

LEGAL ANALYSIS OF THE NON-REFOULEMENT PRINCIPLE IN THE CONTEXT OF THE EU-TURKEY DEAL

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ABSTRACT

The present paper examines the compliance of the EU-Turkey Agreement of 18 March 2016¹ with the principle of non-refoulement² - a cornerstone of the international refugee law.³ EU-Turkey Statement envisages returning asylum-seekers arriving irregularly to the Greek islands via Turkey, to the latter. The mass return of the asylum seekers to the Republic of Turkey “raises eyebrows regarding the legality of the agreement”.⁴

INTRODUCTION

“No one would leave home unless home chased you”
Warsan Shire, “Home”

On March 7, 2016, high-level representatives from the European Union (hereinafter – EU) and the Prime Minister of the Republic of Turkey (hereinafter – Turkey) came to an agreement known as the EU-Turkey Statement (hereinafter – EU-Turkey Deal), designated to handle the massive influx of asylum-seekers into the EU.⁵ The deal envisages returning asylum-seekers arriving irregularly to the Greek islands via Turkey, to the latter.⁶ As the European Commission stated, such returns will be in conformity with international and European law.⁷ The legal basis for such returns is allegedly found in the EU recast Asylum Procedures Directive - 2013/32/EU (hereinafter – APD/Directive),⁸ particularly, in the concept of a *safe third country*.⁹ *Safe third country* rule authorizes receiving state to send back persons claiming international protection to any *safe* non-member state through which s/he passed en route. The success of the deal relies on the assumption that Turkey constitutes a

¹ European Union: Council of the European Union, EU-Turkey statement, 18 March 2016.

² Convention Relating to the Status of Refugees, Art. 33(1).

³ Farmer, A., “Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection”, 37.

⁴ Borges, “The EU-Turkey Agreement: Refugees, Rights and Public Policy”, 124.

⁵ Poon, J., “EU-Turkey Deal: Violation of, or Consistency with, International Law?”, European Papers - Journal on Law and Integration, (2016): 1195, accessed on 22 December, 2019, <http://www.europeanpapers.eu/en/europeanforum/eu-turkey-deal-violation-or-consistency-with-international-law>

⁶ Borges, “The EU-Turkey Agreement: Refugees, Rights and Public Policy”, 123.

⁷ UN High Commissioner for Refugees, “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”, (2016), accessed on 22 December, 2019, <https://www.refworld.org/docid/56f3ee3f4.html>

⁸ Directive 2013/32/EU of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection (Recast), 26 June 2013, accessed on 22 December, 2019, <http://www.refworld.org/docid/51d29b224.html>

⁹ The “*safe third country concept*” is to be applied in cases where an asylum seeker could, in a previous state, could have applied for international protection, but has not done so, or where protection was sought but status was not determined.

safe third country. Taking into account Turkey's current asylum system and its history of the refoulement of non-European asylum seekers, the EU's aforementioned assumption, as well as the agreement itself, was widely criticized by the domestic and international human rights organizations and migration experts.¹⁰ It is argued that designating Turkey as a *safe third country* (without thorough examination) creates the risk of “*deportation chains when asylum seekers are transferred from state to state and back to their country of origin eventually amounting to a refoulement chain*”.¹¹

1. THE PRINCIPLE OF NON-REFOULEMENT UNDER INTERNATIONAL LAW THE SCOPE AND CONTENT OF THE PRINCIPLE OF NON-REFOULEMENT

“*The most urgent need of refugees is to secure entry into a territory in which they are sheltered from the risk of being persecuted*”.¹² There are many cases illustrating potentially harsh consequences of the states' failure to recognize the aforementioned need, for instance notorious example when 907 German Jews, who fled persecution in their homeland, were refused to enter the territory of Cuba. Afterward, these refugees were denied permission to enter by every Latin American country.¹³

Since secure entry of asylum seekers to a territory of the receiving state constitutes their most urgent need, the principle of *non-refoulement*, which requires admission and non-rejection of the asylum seekers at the border of a state,¹⁴ constitutes a cornerstone of the international refugee law¹⁵. The principle of *non-refoulement* is codified in Article 33(1) of the Convention Relating to the Status of Refugees (hereinafter – Refugee Convention),¹⁶ according to which “*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*”.¹⁷ The principle applies to all asylum seekers irrespective of their immigration status.¹⁸ The Principle can be violated directly as well as indirectly since it is not limited to acts committed upon

¹⁰ Gkliati, M. “The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee”, 82.

