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**THE EU-TURKEY STATEMENT, 18 MARCH 2016, TO
TACKLE IRREGULAR MIGRATION**

A legal analysis from a critical outlook

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ABSTRACT

Before the most important refugee crisis seen in years, the States of the World had to mobilize and take action. Though the worst part took place in the Middle East, affecting Syria, Palestine, Iraq, Iran, Afghanistan, Turkey, Lebanon, and many other countries, a high number of refugees tried to seek protection in Europe.

Due the big mass influx coming into the European territory, most of it through Turkey, and the recent terrorist attacks, Europe had to take some measures like the “EU-Turkey Statement” of 18th March 2016 to tackle irregular migration and prevent the entrance of smugglers and terrorists.

Even though, the EU-Turkey Statement has been severely criticized on account of the consequences of its application. For this reason this research aims to analyse the International and European system in relation to the refugee conditions and the Statement as such, and conclude whether it complies with the legal standards or, otherwise, if it has been a failure.

ABBREVIATIONS

AI	Amnesty International
APD	Asylum Procedure Directive
CEAS	Common European Asylum System
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
DGMM	Directorate General for Migration Management
EC	European Communities
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EP	European Parliament
EU	European Union
IGC	Intergovernmental Conference
JHA	Justice and Home Affairs
LFIP	Law on Foreigners and International Protection
MS	Member States
MSF	Médecins Sans Frontières
RABIT	Rapid Border Intervention Team
RIC	Reception and Identification Centres
SAR	Search and Rescue Convention
SEA	Single European Act
SOLAS	Safety of Life at Sea Convention
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TPR	Temporary Protection Regime
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

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1. INTRODUCTION

In 2011 demonstrations and riots known as the Arab Spring took place in North Africa and Middle East aimed to achieve reforms. This movement began in Tunisia and rapidly spread to Egypt, Yemen, Bahrain, Libya and Syria, with the goal of bringing new governments and throw authoritarian leaders away from the power. The results were violent responses from the authorities. More specifically, the conflict in Syria started when 15 boys were detained and tortured for writing graffiti in support of the Arab Spring. While peaceful protest raised in response, President Bashar al-Assad took action by killing hundreds of demonstrators and imprisoning others.

On the one hand, rebel groups aiming at overthrowing the government were created (as the Free Syrian Army, the Islamic Front, and 70 other groups, all called “the opposition”). On the other hand, some sectarian divisions were created due to the fact that the Syrian population is composed of a majority of Sunni Muslims and a minority of Shia Muslims (e.g. the Syrian government is predominantly Alawite— a Shia sect representing less than 15% of the population).

Nowadays, the conflict is still going on and has been worsened by the action taken by third actors. Iran, China and Russia are supporting the Syrian government whilst some Sunni States in the Middle East, France, UK, Turkey and the US also supported “the opposition”. Further complicating the scenario, Islamic radical groups also took action: Al-Nusra and ISIS (the Islamic State coming from the Al-Qaeda of Iraq and known by their brutal atrocities). They aim to spread an Islamic emirate in Syria and Iraq and are considered by a high number of countries as terrorist groups.

Because of the armed conflict and all the States and groups participating in it, more than 4.8 million people were forced to flee the country, and other 8.7 million are internally displaced inside Syria. While Lebanon (around 1 million Syrian refugees), Jordan (655.675 Syrian refugees), Iraq (3.1 million displaced and 228.894 Syrian refugees), Egypt (115.204 Syrian refugees) and Turkey (2.7 million Syrian refugees) have struggled to cope with one of the largest refugee exoduses, only about 10% of Syrian refugees have sought protection in Europe.

European Union and its Member States have tried to solve the problem of migrants and refugees inflows coming to Europe from the Middle East through Turkey and Greece¹. Latest attempts in this regard are represented by the 2015 European Union-Turkey Action Plan and the 2016 Statement of the European Union and Turkey² which contained measures aimed to control the irregular migration.

My aim with this research is to conclude whether the EU-Turkey Statement complies with the European and International standards and, moreover, to see if the efforts of the European Union were worth it and the goals settled achieved.

To obtain these goals I will first analyse which the international Legislation is relating to the refugee condition. Secondly I will analyse the European framework, the Council of Europe work on the matter as an International Organisation (IO) and briefly treat the matter of the borders control, as it is related to the EU-Turkey Statement³.

Once the overall panorama has become clear, the core analysis of this paper will consist in the analysis of the most criticized concepts of the Statement, and other relevant aspects of it. For example, I want to talk about the lack of conceptual distinction between migrants, refugees and irregular migrants made by the Statement contracting parties, or the fact that some countries closed their internal borders before the crisis.

The asylum law system in Turkey and Greece will also be analysed to determine whether they are appropriate in accordance to European and International legal standards, the no-so clear concepts of “safe third country” and “first country of asylum”, the principle of non-refoulement, and the differences between resettlement and relocation. Furthermore, I will contrast the facts with information provided by Amnesty International and other IO or NGO’s to compare and be able to strengthen my conclusions.

Finally I will analyse the legal structure and nature of the Statement to compare it to those European and International standards.

In essence, I aim to clarify which was the real intention of the European Union when it embodied it, which were the consequences, and therefore, if it was a failure or a success.

¹ See “Annex II: The Balkan Route used by refugees, pre-March 2016”

² See “Annex I: The EU-Turkey Statement, 18th of March 2016 to tackle irregular migration”

³ See “Annex III: Legal framework timeline”

2. INTERNATIONAL FRAMEWORK

2.1. 1951 Geneva Convention and the 1967 New York Protocol

The Convention Relating to the Status of Refugees (1951 Geneva Convention) contains three types of provisions: provisions defining who is and who is not a refugee and who has ceased to be one⁴; provisions describing the legal status of refugees, their rights and duties in the country of refuge⁵; and provisions relating to the implementation of the convention⁶.

According to the Convention the term “refugee” applies to any person who is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such event, is unable or fearing to return to it.

The reasons that may lead to consider a person a “refugee” are covered in Article 1A(2) (e.g. race, religion, nationality, social exclusion or political opinion). Later legislation— Protocol Relating to the Status of Refugees (1967 New York Protocol) — removed time and geographical limitations thus extending the coverage of “refugee” beyond the ones imposed by the Convention, namely the ones in Articles 1A(2) and 1B(1)(a)⁷.

Articles 1C(1) to (6) and 1D, E and F of the Convention define “cessation” and “exclusion” clauses, establishing when the a refugee ceases to be one and which refugees shall not receive protection or assistance from organisms of the United Nations other than the UNHCR.

More articles include provisions on the personal status of a refugee, the refugees’ property, access to courts, employment, housing, public education, social security, freedom of movement, identity and travel documents and irregular presence in the country of refuge.

⁴ Chapter I of the Geneva Convention

⁵ Chapters II-V of the Geneva Convention

⁶ Chapters VI-VII of the Geneva Convention

⁷ 1967 New York Protocol, Art. 1(2),(3).

One provision deserves special attention as it lies at the core of the refugee protection: the so-called principle of *non-refoulement* [Art. 33(1)], which is part of the customary international law⁸ and is binding on all States, regardless of whether the Contracting States adhered to the 1951 Geneva Convention or not. According to this principle no government shall not expel or return a person back to persecutions.

However the procedures aiming to recognize the refugee status are not established neither in the 1951 Geneva Convention nor in the 1967 New York Protocol. It is for the Member States to define and enforce the legislation dealing with these situations.

2.2. 1948 Universal Declaration of Human Rights

The Declaration is not, in itself, a legally binding instrument. Nonetheless it contains a series of principles and rights that are based on human rights standards enshrined in other international binding instruments— such as the International Covenant on Civil and Political Rights. Furthermore the Declaration was agreed by the General Assembly and therefore represents a very strong commitment to its implementation in each State.

The Universal Declaration of Human Rights (UDHR), in its Article 14, establishes that:

- (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.*
- (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.*

Nonetheless, we cannot say that the UDHR establishes an individual right to the asylum applicant because the article does only contemplate the possibility to *seek* and *enjoy* asylum but not the obligation to *grant it* or the right to obtain it.

In other words, it makes emphasis on the right of anyone who's been persecuted but eludes the most important part: the recognition of the right to asylum. From here it

⁸ UNHCR. UN High Commissioner for Refugees. *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*. 31 January 1994. Available at: <http://www.refworld.org/docid/437b6db64.html> [14 February 2018]

emerges that asylum is not a human right, it is a prerogative of each State to decide about the recognition of the concession instead⁹.

3. EUROPEAN FRAMEWORK

The EU has evolved from three international organisations established in the 1950s in the field of energy, security and free trade, known as the European Communities¹⁰. The essential purpose of the European Communities (EC) was the economic development through the circulation of goods, capital, people and services. Hence the free movement of people is a basic element of the EU.

Since 1994, nationals of third States that do not belong to the EU but to the European Economic Area (EEA) such as Iceland, Liechtenstein and Norway¹¹, can enjoy the same rights of freedom of movement as the nationals of the EU. Turkish citizens who accessed to the EU to work and settle in a Member State have also certain privileges like the right to stay and the protection against expulsion¹².

The asylum legislation in the EU has evolved incessantly since then.

3.1. Before the Treaty on European Union

a. 1957 Treaty of Rome

The Treaty of Rome established the European Economic Community (EEC) and brought together 6 countries (Belgium, Germany, France, Italy, Luxembourg, and the Netherlands) to work towards integration and economic growth through trade. It created a common market based on the free movement of goods, people, services and capital.

⁹ MARTÍN ARRIBAS, JUAN JOSÉ, *Los Estados Europeos frente al desafío de los refugiados y el derecho de asilo*. Universidad de Burgos. 2000, p.102.

¹⁰ Also known as: the European Coal and Steel Community (ECSC), the European Atomic Energy Community (EAEC or Euratom), and the European Economic Community (EEC)

¹¹ Agreement on the European Economic Area, 2 May 1992, Part III, Free Movement of persons, services and capital, Official Journal n° L 001 de 03/01/1994 p. 0003 - 0036

¹² 1963 Agreement Creating An Association Between The Republic of Turkey and the European Economic Community (Ankara Agreement) and the 1970 Additional protocols.

However, during the 70s, the Member States started developing intergovernmental cooperation to fight against the problems related to Justice and Home Affairs (JHA), among them the refugees and the asylum problems.

b. 1985 Single European Act

The Single European Act (SEA) was signed in Luxembourg on 17th February 1986 and entered into force on 1st July 1987.

One of the goals of the SEA was to establish progressively an internal market without internal borders for free movement of persons, capital, goods and services. This implied the removal of the internal borders between Member States (MS) whilst maintaining the external frontiers and applying a common legislation to those MS trying to adapt the national law to that “common legislation”¹³. The attempt was not successful but some groups, like the *ad hoc group on immigration*, focused on obliterating the common borders and strengthening the exterior ones. The *Ad-Hoc group on immigration* created the Dublin convention.

3.2. After the Treaty on European Union

c. 1985 Schengen Agreement and the 1990 Schengen Implementation Convention¹⁴

The Schengen Agreement is an agreement between the governments of some States – the Benelux Economic Union, the Federal Republic of Germany and the French Republic— about the abolition of checks on persons crossing a land border between two of those countries. The five original signatory States decided to create a territory without checks at the internal borders known as the “Schengen area”. Nowadays all EU MS, except UK and Ireland, are members of the Schengen area. Some non-EU members (Norway, Switzerland and Iceland) have been associated to the implementation.

¹³ MARTÍN ARRIBAS, *op cit.*, p.116.

¹⁴ European Union, Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (“Schengen Implementation Agreement”), 19 June 1990.

In relation with asylum applications, asylum seekers can apply for protection at the border crossing points or within the territory of the Member States¹⁵. The border crossing points are the external land borders, the international airports and seaports of the Member States.

d. 1990 Dublin Convention

The Convention determining the State responsible for examining applications for asylum (the Dublin Convention) was signed in 1990 and entered into force in 1997.

Some of the main objectives of the Dublin Convention—laid down in the Preamble—are the following ones:

- To guarantee adequate protection to refugees in accordance with the terms of the Geneva Convention of 28th July 1951, as amended by the 1976 New York Protocol;
- To take measures to avoid that applicants for asylum are left in doubt for too long as regards the likely outcome of their applications, and to ensure that all applicants applications will be examined by one of the Member States;
- To guarantee that applicants are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum;

The procedure towards determining the Member State responsible for examining the application for asylum under the Dublin Convention should start as soon as an application for asylum is first lodged with a Member State. That application must be examined by the State in accordance with its national laws and its international obligations. A computerised system to collect data and fingerprints of asylum seekers (Eurodac) was also established in accordance with the 1990 Dublin Convention to establish the identity of applicants.

¹⁵ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Art. 3.

However, the convention itself did not provide any obligation to recognise asylum decisions of the other Contracting Parties, and is only applied when the asylum seeker cannot be sent back to a safe country¹⁶.

e. 1993 Maastricht Treaty

The Maastricht Treaty, which entered into force in 1993, introduces the concept of citizenship of the Union, although it is based on the possession of the citizenship of one of the EU Member States. This concept has been widely applied to support the free movement of citizens and members of their families of any nationality.

This Treaty introduced the *pillar structure*, where the EC (the EEC, the ECSC and the EURATOM) is known as the first pillar. The second pillar comprises the Common Foreign and Security Policy (CFSP) and the third pillar under the Maastricht Treaty are the policies on Justice and Home Affairs (JHA).

f. 1999 Amsterdam Treaty

It was signed on the 2nd October 1997 and entered into force on the 1st May 1999, and the main feature is that the subject matter of asylum, among others, was transferred from the third to the first pillar.

The Amsterdam Treaty also introduced the concept of “area of freedom, security and justice”, which is essential for the development of the Common European Asylum System, because it is based on the idea that the EU is an area where people in need of international protection can seek refuge¹⁷.

g. 2001 Treaty of Nice

The main purpose of the 2001 Treaty of Nice was to adapt the institutions to accommodate the future enlargement of the EU to twelve new Member States. It also gave more powers to the European Parliament, notably through extending to new areas its right of co-

¹⁶ FERGUSON SIDORENKO, OLGA. *The Common European Asylum System. Background, current state of affairs, future direction*. T.M.C. ASSER PRESS, The Hague, 2007, p. 18.

¹⁷ FERGUSON SIDORENKO, *op cit.*, p. 20.

deciding legislative Acts with the Council, and by making this right a real co-decision by conferring the same deciding power on the European Parliament as that of the Council¹⁸.

3.3. 2000 Charter of Fundamental Rights of the EU

Proclaimed in year 2000, the Charter of Fundamental Rights of the EU (hereinafter the Charter) was a simple "declaration" not legally binding. Nevertheless, when the Treaty of Lisbon entered into force on 1st January 2009, the Charter, which became legally binding, was altered¹⁹. In this way, the EU institutions (and the Member States) are required to respect the Charter in the process of applying EU Law (Article 51 of the Charter).

Article 18 of the Charter includes, for the first time at the European level, the right of asylum. In accordance with its article 18, it is a qualified right: « [...] guarantees the right of asylum in compliance with the norms of the Geneva Convention [...] and in accordance with the Treaty of the European Union and with the Treaty on the Functioning of the European Union [...] ». Article 19 of the Charter prohibits the return of a person to a situation of justified fear of persecution or of a real risk of torture, inhuman treatment or punishment or degrading ("*non-refoulement*" principle).

In addition, Article 47 of the Charter establishes the right to effective judicial protection and the right of a fair trial, which also includes the possibility to access to legal aid if lack of sufficient resources. On another hand, Article 52 of the Charter stipulates that the minimum protection contemplated in the provisions are in accordance with the ECHR; however, this provision shall not prevent Union law of providing more extensive protection.

4. COUNCIL OF EUROPE

4.1. 1953 Convention for the Protection of Human Rights and Fundamental Freedoms

¹⁸ PIRIS, JEAN-CLAUDE. *The Lisbon Treaty, a legal and political analysis*. United States of America, by Cambridge University Press, New York, 2010, p.9.

