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PRACTICES OF EXTERNALIZATION OF MIGRATION  
MANAGEMENT: THE “EU-TURKEY STATEMENT” AND ITS  
IMPLICATIONS ON THE GREEK ASYLUM SYSTEM

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## Introduction

Human displacement has been a constant feature throughout the history of humanity. After the Second World War, new migration patterns emerged in Europe. In response to these changes, state policies have continuously adapted, evolving alongside the process of State's integration into the emerging European Union.<sup>1</sup> From the 1990s, the rising of migratory flows led European countries to increase border controls and carry out visa regimes to access their borders. Consequently, people on the move in the European Union have been forced to rely on irregular means to cross the borders, such as human smugglers, who charge steep fees for transporting them across borders.<sup>2</sup> Such a situation further exacerbated by the outbreak of Syrian civil war in 2011. Not only arrivals from Syria have increased, but also from other countries where the economic and political stability have worsened, such as Afghanistan, Pakistan, Bangladesh, the Horn of Africa, and Sub-Saharan Africa. Between 2014 and 2015, around 800,000 individuals entered the European Union through non-regular means, fleeing from conflict and violence in their home countries or searching for a better life overseas. This wave of migration quickly became the most significant challenge that European countries has encountered since World War II. Eventually, migration and asylum have become politically sensitive issues, causing intense debate, and exacerbating weaknesses in immigration systems throughout Europe.<sup>3</sup>

The EU response to the reception crisis has come as a set of emergency measures, such as relocation schemes, naval rescue operations, deployment of EU personnel in support of the local staff, and the creation of the hotspots in the Greek and Italian islands, as centres of identification and screening, sadly famous because of the appalling conditions in which migrants live in.<sup>4</sup> Among all, the EU has started to carry out arrangements with

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<sup>1</sup> Lucassen, L. (2017). Peeling an onion: the “refugee crisis” from a historical perspective. *Ethnic and Racial Studies*, 41(3), 383–410. <https://doi.org/10.1080/01419870.2017.1355975>, p. 385

<sup>2</sup> Ibi, p. 391

<sup>3</sup> Metcalfe-Hough, V. (2015). The migration crisis? Facts, challenges and possible solutions. *Overseas Development Institute (ODI)*. <https://odi.org/en/publications/a-migration-crisis-facts-challenges-and-possible-solutions/>, p. 1

<sup>4</sup> Menéndez, A. J. (2016). The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration. *European Law Journal*, 22(4), 388–416. <https://doi.org/10.1111/eulj.12192>, p. 397

third countries, to shift the responsibility of migration management outside its borders.<sup>5</sup> Academic literature describes this approach as “externalisation of migration management”. It is defined as a set of actions by states to prevent migrants and asylum seekers from entering the legal jurisdictions or territories of destination countries. These efforts can involve direct measures to intercept and prevent migration and more indirect measures like providing support for security and migration management in other countries. These efforts can involve direct measures to intercept and prevent migration, as well as more indirect measures like providing support for security and migration management in other countries. These actions are often taken without considering the individual circumstances of migrants and the merit of their protection claims.<sup>6</sup>

Through the EU-Turkey statement, rendered public on 18<sup>th</sup> March 2016, the EU intended to shift the management of migratory flows to Turkey through the implementation of returns of all the migrants arriving on the Greek coasts from Turkey.<sup>7</sup> The research argues that the EU-Turkey statement exemplifies the externalisation of migration management, as it involves the establishment of a migration regime through a multilateral initiative, whether formal or informal. After providing a brief overview of the historical migratory dynamics and consequent political pathways taken by the EU, this research critically analyses the EU-Turkey statement from a legal point of view to investigate its legitimacy from a human rights-based perspective, as well as its consistency with the international legal framework. Indeed, several legal aspects of the Deal are still blurry. For instance, it is unclear whether the European Union or the single Member States constitutes a party in the arrangement and whether the Statement is legally binding.

Finally, this article examines the consequences of the EU-Turkey deal on Greek asylum law. It will explore how national legislation changed to align with the new regulations and how this impacted the human rights of asylum seekers and migrants. Specifically, the fast-track procedure, which processes the asylum applications of individuals covered by the returns regime outlined in the EU-Turkey statement, will be extensively scrutinized

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<sup>5</sup> Frelick, B., Kysel, M., & Podkul, J. (2018). The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants. *SAGE Journals*, 4(4), 190–220. <https://doi.org/10.1177/233150241600400402>, p. 207

<sup>6</sup> Ibi, p. 193

<sup>7</sup> European Council. (2016, March 18). *EU-Turkey statement* [Press release]. <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>

from a human rights viewpoint. Additionally, the article will present another perspective on the quality of migrants' human rights through the experiences shared by six human rights defenders working on the frontline.