¹¹ Borges, “The EU-Turkey Agreement: Refugees, Rights and Public Policy”, 138.

¹² James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005), 275-279.

¹³ *id.*, pp.279-282.

¹⁴ Susan Kneebone, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives*, (2009), 11-12.

¹⁵ Farmer, A., “Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection”, 37.

¹⁶ Convention Relating to the Status of Refugees, 28 July 1951, accessed on 22 December, 2019, <https://www.refworld.org/docid/3be01b964.html>.

¹⁷ *id.*, Article 33(1).

¹⁸ UN Human Rights Committee, “CCPR General Comment No. 15: The Position of Aliens under the Covenant”, (1986), accessed on 22 December, 2019, <https://www.refworld.org/docid/45139acfc.html>.

a state's territory and extends to the idea of "chain" refoulement, covering indirect removal to a place of persecution.¹⁹

Article 33 (2) of the Refugee Convention foresees exceptions to the mentioned principle.²⁰ However, "international human rights law and most regional refugee instruments set forth an absolute prohibition of refoulement, without exceptions of any sort".²¹

LEGAL FRAMEWORK OF THE PRINCIPLE OF NON-REFOULEMENT

Apart from the Refugee Convention, the principle of *non-refoulement* is mirrored in the number of international and regional instruments, including but not limited to the following:

a. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²² The latter in its Article 3 states: "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".²³ Protection of asylum seekers and refugees from refoulement to a country where they would be at risk of torture is part of customary international law and has attained the rank of a peremptory norm of international law or *jus cogens*;²⁴

b. The International Covenant on Civil and Political Rights.²⁵ Articles 6 and 7 of the Covenant prohibit arbitrary deprivation of life (Article 6) and torture or cruel, inhuman or degrading treatment or punishment (Article 7). Obligations under these Articles also encompass prohibition of return of the person to a country where s/he

¹⁹ Susan Kneebone, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives*, (2009), 11-12.

²⁰ Under the Refugee Law, non-refoulement principle may not apply to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

²¹ UN High Commissioner for Refugees, "UNHCR Note on the Principle of Non-Refoulement", (1997), accessed on 22 December, 2019, <https://www.refworld.org/docid/438c6d972.html>

²² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, accessed on 22 December, 2019, <https://www.refworld.org/docid/3ae6b3a94.html>

²³ *id.*, Article 3(1).

²⁴ UN High Commissioner for Refugees, "UNHCR Note on Diplomatic Assurances and International Refugee Protection", (2006), accessed on 22 December, 2019, <https://www.refworld.org/docid/44dc81164.html>; UN High Commissioner for Refugees, "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol", (2007), accessed on 22 December, 2019, <https://www.refworld.org/docid/45f17a1a4.html>; *Prosecutor v. Anto Furundzija*, 1998, ICTY, ¶¶134-164, accessed on 22 December, 2019, <http://www.icty.org/case/furundzija/4>

²⁵ *International Covenant on Civil and Political Rights*, 16 December 1966, accessed on 22 December, 2019, <https://www.refworld.org/docid/3ae6b3aao.html>

will be subjected to the aforementioned treatment;²⁶

c. Other international and regional human rights treaties encompassing the principle of *non-refoulement* include International Convention for Protection of All Persons from Enforced Disappearances;²⁷ the American Convention on Human Rights;²⁸ the European Convention on Human Rights;²⁹ EU Qualification Directive;³⁰ Charter of Fundamental Rights of the European Union,³¹ etc.

