only due to its underlying logic, but also to the way it was drafted, the concrete provisions it included and its implications for refugees seeking protection in EU soil.

Member States and the Council defended the Joint Statement and pleaded for its efficacy at capping the entry of refugees from Turkey, and the data may support somehow that impact. Reducing flows quickly was badly needed in the EU in order to deal with some Member States opposition to the 'open doors' policy privileged at the height of the crisis by Germany, and their decision only to leave them in towards Germany or even in the worst case, refusing to participate in the Relocation Scheme agreed in May-September 2015. Taking responsibility for the integration (and its costs) of the refugees that entered the EU during the 2014-2016 became a key and divisive issue within the EU. This is why the alleged efficacy of the EU-Turkey Joint Statement became a model for the relations with some other Mediterranean third countries like Egypt, Libya or Tunis (Collet, 2017; Collet 2018).

Finally, the involvement of third countries on the management of refugee and migrant flows is not presented either as the dark -though necessary-, side of a wider asylum system that otherwise includes safe and legal paths to reach the EU. To the opposite, there is nothing of an ambitious proposal on the table to include safe and legal paths to the EU, nothing across the different initiatives to reform the ECAS that points out at such shortcoming of the system, with the exception of a shy approach to increasing the commitment to an international resettlement scheme. And that is the problem, the EU badly needs new and ambitious ideas to shape the ECAS into a credible, efficient and asylum-seeker oriented system that puts human rights at its core.

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