¹⁹ SALOME SY SARAH. European Parliament At your service. Fact Sheets on the European Union. *The Charter of Fundamental Rights*. March 2018. Available at: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_4.1.2.html [11 May 2018]

With the purpose to promote the Rule of Law, democracy and human rights, the European Convention on Human Rights (ECHR) was adopted in 1950. Moreover, the European Court on Human Rights (ECtHR) was established under Article 19 of the ECHR to ensure compliance by States with the obligations imposed on them by the Convention²⁰.

The ECHR only contains certain provisions in which foreigners are explicitly mentioned. For example, Article 2 of the Protocol no. 4 of the ECHR establishes that everyone lawfully within the territory of a State will have the right to liberty of movement and freedom to choose his residence or to leave any country, and no restrictions will be placed on the exercise of these rights other than the ones in accordance with Law. Article 3 and 4 settles some prohibitions, such as the prohibition of expulsion of nationals whereby no one will be expelled or deprived to enter the territory of the State of which he is a national, and the prohibition of collective expulsion of aliens.

In article 1 of Protocol no.7 to the ECHR— Protocol amended by Protocol No.11— we see some procedural safeguards relating to expulsion of aliens, which can only be expelled in the interests of public order or grounded reasons of national security and will be allowed to submit reasons against his expulsion, to have his case reviewed, and to be represented for these purposes before the competent authority.

4.2. 1989 Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

This Convention was established in regard of the Convention for the Protection of Human Rights and Fundamental Freedoms and more specifically its article 3: "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".

Furthermore, the Member States of the Council of Europe established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. This Committee can examine the treatment of persons deprived of their

²⁰ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS and COUNCIL OF EUROPE. *Handbook on European law relating to asylum, borders and immigration*. 2015, pp. 15-16. Available at: <http://fra.europa.eu/en/publication/2013/handbook-european-law-relating-asylum-borders-and-immigration> [14 February 2018]

liberty by “non-judicial means of a preventive character”²¹ based on visits, and each Party would have to permit it.

4.3. 1960 European Convention on Extradition

The European Convention on Extradition is a multilateral extradition treaty drawn up in 1957 by the Member States of the Council of Europe.

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members States, with this Agreement the extradition is granted if an offence—punishable under the laws of the requesting Party and of the requested Party— has committed by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.

4.4. 1960 European Agreement on the Abolition of Visas for Refugees

The Agreement aims to facilitate the travel for refugees residing in the territory of one of the Contracting Parties. To this end, it provides that refugees may enter without visas on the territory of all Parties within a maximum of 3 months, but for a longer stay or for the purpose of taking gainful employment, a visa will be required.

Moreover, refugees who have entered the territory of a Contracting Party— under the standards of this Agreement— have to be re-admitted at any time to the territory of the Contracting Party by whose authorities the travel document was issued.

5. ASYLUM POLICY IN EUROPE: CEAS

Since 1999, the European Union have been working on the creation of a Common European Asylum System (CEAS), where a new legislation settles several rules and strengthens the cooperation procedures to grant equal treatment to asylum seekers.

The aim of CEAS is to make easier the access to asylum to those people in need of protection, to grant the non-refoulement of those under persecution and offer fair conditions to asylum seekers and to the beneficiaries of international protection. In this

²¹ COUNCIL OF EUROPE, “European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment”, Strasbourg, 26.XI.1987.

context the European Union adopted several Directives and Resolutions in order to comply with the collective duty of the Member States to welcome refugees²².

5.1. Asylum Procedures Directive

The Asylum Procedures Directive²³ tries to build a system to grant the adoption of fairer decisions and the revision of the applications for all Member States under common criteria:

- Clearer rules for the applicants to ensure efficiency in the borders when asylum requests are made;
- Speed up the procedures up to 6 months, also trying to assist the applicants, namely those with special needs;
- Clarifies the rules for judicial appeal in an attempt to reduce the pressure above Strasbourg Court.

5.2. Reception Conditions Directive

This Directive²⁴ established the conditions of the reception while the applicants are waiting for the assessment of their application. It allows the access to accommodation, food, health assistance and work, also psychological assistance if necessary.

The new Directive²⁵ about reception conditions tries to ensure a common regulation harmonized in the EU. It also settles common dispositions about the detention of the asylum seekers with the aim to protect their fundamental rights; including a list of reasons for detention: it prohibits the arbitrary detention, restricts the detention of vulnerable people as minors, guarantees free legal assistance, and grants specific conditions for those under detention (as the access to IGO's and their relatives).

²² Comisión Europea. *Un Sistema Europeo Común de Asilo*. Asuntos de Interior. Luxemburgo. 2014.

²³ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, recast by the Directive 2013/31/EU of the European Parliament and of the Council of 26 of June 2013 on common procedures for granting and withdrawing international protection

²⁴ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

²⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 of June 2013 on common procedures for granting and withdrawing international protection (recast)

5.3. Directive on minimum standards

The Directive on minimum standards²⁶ specified the reasons for the concession of international protection and some protection rights against devolution, residence permits, travel documents, employment access and education, social protection, health assistance, integration instruments, and specific provisions for vulnerable people.

The recasted Directive²⁷ has the aim to improve the quality of the decision process and grant the fair and equal treatment for the persecuted:

- It aims to clarify the motives of the concession of protection to achieve more solid decisions;
- Ensures the interest of the minors and gender aspects in the evaluation of the asylum request during the application of the rules of international protection;
- It improves the access to the integration measures;
- It introduces common criteria for applicants of international protection to be recognised as eligible for ‘subsidiary protection’, meaning that a third-country national or stateless person who do not qualify as a refugee, faces a real risk of suffering serious harm if returned to their country of origin.

5.4. Dublin Resolution

The core of this Regulation²⁸ is that the responsibility of examining the requests is for the Member State that has played the most important role during the entrance or the residence of the applicant in the EU. The criteria used to determine the responsibility is, in hierarchical order: from family considerations, to recent possession of visa or residence permit in a Member State, to whether the applicant has entered the EU irregularly or regularly.

²⁶ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

²⁷ 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)

²⁸ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

The new Regulation²⁹ contains more reliable protection procedures for the asylum applicants and increases the efficiency of the system by:

- Creating provisions for the protection of the needed, as a compulsory personal interview, guarantees for the minors, and an extension of the possibilities for familiar reunification.
- The possibility to suspend the transfer because an appealing— linked to the grant of the right to everybody to stay in the territory— while the Court decides about the suspension of the transfer during the appealing. Moreover, it grants the right to appeal against a transfer decision;
- The obligation to give free legal assistance to whoever demands it;
- A single ground for detention in case of risk of absconding;
- The opportunity to those who might be considered irregular migrants and might be returned to the place they come from, to be protected in the Dublin procedure (major protection than the Returning Directive³⁰);
- Increasing clarity of the procedure: the Dublin procedure cannot be longer than 11 months if it is related to the shelter of the persons, or 9 months if the result is to return them to the place they came from.

5.5. Eurodac³¹

The new Regulation³² improves the regular functioning of the *Eurodac*:

- New periods for transmission of fingerprints information to the *Eurodac* Central Unit are fixed;
- Total compatibility with the newest legislation relating asylum and data protection is ensured;

²⁹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 of June 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)

³⁰ 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.

³¹ Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of '*Eurodac*' for the comparison of fingerprints for the effective application of the Dublin Convention

³² Regulation (EU) No 603/2013 establishing *Eurodac* for the comparison of asylum applicants' fingerprints, for better application of the Regulation (EU) No 604/2013.

- The use of the *Eurodac* information for national police and Europol is permitted only as a last resource to compare the fingerprints with criminal investigations and always with the aim to prevent, detect, and investigate major crimes and terrorism.

6. BORDERS CONTROL

The Schengen *acquis*, applied in most EU Member States, establishes a unified system for maintaining external border controls but allowing EU individuals to travel freely across borders within the Schengen area. However, Article 6 of the Schengen Borders Code (Regulation (EC) No. 562/2006) prohibits the application of the code in a way that allows *refoulement* or unlawful discrimination³³.

As a general rule, States have a sovereign right to control the entry of non-nationals in their territory, but the EU has set up rules to prevent irregular entry as the EU agency *Frontex*³⁴, created in 2004 to support EU Member States in the management of external EU borders. The agency also provides operational support through joint operations at land, air or sea borders. Besides, Member States can request *Frontex* to deploy a rapid intervention system known as Rapid Border Intervention Team (RABIT) consisting to allow, in case of exceptional migratory pressure, rapid deployment of border guards on a European level.

Later, in 2013, the *Eurosur* Regulation established a European border surveillance system³⁵ necessary to strengthen the exchange of information and the operational cooperation between national authorities of Member States. *Eurosur* provides national authorities with the necessary mechanisms to improve their reaction capability at the external borders, aiming to detect and prevent illegal immigration, cross-border crime and to reinforce the protection of migrants.

As the access to the EU territory may be also by sea, the 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1979 International Convention on maritime

³³ EUROPEAN UNION AGENCY and COUNCIL OF EUROPE, *Handbook on European law. Op cit.*, pp. 25-40.

³⁴ COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, amended by the Regulation (EU) No. 1168/2011.

³⁵ REGULATION (EU) No 1052/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 establishing the European Border Surveillance System (Eurosur)

Search and Rescue (SAR) contain the duty to assist and rescue persons in danger. It is always been controversial where rescued persons should be disembarked, but latest case was when a rescue ship of Open Arms was seized because the captain and the head of the mission refused to deliver 218 migrants rescued at sea to the Libyan Coast Guard³⁶.

7. THE EU-TURKEY STATEMENT: DE JURE AND DE FACTO

7.1. Concept of migrants, refugees and irregular migrants.

The EU-Turkey Statement (hereinafter the Statement) aims to address the overwhelming flow of smuggled migrants traveling across the Aegean from Turkey to the Greek islands by allowing Greece to return to Turkey “all new irregular migrants” arriving after March 2016.

Although the scope of the agreement is *irregular migration*, it implicitly affects people that could be considered refugees and thus it raises several issues regarding its compatibility with the 1951 Geneva Convention relating to the Status of Refugees.

The significant element of the refugee’s legal status under the Geneva Convention is the lack of protection they receive from their own country, but refugees must not be considered just migrants as they are forced to leave their country. At most, they may be considered subjects of forced migration.

Moreover, Article 31 of the Geneva Convention provides special guarantees for the refugees being unlawfully in the country of refuge, including the prohibition to impose criminal penalties and apply restrictions to their right of movement. Consequently, Member States have special negative obligations regarding refugees and, in many cases, the entry on the territory of the State of the person seeking international protection from a foreign State is achieved through illegal means³⁷.

In essence, the Agreement lacks precision and it should not have ignored the differences between the term “refugee”, “migrant” and “irregular migrant”. In addition, since it did not established a difference between these categories of persons, it might be provoked the

³⁶ For more information of the case: OPEN MIGRATION website, www.openmigration.org; and the Italian Guard Coast *Comunicato stampa 16 marzo 2018*: www.guardiacostiera.gov.it

³⁷ MOLDOVAN Carmen. *Is the EU-Turkey Action Plan an effective or just an apparent solution to the refugee crisis?* Romania. 2017. Available at: http://www.ceswp.uaic.ro/articles/CESWP2017_IX3_MOL.pdf [April 2018]

effect of excluding those in need of protection and Member States could have ignored responsibilities towards them.

7.2. Borders closure

As said before, the Schengen Borders Code established in its Article 3 the obligation to apply such Code without prejudice of *the rights of refugees and persons requesting international protection, in particular as regards non-refoulement*. In May 2016— two months after the Agreement was signed— the war already did forced the migration of 4,843,285 refugees³⁸. Nonetheless, some European States closed their borders alleging Article 25 of the Schengen Borders Code³⁹, which allows the reestablishment of the borders within the Schengen Area, and Article 26, pleading that the mass influx of refugees implied a threat to public policy and internal security.

Because these articles allowed the reintroduction of border controls, Hungary built a razor-wire barrier on its border with Serbia; also it did Croatia after 3,000 migrants and refugees crossed into the country in one day; Austria, erecting a four-kilometre-long fence at the Slovenian border and deploying armed forces around the border; or Macedonia and Slovenia, who announced that they were not going to let migrants and refugees through their borders with Greece.

The measures undertaken by States for the prevention of illegal migration via restrictive rules when admitting foreigners –or even closing borders— may have as legitimate objective the protection of the rights of its own citizens, public order and security of the territory. However, their legitimacy should be in relation with irregular migrants and smugglers, but not with persons claiming international protection and refugee status.

7.3. The Asylum Law in Turkey

³⁸ CEAR: Comisión Española de Ayuda al Refugiado. *Las personas refugiadas en España y Europa*. Madrid. Informe del 2016. Available at: https://www.cear.es/wp-content/uploads/2016/06/Informe_CEAR_2016.pdf [8 March 2018]

³⁹ GUILD ELSPETH, BROUWER EVELIEN, GRONENDIJK KEES and CARRERA SERGIO from Societal Security Network. *What is happening to the Schengen borders?* CEPS Paper in Liberty and Security in Europe. No. 86/December 2015. p. 10-11. Available at: https://www.ceps.eu/system/files/No%2086%20Schengenland_0.pdf [May 2018]

Firstly, Turkey hosts a high number of refugees from Syria, but also a high number of asylum seekers of other nationalities –Iraq, Afghanistan, Iran and Somalia, among others⁴⁰. As we see, even if all of them are from non-European States in of seek protection, they have been differentiated in two groups (Syrian in one hand, and the others on the other hand) and they are also under two different sets of asylum rules and procedures (as we will next).

Turkey's asylum law, the Law on Foreigners and International Protection from 2014 (LFIP), completely reformed the country's legal framework for migration matters and established a new civilian agency called the Directorate General for Migration Management (DGMM), which is in charge of managing asylum and migration in Turkey. Nonetheless, the LFIP maintained the geographical limitation for the condition of refugees to those “persons who have become refugees as a result of events occurring in Europe”⁴¹.

The LFIP has two main parts: the section on “Foreigners” and the section on “International Protection”. The International Protection section determine 4 categories of protection:

- “Refugees” are those who fled their country because of events in Europe, and “shall be granted refugee status upon completion of the refugee status determination process” (art. 61. LFIP);
- “Conditional refugee” are those who fled because of events from outside Europe, and “shall be allowed to reside in Turkey temporarily until they are resettled to a third country” (art. 62 LFIP);
- “Subsidiary protection beneficiary” are beneficiaries who do not “qualify as refugees nor as a conditional refugee” but shall “nevertheless be granted subsidiary protection upon the status determination because if returned to the country of origin or country of habitual residence” would face death, execution, torture, inhuman treatment, etc. (art. 63. LFIP)

⁴⁰ RSN. Refugee Solidarity Network. *Refugees and Asylum in Turkey*. Available at: <https://www.refugeesolidaritynetwork.org/about-refugees-in-turkey/> [May 2018]

⁴¹ Article 61. Part Three “International Protection” of the Law No. 6458 of 2013 on Foreigners and International Protection [Turkey], 4 April 2013.

- “Temporary protection” is the protected legal status for Syrians in Turkey (art. 91.1. LFIP and the Provisional Article 1 of the Temporary Protection Regulation, Turkey, 22 October 2014 [TPR]). “Temporary protection may be provided for foreigners who have been forced to leave their country, cannot return to the country that they have left, and have arrived at or crossed the borders of Turkey in a mass influx situation seeking immediate and temporary protection”.

Unlike the status of “refugee” or “conditional refugee”, temporary protection does not allow for the possibility of resettlement under the LFIP. In 2015, the UNHCR stated that resettlement is not a right as such⁴² and, besides, the UNHCR Turkey Fact Sheet of October 2017, also established that resettlement *is based on a rigorous prioritization of cases with the most acute vulnerabilities or protection risks*.

Therefore, the Turkish “temporary protection” concept represents a group-based system for immediate protection but does not determine a procedure for a durable solution. This is because the TPR neither sets a duration of the temporary protection status (Art. 10 of the TPR) nor guarantees access to the individual “international protection” procedure for the ones who seek a future termination of that “temporary protection” regime⁴³. As a further matter, Article 16 of the TPR establishes that “individual international protection applications filed by foreigners under this regulation shall not be processed in order to ensure the effective implementation of temporary protection measures during the period of the implementation of temporary protection”.