The principle of *non-refoulement* has also been recognized as part of customary international law.³² As such, it is binding on all states, including those, which have not yet become a party to the Refugee Convention and/or its 1967 Protocol.³³

THE PRINCIPLE OF NON-REFOULEMENT UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Even though the European Convention on Human Rights (hereinafter – ECHR or Convention)³⁴ does not enshrine provisions, which explicitly protect the right

²⁶ *id.*, Articles 6,7.

²⁷ International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2010, Article 16, accessed on 22 December, 2019, <https://www.refworld.org/docid/47fdfae0.html>.

²⁸ American Convention on Human Rights, 22 November 1969, Article 22, accessed on 22 December, 2019, <https://www.refworld.org/docid/3ae6b36510.html>.

²⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Article 3, accessed on 22 December, 2019, <https://www.refworld.org/docid/3ae6b3b04.html>.

³⁰ Directive 2011/95/EU of the European Parliament and of the Council on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast), 20 December 2011, Article 21, accessed on 22 December, 2019, <https://www.refworld.org/docid/4f197df02.html>.

³¹ Charter of Fundamental Rights of the European Union, 26 October 2012, Article 18, accessed on 22 December, 2019, <https://www.refworld.org/docid/3ae6b3b70.html>.

³² 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”, (1994), accessed on 22 December, 2019, <https://www.refworld.org/docid/437b6db64.html>; “Note on Migration and Principle of Non-refoulement”, International Review of the Red Cross, (2018):344, accessed on 22 December, 19, <https://international-review.icrc.org/articles/note-migration-and-principle-non-refoulement-icrc-2018>; UN High Commissioner for Refugees, “Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol”, (2007), accessed on 22 December, 2019, <https://www.refworld.org/docid/45f17a1a4.html>; Declaration on Territorial Asylum, 1967, Article 3, accessed on 22 December, 2019, <https://www.refworld.org/docid/3bofo5a2c.html>.

³³ *id.*

³⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, accessed on 22 December, 2019, <https://www.refworld.org/docid/3bofo5a2c.html>.

to seek and enjoy asylum, Convention, within the framework of its different provisions, created effective supervisory mechanism protecting individuals from arbitrary expulsion, which is not foreseen by the Refugee Convention.³⁵

ECHR and case law of the European Court of Human Rights (hereinafter – ECtHR or Court) established a higher standard for the protection of the rights of the asylum seekers.³⁶ The Court has on many occasions acknowledged the importance of the principle of *non-refoulement*.³⁷ In its landmark Judgement in *Soering v. The United Kingdom*,³⁸ the Court ruled that: “the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, where substantial grounds have been shown for believing that the person concerned if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country”³⁹.

After this landmark decision, the Court in further judgments confirmed that the expulsion of an asylum-seeker to her/his country of origin may cause violation of Article 3 of the Convention.⁴⁰ For instance: in the *Cruz Varas v. Sweden*,⁴¹ the Court affirmed that principles established in the *Soering Case* shall be used in extradition and refoulement cases relating to the asylum seekers.⁴² The same approach was upheld by the Court in *Vilvarajah v. the United Kingdom*,⁴³ *Ahmed v Austria*,⁴⁴ *Chahal v the UK*,⁴⁵ etc.

2. THE EU-TURKEY DEAL

EU-Turkey bilateral relations have always been characterized by complexity and mutual ambivalence. EU “refugee crisis” developed new dynamics in the

www.refworld.org/docid/3ae6b3bo4.html.

³⁵ ხუციშვილი, ქ. “ექსტრადიციისა და დეპორტაციის საკითხი ადამიანი უფლებათა და ძირითად თავისუფლებათა დაცვის ევროპული კონვენციის მიხედვით”, 317-318.

