

## RESEARCH ARTICLES

### **How Safe Shall be a Third Country for Asylum-Seekers from a European Perspective? The Human Rights Implications of the EU-Turkey Deal and the Assessment of the ECHR/General Court**

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**Abstract.** As a response to the refugee crisis of 2015, the European Union reached an agreement with Turkey for return of all new irregular migrants crossing from Turkey to Greek islands. The major question this paper address related to the application of this agreement is if Turkey could be considered a safe third country for the refugees it tries to contain. Even if the Turkey 2016 Report of the European Commission and the 2016 EU Annual Report on Human Rights and Democracy in the World are critical about the current respect for rule of law and human rights in Turkey, the treatment of migrants is not considered to be a major issue. The paper takes into account the ECHR and the General Court perspectives on human rights in the light of the EU - Turkey agreement which seems to be in line with the EU view. The conclusion is that the „offshoring” of the EU migration and asylum policy has been developed before the 2015 refugee crisis and the EU - Turkey agreement is just one step forward in this direction.

**Keywords:** *asylum - seekers, ECHR, EU, human rights, General Court, migration, Turkey*

#### **EU - Turkey agreements 2015 - 2016**

The EU - Turkey deal is an idea that emerged long before the refugee crisis of 2015. It was related to the Arab Spring events and subsequently the start of the Syrian civil war. Turkey is a natural gateway to Europe and it was affected by smaller influx of refugees before 2015. Apart from the response of the European Union and of the Member States, a Joint Action Plan has been signed between EU and Turkey<sup>1</sup>.

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<sup>1</sup> EU Turkey Joint Action Plan, [http://europa.eu/rapid/press-release\\_MEMO-15-5860\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm), accessed on 25 May 2018.

A statement of the European Council followed in March 2016<sup>2</sup> and the final step was the EU - Turkey agreement during the same month.

The Action Plan is the result of a joint initiative of Turkey and the EU. Turkey promised to apply a policy of refugee containment, in order to stop them from coming to Europe. It offered protection to those refugees staying in Turkey. The EU offered financial support and it answered in a positive way to the Turkey demand of liberalising the visa regime for Turkish citizens.

When the Action Plan has been officially released, the EU has been criticised because it treated the same people as in need of protection while in Turkey and as irregular migrants as they reach the territory of the EU<sup>3</sup>. Member States were not so enthusiastic in adopting the relocation scheme proposed by the Commission and therefore they very much support the Action Plan. It is not the desire to fulfil international human rights obligations, but rather the will to find an alternative solution to the one proposed by the Commission. The Action Plan has been designed in such a way to give as much as possible protection to the refugees while they choose to stay in Turkey. The priority for delivering funds is given to

„actions providing immediate humanitarian assistance; provision of legal, administrative and psychological support; support for community centres; the enhancement of self-sufficiency and participation in economy and their social inclusion during their stay in Turkey; improved access to education at all levels; but also actions supporting host communities in areas such as infrastructure and services”<sup>4</sup>.

Turkey promised to fulfil three major obligations:

„Continue to ensure that migrants are registered and provided with appropriate documents on a compulsory basis to enable to build a stronger migration management strategy and system.

Continue to ensure efforts to adopt and implement policies, legislation and programmes facilitating for Syrians under temporary protection to have access, for

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<sup>2</sup> European Council, *Statement of the EU heads of State and Government* <http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement>, accessed on 15 September 2018.

<sup>3</sup> Idil ATAŞ, *A look at the EU - Turkey Action Plan*, <http://francoiscrepeau.com/fr/a-look-at-the-eu-turkey-action-plan>, accessed on 15 September 2018.

<sup>4</sup> EU Turkey Joint Action Plan, *op. cit.*

the duration of their stay in Turkey, to public services including education for pupils, to health services and participation in economy.

Ensure that vulnerable people continue to be identified and taken care of”.

The main problem of refugee move across the borders is not mentioned as it would be the case. There is only a mention to EU support in order to weakening of „push factors forcing them to move towards Turkey”. The possibility of a humanitarian intervention in Syria or in the states from where the refugees are coming from is not mentioned at all. The Action Plan mentions the support for EU resettlement schemes - it was the specific demand of the EU in order to get a better position in the tough negotiation on this issue with some Member States.