The significance of this study must be seen in the attempt to offer a legal analysis that ultimately assesses the impact on the human rights of asylum seekers. It is essential to recognise that the primary goal is to evaluate the direct and indirect impacts on the Greek asylum system, with a particular focus on migrants as the subject, rather than objects of the EU-Turkey Statement. Everything examined ultimately aims to bring attention to the conditions of migrants. Therefore, this study combines a legal evaluation with a depiction of the situation individuals face. To avoid going beyond the scope of this research, certain arguments, despite being pertinent to the main topic, will be only briefly discussed, without delving into detail. This is the case of the “1-1” relocation schemes foreseen by the EU-Turkey deal, and the regime of detention and pre-removal centres in Greece.

### **Research Methodology**

This research primarily relies on a bibliographic approach involving primary sources, research and academic literature, and official reports from governmental, non-governmental and civil society organisations. In addition, the information in the Third Chapter was gathered from a set of interviews conducted. To provide critical analysis of the EU-Turkey statement and its implications on the Greek asylum system, the official stances of the European institutions, and the Greek and Turkish government, are not used to support the arguments sustained by the research. The methodology used can be summarized as follows.

The First Chapter mainly provides historical insights, historical literature, and official documents of the EU has been reviewed. In the Second Chapter, the information regarding the development and updates on the implementation of the EU-Turkey statement is gathered from official briefings and reports published by the European Council, EU Commission and EU Parliament, online press (the Guardian and BBC) and non-governmental entities monitoring human rights, such as Human Rights Watch (HRW) and European Council on Refugees and Exiles (ECRE). The legal analysis has been conducted by reviewing several official documents and text law of the European Union and Turkey and several opinion statements published by lawyers and human rights experts from advocacy and legal organisations based in Greece.

Concerning the Third Chapter, the relevant EU and Greek text law (translated) is reviewed. Furthermore, official statements, press reviews and reports from international and grassroots organisations advocating for refugee rights in Greece have been consulted, such as Prosy, Greek Refugee Council (GCR), Refugee Support Aegean (RSA), Solidarity Now and Fenix Legal Aid. Few academic articles have been taken into consideration for this Chapter.

Lastly, six interviews have been conducted to gather qualitative information about the overall human rights situation for asylum seekers and undocumented people attempting to cross Greek borders, as well as the specific situation of those undergoing the fast-track asylum procedure. The interviews were conducted with legal experts working for several no profit organisations operating on the frontline (Equal Legal Aid, Refugee Legal Support, Mobile Info Team, Avocats Sans Frontières) through face-to-face online meetings of approximately 45 minutes.

The research thesis draws numerical data from official primary sources, including reports from the European Commission, Eurostat, the Greek government, and the UN High Commissioner for Refugees (UNHCR). However, the reliability of this data is not infallible. In the case of the Greek government, for example, there have been inconsistencies between official documents. Moreover, the databases consulted often lack gender and age disaggregated data and make limited distinctions between the legal and personal status of applicants, which limits the study. As a result, a deep gender-based analysis was not possible. While the data provided are functional in providing a reliable overview of the facts and dynamics analysed, they should only be considered partially accurate when examining the finer details.

### **Literature Review**

The literature review covers a wide range of sources from the 1990s to the present, focusing on the core period of 2015-2016. The majority of sources analysed are academic literature, which presents a consistent and detailed account of the historical facts, emphasising the 2015 crisis as a turning point in migration management in Europe. Overall, the academic literature analysed covers a broad part of what has been published on the treated issue, and they do not present significant reasoning discrepancies between each other. The numerical data represent the only significant inconsistency. Overall, three main kinds of pieces of literature have been taken into consideration. Historical literature:

the information available has been found to be consistent and detailed. All tend to give ample space to the 2015 crisis as a historical threshold in Europe's migration management history. The legal literature analysed focuses on different aspects of the EU-Turkey statement but shares a critical perspective. In addition, the human rights literature and reports from non-profit organisations also rely on official documents and interviews with human rights defenders and people affected by the statement. The main inconsistency found in the literature concerns the numerical data. Overall, this research thesis aligns with the existing literature, which provides a comprehensive and critical analysis of the EU-Turkey statement and its implications.