³⁶ *id.*

³⁷ *M.S.S. v. Belgium and Greece*, 2011, European Court of Human Rights, accessed on 22 December, 2019, <https://www.refworld.org/cases,ECHR,4d39bc7f2.htm>; *Vilvarajah and Others v. The United Kingdom*, 1991, European Court of Human Rights, ¶ 108, accessed on 22 December, 2019, <https://www.refworld.org/cases,ECHR,3ae6b7008.html>

³⁸ *Soering v. The United Kingdom*, 1989, European Court of Human Rights, accessed on 22 December, 2019, <https://www.refworld.org/cases,ECHR,3ae6b6fec.html>

³⁹ *id.*, ¶ 91.

⁴⁰ ხუციშვილი, ქ. “ექსტრადიციისა და დეპორტაციის საკითხი ადამიანი უფლებათა და ძირითად თავისუფლებათა დაცვის ევროპული კონვენციის მიხედვით”, 324-327.

⁴¹ *Cruz Varas and Others v. Sweden*, 1991, European Court of Human Rights, accessed on 22 December, 2019, <https://www.refworld.org/cases,ECHR,3ae6b6fe14.html>

⁴² *id.*, ¶ 70.

⁴³ *Vilvarajah and Others v. The United Kingdom*, 1991, European Court of Human Rights, ¶ 108, accessed on 22 December, 2019, <https://www.refworld.org/cases,ECHR,3ae6b7008.html>

⁴⁴ *Ahmed v Austria*, 1996, European Court of Human Rights, ¶ 39, accessed on 22 December, 2019, <https://www.refworld.org/cases,ECHR,3ae6b62f2c.html>

⁴⁵ *Chahal v. The United Kingdom*, 1996, European Court of Human Rights, ¶ 74, accessed on 22 December, 2019, <https://www.refworld.org/cases,ECHR,3ae6b69920.html>

aforementioned relations.⁴⁶ Turkey, which is used as a transit zone by the asylum-seekers coming to Europe from Syria or Iraq, constitutes an important factor in the migration policy of Europe.⁴⁷

The negotiation on the EU-Turkey readmission agreement was initiated in 2002. The final draft of the Agreement was prepared after 10 years in June 2012. In December 2013, the first roadmap on implementing the Agreement was created, according to which the readmission of the third-country nationals to Turkey would likely begin after the end of 2016. After the adoption of the roadmap, the negotiations were suspended. However, in 2016, as a result of the unprecedented influx of asylum-seekers in Europe from the Middle East and African countries, EU officials decided to re-negotiate the agreement with Turkey. Consequently, on March 7, 2016, high-level representatives from the EU and the Prime Minister of Turkey came to an agreement (which was finally adopted on 16 March 2018) commonly referred to as EU-Turkey Deal.⁴⁸

The deal envisages returning asylum-seekers arriving irregularly to the Greek islands via Turkey, to the latter.⁴⁹ The readmission agreement establishes three operational procedures:

- a) All irregular migrants (including asylum seekers whose claims have been declared inadmissible) crossing from Turkey into Greek islands will be returned and readmitted to Turkey;
- b) For every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to the EU;
- c) 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.⁵⁰

The deal entered into force on 20 March 2016. It is implemented by the Greek Asylum Service, which is responsible to deal with asylum applications. Since its adoption, the agreement has been in the “*midst of significant political and legal turmoil*”.⁵¹ The United Nations High Commissioner for Refugees (hereinafter – UNHCR), scholars and domestic and international non-governmental organizations expressed their

⁴⁶ Ott, A., “EU-Turkey Cooperation in Migration Matters: A Game Changer in a Multi-layered Relationship?”, *Asser Institute for International & European Law*, (2017):5, accessed on 22 December, 19, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3118921.

⁴⁷ Poon, J., “EU-Turkey Deal: Violation of, or Consistency with, International Law?”, *European Papers - Journal on Law and Integration*, (2016): 1195, accessed on 22 December, 2019, <http://www.europeanpapers.eu/en/europeanforum/eu-turkey-deal-violation-or-consistency-with-international-law>.