In order to prevent irregular migration, EU and Turkey promised to strenghten the capacity of the Turkish Coast Guard for surveillance and boost cooperation with some Member States. Turkey promised to implement an agreement with Greece and Bulgaria for the establishment of a common centre in Capitan Andreevo but this was just a promise not fulfilled.

EU provided funding for Turkey to enhance the „capacities and developing a well-functioning asylum, migration, visa, and integrated border management system in line with the EU - Turkey visa dialogue”. Frontex is the EU agency in charge with the deployment of the liaison officers that were operating on the ground. Turkey promised to ensure smooth readmission procedures and the rapid processing of asylum requests in order that the status of refugee could be granted „without delay to those whose asylum requests are positively assessed”.

The second document that is relevant for the EU - Turkey common assesement of the refugee problem has been the Joint Statement of 7 March 2016<sup>5</sup>. They agreed the following:

- The return of all new irregular migrants crossing from Turkey into the Greek islands with the costs covered by the EU;
- The resettlement, for every Syrian readmitted by Turkey from Greek islands, of another Syrian from Turkey to the EU Member States, within the framework of the existing commitments;

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<sup>5</sup> <http://www.consilium.europa.eu/en/meetings/international-summit/2016/03/07/>, accessed on 15 September 2018.

- The implementation of the visa liberalization roadmap with all Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016;
- The use of EUR 3 billion that were initially allocated in order to fund the first set of projects and to decide on additional funding for the refugee facility for Syrians;
- The opening of new chapters in the accession negotiations;
- EU and Turkey shall work to improve conditions inside Syria which would allow for the local population and refugees to live in areas which will be more safe.

On 18 March 2016 the EU - Turkey agreement has been reached, in the form of a Joint Statement between EU heads of state and government and the Turkish authorities<sup>6</sup>. According to this agreement, the following issues have to be monitored every month:

- The principle of no blanket expulsion is the cornerstone of this agreement. The principle of readmission to Turkey of the migrants crossing from Turkey to Greek islands is connected with it. Migrants who reach Greece and claim asylum have to be registered in line with the Directive 2013/32/EU on common procedures for granting and withdrawing international protection<sup>7</sup>. Those who remain (not applying for asylum or not eligible for protection) have to be returned to Turkey and the EU covers the expenses connected with.
- Another principle is that for every Syrian being returned to Turkey from Greece another Syrian will be resettled from Turkey to the EU. Then every person in such a situation will be send to one member state according to the commitments they made in the framework of the relocation scheme.
- Turkey promised to take all the available measures to block the possibilities of opening new routes for illegal migration from his territory

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<sup>6</sup> European Council, *Statement of the EU heads of State and Government*, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, accessed on 15 September 2018.

<sup>7</sup> OJ L 180, 29.6.2013, p. 60 - 95.

to EU, in cooperation with the neighbouring countries (including Syria) and the EU Member States.

- The next step, after the limitation of refugee influx, is the implementation of the Voluntary Humanitarian Admission Scheme - the hosting of refugees by EU Member States as a voluntary gesture.
- The EU shall liberalise the visa requirements for Turkish citizens, once the obligations of Turkey are fulfilled.
- The Customs Union between EU and Turkey will be discussed in order to enhance its content.
- Chapter 33 of negotiations between the EU and Turkey shall be open.

The EU and Turkey have to work together to find better solutions to the humanitarian crisis.

### **Is it Turkey a safe third country for refugees, according to the EU standards?**

The deal between the EU and Turkey has been criticized from the perspective of international and European asylum law<sup>8</sup>. It has opened a discussion related to the relationship between democracy and the EU law<sup>9</sup>. Another critics has been related to the human rights protection safeguards. The fact that the EU delegates its powers to control external borders to countries with a weak judicial system and a non-governmental sector underdeveloped and not prepared to deal with a humanitarian crisis is considered a dangerous development that could lead to human rights violations<sup>10</sup>.