After the reading of these articles, the conclusion we can get is that ineligible for resettlement, unable to apply for international protection and being not possible to return to Syria, those in need of protection remain in limbo⁴⁴.

⁴² UNHCR document. *Frequently Asked Questions About Syrian Refugees in Turkey*: “It is a last resort solution for the most vulnerable refugees”. 2015. p. 8. Available at: http://www.unhcr.org/tr/wp-content/uploads/sites/14/2017/02/frequently_asked_questions.pdf [May 2018]

⁴³ Art. 3.f) TPR: “Protection status granted to foreigners, who were forced to leave their countries and are unable to return to the countries they left and arrived at or crossed our borders in masses to seek urgent and temporary protection and whose international protection requests cannot be taken under individual assessment”, and; Art. 3.ö) TPR: “International protection: The status granted for refugee, conditional refugee, and subsidiary protection”

⁴⁴ DROMGOLD MICHELLE. *Migration Policy and Migration Management of Syrians in Turkey*. Turkish Migration Conference 2015 Selected Proceedings; co-edited by Guven Seker, Ali Tilbe, Mustafa Okmen,

Another matter in this regard is that even if registered Syrians in Turkey have granted rights regarding basic needs and services there is a lack of knowledge on how the Turkish system works and which are they rights and services available to them⁴⁵. As Annette Groth's explains in her report on "*A stronger European response to the Syrian refugee crisis*" (Doc. 14014), Syrian refugees in Turkey faces really difficult conditions. The report describes how "non-camp" Syrian refugees in Turkey have problems in accessing accommodation, education and labour markets and occasional difficulties with access to health care, and that many live in poverty and debt.

In essence, Turkish "temporary protection" in its current form falls short of promising a secure, long-term solution for refugees from Syria, because it only creates a framework addressing short-term protection. Therefore, current legislation on international protection of refugees in Turkey remains inadequate, bringing into question whether Turkey can be really called a "safe third country" and leaving temporary protected persons in a limbo.

7.4. The "safe third country" and the "first country of asylum"

The Geneva Convention does not explicitly contain the concept of a "safe third country", but on the APD, a list of procedural safeguards were established to ensure that those countries designated as a "safe third country" complies with international and EU laws. Specifically this four criteria have to be fulfilled (art. 38 APD):

- a) Life and liberty of the asylum claimants and refugees cannot be menaced because of race, religion, nationality, or membership of a particular social group or political opinion;
- b) Has to be no risk of serious harm as defined in Directive 2011/95/EU;
- c) *non-refoulement* has to be respected;
- d) Prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment is respected; and

Pinar Yazgan, Deniz Eroglu Utku and Ibrahim Sirkeci. London. 2015. p.102. Available at: https://www.academia.edu/15916151/Migration_Policy_and_Migration_Management_of_Syrians_in_Turkey [22 March 2018]

⁴⁵ Ibid. p. 102

- e) Has to exist the possibility to request refugee status and, if found to be a refugee, to be accorded Refugee Convention protection.

The concept is also found in the APD in connection with the so-called “first country of asylum”. Article 35 APD allows the return of refugees to the “first country of asylum”, where a person either has already been recognised as a refugee or enjoys “sufficient protection”. When applying the concept of “first country of asylum” Member States have to take into account Article 38 of the APD, which allows people to be returned to a “safe third country”, where they will not be at risk of persecution or refoulement, and where they will be able to request refugee status.

It could seem—from Article 33 and 35 to the APD—that asylum-seekers should apply for asylum in the first safe country they are able to reach, meaning in this case that:

- Turkey will be responsible for asylum applications of asylum-seekers that reach the country, because it is the “first safe country” they reached after they left their country of origin.
- If asylum seekers reach the EU by crossing Turkey, they will be returned to Turkey, since it is considered to be a “safe third country”.

Moreover, Article 38.2 APD provides Member States with the possibility to not examine an asylum claim where, due to a sufficient connection with a “safe third country”, the applicant can instead seek protection there (allowing Member States to close the asylum procedure and to return the asylum applicant to the “safe third country” in question).

A Commission’s Communication⁴⁶ noted that if there is a connection with the third country, and if it is 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 applicant⁴⁷.

⁴⁶ EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*. COM/2016/085 final. Brussels. 2016. Pg. 18. Available at: https://ec.europa.eu/info/sites/info/files/implementation_europeanagenda_migration_state_of_play_20160210_en.pdf [21 March 2018]

⁴⁷ DIMITRIADI ANGELIKI. *The Impact of the EU-Turkey Statement on Protection and Reception: the Case of Greece*. Athens. October 2016. p.6. Available at: http://www.iai.it/sites/default/files/gte_wp_15.pdf [13 April 2018]

Nonetheless, the UNHCR does not consider just *transit* as a sufficient connection or meaningful link, unless there is a formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards⁴⁸. Furthermore, there is no legal international rule allowing the countries to transfer the responsibility of processing an asylum claimant to another country because the “safe third country” concept. In fact, it does not exist any obligation as such to apply in the first country reached after fleeing the country of origin⁴⁹.

On another hand, Amnesty International (AI) is one of the many organizations to criticize the prospect of returns to Turkey, arguing insufficient protection for refugees. AI estimated that around 3 million asylum seekers and refugees in Turkey are being left to meet their own shelter needs. This contrasts with the guidelines for protection settled by the UNHCR including: access to adequate living standards, work, education, health care and access to a secure legal status⁵⁰.

In addition, NUR OSSO BERFIN in *Success of Failure?*⁵¹ explains and proofs that Turkey is not a safe country: “just a few months after the EU-Turkey deal, in June 2016, Turkish border guards killed eleven Syrians refugees who attempted to cross the Syrian-Turkish border and this case brought the question of the lives of the asylum-seekers being highly threatened. Indeed their right to life was violated by the Turkish authorities”.

In conclusion, the concepts settled in the APD allows the EU Member States to exercise discretion in determining which country is deemed “safe”, producing a systematic result of Member States finding applications inadmissible and therefore people been returned to Turkey. Thus, the EU-Turkey Agreement was created assuming Turkey was a safe place without questioning if Turkey met all four APD criteria.

⁴⁸ 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*. March 2016. Available at: <http://www.unhcr.org/56f3ec5a9> [20 March 2018]

⁴⁹ EUROPEAN COUNCIL ON REFUGEE AND EXILES (ECRE): *Debunking the “Safe Third Country” Myth*. Policy note #08, 2017. Available at: <https://www.ecre.org/wp-content/uploads/2017/11/Policy-Note-08.pdf> [13 April 2018]

⁵⁰ DIMITRIADI ANGELIKI. *Op cit.* p.5.

⁵¹ NUR OSSO BERFIN. *Success or Failure? Assessment of the Readmission Agreement between the EU and Turkey from the Legal and Political Perspectives*. Prague. 2016. p. 11. Available at: www.academia.edu [13 April 2018]

Meanwhile, asylum seekers find themselves facing conditions that do not match with the “safe country” basic assumptions.

7.5. The principle of non-refoulement and the collective expulsions

It was agreed, in the EU-Turkey Statement, that irregular migrants shall be returned to Turkey “excluding any kind of collective expulsion” and also, “all migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement”.

As we seen previously, the non-refoulement principle is prohibited under the Article 33 of the Geneva Convention “no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

Non-rejection at the border was also included in the principle of non-refoulement and supported by various Conclusions of UNHCR’s Executive Committee⁵². It should be noted that simply denying entry or returning a boat to the high seas is not necessarily in breach of the principle of non-refoulement if it does not have as result the risk of those persons.

On the other hand, “collective expulsion” is prohibited under Protocol No. 4 of the ECHR. Collective expulsion can be any measure of the competent authorities compelling aliens as a group to leave the country, except when such measures are taken on the basis of a reasonable examination of the particular cases of each individual of the group. Thus, if a number of aliens receive similar decisions it does not mean that there is a “collective expulsion”— if each person concerned has been given the opportunity to put arguments against its expulsion to the competent authorities on an individual basis. Moreover, there

⁵² UNHCR. *A thematic Compilation of Executive Committee Conclusions*. 7th edition, June 2014. Available at: <http://www.unhcr.org/53b26db69.pdf> [13 April 2018]

will be no violation of Article 4 of Protocol No. 4 if the lack of an expulsion decision made on an individual basis is the consequence of an applicant's own culpable conduct⁵³.

However, AI reports proved that in the late 2015 and the early 2016, asylum-seekers and refugees in Turkey were sent back to Afghanistan, Iraq and Syria⁵⁴, even the risk they were facing. Other reports also showed that there was a case of forced return of thirty Afghan asylum-seekers, even though the prohibition of collective expulsion⁵⁵. The treatment within Turkey shows that the country does not provide effective protection against refoulement and it also breaches one of the main rules regarding collective expulsion.

7.6. The Asylum Law in Greece

The 2013 recast of the Asylum Procedures Directive established special procedures to deal with specific cases, distinguishing between prioritised procedures (art. 31.7) and accelerated procedures (art. 31.8).

Prioritised procedures entail a more rapid examination of claims in accordance with all principles and guarantees, while accelerated procedures differ from regular procedural rules by introducing shorter time limits –for those applications based on not relevant issues, if the applicant is from a safe country, if false documents are presented, if he/she acted in bad faith, or if they refuse to give their fingerprints, etc.

Seems pretty reasonable that in one hand, Member States prioritise applications from persons with manifestly well-founded claims warranting special procedural guarantees, and, on the other hand, unfounded applications are accelerated under a less protective procedural regime (on the assumption that the application will probably be rejected).

⁵³ ECtHR. *Guide on Article 4 of Protocol No.4 to the European Convention on Human Rights*. April 2017. Available at: https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf [12 April 2018]

⁵⁴ AMNESTY INTERNATIONAL. *No safe refuge asylum-seekers and refugees denied effective protection in Turkey*. London, 2016. Available at: <https://www.amnesty.org/download/Documents/EUR4438252016ENGLISH.pdf> [13 March 2018]

⁵⁵ REUTERS WORLD NEWS. *Amnesty says 30 Afghans forcibly returned from Turkey*. March 23, 2016. Available at: <https://www.reuters.com/article/us-europe-migrants-turkey-afghans-idUSKCN0WP2JK> [13 April 2018]

However, the assumption of unfoundedness is questionable due to the APD leaves that determination to the Member States [paragraph (20) and Article 32 of the APD].

Under the Greek national law, a “Fast-track border procedure” (procedure implemented by the Article 60.4 of the Law No. 4375/2016)⁵⁶ takes place in the Reception and Identification Centres (RIC) –Art. 10— of Lesbos, Chios, Samos, Leros and Kos. It is applicable when large numbers of third country nationals or stateless persons arrive in the country applying for international protection at the border or while they remain in RIC. It is an exceptional procedure which has to be completed, at first and second instance, in 14 days.

First of all, this fast-track procedure seems to fall outside the concepts of “prioritising” well-founded claims or “accelerating” unfounded ones, due the procedure has been consciously applied only in cases of applicants subject to the EU-Turkey statement, i.e. People arriving through the Evros border and the island of Crete are not subject to the fast-track border procedure— which is not applicable in those places— so they have been transferred to Kos⁵⁷ were it is applicable, under the excuse to move them to detention centres in the mainland for security concerns or because risk of absconding.

Furthermore, the proof of this facts is a letter⁵⁸ sent to the EU Member States’ Interior Ministers ahead of the JHA Council from the Greek Minister for Migration Policy, Ioannis Mouzalas, asking to approve Greece’s request to transfer specific groups of people from the hotspots on the islands to selected detention centres on the mainland, without exempting them from the application of the EU-Turkey statement. Even though the fast-track procedure should not applied to vulnerable groups or persons falling within the family provisions of the Dublin III Regulation [Article 60(4) Law No. 4375/2016], a report published by Médecins Sans Frontières (MSF) in July 2017 demonstrates that “far

⁵⁶ It transposes the APD within the Greek system. On the 16th of June, the Greek Parliament approved an amendment (L 4399/2016) modifying the composition of Appeals Committees and the right of asylum seekers to be heard in appeals against negative decisions

⁵⁷ More information of the transfers at ECRE. *The other Greek island: Squalid conditions and arbitrary deportation in Crete*. 22 September 2017. Available online at: <http://bit.ly/2fnyQFb> [May 2018]

⁵⁸ See “ANNEX IV. Translation of the Statement of the letter of the Minister of Immigration Policy, Yannis Mouzalas, to the ministers of Interior and Immigration of the European Union”.

from being over-identified, vulnerable people are falling through the cracks and are not being adequately identified and cared for.”⁵⁹

Additionally, AI explains in “*A blueprint for despair. Human rights impact of the EU-Turkey Deal*”, 19 March 2016, that camps on the islands were evacuated and thousands were transferred on ferries to camps on the mainland. The evacuated camps were transformed into detention facilities to hold new arrivals in anticipation of the finalising of the necessary readmission procedures with Turkey. It was the Greek national authorities whom chose to enforce a restriction⁶⁰ new asylum seekers to remain on the islands. Even though deprivation of liberty— under international standards⁶¹— is only lawfully if it is in accordance with a procedure prescribed by law detentions related to immigration control is permissible as, for example, to prevent unauthorized entries.

Secondly, it has to be noted that the fast-track procedure has to be concluded in a very short time period (no more than 2 weeks). This may result in the underestimation of the procedural and qualification guarantees provided by the International, European and National legal standards, including the right to be assisted by a lawyer (e.g. contradiction with Article 43 of the APD, which does not permit restrictions on the procedural rights available in a border procedure for reasons related to large numbers of arrivals). The Director of the Asylum Service in Greece, Maria Stavropoulou, recognised in 2016 that:

“Insufferable pressure is being put on us to reduce our standards and minimise the guarantees of the asylum process... to change our laws, to change our standards to the lowest possible under the EU [Asylum Procedures] directive.”⁶²

⁵⁹ MSF. *A dramatic deterioration for asylum seekers on Lesbos*. July 2017, 3. Available at: https://www.msf.org/sites/msf.org/files/msf_lesbos_vulnerability_report1.pdf [3 May 2018]

⁶⁰ Article 14.2. Law. No. 4375/201660 allows the restriction of liberty of those third-country nationals or stateless persons entering the Reception and identification Centre

⁶¹ International Covenant on Civil and Political Rights, Article 9; European Convention on Human Rights, Article 5(1) (; American Convention on Human Rights, Article 7; African Charter on Human and Peoples’ Rights, Article 6; Universal Declaration on Human Rights, Article 3; American Declaration on the Rights and Duties of Man, Articles I and XXV; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 2; EU Charter of Fundamental Rights, Article 6.

⁶² PSAROPOULOS JOHN. *Greek asylum system reaches breaking point*. IRIN news. Athens, 31 March 2016. Available at: <https://www.irinnews.org/news/2016/03/31/greek-asylum-system-reaches-breaking-point> [May 2018]

Thirdly, the EU-Turkey Statement— in disregard of formal rules— accelerated the process only for certain nationalities applications, and limiting nationalities within the fast-track border procedure also violates Article 43 of the APD. This “discrimination” has been proven by the AIDA [the Asylum Information Database managed by the ECRE (European Council on Refugees and Exiles)] in the *Differential Treatment of Specific Nationalities in the Procedure* document available online:

- “Applications by Syrian asylum seekers are examined on admissibility on the basis of the Safe Third Country concept, with the exception of Dublin cases and vulnerable applicants who are referred to the regular procedure”;
- “Applications by non-Syrian asylum seekers from countries with a recognition rate below 25% are examined only on the merits”;
- “Applications by non-Syrian asylum seekers from countries with a recognition rate over 25% are examined on both admissibility and merits (“merged procedure”)”.