⁴⁸ *id.*

⁴⁹ Borges, “The EU-Turkey Agreement: Refugees, Rights and Public Policy”, 123.

⁵⁰ EU-Turkey Statement of the European Council, 18 March 2016, accessed on 22 December, 2019, <https://www.refworld.org/docid/5857b3444.html>.

⁵¹ Gkliati, M. “The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee”, 82-83.

concerns regarding “the lack of international protection and procedural safeguards for asylum claimants and refugees which the Deal applies to”.⁵²

3.COMPLIANCE OF THE EU-TURKEY DEAL WITH THE PRINCIPLE OF NON-REFOULEMENT

The major concern in relation to the Deal is that it might lead to a violation of the principle of *non-refoulement*, namely it might create the risk of “chain” refoulement, covering indirect removal of asylum seekers to a place of persecution.⁵³

As it was stated by the European Commission, the procedure of the return of asylum seekers will be in conformity with international and European law.⁵⁴ The legal basis for such returns is allegedly found in APD⁵⁵, particularly, in the concept of a *safe third country*.⁵⁶ *Safe third country* rule authorizes receiving states to send back persons claiming international protection to any *safe* state through which s/he passed en route. The success of the deal is relied on the assumption that Turkey constitutes a *safe third country*. This assumption was widely criticized by domestic and international human rights organizations and migration experts.⁵⁷ Since agreement envisages the return of the hundreds of asylum seekers to Turkey, it is argued that there exists the risk of indirect refoulement of asylum seekers unless fair and effective asylum procedure will be provided by Turkey. In light of the above, two issues should be analyzed: 1) whether Turkey constitutes a *safe third country*; 2) whether Turkey has a fair and effective asylum system.⁵⁸

TURKEY AS A SAFE THIRD COUNTRY

Article 33(2) of the APD allows the state obliged to consider a refugee claim, to send the applicant onward to a *safe third country*. To qualify as a *safe third country*, the mere determination that the destination country is prepared to consider the applicant’s

⁵² Poon, J., “EU-Turkey Deal: Violation of, or Consistency with, International Law?”, European Papers - Journal on Law and Integration, (2016): 1196, accessed on 22 December, 2019, <http://www.europeanpapers.eu/en/europeanforum/eu-turkey-deal-violation-or-consistency-with-international-law>

⁵³ Susan Kneebone, Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives, (2009), 11-12.

⁵⁴ UN High Commissioner for Refugees, “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”, (2016), accessed on 22 December, 2019, <https://www.refworld.org/docid/56f3ee3f4.html>

⁵⁵ Directive 2013/32/EU of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection (Recast), 26 June 2013, Article 33, accessed on 22 December, 2019, <http://www.refworld.org/docid/51d29b224.html>

⁵⁶ The “*safe third country concept*” is to be applied in cases where an asylum seeker could, in a previous state, have applied for international protection, but has not done so, or where protection was sought but status was not determined.

⁵⁷ Gkliati, M. “The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee”, 82.

⁵⁸ Borges, “The EU-Turkey Agreement: Refugees, Rights and Public Policy”, 126.

claim on international protection is deemed sufficient.⁵⁹ Therefore, the *safe third country* rule can be criticized since it does not impose an obligation upon the third country (Turkey in this case) to ensure the efficient and fair asylum procedure.⁶⁰

The APD establishes procedural safeguards to ensure that the country designated as a “*safe third country*” complies with relevant international and EU laws, namely under Article 38 of the APD: “*The member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned*”:

- a) Life and liberty of the asylum claimants and refugees are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- b) There is no risk of serious harm as defined in Directive 2011/95/EU;
- c) The principle of *non-refoulement* is respected;
- d) The prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment is respected;
- e) The possibility exists to request refugee status and, if found to be a refugee, to be accorded Refugee Convention protection.⁶¹