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<sup>8</sup> Philippe De BRUYCKER, Henri LABAYLE, *L'accord Union Européenne - Turquie : Faux Semblant Ou Marché de Dupes ?*, <http://www.gdrelsj.eu/2016/03/23/asile/laccord-union-europeenne-turquie-faux-semblant-ou-marche-de-dupes/>, accessed on 15 September 2018;  
Ruma MANDAL, *EU-Turkey Refugee Deal Is Vulnerable to Legal Challenge*, <https://www.chathamhouse.org/expert/comment/eu-turkey-refugee-deal-vulnerable-legalchallenge>, accessed on 15 September 2018;  
Steve PERS, *The Final EU/Turkey Deal: A Legal Assessment*, <http://eulawanalysis.blogspot.it/2016/03/the-final-euturkey-refugee-deal-legal.html>, accessed on 15 September 2018.

<sup>9</sup> Mauro GATTI, *The EU - Turkey Statement: A Treaty That Violates Democracy*, <http://ejiltalk.org>, accessed on 15 September 2018.

<sup>10</sup> Adam LUEDTKE, "Crisis" and Reality in European Immigration Policy, *Current History*, 114(70):89, March 2015, 92.

Is it Turkey a safe third country for the refugees it tries to contain in order to not reach the shores of the EU? If the answer is positive, a refugee passing through Turkey cannot receive asylum because of human rights abuses. His application would be declared inadmissible according to the Article 33 of the Directive 2013/32/EU<sup>11</sup>, after an interview (Article 34). For an answer to this question we shall examine if Turkey fulfils the criteria of a safe third country that are described in Article 38. These criteria are the following:

- Life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- There is no risk of serious harm as defined in Directive 2011/95/EU<sup>12</sup>;
- The principle of non-*refoulement* in accordance with the Geneva Convention is respected;
- The prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman and degrading treatment as laid down in international law is respected;
- The possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

In order to assess these criteria, we may look at the latest *Turkey 2016 Report* of the European Commission<sup>13</sup>. This Report underline that „significant steps have been taken to decrease deaths at sea and reduce the numbers of migrants leaving Turkey for Greece and also that out of EUR 3 billion of the total funding for 2016 and 2017, EUR 2.2 billion have already been allocated for actions in support of refugees and host communities in Turkey. Nevertheless, the human rights situation downgraded since Turkey notified the Council of Europe of a derogation from its obligation to secure a number of fundamental rights protected by the ECHR.

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<sup>11</sup> Directive 2013/32/EU on common procedures for granting and withdrawing international protection, *op. cit.*

<sup>12</sup> Directive 2011/95/EU 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, OJ L 337, 20.12.2011, p. 9 - 26.

<sup>13</sup> Commission Staff Working Document, *Turkey 2016 Report* accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2016 Communication on EU Enlargement Policy* COM (2016) 715 final, Brussels, 9.11.2016 SWD (2016) 366 final.

According to the European Commission, there has been backsliding with regard to the independence of the judiciary. The implementation of the March 2016 Statement is considered by the Commission as satisfactory overall - cooperation has been „smooth, facilitated by liaison officers deployed by each party” and „return operations from Greek islands to Turkey are carried out on the basis of commonly agreed readmission lists” - but Turkey has to fulfil further requirements:

„Align the legislation on personal data protection with European standards and accordingly negotiate an operational cooperation agreement with Europol;

Revise its legislation and practices on terrorism in line with the ECHR”.

The conclusion is that, for the moment, Turkey is still a safe third country for the refugees it hosted, even if serious concerns could be raised in the framework of neglecting democracy and rule of law standards as Turkey moves towards an authoritarian regime.