The Asylum recognition rate is defined by the EUROSTAT *Statistics Explained* website, as “the share of positive decisions in the total number of asylum decisions for each stage of the asylum procedure i.e. first instance and final on appeal). The total number of decisions consist of the sum of positive and negative decisions”. On another side, the merits is referred to a judgment or decision of a court based upon the facts presented in evidence and the law applied to that evidence.

This demonstrates that the applications shall be examined upon a first selection procedure that will consist on the nationality. Ariel Ricker, a refugee rights lawyer working on Lesbos with Advocates Abroad, spoke against it saying that the fast-track procedure was a "racist policy" which is "exclusionary and illegal"⁶³.

The UN High Commissioner for Refugees mentioned in its latest recommendations to Greece⁶⁴ that: “Discriminatory practices, which delay the registration of claims of some

⁶³ BROOMFIELD MATT. The New Arab News: *'Racist and illegal' fast-track deportations target North African and Asian refugees in Greece*. 23 October, 2017. Available at: www.alaraby.co.uk [17 April 2018]

⁶⁴ UNHCR. Bureau for Europe. *UNHCR Recommendations for Greece in 2017*. February 2017. Available at: <http://www.unhcr.org/58d8e8e64.pdf> [24 March 2018]

nationalities (such as Afghans and Iraqis), are not in line with EU and Greek standards. On the mainland, first instance decisions for those pre-registered during the summer of 2016 will take approximately two years. The lack of capacity to fully process asylum claims within a reasonable timeframe needs to be addressed. It directly contributes to the significant tensions in many of the asylum-seeker sites, generates onward movement and prevents working towards the implementation of solutions”.

Fourthly, the fast-track border procedure examines whether applications may be dismissed on the ground that Turkey is a “safe third country” or a “first country of asylum”⁶⁵. That means that first instance decisions dismisses Syrian applications on the basis that Turkey is a safe third country using a pre-defined template provided to Regional Asylum Offices or Asylum Units on the islands. But, as analysed before, Turkey is not a safe third country. Furthermore, on the 22nd of September 2017, the Greek Council of State delivered two rulings concerning two Syrian nationals who challenged the fast-track procedure of the Greek asylum system following the EU-Turkey statement of 18 March 2016. The Council of State agreed with the Appeals Committee that the applicants’ claims were inadmissible based on the “safe third country” concept. It also refused by narrow majority to refer a preliminary question to the CJEU on the interpretation of Article 38 of the APD⁶⁶.

In essence, the asylum procedure in Greece does not follow any distinction between prioritised and accelerated procedures since it applies the fast-track procedure to “manifestly well-founded” and “manifestly unfounded” caseloads alike⁶⁷.

Moreover, since Greek authorities will find all those applications unfounded or dismissed because of the “first country” or “third safe country” concepts, asylum seekers will be returned to Turkey and excluded from relocation in practice. That means that no adequate safeguards are provided while been applied to all asylum seekers falling under the EU-

⁶⁵ AIDA. Asylum Information Database. *Aida 2016 update: Greece*. March 2017. Available at: <http://www.asylumineurope.org/news/28-03-2017/aida-2016-update-greece> [17 April 2018]

⁶⁶ Greek Council of State. Decisions 2347/2017 and 2348/2017. Plenary Session. 22 September 2017.

⁶⁷ AIDA. Asylum Information Database. *Accelerated, prioritised and Fast-track asylum procedures. Legal frameworks and practice in Europe*. May 2017. Available at: https://www.ecre.org/wp-content/uploads/2017/05/AIDA-Brief_AcceleratedProcedures.pdf [17 April 2018]

Turkey Statement scope. Meanwhile, they remain detained in refugee camps in non-acceptable conditions, and their lives in jeopardy.

It is really doubtful if Greece is neither a safe country nor appropriate for register migrant's applications of asylum as the EU-Turkey Statement settles.

7.7. The 1:1 Resettlement mechanism

Before the EU-Turkey Statement— which established that for every Syrian national returned from the Greek islands another will be resettled to the EU directly from Turkey— two mechanisms were adopted.

Under the emergency Relocation Scheme, adopted by the Council in September 2015, asylum seekers with a high chance of having their applications successfully processed were going to be relocated from Greece and Italy to other Member States where they could have their asylum applications processed. If the applications were finally successful, the applicants could have the refugee status granted included the right to reside in the Member State to which they were relocated. The EU budget provided financial support to the participating Member States.

On another hand, in May 2015, the Commission proposed a European Resettlement Scheme which was adopted by the Council in July 2015. To avoid displaced persons in need of protection having to resort to the criminal networks of smugglers and traffickers, the resettlement programme provided legal pathways to enter the EU. This scheme provided resettlement for 22,000 people in need of international protection from outside of the EU to the EU Member States, and it was also supported by the EU budget.

a. Resettlement

Resettlement is defined by UNHCR as *'the selection and transfer of refugees from a state in which they have sought protection to a third country that admits them – as refugees – with a permanent residence status'*. It is a durable solution for refugees.

The core of the EU-Turkey Statement is the 1:1 swapping mechanism, consisting in the resettlement of one Syrian refugee from Turkey for each irregular migrant readmitted from the Greek islands. In exchange for its cooperation in halting irregular crossing and fighting smuggling,—and 6 billion euros—Turkey negotiated an acceleration of the visa liberalisation dialogue, an upgrade of the Customs Union and a “re-energisation” of the dragging accession talks.

The table below of the ANNEX to the Fifteenth Report on Relocation and Resettlement from the Commission⁶⁸ to the European Parliament, the European Council, and the Council, shows the state of play of the resettlements as of 4 September 2017, under the 20 July 2015 Conclusions⁶⁹ and under the 1:1 mechanism with Turkey:

Member State / Associated State	Pledges made under the 20 July 2015 scheme	Total resettled under the 20 July 2015 scheme, including the 1:1 mechanism with Turkey	Third country from which resettlement has taken place
Austria	1,900	1,830	Lebanon: 886; Jordan: 614; Turkey: 329 (out of which 152 under 1:1 mechanism) ; Iraq: 1
Belgium	1,100	905	Lebanon: 448; Turkey: 708 under 1:1 mechanism (245 within 20 July scheme and 463 outside of 20 July scheme¹) ; Turkey: 4 Jordan: 184; Egypt: 24
Bulgaria	50	0	
Croatia	150	0	
Cyprus	69	0	
Czech Republic	400	52	Lebanon: 32; Jordan: 20
Denmark	1,000	481	Lebanon, Uganda
Estonia	20	20	Turkey: 20 under the 1:1 mechanism
Finland	293	293 ²	Turkey: 754³ under the 1:1 mechanism, outside of 20 July scheme ; Lebanon: 282; Egypt: 7; Jordan: 4
France	2,375	1,965	Lebanon: 1,062; Turkey: 926 under the 1:1 mechanism (228 within 20 July scheme and 698 outside of 20 July scheme⁴) ; Jordan: 539; Iraq: 8; other: 128
Germany	1,600	1,600	Turkey: 2,903 under the 1:1 mechanism (1,600 within 20 July scheme and 1,303 outside of 20 July scheme)
Greece	354	0	
Hungary			
Iceland	50	50 ⁵	Lebanon
Ireland	520	520 ⁶	Lebanon
Italy	1,989	1,152	Lebanon: 708; Turkey: 291 under the 1:1 mechanism ; Jordan: 53; Syria: 52; Sudan: 48

⁶⁸ EUROPEAN COMMISSION. *Report from the Commission to the European Parliament, the European Council and the Council. Fifteenth report on relocation and resettlement*. Brussels. 6.9.2017.

⁶⁹ COUNCIL OF THE EUROPEAN UNION. *Outcome of the Council meeting*. 3405th Council meeting. Justice and Home Affairs. Brussels. 20 July 2015.

Member State / Associated State	Pledges made under the 20 July 2015 scheme	Total resettled under the 20 July 2015 scheme, including the 1:1 mechanism with Turkey	Third country from which resettlement has taken place
Latvia	50	25	Turkey: 25 under the 1:1 mechanism
Liechtenstein	20	20	Turkey
Lithuania	70	28	Turkey: 28 under the 1:1 mechanism
Luxembourg	30	26	Lebanon: 26; Turkey: 141 under the 1:1 mechanism, outside of 20 July scheme ⁷
Malta	14	0	
Netherlands	1,000	1,000	Turkey: 1,942 under the 1:1 mechanism (556 within 20 July scheme and 1,386 outside of it); Turkey 7; Lebanon: 341; Kenya: 70; Ethiopia: 8; Jordan: 7; Libya: 4; Israel: 2; Iraq, Morocco, Egypt, Saudi Arabia, Syria: 1
Norway	3,500	3,421	Lebanon: 2,624; Turkey: 540; Jordan: 257
Poland	900	0	
Portugal	191	76	Egypt: 63; Turkey: 12 under the 1:1 mechanism; Morocco: 1
Romania	80	0 ⁸	Turkey: 11 under the 1:1 mechanism outside of 20 July scheme
Slovakia	100	0	
Slovenia	20	0	
Spain	1,449	631	Lebanon: 436; Turkey: 195 under the 1:1 mechanism
Sweden	491	491	Turkey: 726 under the 1:1 mechanism (of which 269 within 20 July scheme); Sudan: 124; Kenya: 80; Lebanon: 8; Iraq: 8; Egypt: 1; Jordan: 1
Switzerland	519	519	Lebanon: 431; Syria: 88
United Kingdom	2,200	2,200	Jordan, Lebanon, Turkey, Egypt, Iraq and others
TOTAL	22,504	17,305	A total of 8,834 people were resettled from Turkey under the 1:1 mechanism: 3,621 through the scheme of 20 July 2015 and 5,213 in addition to it

We can see that the only countries that had fulfilled the pledges made were Estonia, Finland, Germany, Ireland, Netherlands, Sweden, and UK – as well as three Associated Countries (Iceland, Liechtenstein and Switzerland). Out of the 22,504 pledges made under the 20 July 2015 scheme, 17,305 resettlements were actually carried out (8,834 people resettled from Turkey under the 1:1 mechanism, 3,621 through the 20 July 2015 scheme, and 5,213 in addition to it). On another hand, is also noticed that some countries did not resettled one single refugee at the time of 2017, as: Bulgaria, Croatia, Cyprus, Hungary, Malta, Poland, Romania, Slovakia, and Slovenia.

Among the countries that did not complied with the scheme, Poland and Hungary have actually refused to accept asylum-seekers. Slovakia, which unsuccessfully challenged the relocation scheme in the European Court, only accepted 16 of the 902 asylum-seekers it was assigned, and the Czech Republic only 52 over 400. Spain only fulfilled the 13.7% (631 out of 1,449) of its quota.

b. Relocation

On the other side relocation refers to *the movement of refugees from one EU Member State to another*. It is an *intra-EU* process, in which Member States help another Member State to cope with the pressure of hosting a relatively large refugee population by agreeing to receive a number of them. Relocation is an expression of internal EU solidarity and burden-sharing, particularly with those countries at the borders of Europe that receive a high number of refugees.

The Fifteenth Report on Relocation and Resettlement also shows the state of play of the Relocations from Italy and Greece (the countries of the EU with more mass influx of asylum seekers).

Nonetheless, not a single country fulfilled the commitment legally foreseen in the Council Decisions (except Liechtenstein, Norway and Switzerland, which relocated more people than some Member States). The relocation scheme for those asylum seekers arriving in Greece and Italy was planned to support Greece with the relocation of 63,302 persons and Italy with 34,953 – a total of 98,255 relocations and only 27,695 were effectively relocated. However, with the EU-Turkey Statement reducing irregular flows to Greece and the majority of migrants arriving in Italy not being eligible, the number of persons to be relocated turned out to be much lower.



As we see in the graphic above based on Hellenic Coast Guard data⁷⁰, after March 2016 the inflow of persons arriving reduced drastically and, in this regard, the Statement has been successful.

⁷⁰ UNHCR. *UNHCR Greece factsheet. Highlights of the month*. 1-31 July 2016. Available at: <http://donors.unhcr.gr/en/unhcr-greece-factsheet-july-2016/> [May 2018]

As a result, since the Statement was agreed, asylum seekers have unlawfully been excluded from the relocation scheme, and many remain trapped on the islands⁷¹.

In conclusion, it is not clear that the deal does anything to provide alternative safe routes to those in need to reach Europe. Besides, the resettlement of Syrian refugees should not be linked to the number of returns or arrivals since the European Union has the duty to open humanitarian pathways for all refugees from Turkey, and other countries⁷².

Further, based on UNHCR data, from the total of displaced people due to the Syrian war more than 5 million are in neighbouring countries in the Middle East and North Africa, but just 1 million have moved to Europe, or tried so. Despite European countries do not sustain the burden of the crisis, they have utterly failed to fulfil their commitments with resettlement, but also to relocate asylum-seekers and help Greece and Italy. Thus, Europe could not even help their own.

The table below of the ANNEX to the Fifteenth Report on Relocation and Resettlement present the latest state of play of the implementation of the relocation scheme as of September 2017:

⁷¹ KOENIG NICOLE and WALTER-FRANKE MARIE. *One year on: what lessons from the EU-Turkey "deal"?* Jacques Delors Institute, Berlin. 14 March 2017: "In early 2017, Amnesty International estimated that at least 15,000 migrants were stuck on the Greek islands in dire conditions and with unclear prospects". p.4. Available at: http://www.delorsinstitut.de/2015/wp-content/uploads/2017/03/20170317_EU-Turkey-deal-one-year-on-NK-MW.pdf [6 April 2018]

⁷² STRIK TINEKE. Council of Europe. Parliamentary Assembly, Resolution 2109. *The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016*. Netherlands. 20 April 2016. Available at: <http://www.refworld.org/docid/583739a54.html> [8 March 2018]

Member State	Effectively Relocated from Italy	Effectively Relocated from Greece	Total effectively relocated	Commitment legally foreseen in the Council Decisions ¹
Austria ²	15		15	1953
Belgium	259	677	936	3812
Bulgaria		50	50	1302
Croatia	18	60	78	968
Cyprus	34	96	130	320
Czech Republic		12	12	2691
Estonia		141	141	329
Finland	755	1196	1951	2078
France	330	3948	4278	19714
Germany	3405	4447	7852	27536
Hungary			0	1294
Iceland			0	
Ireland		487	487	600
Latvia	27	294	321	481
Liechtenstein		10	10	
Lithuania	27	355	382	671
Luxembourg	111	271	382	557
Malta	47	101	148	131
Netherlands	762	1595	2357	5947
Norway	815	693	1508	
Poland			0	6182
Portugal	299	1116	1415	2951
Romania	45	682	727	4180
Slovakia		16	16	902
Slovenia	45	172	217	567
Spain	168	1089	1257	9323
Sweden ³	511	1392	1903	3766
Switzerland	778	344	1122	
TOTAL	8,451	19,244	27,695	98,255

7.8. Measures against the States that did not fulfil the commitment

According to the EU law system, the Commission may take legal action – named infringement procedure – against a Member State that fails to implement EU law by referring the issue to the Court of Justice, which in certain cases, can impose financial penalties.

The procedure follows a number of steps laid out in the Article 258 of the Treaty on the Functioning of the European Union (TFUE), each one ending with a formal decision:

1. Firstly, the Commission sends a letter requesting further information to the country, which must send a detailed reply within a specified period (usually 2 months).
2. Secondly, the Commission evaluates if the country is failing to fulfil its obligations under EU law. If concludes that the country failed, it may send a reasoned opinion explaining why it considers that the country is breaching EU law, finally requesting the country to inform of the measures it will take (2 months) and a request to comply with EU law.
3. Thirdly, if the EU country still doesn't comply, the Commission may decide to refer the matter to the Court of Justice.
4. Finally, if the Court finds that the country has breached EU law, the national authorities must take action to comply with the Court judgment.

If despite the Court's judgment, the MS still does not rectify the situation, the Commission may refer the MS back to the Court. Nonetheless, a second time before the Court implies that the Court might impose financial penalties—which can be either a lump sum and/or a daily payment—taking into account the importance of the rules breached and the impact of the infringement on general and particular interests and the country's ability to pay.