Even though APD enshrines the aforementioned procedural safeguards, it is argued that the EU has presumed Turkey as a *safe third country* without inquiring whether Turkey indeed satisfies all of the abovementioned criteria.⁶² It is argued that designating Turkey as a *safe third country* (without thorough examination) creates a risk of “*deportation chains when asylum seekers are transferred from state to state and back to their country of origin eventually amounting to a refoulement chain*.”⁶³

THE ASYLUM SYSTEM OF TURKEY - CHALLENGES

Turkey is a signatory to the Refugee Convention; however, it maintains a geographical limitation and only applies it to refugees originating from the European countries.⁶⁴ Consequently, asylum seekers not originating from European countries but otherwise satisfying the criteria established under the Refugee Convention are instead eligible for the “*conditional refugee*”⁶⁵ status under Turkish law.

⁵⁹ James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005), 275-279.

⁶⁰ Borges, “The EU-Turkey Agreement: Refugees, Rights and Public Policy”, 126.

⁶¹ Directive 2013/32/EU of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection (Recast), 26 June 2013, Article 38, accessed on 22 December, 2019, <http://www.refworld.org/docid/51d29b224.html>.

⁶² Poon, J., “EU-Turkey Deal: Violation of, or Consistency with, International Law?”, *European Papers - Journal on Law and Integration*, (2016): 1199, accessed on 22 December, 2019, <http://www.europeanpapers.eu/en/europeanforum/eu-turkey-deal-violation-or-consistency-with-international-law>.

⁶³ Borges, “The EU-Turkey Agreement: Refugees, Rights and Public Policy”, 138.

⁶⁴ “Country Report – Turkey”, *Asylum Information Database*, (2018), accessed on 22 December, 2019, <https://www.asylumineurope.org/reports/country/turkey>.

⁶⁵ Conditional refugee status is a Turkish legal concept introduced by the Law on Foreigners and International Protection for the purpose of differentiating in treatment between 1951

In April 2013 Turkey adopted EU-inspired Law on Foreigners and International Protection (hereinafter – LFIP/Law), which establishes the legal framework for asylum system in Turkey.⁶⁶

LFIP establishes three forms of international protection in accordance with Turkey’s “geographical limitation” policy on the Refugee Convention:

- a. Refugee status – shall be granted to persons who satisfy the criteria established under Article 1(A)(2) of the Refugee Convention and come from “European country of origin”;
- b. Conditional refugee status – shall be granted to persons who satisfy the criteria established under Article 1(A)(2) of the Refugee Convention, but come from a so-called “non-European country of origin”;
- c. Subsidiary protection status – shall be granted to persons who do not satisfy the criteria established under Article 1(A)(2) of the Refugee Convention, however, there exists risk that s/he will be subjected to death penalty or torture (in country of origin) or will be at “individualized risk of indiscriminate violence” due to situations or international or non-international armed conflict.⁶⁷

Apart from the international protection statuses, Article 91 of the LFIP establishes temporary protection status, which is a discretionary measure that may be deployed in situations of the mass influx of asylum seekers where individual processing of applications on international protection is impractical.⁶⁸

As migration experts note the main problem within the Turkish asylum regime is that, in general, protection statuses established under Turkish law, other than aforementioned actual refugee status, “fail to provide a sufficient degree of predictability or long-term prospects in Turkey”.⁶⁹ It is also argued that due to Turkey’s geographical reservation to the Refugee Convention, actual refugee status is accessible to a very limited number of asylum seekers in Turkey. Other problematic issues include “a considerable lag in the implementation of the new laws and a pervasive lack of transparency in practice”.⁷⁰

In addition to the existing challenges and problems of the Turkish asylum system, it is also argued that Turkey has a “history of refoulement of non-European asylum seekers”.⁷¹

Convention-type refugees originating from “non-European” states and those originating from “European” states.

⁶⁶ “Country Report – Turkey”, Asylum Information Database, (2018), accessed on 22 December, 2019, <https://www.asylumineurope.org/reports/country/turkey>

⁶⁷ *id.*, p.99.

⁶⁸ *id.*, p. 111.