## CHAPTER I - An overview of asylum in Europe

### 1. Introduction

In the first chapter, I provide a historical overview of migrations in Europe, from the end of the Second World War until the so-called “refugee crisis” in 2015. The purpose is to set a historical framework that can introduce the ensuing discussion that will follow in chapter II and chapter III about the EU-Turkey deal and the implications for the Greek asylum system. In the first part, I present a brief history of the migratory flows to Europe, aiming to point out the salient moments, representing a threshold for new political approaches. Because of its determinant role in transforming the European approach to asylum (according to which the EU-Turkey statement was conceived), particular attention is given to the, 2015 “refugee crisis<sup>8</sup>”, as has been defined by the media and scholars, and the consequent European Union response. In the second part, I present a brief review of European migration and refugee law, including the main treaties, regulations, and institutional structures, analysing their birth, their evolution, and possible future scenarios. Lastly, in the third part, I aim to discuss the European approach to asylum in terms of response to the developments that occurred over history and possible future developments.

For the purposes of the chapter, the term "migrant" includes asylum seekers as well as other categories of undocumented migrants (economic migrants, unaccompanied minors) since the considered historical facts and dynamics necessarily bring such categories together. Moreover, independently from the circumstances, migrants may be forced to leave for a plurality of reasons (both of economic and non-economic nature) that may be difficult to disentangle in practice.<sup>9</sup>

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<sup>8</sup>Whitin the scope of the text, it is solely used to refer to the period under study and to place this research within the context of the discourse surrounding this phrase as it is used in the media, public, and academia. However, it should be noted that this term may not be completely neutral. Alternatives such as "asylum crisis" or "humanitarian crisis" may better reflect the focus on the failures of the Common European Asylum System.

<sup>9</sup>Fargues, P. (2017). Four Decades of Cross-Mediterranean Undocumented Migration to Europe: A Review of the Evidence. In *IOM*. International Organization for Migration (IOM). Retrieved December 6, 2022, from <https://www.iom.int/news/new-study-concludes-europes-mediterranean-border-remains-worlds-deadliest>, p. 15

## 2. Migratory flows in Europe: a historical perspective

The Second World War caused one of the largest population displacements in modern history. Only on European soil, over 40 million people from eastern European countries (Russia, Ukraine, Poles, Byelorussia, Lithuania) were estimated to be displaced. In addition, over a million people were fleeing from the rising communist domination of Joseph Stalin. The Greek civil war and other conflicts in southeast Europe also generated thousands of forcible displacements.<sup>10</sup> The situation was exacerbated in the 1950s, with the intensification of the Cold War, when a rising number of people decided to flee from their countries of origin. In these years, new terms were coined to designate people escaping their countries, such as “defector”, “escapee”, and “asylum seeker”.<sup>11</sup>

After the stabilisation of the situation in the 1950s, asylum requests remained low until the 1980s, except for the 1965 Hungarian revolt and the 1968 Prague spring. Since 1980, the landscape of migration started to mutate: about 60% of migrants came from countries which were former colonies, in the Middle East (Iran, Lebanon), from the Indian subcontinent, especially from Sri Lanka, and the remaining from conflict zones in Africa (Horn of Africa, former, current Democratic Republic of Congo)<sup>12</sup>. The growth of the number of people migrating to Europe from such areas was largely due to the global economic recession. Having affected Western countries during 1980 and 1990, it dragged Global South<sup>13</sup> countries into extreme poverty, with strong effects all over the world, but in Sub-Saharan Africa in particular.<sup>14</sup>

In the 1990s, the number of incoming migrants and asylum seekers increased dramatically again.<sup>15</sup> Besides the global economic crisis and the ideological constraints of the Cold

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<sup>10</sup> Berger, A. (1947). Displaced Persons: A Human Tragedy of World War II. *Social Research*, 14(1), 45–58. <http://www.jstor.org/stable/40969176>, p. 46

<sup>11</sup> Carlin, L. (1982). Significant Refugee Crises Since World War II and the Response of the International Community. *Michigan Journal of International Law*, 3(1), 3–25. <https://repository.law.umich.edu/mjil/vol3/iss1/1>, p. 6