The Commission also publishes an annual report presenting infringement cases by policy area and country.

Under the Relocation Scheme, the Council Decisions⁷³ required Member States to pledge available places for relocation every three months to ensure a swift and orderly relocation procedure. As explained before, Hungary, Poland and Czech Republic utterly failed to fulfil their commitments with their neighbouring countries. Thus, the 15th June 2017, the Commission launched infringement procedures against those Member States.

⁷³ 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; and 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.

However, the replies sent back to the Commission were not satisfactory⁷⁴, due none of them secured relocations within their territory. Further, none of the arguments invoked by those Member States justified the failure to pledge places for relocation.

Since Czech Republic, Hungary and Poland did not comply with their legal obligations on relocation—ignoring the problem Greece and Italy were facing— the Commission decided to move to the next stage of the infringement procedure.

On the second step in the procedure, which consists in requesting to comply with EU law— calling on the Member States to inform the Commission of the measures taken to comply within a specified period— this time the Member States had just one month to respond because the urgency of the situation.

Nonetheless, the reply received was not satisfactory, so the Commission decided to move to the next stage of the infringement procedure, and refer the case to the Court of Justice of the EU.

The next stage of the infringement procedure before the Court of Justice started on 6 September 2017, and the Court dismissed in its entirety the challenges⁷⁵ brought by Hungary and Slovakia against the provisional mechanism of mandatory relocation (all three Member States always have expressed their disapproval on the relocation scheme in general).

In accordance with the rules governing infringement procedures, if the CJEU finds that those Member States have failed to fulfil the obligations, they can be required to take the necessary measures to comply with the judgment. If Poland, Hungary and Czech Republic do not take those measures to comply with the judgment, a financial measure will be imposed.

⁷⁴ EUROPEAN COMMISSION. PRESS RELEASE. *Relocation: Commission moves to next stage in infringement procedures against the Czech Republic, Hungary and Poland Brussels*. 26 July 2017. Available at: https://ec.europa.eu/commission/commissioners/2014-2019/avramopoulos/announcements/relocation-commission-moves-next-stage-infringement-procedures-against-czech-republic-hungary-and_en [23 April 2018]

⁷⁵ EDAL. European Database of Asylum Law. CJEU - Judgment in Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council. Available at: <http://www.asylumlawdatabase.eu/en/content/cjeu-joined-cases-c-64315-and-c-64715-slovak-republic-and-hungary-v-council-european-union-6> [29 April 2018]

8. LEGAL NATURE

a. The elements of the Contract

Among the main issues of discussion due to the controversy of the Statement, its legal nature from the perspective of European law has been one of the most important.

First of all, it could seem that both Contracting Parties have legal capacity to perform an Agreement, as the Republic of Turkey is a sovereign State, able to establish legal relations with other subjects in an international level (*ius ad tractatum*⁷⁶) even if it never ratified the 1969 Vienna Convention on the Law of Treaties—, which establishes in its Article 6 the capacity of every State to perform Treaties.

However, even if the European Union has full juridical personality because it is an International Organisation⁷⁷—with their own, permanent, independent bodies in charge to manage collective interests, as we will analyse in the following part— it has never been clarified which European institution was the other formal Contracting Party of the Statement. It is important to clarify that the European Council is in charge of the Union interests and defines the general guidelines for the Common Foreign and Security Policy (CFSP), and it also decides on common strategies for its implementation (Article 26 TEU)⁷⁸. Thus, the European Council is enabled to develop relations with the neighbouring States—as Turkey—and can establish agreements including rights and obligations.

Secondly, from a first reading of the Statement, we see that Turkey committed to take all necessary measures to prevent the creation of new sea or land routes for smugglers while the EU engaged with the fulfilment of the visa liberalization for Turkish citizens at the latest by the end of June 2016. So it is clear that the Statement concluded at the time had obligations and rights.

From this, we could think that the binding character of the Statement is identifiable because the instrument complies with the requirements demanded for an international treaty (e.g. it was concluded in writing and establishes obligations and rights, falling

⁷⁶ Capacity to conduct treaties under international legal personality.

⁷⁷ Article 47 Treaty on European Union: *The Union shall have legal personality.*

⁷⁸ For more information: EUROPEAN COMMISSION. *The European Union Explained. How the European Union works. Your guide to the EU institutions.* Brussels. 2014. Available at: https://europa.eu/european_council/images/publicaciones/HTEUW_How_the_EU_Works.pdf [April 2018]

within the requirements established in the Vienna Convention). But, several scholars –as Ignacio Odriozola⁷⁹– disagree about the legal nature and execution of the Statement. One of the many arguments he used is that it consists in a *soft law* declaration, meaning that the Statement has no legal force and thus the no-compliance has no repercussion in the international panorama⁸⁰. Nonetheless, even though *soft law* rules do not have real legal effectiveness *per se*, that does not mean they have no effectivity at all, because it has influence over States, communitarian institutions and individuals. *Soft* or *non-binding* rules can have effectivity as a Treaty or a *binding* rule despite the *soft law* “voluntary” feature. If and International actor perceive the rule as a *hard* norm it might behave accordingly and in result – in this case in regard of the Statement – will prove effective⁸¹.

Another problem that rises from the Statement conception is the economic disbursement agreed in the Statement (initially 3 billion euros for the Facility for Refugees in Turkey and further projects, and 3 additional billion euros up to the end of 2018). As known, the annual EU budget has to be agreed by the Council and the European Parliament by a proposal from the Commission. If the Council and the European Parliament do not reach an agreement, the Commission has to present a new draft annual budget⁸². As established in the Statement, the first disbursement of 3 billion euros for Turkey was conducted in 2016 by a proposal of the European Commission – 1 billion from the EU budget and other 2 billion from MS contributions⁸³—and the 14th of March 2018 the European

⁷⁹ ODRIOZOLA IGNACIO. *El lado oculto del Acuerdo Unión Europea-Turquía. Una mirada crítica desde la perspectiva del derecho internacional de los refugiados*. Revista de Ciencias Sociales no2. ISSN 2525-1112. Julio-Diciembre 2016. Available at: <http://rephip.unr.edu.ar/bitstream/handle/2133/6850/PRCS%20No%202%20Odriozola.pdf?sequence=3> [4 April 2018]

⁸⁰ MAURICIO IVÁN DEL TORO HUERTA. *El fenómeno del soft law y las nuevas perspectivas del derecho internacional*. Anuario Mexicano de Derecho Internacional. Vol. VI, 2006. Pp.513-549.

⁸¹ M.ZERRILLI FILIPPO. *The rule of soft law: an introduction*. Journal of Global and Historical Anthropology 56. 2010. Available at: <https://revistas.juridicas.unam.mx/index.php/derecho-internacional/article/viewFile/160/256> [6 April 2018]

⁸² For more information regarding EU budget, available at: <http://www.europarl.europa.eu>

⁸³ EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament and the Council. Second Annual Report on the Facility for Refugees in Turkey*. Brussels. 14 March 2018. p. 6. Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/14032018_facility_for_refugees_in_turkey_second_annual_report.pdf

Commission⁸⁴ decided to mobilise the other 3 billion. Even though, it is not clear the participation of these institutions regarding the Statement creation since they all have denied their involvement.

In addition, the TFUE establishes in its article 214 that the Union's operations in the field of humanitarian aid—when helping victims of third-countries from natural or man-made disasters—shall be conducted in compliance with the principles of international law (in line with the principles of impartiality, neutrality and non-discrimination). The European Parliament and the Council, acting in accordance, shall establish the measures defining the framework within which the Union's humanitarian aid operations shall be implemented. But, as we will see next, the Council has proclaimed that it did not have any participation in the creation of the Statement.

b. The stakeholders of the Contract

After the 18th of March 2016 two Pakistani nationals and an Afghan national travelled from Turkey to Greece, where they submitted applications for asylum. In view of the possibility to be returned to their countries of origin, they started actions before the General Court of the European Union aiming to challenge the legality of the Statement⁸⁵.

According to those asylum seekers, the Statement infringed the rules of the TFUE relating to the conclusion of international agreements by the EU. The General Court dismissed the three actions alleging that the Statement did not relate to an act of the European Council nor of any other body, office or agency of the Union and hence that the Court lacked of jurisdiction.

However, the Court stated that there were inaccuracies regarding the identification of the authors of the Statement. The evidences showed that it was not the EU but its Member States the ones conducting negotiations with Turkey.

The European Council repeatedly manifested before the Court and in different fora that “the meeting between the EU and Turkey to which the press release that contains the

⁸⁴ EUROPEAN COMMISSION. Press release. *EU Facility for Refugees in Turkey: the Commission proposes additional funds for Syrian refugees*. Brussels. 14 March 2018. [May 2018]

⁸⁵ See “ANNEX V. ORDER OF THE GENERAL COURT (First Chamber, Extended Composition). 28 February 2017. Case T-193/16”

Statement refers, was not a meeting of the European Council, but an informal meeting of representatives of Heads of State or Government of which no minutes are kept”⁸⁶.

The Council also submitted to the Court that “it was not the author of the EU-Turkey Statement and that it had not been in any way involved in the structured dialogue that took place between the representatives of the Member States and the Republic of Turkey”⁸⁷.

Of course, the Commission also claimed that “no agreement” was concluded between the EU and the Republic of Turkey. Furthermore, the Commission replied that it was clear from the vocabulary used in the EU-Turkey statement, “that it was not a legally binding agreement but a political arrangement reached by the ‘Members of the European Council, [that is to say,] the Heads of State or Government of the Member States, the President of the European Council and the President of the Commission”⁸⁸.

Therefore the European Council and the other institutions of the EU denies having concluded an agreement with the Turkish Government⁸⁹. That is why, in the absence of any act of an institution of the EU, the Court concluded its lack of jurisdiction to hear about the actions brought by the three asylum seekers.

On 23rd of April 2017, the asylum seekers lodged an appeal and claimed that the General Court made several errors of law and that it was wrong to decline jurisdiction. The appellants invoked that, amongst other pleas, the General Court failed to properly consider whether the EU-Turkey Statement was in reality a decision of the European Council, and failed to investigate and assess material issues⁹⁰.

⁸⁶ Email sent to Mr. Tony Bunyan (from State Watch) from Fernando Paulino Pereira (from the Council of the European Union) the 6th of April 2017. For more information, full document available at: <http://www.statewatch.org/news/2017/may/eu-council-sw-eu-turkey.pdf>

⁸⁷ Paragraph 29 of the Order in Case T-257/16, para.12 in each of the other two Orders.

⁸⁸ Paragraph 28 of the Order in Case T-257/16, para.12 in each of the other two Orders.

⁸⁹ CJEU. General Court of the European Union. Press release No. 19/17. Luxembourg, 28 February 2017: The Court accepted the European Council’s argument that separate meetings had taken place, one conducted by the European Council on 17 March and one by the heads of state or government in an international summit with Turkey on 18 March. Thus the Court concluded that it was during the international summit that the Statement with Turkey was concluded.

⁹⁰ COUNCIL OF THE EUROPEAN UNION. Information note to the Permanent Representatives Committee about the cases C-208/17 P, C-209/17 P and C-210/17 P before the Court of Justice. Brussels.

As the resolution of the Appeal is still in process, the answer regarding the legality of the Statement is unknown.

c. Conclusion

In the event that the Statement was agreed by the European Council, we can admit that it does comply with the elements required by the international law to be considered a *soft law* act with relative effectiveness. Despite this, it is still not clear if the Statement does lack of the support of the European Institutions—transcendental if we take into account the procedures needed to approve the EU budget and how to spend it. Moreover, the refugees' problem seems to be a topic addressed to both the Parliament and the EU Council—as they are the Institutions with the legislative capacity to adopt measures addressing humanitarian aid— though they claimed not to be involved in the creation of the Statement.

Therefore we could see that the European Council, the Council of the EU and the European Commission maintained the following position before the Court: “*it wasn't me*”⁹¹. This calls into question the transparency of the EU decision-making, the evasion of the European democracy standards, and the EU judicial review.

On another hand, the European institutions “redirected” such responsibility to the Heads of the Governments of the MS (the Members of the European Council). The ERTA doctrine⁹² developed by the Court and laid down in Article 3(2) TFEU is important in this regard. According to the Court's case-law: “Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules”⁹³. This

12 May 2017. 9148/17. Available at: <http://www.statewatch.org/news/2017/may/eu-council-ls-eu-turkey-appeal-9148-17.pdf> [7 April 2018]

⁹¹ CARRERA SERGIO, DEN HERTOOG LEONHARD and STEFAN MARCO. “*It wasn't me! The Luxemburg Court Orders on the EU-Turkey Refugee Deal*” Policy Insights. NO 2017-15/April 2017. p. 2. Available at: <https://www.ceps.eu/system/files/EU-Turkey%20Deal.pdf> [7 April 2018]

⁹² Judgment of the Court of 31 March 1971. *Commission of the European Communities v Council of the European Communities*. European Agreement on Road Transport. Case 22-70. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61970CJ0022&from=EN> [29 April 2018]

⁹³ CJEU, Case C-476/98 *Commission v Germany* [2002] ECR I-9855, para. 108. Available at: <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d0f130da72b9ac82a2d941889616bb413f0861d8.e34KaxiLc3eQc40LaxqMbN4Pb3eQe0?text=&docid=47844&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=44361> [April 2018]

means that the EU obtains exclusive treaty-making powers when the conclusion of an international agreement “may affect common rules or alter their scope”. Besides, the Article 4.3 TEU establishes “the duty of sincere and loyal cooperation” by Member States and European institutions. Therefore, a ‘crisis’ should not exempt European Union actors of acting without full compliance of the EU democratic rule of law standards laid down in the Treaties.

The feeling of the European citizens in front of this situation is that, after all, there is a general and persistent lack of information. Since all institutions are avoiding responsibilities arising after the legality of the Agreement was challenged, a sensation of insecurity and absence of answers make doubt about that EU democratic rule of law.

9. CONCLUSIONS

FIRST. According to my analysis of the legal framework and the Statement itself, the fundamental values of Europe established in all the Treaties were undermined, being the main conclusion of this paper that the EU-Turkey Statement is not in line with neither the International Law nor the EU legal standards.

SECOND. MS of the EU, in their really small obligations compared with the Middle-East countries receiving the most important refugees' inflow, have failed with their commitments and the answer of some of them was the closure of the external borders or the raising of barriers. The problem was not only tacitly eluded but also actively avoided; and when tested with the arrival of thousands of refugees, the response of the EU has been the denial of responsibility towards a humanitarian crisis.

THIRD. The scope of the Statement forces the application of a norm for irregular migrants to people seeking protection under the status of refugees. This provoked a lack of protection of thousands and a lack of solidarity.

The Statement also leaves apart some nationalities thus falling in the contradiction of being a discriminatory policy. It shortfalls when identifying the ones in need of protection and ignores the fact that Syrians are not the only nationality in need of such protection. By ignoring other nationalities they also have denied access to elemental human rights according to the UDHR.

FOURTH. Turkey cannot be considered a safe third country under the APD. The concrete examples given in this paper – as the inhuman conditions they are facing in the camps, the refoulement of vulnerable people, and the collective expulsions— show that Turkish treatment of asylum-seekers comes in contradiction with the ECHR and therefore with the European values. Moreover, the Turkish asylum system falls short when promising secure and long-term solutions.

FIFTH. The European Commission did well in bringing the cases of Hungary, Poland and Check Republic before the CJEU because some measures have to be imposed to those who did not complied with the compromises. If we do not ignore the fact that lives have been damaged or destroyed because of the inaction of some MS, the outcome of the process might be an insufficient financial measure. Thus, coming up with economic

sanctions to avoid political sensible solutions seems not a good measure and, in any case, it would not be aligned to the European values of democracy and transparency.

SIXTH. Not only the binding force of the Statement is very doubtful— and we will have to wait until the appeal before the CJEU has been resolved— but also the non-participation of the EU institutions is questionable. Nonetheless, if the creation of the Statement was carried by the Heads of the Governments, they have acted on *mala fide* bases according to the ERTA doctrine.