⁶⁹ Skribeland, O.G., “Seeking Asylum in Turkey”, (2016), accessed on 22 December, 2019, https://www.noas.no/wp-content/uploads/2017/07/Seeking-asylum-in-Turkey_2016.pdf

⁷⁰ *id.*

⁷¹ Borges, “The EU-Turkey Agreement: Refugees, Rights and Public Policy”, 137.

Finally, the ECtHR, in its judgments rendered in the last two decades, referred to the poor conditions of asylum seekers in Turkey.⁷² The ECtHR underlined the grave situation of asylum seekers in Turkish detention facilities and in its landmark judgment in *Abdolkhani and Karimnia v Turkey*,⁷³ stated that there are no meaningful domestic juridical instruments or safeguards for asylum seekers and other migrants.⁷⁴

4. IMPLEMENTATION OF THE EU-TURKEY AGREEMENT – PRACTICAL ASPECTS

After the EU-Turkey agreement came into force, the Appeals Committees, which have been part of the asylum system in Greece since 2012, have issued 393 decisions reviewing decisions adopted at the first instance that has ruled at the admissibility stage that Turkey constituted a *safe third country*. In 390 decisions out of 393, Appeals Committee overturned the ruling of the first instance and decided that the applicant's claim was admissible since the safe third country requirements were not fulfilled with respect to Turkey.⁷⁵

Moreover, as it is demonstrated by a Council of Europe fact-finding mission to Turkey, as well as by the report published in the Vrije Universiteit Amsterdam (VU) Migration Law Series, the deal resulted in grave consequences for irregular migrants, namely, they face a risk of refoulement, as they are detained prior to their deportation and have no access to information and no possibility to apply for international protection.⁷⁶

Finally, one of the major challenges of the Deal is that its form and nature made it very difficult for those who are affected by it to challenge it.⁷⁷ The three cases brought in the aftermath of the deal by asylum seekers (Afghan and Pakistani nationals) in front of the General Court of EU prove this point.⁷⁸ By applications lodged at the Registry of the General Court on 22 April 2016, the applicants - NF, NG, and NM each brought an action seeking annulment of the Agreement, arguing that it is an act attributable to the European Council establishing an international agreement contrary to EU law.⁷⁹ In each case, the General Court of the EU dismissed their actions for annulment of the agreement, on the ground that it did not have jurisdiction to hear the case. The General Court ruled that the EU-Turkey Statement as published

⁷² Gkliati, M. "The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee", 89.

⁷³ *Abdolkhani and Karimnia v. Turkey*, 2009, European Court of Human Rights, accessed on 22 December, 2019, <https://www.refworld.org/cases,ECHR,4ab8a1a42.html>.

⁷⁴ *id.*, ¶89.

⁷⁵ Gkliati, M. "The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee", 93-95.

⁷⁶ Idriz, N., "The EU-Turkey deal in front of the Court of Justice of the EU: An unsolicited Amicus Brief", Asser Institute for International & European Law, (2017):8, accessed on 22 December, 19, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080838.

⁷⁷ *id.*, p.1.

⁷⁸ *id.*, p.3.

⁷⁹ Zoetewij, M.H., "Above the Law - Beneath Contempt: The End of the EU-Turkey Deal?", 151.

by means of Press Release (No 144/16) could not be regarded as a measure adopted by the European Council, or by any other institution of the European Union. The Court considered that EU-Turkey Statement was an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister. While, in an action brought under Article 263 of the Treaty on the Functioning of the European Union (TFEU),⁸⁰ General Court of the EU does not have jurisdiction to rule on the lawfulness of an international agreement concluded by the Member States. Therefore, the Court concluded that it lacked jurisdiction to review the legitimacy of the agreement.⁸¹ Aftermath applicants lodged the appeal before the Court of Justice of the EU and sought the annulment of the order of the General Court. Court of Justice has affirmed the decision rendered by the General Court and declined its jurisdiction in a case filed for the annulment.⁸²