The EU - Turkey agreement has been criticized because the Turkish asylum system was considered abusive even before the refugee crisis of 2015 and the failed *coup d'état* in 2016. It has been considered that the agreement may have worsened the difficult situation of asylum-seekers. UNHCR has alleged that the asylum-seekers and migrants who arrived in Greece after the entry into force of the agreement (20 March 2016) have been detained and were subject to the new return policy. As a consequence of this situation, many international NGOs that worked in Greece with refugees have suspended their operations in the „hotspots”, fearing that they could be „instrumentalized for a mass expulsion operation” (Medicins sans Frontières, International Rescue Committee, Norwegian Refugee Council, Save the Children, etc.). Refugees started to be sent to Turkey on 4 April 2016<sup>14</sup>.

In the 2016 EU Annual Report on Human Rights and Democracy in the World adopted on 16 October 2017 it has said that:

„Reform and capacity-building needs under the rule of law and fundamental rights...remained a high priority in 2016, in a particularly sensitive context, not least in the aftermath of the July 2016 coup attempt. From the perspective of implementation, very large budgets have already been mobilised for Turkey in 2015 and 2016 for migration, asylum and border management as a consequence of the migration crisis and the implementation of the Visa Liberalisation Roadmap, while assistance relating to the refugee crisis will continue to be mobilised through the

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<sup>14</sup> Mauro GATTI, *op. cit.*

facility for refugees in Turkey. Political and institutional uncertainties experienced by some key beneficiaries after the coup attempt are also being taken into consideration”<sup>15</sup>.

This document is therefore more critical than the *Turkey 2016 Report* about the implementation of the EU - Turkey agreement, even if it does not say who are the „key beneficiaries” that were not able to use the provisions of that agreement.

The European Commission have released a report on the implementation of the EU - Turkey deal. This report does not mention refugees human rights as an issue but it offers an important information: only 103 Syrian refugees has been resettled<sup>16</sup>.

It is not clear how Frontex and its supposed enhanced cooperation with the Turkish Coast Guards, according to the EU - Turkey agreement, is beneficial for the rights of refugees intercepted in the sea, a purpose that has been reiterated on a number of occasions by the EU officials. The Turkey 2016 Report mention only the positive role played in this regard by „Turkey’s law enforcement agencies”<sup>17</sup>.

### **EU - Turkey agreement in the light of the ECHR and of the General Court cases**

The ECHR has been confronted so far with two cases related to the EU - Turkey agreement. The first case, *Allaa Kaak and Others v. Greece*<sup>18</sup>, is not solved yet. The applicants are 51 people detained on the Greek island of Chios, that irregularly arrived between 20 March and 15 April 2016, are complaining that they formulated asylum demands but their demands could not be registered. They complain about the detention conditions that are contrary, in their opinion, to Articles 2 and 3 of the Convention, to Article 5 §1 f) (detention conditions, based only on a administrative decision) and Article 5 § 4 (the authorities have denied their right to address to a judicial authority). The second case, *J.R. and Others v. Greece*<sup>19</sup> is

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<sup>15</sup> *Annual Report on Human Rights and Democracy in the World*, [https://eeas.europa.eu/headquarters/headquarters-homepage/33993/annual-report-human-rights-and-democracy-world-2016\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/33993/annual-report-human-rights-and-democracy-world-2016_en), accessed on 15 September 2018.

<sup>16</sup> European Commission, *Managing the Refugee Crisis: Commission Reports on Implementation of EU - Turkey Statement*, [http://europa.eu/rapid/press-release\\_IP-16-1444\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1444_en.htm), accessed on 15 September 2018.

<sup>17</sup> Commission Staff Working Document, *Turkey 2016*, *op. cit.*

<sup>18</sup> Requête no. 34215/16, *Allaa Kaak et autres contre la Grèce* introduite le 16 juin 2016, <http://www.asylumlawdatabase.eu/en/content/ecthr-communicated-cases-against-russia-greece-france-denmark-and-switzerland>, accessed on 15 September 2018.