SEVENTH. The reasons underlying the Statement are also questionable as the national interests prevail over the humanitarian ones. By granting the visa-free travel for Turkish nationals, an upgrade of the Customs Union and the acceleration of the EU accession process, the EU has prevented refugees coming into the European territory. For Turkey, in exchange of €6 billion for funding the facilities and profit of the political opportunism, had “*protected*” millions of refugees. Even if the negotiations between the two parties have been fruitful –in some way it is a win-win Agreement— it is a completely failure from a humanitarian point of view.

EIGHT. Not only as a student, but also as a European citizen, I have found a tremendous lack of transparency from the EU institutions while trying to work on this research. Certainly a lot of information is available, but from a critical point of view and after all the information received from NGO’s, it felt objectionable. In my opinion a deeper research seemed necessary to solve my questions even though I found obstacles.

NINTH. My research had among other aims to conclude whether the EU-Turkey Statement complied with the European and International standards; which it does not. But, if we only take into account the effectiveness of the Statement in reducing “irregular arrivals”, its goals were achieved: they succeeded in reducing the entrance of migrants to Europe which was the non-explicit intention when the Statement was embodied.

The consequences of such actions threatened the life conditions and the life itself of thousands of persons, which in this sense is a true success for the EU and Turkey.

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ANNEX I. The EU-Turkey Statement, 18th of March 2016, to tackle irregular migration

Today the Members of the European Council met with their Turkish counterpart. This was the third meeting since November 2015 dedicated to deepening Turkey-EU relations as well as addressing the migration crisis.

The Members of the European Council expressed their deepest condolences to the people of Turkey following the bomb attack in Ankara on Sunday. They strongly condemned this heinous act and reiterated their continued support to fight terrorism in all its forms.

Turkey and the European Union reconfirmed their commitment to the implementation of their joint action plan activated on 29 November 2015. Much progress has been achieved already, including Turkey's opening of its labour market to Syrians under temporary protection, the introduction of new visa requirements for Syrians and other nationalities, stepped up security efforts by the Turkish coast guard and police and enhanced information sharing. Moreover, the European Union has begun disbursing the 3 billion euro of the Facility for Refugees in Turkey for concrete projects and work has advanced on visa liberalisation and in the accession talks, including the opening of Chapter 17 last December. On 7 March 2016, Turkey furthermore agreed to accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants intercepted in Turkish waters. Turkey and the EU also agreed to continue stepping up measures against migrant smugglers and welcomed the establishment of the NATO activity on the Aegean Sea. At the same time Turkey and the EU recognise that further, swift and determined efforts are needed.

In order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and Turkey today decided to end the irregular migration from Turkey to the EU. In order to achieve this goal, they agreed on the following additional action points:

- 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.

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 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.

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.

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.

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.

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.

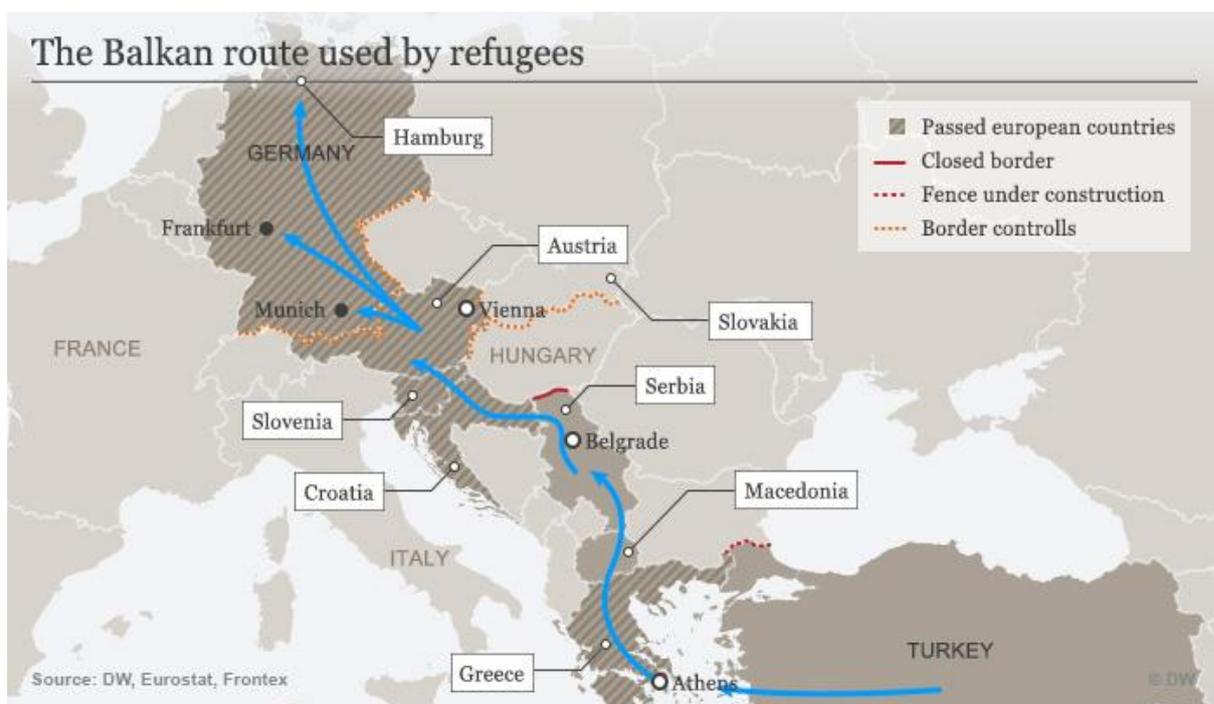
All these elements will be taken forward in parallel and monitored jointly on a monthly basis.

The EU and Turkey decided to meet again as necessary in accordance with the joint statement of 29 November 2015.

NB: Reference to this press release has been made in the orders rendered by the General Court on 20 February 2017 in cases T-192/16, T-193/16 and T-257/16 which are currently under appeal.

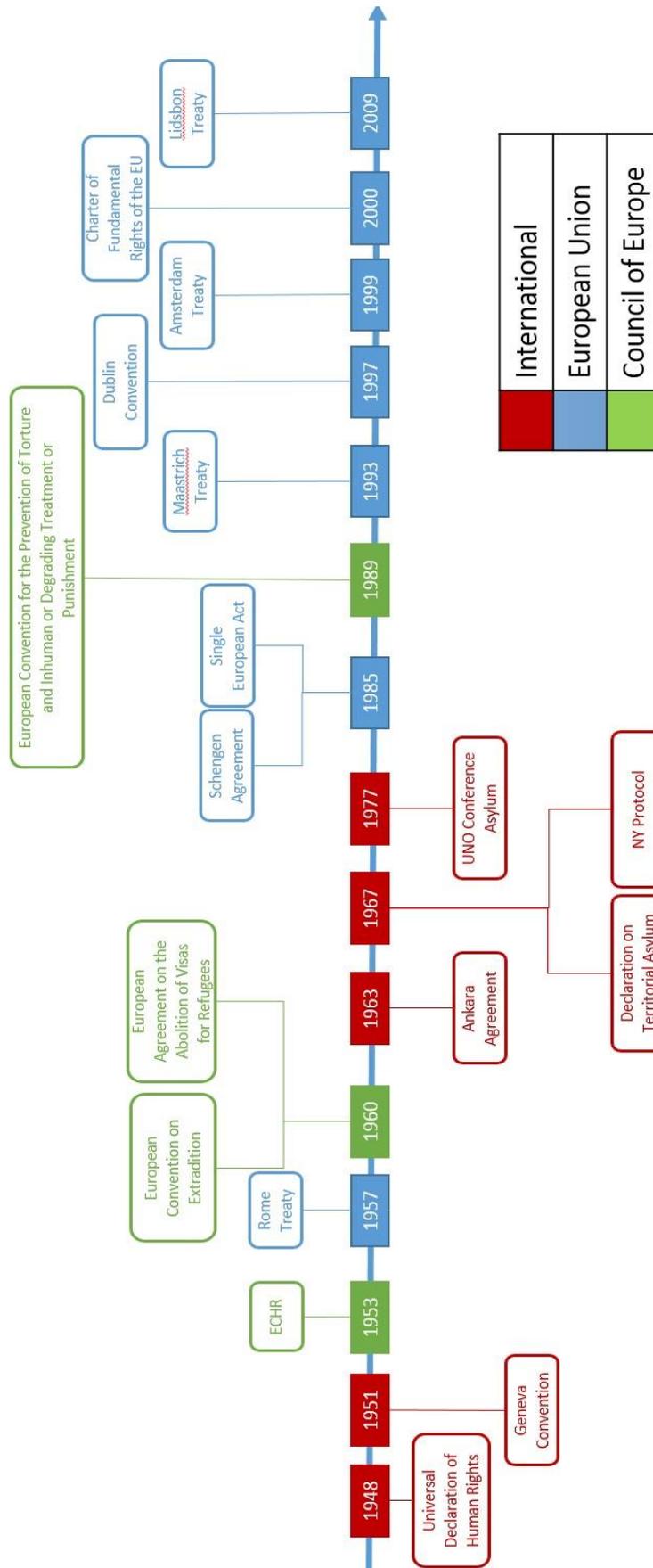
Source: www.consilium.europa.eu

ANNEX II. The Balkan Route used by refugees, pre-March 2016.



Source: Eurostat, Frontex. Available at www.europenowjournal.org

ANNEX III. Legal Framework timeline



ANNEX IV. Translation of the Statement of the letter of the Minister of Immigration Policy, Yannis Mouzalas, to the ministers of Interior and Immigration of the European Union.

We are putting forward a press release of the Ministry of Immigration Policy, regarding with the letter of the Minister, Yannis Mouzalas, to the Ministers of Interior and Immigration of the EU: Within the attempt of the the Greek government, in order to transfer the special population of migrants, from the islands to closed camps, without diverging from the common Statement of the EU and Turkey, the Minister of immigration policy, Yannis Mouzalas, sent a letter to the Ministers of Interior and Immigration of the EU, in view of tomorrows consultation . By his letter, mister Mouzalas points out the need of reconsideration and implementation pf the Greek proposition, regarding the transfer of the special population of migrants, from the islands to predetermined closed camps in the mainland, without diverging from the common statement of the EU and Turkey. It is noted that the Minister, Yannis Mouzalas, has held a set of meetings with eleven Ministers of Interior and Immigration and other institutional entities of the European Union but also with competent institutional entities of Turkey, in order to implement the request of the Greek government.

Translation made by Maria Bairaktari, law student from Thessaloniki University in Greece

Source: www.media.gov.gr

ANNEX V. ORDER OF THE GENERAL COURT (First Chamber, Extended Composition). 28 February 2017. Case T-193/16

(Action for annulment — EU-Turkey statement of 18 March 2016 — Press release — Concept of ‘international agreement’ — Identification of the author of the act — Scope of the act — Meeting of the European Council — Meeting of the Heads of State or Government of the Member States of the European Union held on the premises of the Council of the European Union — Capacity of the representatives of the Member States of the European Union during a meeting with the representative of a third country — First paragraph of Article 263 TFEU — Lack of jurisdiction)

In Case T-193/16,

NG, residing in Athens (Greece), represented by B. Burns, Solicitor, P. O'Shea and I. Whelan, Barristers,

applicant,

v

European Council, represented by K. Pleśniak, Á. de Elera-San Miguel Hurtado and S. Boelaert, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU and seeking the annulment of an alleged agreement concluded between the European Council and the Republic of Turkey dated 18 March 2016 and entitled 'EU-Turkey statement, 18 March 2016',

THE GENERAL COURT (First Chamber, Extended Composition),

composed of I. Pelikánová, President, V. Valančius, P. Nihoul, J. Svenningsen (Rapporteur) and U. Öberg, Judges,

Registrar: E. Coulon,

makes the following

Order

Background to the dispute

The meetings between the European leaders and the Turkish leader prior to 18 March 2016

- 1 On 15 October 2015, the Republic of Turkey and the European Union agreed on a joint action plan entitled 'EU-Turkey joint action plan' ('the joint action plan') designed to strengthen their cooperation in terms of supporting Syrian nationals enjoying temporary international protection and managing migration, in order to respond to the crisis created by the situation in Syria.

- 2 The joint action plan aimed to respond to the crisis situation in Syria in three ways, namely, first, by addressing the root causes leading to a mass exodus of Syrians, secondly, by providing support to Syrians enjoying temporary international protection and to their host communities in Turkey and, thirdly, by strengthening cooperation in the field of preventing illegal migration flows towards the European Union.

- 3 On 29 November 2015, the Heads of State or Government of the Member States of the European Union met with their Turkish counterpart ('the first meeting of the Heads of State or Government'). Following that meeting, they decided to activate the joint action plan and, in particular, to step up their active cooperation concerning migrants who were not in need of international protection, by preventing them from travelling to Turkey and the European Union, by ensuring the application of the established bilateral readmission provisions and by swiftly returning migrants who were not in need of international protection to their countries of origin.

- 4 On 8 March 2016, a statement by the Heads of State or Government of the European Union, published by the joint services of the European Council and the Council of the European Union, indicated that the Heads of State or Government of the European Union had met with the Turkish Prime Minister in regard to relations between the European Union and the Republic of Turkey and that progress had been made in the implementation of the joint action plan. That meeting had taken place on 7 March 2016 ('the second meeting of the Heads of State or Government'). That statement specified:
 'The Heads of State or Government agreed that bold moves were needed to close down people smuggling routes, to break the business model of the smugglers, to protect [the] external borders [of the European Union] and to end the migration crisis in Europe ... [They] warmly welcomed the additional proposals made today by [the Republic of] Turkey to address the migration issue. They agreed to work on the basis of the [following] principles:
 – to return all new irregular migrants crossing from Turkey into the Greek islands with the costs covered by the [European Union];
 – to resettle, for every Syrian readmitted by Turkey from Greek islands, another Syrian from Turkey to the ... Member States [of the European Union], within the framework of the existing commitments;

— ...

The President of the European Council will take forward these proposals and work out the details with [the Republic of Turkey] before the March European Council. ...

This document does not establish any new commitments on Member States as far as relocation and resettlement is concerned.

...’

- 5 In its Communication COM(2016) 166 final of 16 March 2016 to the European Parliament, the European Council and the Council, entitled ‘Next operational steps in EU-Turkey cooperation in the field of migration’ (‘the communication of 16 March 2016’), the European Commission stated that, on 7 March 2016, the ‘[European Union] leaders [had] warmly welcomed the additional proposals made by [the Republic of] Turkey and [had] agreed to work with Turkey on the basis of a set of six principles’, that ‘the President of the European Council [had been] requested to take forward these proposals and work out the details with Turkey before the March European Council’ and that ‘this Communication [set] out how the six principles should be taken forward, delivering on the full potential for [European Union]-[Republic of] Turkey cooperation while respecting European and international law’.
- 6 In the communication of 16 March 2016, the Commission stated in particular that ‘the return of all new irregular migrants and asylum seekers from Greece to Turkey [was] an essential component in breaking the pattern of refugees and migrants paying smugglers and risking their lives’ and that, ‘given the extent of flows currently between Turkey and Greece, such arrangements should be considered as a temporary and extraordinary measure which is necessary to end the human suffering and restore public order and which needs to be supported with the relevant operational framework’. According to that communication, recent progress had been made in the readmission of irregular migrants and asylum seekers not in need of international protection to the Republic of Turkey under the bilateral Readmission Agreement between the Hellenic Republic and the Republic of Turkey, which was to be succeeded, from 1 June 2016, by the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation (OJ 2014 L 134, p. 3).
- 7 The Commission concluded, in the communication of 16 March 2016, that the ‘arrangements for the return of all new irregular migrants and asylum seekers crossing

the Aegean Sea from Turkey ... [would] be a temporary and extraordinary measure [that] should begin as soon as possible' and that, in that respect, the communication '[set] out a framework that will ensure that the process is carried out in accordance with international and European law, which excludes the application of a "blanket" return policy[, and it] also [indicated] the steps, legislative and logistical, that [needed] to be taken as a matter of urgency for the process to be launched'.