CONCLUSIONS

*“The most urgent need of refugees is to secure entry into a territory in which they are sheltered from the risk of being persecuted”.*⁸³ Therefore, principle of *non-refoulement*, which covers admission and non-rejection of the asylum seekers at the border of a state constitutes cornerstone of the international refugee law⁸⁴ Due to the fact that Turkey, as well as EU Member States, are signatories of the 1951 Convention (moreover the principle of *non-refoulement* constitutes part of customary international law.⁸⁵ Consequently, it is binding on all states, including those, which have not yet become party to the Refugee Convention and/or its 1967 Protocol), EU-Turkey Agreement, analysed above, should be implemented in full compliance with this principle.

The main criticism regarding the Deal is derived from the fact that EU has presumed Turkey as a *safe third country* failing to consider the existing challenges and problems of the Turkish asylum system. It is argued that such an assumption was made without an actual examination of Turkey’s compliance with the essential criteria established under the APD.⁸⁶ UNHCR, scholars and domestic and international non-governmental organizations state that designating Turkey as a *safe third country*

⁸⁰ Treaty on the Functioning of the European Union, 13 December 2007, Article 263, accessed on 22 December, 2019, <https://www.refworld.org/docid/4b17a07e2.html>

⁸¹ *NF v European Council*, 2017, General Court of the European Union, ¶72, accessed on 22 December, 2019, <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62016TO0192>

⁸² *NF and Others v European Council*, 2018, Court of Justice of the European Union, Section 30, accessed on 22 December, 2019, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-208/17%20P>

⁸³ James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005), 275-279.

⁸⁴ Farmer, A., “Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection”, 37.

⁸⁵ *id.*

⁸⁶ Poon, J., “EU-Turkey Deal: Violation of, or Consistency with, International Law?”, *European Papers - Journal on Law and Integration*, (2016): 1199, accessed on 22 December, 2019, <http://www.europeanpapers.eu/en/europeanforum/eu-turkey-deal-violation-or-consistency-with-international-law>

(without thorough examination) creates the risk of “*deportation chains when asylum seekers are transferred from state to state and back to their country of origin eventually amounting to a refoulement chain.*”⁸⁷

It is also contended that practice on the application of the Agreement, analysed above, also proves that above-mentioned assumption (EU has presumed Turkey as a *safe third country*) is not justified, since - 1) Greece Appeals Committee in 390 decisions out of 393, ruled that Turkey did not constitute *safe third country*;⁸⁸ 2) as it is demonstrated by a Council of Europe fact-finding mission to Turkey, the deal resulted in grave consequences for irregular migrants returned to Turkey.⁸⁹ Recent applications lodged before the CJEU regarding the annulment of the Deal also proves this statement. Even though CJEU declined jurisdiction on the ruling of the legality of the Deal,⁹⁰ migration experts argue that gravity of the consequences of refoulement and its unequivocal prohibition (under Article 19 of the EU’s Charter of Fundamental Rights as well as under Article 3 of the ECHR and Article 33(1) of the Refugee Convention to which all Member States are party), might be considered “*compelling reasons for the Court to interpret the admissibility requirements less harshly so as provide access to justice to applicants.*”⁹¹

⁸⁷ Borges, “The EU-Turkey Agreement: Refugees, Rights and Public Policy”, 138.

⁸⁸ Gkliati, M. “The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee”, 93-95.

⁸⁹ Idriz, N., “The EU-Turkey deal in front of the Court of Justice of the EU: An unsolicited Amicus Brief”, Asser Institute for International & European Law, (2017):8, accessed on 22 December, 19, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080838.

⁹⁰ *NF and Others v European Council*, 2018, Court of Justice of the European Union, Section 30, accessed on 22 December, 2019, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-208/17%20P>.

⁹¹ Idriz, N., “The EU-Turkey deal in front of the Court of Justice of the EU: An unsolicited Amicus Brief”, Asser Institute for International & European Law, (2017):8, accessed on 22 December, 19, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080838.