<sup>19</sup> Appl. no. 22696/16, 25.01.2018.

already solved on 25 January 2018. The applicants are Afghan nationals who irregularly arrived on the same Greek island of Chios where they were placed in a refugee centre. They complained about the conditions and length of their detention in the centre, relying on Article 5 § 1 of the Convention, they complained about denial of the right to be informed of charge, relying on Article 5 § 2 of the Convention and J.R. complains about the fact that they were questioned by the police in October 2016 concerning his application to the ECHR, considering that this is an attempt to intimidate him and dissuade him from pursuing his case. The ECHR considered that a detention period of one month cannot be considered as excessive and also that the conditions were not severe enough for their detention to be characterised as inhuman or degrading treatment. The ECHR found that „*while the applicants could have been aware that they had entered Greece unlawfully, they might not know that their situation is covered by the EU - Turkey Declaration, signed the day before their arrest...even if they had received an information leaflet...its content was not such as to provide them with sufficient details about the reasons for their arrest or the remedies available to them*”. Therefore, the ECHR considered that there has been a violation of Article 5 § 2.

The ECHR does not tell everything in this case neither about the legitimacy of the Greek detention centres, nor about the issue if Turkey is a safe third country for asylum - seekers. The ECHR did not clarify the nature of the EU - Turkey Statement: it refers to it as an „agreement” („accord” in the French version) but does not say anything about its legal nature. The General Court of the EU has ruled already that it does not have jurisdiction over the EU - Turkey Statement<sup>20</sup>, leaving unanswered the question whether it is only a political statement or a measure capable of producing legal effects. The General Court said the Statement was concluded between EU Member States and Turkey and not between EU and Turkey. The case is not over, since an appeal is pending before the Court of Justice<sup>21</sup>. According to one opinion, the General Court wrongly characterized the Statement as an agreement

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<sup>20</sup> Cases T-192/16 (*NF v. European Council*), T-193/16 (*NG v. European Council*) and T-257/16 (*NM v. European Council*). About these cases, see Narin IDRIZ, *The EU-Turkey Deal in Front of the Court of Justice of the EU: An Unsolicited Amicus Brief* (December 1, 2017). T.M.C. Asser Institute for International & European Law, Policy Brief 2017-03, available at SSRN: <https://ssrn.com/abstract=3080838>, accessed on 25 May 2018.

<sup>21</sup> Annick PIJNENBURG, *JR and Others v Greece: what does the Court (not) say about the EU-Turkey Statement?*, <https://strasbourgobservers.com/2018/02/21/jr-and-others-v-greece-what-does-the-court-not-say-about-the-eu-turkey-statement/>, accessed on 15 September 2018.

between EU Member States and a third country, since EU Member States have no competence to act on their own on a subject matter of readmission of refugees to Turkey<sup>22</sup>.

## Conclusions

The foundations of the EU - Turkey deal were laid much time before the refugee crisis emerged, since the beginning of a coherent EU migration policy. The so-called „offshoring” of immigration and asylum policy<sup>23</sup> has been developed through Frontex, agreements with third countries about return of refugees and, the most remarkable achievement, the Dublin Convention. Requiring the application of asylum to be processed in the first country applicants arrived is the cornerstone of the current „offshoring” of the migration policy. Member States have a paradoxical position: they complain about the EU having more power on migration issues, but they are happy to create a European database for asylum - seekers, because they does not want to be confronted with such a problem. The EU have also a paradoxical attitude towards migration: it tries to promote human rights in its neighborhood and oppose the neglect of them by third countries, but it see Turkey as a reliable partner in dealing with migration issues. EU Member States does not want to create a long-term, self-sustainable system for the protection of asylum - seekers. They prefer to hide the lack of political will behind the support for the EU involvement in this matter. If the Court of Justice or the ECHR will challenge the current status quo by defining the EU - Turkey deal as a legal document and/or as a document not signed by the EU Member states but by the EU remains to be seen. After all, the main issue at stake are the human rights of the asylum seekers, but it seems that this is not considered to be at the heart of the current debate about how to tackle the migration challenges.

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<sup>22</sup> Narin IDRIZ, *The EU-Turkey Statement or the 'Refugee Deal': The Extra-Legal Deal of Extraordinary Times?*, T.M.C. Asser Institute for International & European Law Research Paper no. 2017-06, available at SSRN: <https://ssrn.com/abstract=3080881>, accessed on 15 September 2018.

<sup>23</sup> Adam LUEDTKE, *op. cit.*, p. 91.