The meeting of 18 March 2016 and the EU-Turkey statement

- 8 On 18 March 2016, a statement was published on the Council's website in the form of Press Release No 144/16, designed to give an account of the results of 'the third meeting since November 2015 dedicated to deepening Turkey-EU relations as well as addressing the migration crisis' ('the meeting of 18 March 2016') between 'the Members of the European Council' and 'their Turkish counterpart' ('the EU-Turkey statement').
- 9 The EU-Turkey statement provided that, while 'reconfirm[ing] their commitment to the implementation of their joint action plan activated on 29 November 2015[, the Republic of] Turkey and the [European Union] recognise[d] that further, swift and determined efforts [were] needed'. That statement continued in the following terms:
'In order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and [the Republic of] Turkey today decided to end the irregular migration from Turkey to the [European Union]. In order to achieve this goal, they agreed on the following additional action points:
(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 [European Union] 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 [the Office of the United Nations High Commissioner for Refugees]. 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. [The Republic of] Turkey and [the Hellenic Republic], assisted by [European Union] 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.

(2) For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the [European Union] taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, [European Union] 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 [European Union] 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 applicant's situation

- 10 The applicant, NG, is an Afghan national. He claims to have fled the Islamic Republic of Afghanistan with his family because of fear of persecution and serious harm to his person. He claims to have been the target and the victim of direct attacks by the Taliban, who tried to kill him because of his professional responsibilities in a private company having links to the United States of America, committed to carrying out sensitive tasks for the benefit of the regular Afghan army.
- 11 By his own account, the applicant entered Greece on a date later than 18 March 2016, having the intention of introducing an application for asylum in the Federal Republic of Germany.
- 12 The applicant explains that he submitted his application for asylum in Greece under coercion, owing in particular to the existence of the 'challenged agreement'. However, he never wished or had the intention to submit such an application in Greece because of the

bad reception conditions in that Member State, particularly in terms of infrastructure, and the length of time for the processing of applications for asylum and systematic deficiencies in the implementation of the European Asylum System both at the level of that Member State's administration and at the level of its judicial system. These deficiencies, he claims, were noted, in particular, by the European Courts in the judgment of 21 December 2011, *N.S. and Others* (C-411/10 and C-493/10, EU:C:2011:865), and in the judgment of the European Court of Human Rights of 21 January 2011, *M.S.S. v. Belgium and Greece* (CE:ECHR:2011:0121JUD003069609).

- 13 Finally, the sole purpose of the applicant's presentation of his application for asylum in Greece was, he claims, to prevent him being returned to Turkey with, as the case may be, the risk of being detained there or being expelled to Afghanistan.

Procedure and forms of order sought

- 14 By application lodged at the Court Registry on 22 April 2016, the applicant brought the present action, in which, taking the view that the EU-Turkey statement was an act attributable to the European Council establishing an international agreement concluded on 18 March 2016 between the European Union and the Republic of Turkey, which he describes in his pleadings as the 'challenged agreement', he claims that the Court should:
- annul the '[alleged] agreement between the European Council and [the Republic of] Turkey dated 18 March 2016 [and] entitled "EU-Turkey statement, 18 March 2016"' ('the contested measure');
 - order the European Council to pay the costs.

The expedited procedure and referral of the case to the First Chamber (Extended Composition)

- 15 By a separate document lodged at the same time as the application, the applicant requested that the case be dealt with under the expedited procedure pursuant to Article 152 of the Rules of Procedure of the General Court.
- 16 On 10 June 2016, the European Council submitted its observations on the request for an expedited procedure, concluding, in essence, that the conditions for applying that

procedure were not met. By separate document lodged on the same day, that institution requested, principally, referral of the present case to the Grand Chamber pursuant to Article 28(1) and (2) of the Rules of Procedure. In the alternative, that institution requested referral of the present case to a Chamber sitting with at least five Judges pursuant to Article 28(5) of the Rules of Procedure.

17 By letter of 20 June 2016, the Court Registry acknowledged receipt of the request that the present case be referred to the Grand Chamber and informed the parties of its referral, pursuant to Article 28(5) of the Rules of Procedure, to an extended Chamber sitting with five Judges, in this instance the Seventh Chamber (Extended Composition).

18 By decision of 22 June 2016, the General Court granted the request for an expedited procedure.

The plea raised by the European Council and the applications to intervene

19 By document lodged at the Court Registry on 11 July 2016, the Council raised a plea entitled ‘plea of inadmissibility’ pursuant to Article 130 of the Rules of Procedure.

20 By document lodged at the Court Registry on 19 July 2016, NQ, NR, NS, NT, NU and NV sought leave to intervene in support of the form of order sought by the applicant.

21 By documents lodged on 20 and 22 July 2016 respectively, the Kingdom of Belgium and the Hellenic Republic sought leave to intervene in support of the form of order sought by the European Council.

22 By document lodged on 3 August 2016, the Commission sought leave to intervene in support of the form of order sought by the ‘Council of the European Union’. By letter of amendment of 11 August 2016, the Commission indicated that it intended to intervene in support of the form of order sought by the ‘European Council’.

23 By document lodged on 15 August 2016, Amnesty International sought leave to intervene in support of the form of order sought by the applicant.

24 In its plea, the European Council formally requests the Court to:

- dismiss the action as ‘manifestly inadmissible’;

– order the applicant to pay the costs.

25 On 3 August 2016, the applicant submitted his observations on the plea raised by the European Council, in which he claims that the Court should:

– dismiss that plea;

– declare the action admissible;

– order the European Council to pay the costs which he has incurred in the context of the preliminary issue relating to admissibility.

26 By letter from the Registry of 3 October 2016, the parties were informed that a new Judge-Rapporteur had been designated and that the present case had been reassigned to the First Chamber (Extended Composition), in which that Judge sits.

The replies to the measures of organisation of procedure

27 By letters from the Registry of 3 November 2016, the European Council was invited to comply with measures of organisation of procedure adopted by the Court pursuant to Article 89(3)(a) and (d) and Article 90(1) of the Rules of Procedure, while the Council and the Commission were, for their part, invited by the Court to reply to certain questions and to provide certain documents pursuant to the second paragraph of Article 24 of the Statute of the Court of Justice of the European Union and Article 89(3)(c) of the Rules of Procedure. In that context, those institutions were asked, in particular, to inform the Court whether the meeting of 18 March 2016 had led to a written agreement and, if so, to send it any documents enabling the identification of the parties that had agreed the ‘additional action points’ referred to in the EU-Turkey statement.

28 In its replies of 18 November 2016 to the Court’s questions, the European Council explained, *inter alia*, that, to the best of its knowledge, no agreement or treaty in the sense of Article 218 TFEU or Article 2(1)(a) of the Vienna Convention on the law of treaties of 23 May 1969 had been concluded between the European Union and the Republic of Turkey. The EU-Turkey statement, as published by means of Press Release No 144/16, was, it submitted, merely ‘the fruit of an international dialogue between the Member States and [the Republic of] Turkey and — in the light of its content and of the intention

of its authors — [was] not intended to produce legally binding effects nor constitute an agreement or a treaty’.

- 29 The European Council also provided a number of documents relating to the meeting of 18 March 2016 which constituted, according to that institution, a meeting of the Heads of State or Government of the Member States of the European Union with the representative of the Republic of Turkey, and not a meeting of the European Council in which that third country had participated.
- 30 In its reply of 18 November 2016, the Commission informed the Court, *inter alia*, that it was clear from the vocabulary used in the EU-Turkey statement, in particular the use of the word ‘will’ in the English version, that it was not a legally binding agreement but a political arrangement reached by the ‘Members of the European Council, [that is to say,] the Heads of State or Government of the Member States, the President of the European Council and the President of the Commission’, which had been recounted in its entirety in the body of Press Release No 144/16 relating to the meeting of 18 March 2016 and setting out the EU-Turkey statement.
- 31 In its reply of 2 December 2016, the Council explained, *inter alia*, that it was not the author of the EU-Turkey statement and that it had not been in any way involved in the structured dialogue that took place between the representatives of the Member States and the Republic of Turkey or in the activities of the President of the European Council leading to that statement. The preparatory work that took place within the Permanent Representatives Committee (Coreper) concerned only the preparation of meetings of the European Council, some of which concerned the management of the migration crisis. By contrast, the Council had not prepared the summit held on 18 March 2016 between the Members of the European Council, who are the Heads of State or Government of the Member States of the European Union, and the Turkish Prime Minister.
- 32 The Council indicated, moreover, that it fully shares the position developed by the European Council in its plea made pursuant to Article 130 of the Rules of Procedure. In that regard, it claimed in particular that, to the best of its knowledge, no agreement or treaty had been concluded between the European Union and the Republic of Turkey in connection with the migration crisis.

- 33 In his observations lodged on 19 December 2016, the applicant contested the position of the European Council, the Council and the Commission according to which, first, no agreement had been concluded with the Republic of Turkey during the meeting of 18 March 2016 and, secondly, that the outcome of the discussions with that third country had to be classified as a political arrangement. In particular, the applicant is of the view that, taking into account the language used in what he describes as the ‘challenged agreement’, the use of the English word ‘agree’ shows that it is an agreement intended to produce legal effects vis-à-vis third parties. Furthermore, he submits, the absence of the term ‘Member States’ indicates that the ‘challenged agreement’ could not have been concluded by the Member States of the European Union.

Law

- 34 Pursuant to Article 130 of the Rules of Procedure, where, by separate document, the defendant applies to the Court for a decision on inadmissibility or lack of competence without going to the substance of the case, the Court must decide on the application as soon as possible, where necessary after opening the oral part of the procedure.
- 35 In the present case, the Court considers that it has sufficient information from the documents before it and decides to give its decision without any need to propose to the plenum that the present case be referred to the Grand Chamber or to open the oral procedure.
- 36 In the context of the plea which it raises, the European Council alleges, principally, that the Court has no jurisdiction to rule on the present action.
- 37 It being understood that the rules on the jurisdiction of the Courts of the European Union, as laid down by the FEU Treaty and also by the Statute of the Court of Justice and the annex thereto, form part of primary law and are central to the European Union’s legal order and that, therefore, respect for those rules constitutes a fundamental requirement in that legal order (judgment of 10 September 2015, *Review Missir Mamachi di Lusignano v Commission*, C-417/14 RX-II, EU:C:2015:588, paragraph 57), the Court must first of all examine that question.

- 38 In support of its plea of lack of jurisdiction, the European Council contends that neither it nor any of the entities referred to in the first paragraph of Article 263 TFEU is the author of the EU-Turkey statement, as published by the Council by means of Press Release No 144/16, with the result that it cannot properly be designated as being the defendant in the present case.
- 39 According to the European Council, the EU-Turkey statement was issued by the participants in an international summit held, in this instance, on 18 March 2016 in the margins of and following the meeting of the European Council. Therefore, that statement is attributable to the Members of the European Council, which are the Member States of the European Union, and their ‘Turkish counterpart’, since they met in the context of a meeting distinct from that of the European Council. That distinct meeting followed the first two meetings of the Heads of State or Government, of the same type, which had taken place on 29 November 2015 and 7 March 2016 and had resulted in the publication of either a joint statement, such as that at issue in the present case as set out in Press Release No 144/16, or a joint action plan. The European Council contends that the EU-Turkey statement cannot therefore be classified as a measure adopted by it.
- 40 The applicant opposes that analysis by claiming that what he describes as the ‘challenged agreement’, as a contested measure, having regard to its content and all of the circumstances surrounding its adoption, must be regarded as a measure of the European Council because, in the present case, contrary to what that institution claims, the Member States of the European Union acted collectively within that institution and did not exercise national competences outside the institutional framework of the European Union. Furthermore, the applicant maintains that the European Council and the Commission actively participated in the preparation and negotiation of that ‘challenged agreement’, as is shown, in that respect, by the content of the communication of 16 March 2016, and that that ‘challenged agreement’ is in fact an international agreement.
- 41 The applicant disputes the contention that the European Council may, on the one hand, assert that the members of that institution acted, in this case, in their capacity as representatives of their governments or States and, on the other hand, assert that the Member States were thus able to act in the name of the European Union by binding it to a third country by what he describes as the ‘challenged agreement’, which, moreover, is

contrary to the standards laid down by the applicable secondary European Union law on asylum.

- 42 In any event, he submits, reference must be made to the terms used in the EU-Turkey statement as published by means of Press Release No 144/16, in particular the fact that it, first, refers to the fact that the ‘EU’ and the Republic of Turkey ‘agreed’ on certain additional action points, ‘decided’ and ‘reconfirmed’ certain aspects and, secondly, states the specific obligations accepted by each of the parties, which, in his view, corroborates the existence of a legally binding agreement. Furthermore, concerning the Commission’s explanations relating to the existence of a legislative and regulatory framework already enabling the financing of return operations, which was an additional action point referred to in the EU-Turkey statement, this, in the applicant’s view, suggests that what he describes as the ‘challenged agreement’ was concluded in a context enabling its implementation, which reinforces the capacity of that ‘challenged agreement’ to produce legal effects.

Preliminary considerations

- 43 As a preliminary point, it should be remembered that the action for annulment laid down in Article 263 TFEU must be available in the case of all measures adopted by the institutions, bodies, offices and agencies of the Union, whatever their nature or form, provided that they are intended to produce legal effects (judgments of 31 March 1971, *Commission v Council*, 22/70, EU:C:1971:32, paragraph 42, and of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraphs 38 and 39; see, also, judgment of 28 April 2015, *Commission v Council*, C-28/12, EU:C:2015:282, paragraphs 14 and 15 and the case-law cited). In this regard, the fact that the existence of a measure intended to produce legal effects vis-à-vis third parties was revealed by means of a press release or that it took the form of a statement does not preclude the possibility of finding that such a measure exists or, therefore, the jurisdiction of the European Union Courts to review the legality of such a measure pursuant to Article 263 TFEU, provided that it emanates from an institution, body, office or agency of the European Union (see, to that effect, judgment of 30 June 1993, *Parliament v Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 14).

- 44 With regard to the European Council, the Lisbon Treaty established that body as an institution of the European Union. Thus, contrary to what had been found previously by

the European Union Courts (orders of 13 January 1995, *Roujansky v Council*, C-253/94 P, EU:C:1995:4, paragraph 11, and of 13 January 1995, *Bonnamy v Council*, C-264/94 P, EU:C:1995:5, paragraph 11), the measures adopted by that institution, which, according to Article 15 TEU, does not exercise legislative functions and consists of the Heads of State or Government of the Member States, together with its President and the President of the Commission, no longer escape the review of legality provided for in Article 263 TFEU (see, to that effect, judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraphs 30 to 37).

45 However, it follows from Article 263 TFEU that, generally, the European Union Courts have no jurisdiction to rule on the lawfulness of a measure adopted by a national authority (judgments of 3 December 1992, *Oleificio Borelli v Commission*, C-97/91, EU:C:1992:491, paragraph 9, and of 15 December 1999, *Kesko v Commission*, T-22/97, EU:T:1999:327, paragraph 83) or of a measure adopted by the representatives of the national authorities of several Member States acting in the framework of a committee provided for in a European Union regulation (see, to that effect, judgment of 17 September 2014, *Liivimaa Lihaveis*, C-562/12, EU:C:2014:2229, paragraph 51). In the same way, measures adopted by the representatives of the Member States physically gathered in the grounds of one of the European Union institutions and acting, not in their capacity as members of the Council or European Council, but in their capacity as Heads of State or Government of the Member States of the European Union, are not subject to judicial review by the European Union Courts (judgment of 30 June 1993, *Parliament v Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 12).

46 However, it does not suffice, in this regard, that a measure is classified, by an institution featuring as the defendant in an action, as a ‘decision of the Member States’ of the European Union in order for such a measure to escape the review of legality established by Article 263 TFEU, in the present case, measures of the European Council. In order for such a measure to be excluded from review, it is still necessary to determine whether, having regard to its content and all the circumstances in which it was adopted, the measure in question is not in reality a decision of the European Council (judgment of 30 June 1993, *Parliament v Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 14).

The authors of the contested measure

- 47 Those clarifications having been made, the Court finds that, in the present case, the contested measure is formally described in the application as being the ‘agreement entered into by the European Council dated 18 March 2016 with [the Republic of] Turkey entitled “EU-Turkey statement, 18 March 2016”’, namely, a measure governed by international treaty law. However, concerning the review of legality by the European Union Courts of measures relating to international treaty law, this can concern only the measure by which an institution sought to conclude the international agreement at issue, and not the latter as such (see, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 286). The form of order sought by the applicant must therefore be understood as seeking, in essence, the annulment of a measure by which the European Council sought to conclude, on behalf of the European Union, an agreement with the Republic of Turkey on 18 March 2016 (see, to that effect, judgment of 9 August 1994, *France v Commission*, C-327/91, EU:C:1994:305, paragraph 17), the content of which was set out in the EU-Turkey statement as published by means of Press Release No 144/16.
- 48 Consequently, it is for the Court to assess whether the EU-Turkey statement, as published by means of that press release, reveals the existence of a measure attributable to the institution concerned in the present case, namely, the European Council, and whether, by that measure, that institution concluded an international agreement, which the applicant describes as the ‘challenged agreement’, adopted in disregard of Article 218 TFEU and corresponding to the contested measure.
- 49 To the extent that, for the purposes of the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, the contested measure was given form by the applicant through the production of Press Release No 144/16, the circumstances in which the EU-Turkey statement, as published by that press release, was adopted and the content of that statement must be examined in order to determine whether it may constitute or reveal the existence of a measure attributable to the European Council and, thus, falling under the review of legality laid down in Article 263 TFEU (see, to that effect, judgment of 30 June 1993, *Parliament v Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraph 14), in the present case a measure that corresponds to the

contested measure and concludes what the applicant describes as the ‘challenged agreement’.

- 50 As mentioned in the EU-Turkey statement, the meeting of 18 March 2016 was the third meeting to occur since November 2015. However, as regards the two previous meetings, which took place, respectively, on 29 November 2015 and 7 March 2016, the representatives of the Member States participated in those meetings in their capacity as Heads of State or Government of the Member States of the European Union and not as Members of the European Council.
- 51 As regards the first meeting of the Heads of State or Government, this gave rise to a press release, entitled ‘Meeting of [European Union] Heads of State or Government with [the Republic of] Turkey — EU-Turkey statement, 29 [November] 2015’, in which it was stated that it was the ‘Leaders of the European Union’ who had met with their ‘Turkish counterpart’.
- 52 As regards the second meeting of the Heads of State or Government, it gave rise to a press release, entitled ‘Statement of the [European Union] Heads of State or Government’, in which it was stated that it was the ‘[European Union] Heads of State or Government’ who had met with the Turkish Prime Minister and that ‘they [had] agreed ... on the basis of the principles ... contain[ed] [in the additional proposals made on 7 March 2016 by the Republic of Turkey]: to return all new irregular migrants [who crossed] from Turkey into the Greek islands with the costs covered by the [European Union]; to resettle, for every Syrian readmitted by [the Republic of] Turkey from Greek islands, another Syrian from Turkey to the Member States of the European Union, within the framework of the existing commitments’.
- 53 In that context, the Commission’s communication of 16 March 2016 was released, which cannot be regarded as a proposal within the meaning of Article 294(2) TFEU (see, to that effect, judgment of 30 June 1993, *Parliament v Council and Commission*, C-181/91 and C-248/91, EU:C:1993:271, paragraphs 17 and 18). That communication indicates that the ‘new phase in EU-Turkey cooperation to tackle the migration crisis will require concerted efforts from [the Hellenic Republic] and [the Republic of] Turkey, supported by the Commission, [European Union] agencies and partner organisations’ and that ‘it will also

require the support of Member States, both in terms of the provision of personnel and the willingness to make pledges for resettlement’.

- 54 However, the EU-Turkey statement, as published following the meeting of 18 March 2016 by means of Press Release No 144/16, differs in its presentation in comparison with the previous statements published following the first and second meetings of the Heads of State or Government.
- 55 Press Release No 144/16 relating to the meeting of 18 March 2016 states, first, that the EU-Turkey statement is the result of a meeting between the ‘Members of the European Council’ and their ‘Turkish counterpart’; secondly, that it was the ‘Members of the European Council’ who met with their Turkish counterpart and, thirdly, that it was ‘the EU and [the Republic of] Turkey’ which agreed on the additional action points set out in that statement. It is therefore necessary to determine whether the use of those terms implies, as the applicant submits, that the representatives of the Member States participated in the meeting of 18 March 2016 in their capacity as members of the ‘European Council’ institution or that they participated in that meeting in their capacity as Heads of State or Government of the Member States of the European Union.
- 56 In this regard, the Court notes that, although Press Release No 144/16, by which the EU-Turkey statement was published, includes, in its online version provided by the applicant as an annex to the application, the indication ‘Foreign affairs and international relations’, which relates in principle to the work of the European Council, the PDF version of that press release provided by the European Council, for its part, bears the heading ‘International Summit’, which relates in principle to the meetings of the Heads of State or Government of the Member States of the European Union with the representatives of third countries. Consequently, no conclusion can be drawn regarding the presence of those indications.
- 57 Next, with regard to the content of the EU-Turkey statement, the use of the expression ‘Members of the European Council’ and the indication that it was the European Union which agreed on the additional action points with the Republic of Turkey could, admittedly, imply that the representatives of the Member States of the European Union had acted, during the meeting of 18 March 2016, in their capacity as members of the ‘European Council’ institution and had, notwithstanding that institution’s lack of

legislative competence, as expressly mentioned in Article 15(1) TEU, decided to conclude legally an agreement with that third country outside of the procedure laid down in Article 218 TFEU.

58 However, in its reply of 18 November 2016, the European Council explained that the expression ‘Members of the European Council’ contained in the EU-Turkey statement must be understood as a reference to the Heads of State or Government of the Member States of the European Union, since they make up the European Council. Furthermore, the reference in that statement to the fact that ‘the EU and [the Republic of] Turkey’ had agreed on certain additional action points is explained by the emphasis on simplification of the words used for the general public in the context of a press release.

59 According to that institution, the term ‘EU’ must be understood in this journalistic context as referring to the Heads of State or Government of the Member States of the European Union. In this regard, the European Council insisted on the form in which the EU-Turkey statement at issue in the present case was published, namely, that of a press release which, by its nature, serves only an informative purpose and has no legal value. The defendant stresses that this informative support is produced by the press office of the General Secretariat of the Council in order to address the general public. This explains, first, the affixing, in certain documents published on the internet, such as the online version of Press Release No 144/16 relating to the EU-Turkey statement provided by the applicant, of a double header ‘European Council/Council of the European Union’, and, secondly, the fact that some documents are occasionally inadvertently placed under inappropriate sections of the internet site shared by those two institutions and the President of the European Council.

60 On account of the target audience of such informative support, the press release in which the EU-Turkey statement had been set out intentionally used simplified wording, plain language and shorthand. However, this popularisation of words cannot be used to proceed with legal and regulatory assessments and, in particular, cannot alter the content or the legal nature of the procedure to which it relates, namely, an international summit, as the PDF version of the press release relating to the EU-Turkey statement indicates.

61 Thus, according to the European Council, the inappropriate use of the expression ‘Members of the European Council’ and the term ‘EU’ in a press release, such as Press

Release No 144/16 setting out the EU-Turkey statement, cannot in any way affect the legal status and the role in which the representatives of the Member States met with their Turkish counterpart, in the present case in their capacity as Heads of State or Government, and cannot bind the European Union in any way. The EU-Turkey statement, as published by Press Release No 144/16, is in reality, it submits, merely a political commitment of the Heads of State or Government of the Member States of the European Union vis-à-vis their Turkish counterpart.

- 62 In regard to these explanations of the European Council and taking into account the ambivalence of the expression ‘Members of the European Council’ and the term ‘EU’ in the EU-Turkey statement, as published by Press Release No 144/16, reference must be made to the documents relating to the meeting of 18 March 2016 in order to determine their scope.
- 63 In this regard, the Court finds that the official documents relating to the meeting of 18 March 2016, provided by the European Council at the Court’s request, show that two separate events, that is to say, the meeting of that institution and an international summit, were organised in parallel in distinct ways from a legal, formal and organisational perspective, confirming the distinct legal nature of those two events.
- 64 First, in its replies of 18 November 2016 to the Court’s questions, the European Council explained, by producing the various items of press material published by it, that the meeting of the European Council was initially intended to extend over two days but that, taking intervening migratory events into account, it had been decided to dedicate no more than a single day to that meeting, namely, 17 March 2016, and to replace the second day of the initially envisaged meeting of the European Council, namely, 18 March 2016, by a meeting between the Heads of State or Government of the Member States of the European Union and their Turkish counterpart, a meeting which, for reasons of costs, security and efficiency, had taken place in the same building as that used for the meetings of the European Council and those of the Council.
- 65 Secondly, it follows in particular from the invitation sent on 9 March 2016 by the President of the European Council to the different Member States of the European Union that the ‘Members of the European Council’ were invited on 17 March 2016 to a meeting of the European Council, the work of which was scheduled from 16:45 to 19:30 and was

followed by a dinner, while, as regards 18 March 2016, the arrival of the '[European Union] Heads of State or Government and the Head of Government of Turkey' was scheduled between 9:15 and 9:45 and followed by a 'working lunch for the ... Heads of State or Government [of the European Union] and the Head of Government of Turkey' at 10:00. A note of 11 March 2016 sent by the General Secretariat of the Council to the Mission of the Republic of Turkey to the European Union describes, in the same terms, the course of the meeting of 18 March 2016 by inviting the Turkish Prime Minister to a meeting with the Heads of State or Government of the European Union and not with the Members of the European Council.

- 66 Furthermore, a note of 18 March 2016 of the Directorate for Protocol and Meetings of the Directorate-General 'Administration' of the Council, entitled 'Working Programme of the Protocol service', indicates, for its part, as regards the meeting of 18 March 2016, that the arrival of the 'Members of the European Council, the Prime Minister of the Republic of Turkey and the High Representative of the Union for Foreign Affairs and Security Policy' would take place without protocol order between 12:00 and 12:45 and that a 'working lunch for Members of the European Council and High Representative' would be offered from 13:00, with no mention of the Turkish Prime Minister's presence. By contrast, that note, produced by the service in charge of protocol, invited the participants to a 'working session of the ... Heads of State and Government and High Representative [of the European Union] with Prime Minister of Turkey' scheduled to begin at 15:00, corroborating the fact that it was in that latter capacity, and not in their capacity as Members of the European Council, that the representatives of the Member States of the European Union were invited to meet their Turkish counterpart.
- 67 Those documents, officially sent to the Member States of the European Union and the Republic of Turkey, 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.
- 68 In this regard, the fact that the President of the European Council and the President of the Commission, not formally invited, had also been present during that meeting cannot

allow the conclusion that, because of the presence of all those Members of the European Council, the meeting of 18 March 2016 took place between the European Council and the Turkish Prime Minister.

69 Referring to several documents produced by its President, the European Council indicated that, in practice, the Heads of State or Government of the Member States of the European Union conferred upon him a task of representation and coordination of negotiations with the Republic of Turkey in their name, which explains his presence during the meeting of 18 March 2016. Likewise, the presence of the President of the Commission in that meeting is explained by the fact that that meeting was a continuation of the political dialogue with the Republic of Turkey initiated by the Commission in October 2015 at the invitation of the Heads of State or Government of the European Union made on 23 September 2015. As the European Council correctly points out, those documents refer explicitly and repeatedly, as regards the work of 18 March 2016, to a meeting of the Heads of State or Government of the European Union with their Turkish counterpart, and not to a meeting of the European Council. That is in particular the case with regard to statement No 151/16 of the President of the European Council, communicated immediately after the meeting of 18 March 2016, entitled ‘Remarks by President Donald Tusk after the meeting of ... Heads of State or Government [of the European Union] with Turkey’.

70 In those circumstances, the Court finds that the expression ‘Members of the European Council’ and the term ‘EU’, contained in the EU-Turkey statement as published by means of Press Release No 144/16, must be understood as references to the Heads of State or Government of the European Union who, as during the first and second meetings of the Heads of State or Government on 29 November 2015 and 7 March 2016, met with their Turkish counterpart and agreed on operational measures with a view to restoring public order, essentially on Greek territory, that correspond to those already mentioned or stated previously in the statements published in the form of press releases following the first and second meetings of the Heads of State or Government of the Member States of the European Union with their Turkish counterpart. This is corroborated by the fact that the statement adopted following the second meeting of the Heads of State or Government, held on 29 November 2015, equally and invariably used the term ‘EU’ and the expression ‘European leaders’ to designate the representatives of the Member States of the European

Union, acting in their capacity as Heads of State or Government of those Member States, during that meeting of 29 November 2015, in a similar way to that of 18 March 2016.

- 71 It is clear from that overall context preceding the online publication on the Council's website of Press Release No 144/16 setting out the EU-Turkey statement that, concerning the management of the migration crisis, the European Council, as an institution, did not adopt a decision to conclude an agreement with the Turkish Government in the name of the European Union and that it also did not commit the European Union within the meaning of Article 218 TFEU. Consequently, the European Council did not adopt any measure that corresponds to the contested measure, as described by the applicant and of which the content was allegedly set out in that press release.
- 72 It follows from all of the foregoing considerations that, independently of whether it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects, the EU-Turkey statement, as published by means of Press Release No 144/16, cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measure.
- 73 For the sake of completeness, with regard to the reference in the EU-Turkey statement to the fact that 'the EU and [the Republic of] Turkey agreed on ... additional action points', the Court considers that, even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, which has been denied by the European Council, the Council and the Commission in the present case, that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister.
- 74 However, in an action brought under Article 263 TFEU, the Court does not have jurisdiction to rule on the lawfulness of an international agreement concluded by the Member States (judgment of 5 May 2015, *Spain v Parliament and Council*, C-146/13, EU:C:2015:298, paragraph 101).

- 75 Accordingly, the plea of lack of jurisdiction raised by the European Council must be upheld, bearing in mind that Article 47 of the Charter of Fundamental Rights of the European Union is not intended to change the system of judicial review laid down by the Treaties (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 97).
- 76 As the plea of lack of jurisdiction has been upheld and the action must, accordingly, be dismissed, there is no longer any need to rule on the applications for leave to intervene submitted by NQ, NR, NS, NT, NU and NV, by Amnesty International, and by the Kingdom of Belgium, the Hellenic Republic and the Commission.

Costs

- 77 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, pursuant to Article 135(1) of those rules, the General Court may, if equity so requires, decide that an unsuccessful party is to bear his own costs, but is to pay only part of the costs incurred by the other party, or even that he is not to be ordered to pay any costs.
- 78 In view of the circumstances of the present case, in particular the ambiguous wording of Press Release No 144/16, the Court deems it fair to decide that each party is to bear its own costs.
- 79 Under Article 144(10) of the Rules of Procedure, if the proceedings in the main case are concluded before the application for leave to intervene has been decided upon, the applicant to intervene and the main parties must each bear their own costs relating to the application for leave to intervene. Consequently, NG, the European Council, NQ, NR, NS, NT, NU and NV, Amnesty International, the Kingdom of Belgium, the Hellenic Republic and the Commission must bear their own costs relating to the applications for leave to intervene.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby orders:

- 1. The action is dismissed on the ground of the Court's lack of jurisdiction to hear and determine it.**
- 2. There is no need to rule on the applications for leave to intervene submitted by NQ, NR, NS, NT, NU and NV, Amnesty International, the Kingdom of Belgium, the Hellenic Republic and the European Commission.**
- 3. NG and the European Council shall bear their own costs.**
- 4. NQ, NR, NS, NT, NU and NV, Amnesty International, the Kingdom of Belgium, the Hellenic Republic and the Commission shall bear their own costs.**

Luxembourg, 28 February 2017.

E. Coulon

Registrar

I. Pelikánová

President

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