<sup>12</sup> Lucassen, L. (2017), cit. p.386

<sup>13</sup> The expression “Global South” broadly indicates the regions of Asia, Africa, Latin America, and Oceania, mostly low-income and historically put at the margin of the political and cultural discourse. The use of this expression aims to shift from a central focus on development and cultural difference, towards an emphasis on geopolitical relations of power and inequalities in economic and social change, as outcome of a whole history of colonialism and neo-imperialism. (Dados, N., & Connell, R. (2012b). The Global South. *Contexts*, 11(1), 12–13. <https://doi.org/10.1177/1536504212436479>)

<sup>14</sup> Martin, T. (1999). “Fortress Europe” and Third World Immigration in the Post-Cold War Global Context. *Third World Quarterly*, 20(4), 821–837. <https://www.jstor.org/stable/3993590>, p. 822

<sup>15</sup> Lucassen, L. cit. p.386

War, in service of the strategic interests of the western superpowers, ethnic tensions were being fostered. This led to many ethnic conflicts that triggered civil wars and conflict escalation in the Middle East and the Horn of Africa. For instance, during the 1988 Afghan war, traditional pre-war tribal conflicts resurfaced. Hereafter the 1990 Persian Gulf war, a bloody civil conflict resumed between the Shiite and Kurdish separatist movements. Many African states formed under colonial rule, where religious and tribal divisions were endemic, and ethnic strife and civil wars devastated nations and whole regions, along with military rule. Lastly, a civil war started in former Yugoslavia, caused by the fact that the central government's legitimacy was largely subordinated to ethnic groups.<sup>16</sup>

In addition, what also contributed to growing the numbers in 1990 was the worsening environmental conditions (water scarcity, desertification, deforestation) in many Global South areas due to uncontrolled exploitation of natural resources by western private and public businesses, as well as a considerable demographic growth.<sup>17</sup> Overall, demographic growth, jointly with the deteriorating economic, political and environmental conditions, caused large-scale population movements during the 1990s.<sup>18</sup> After a decrease in the 2000s, due to the temporary stabilisation of the situation in the Middle East<sup>19</sup>, when the American troops left in 2011, Iraq and Afghanistan rapidly collapsed.<sup>20</sup> This also coincided with the outbreak of the pro-democracy protests and opposition of the militias against the Assad regime in Syria in 2011, which turned into a civil conflict by 2012.<sup>21</sup> From that moment onwards, the number of asylum seekers in Europe started to increase again, ending up in what has been defined as the "refugee crisis" of 2015. Whereas the latest numbers cannot be considered so exceptional, compared to the arrivals in 1990<sup>22</sup>, the episodes that occurred in 2015 caused remarkable evolutions that led to significant changes in migration patterns.

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<sup>16</sup> Martin, T., cit. p. 825

<sup>17</sup> Ibi, p. 827

<sup>18</sup> Ibi, p. 830

<sup>19</sup> Lucassen, L., cit. p.386

<sup>20</sup> Ibi, p.387

<sup>21</sup> Syrian Civil War. (2023). *Encyclopaedia Britannica*. <https://www.britannica.com/event/Syrian-Civil-War>

<sup>22</sup> Ibi, p.387

## 2.1 What changed after 1990?

After the disintegration of the Eastern bloc, country borders were porous, and in Eastern European countries, as well as Turkey, there was no control over arrivals from Afghanistan, Iraq, Iran and Somalia, among other countries. In 1993, the situation changed when the European Union adopted a new policy of protection and control of its borders, which had notable consequences for migrants and asylum seekers.<sup>23</sup> The adopted approach was, instead of fortifying the external borders with fences, gates and barbed wire, to establish legal barriers.<sup>24</sup> On 24<sup>th</sup> November 1993, the Commission approved a joint proposal for presentation to the Council and the European Parliament regarding the revision of the Convention on controls of Persons Crossing External Frontiers and a proposal for a regulation determining which third countries whose nationals must own a visa to cross the external frontiers of the Member States. The overall objective of such proposals was the harmonisation of rules and the mutual recognition of visas within the new-born Schengen Area.<sup>25,26</sup>

In 1997, the Dublin convention entered into force, which determined the State responsible for examining the application of international protection lodged in one of the Member States.<sup>27</sup> According to the Convention, unless there is the presence of a family member holding refugee status in one of the Member States or the applicant has a valid visa for one of the Member States<sup>28</sup>, the state responsible for the examination of the application is the first Member State the applicant has stepped in, without any possibility to lodge different asylum claims in different Member States.<sup>29</sup> The basic principle was that State

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<sup>23</sup> Ibi, p.387

<sup>24</sup> Ibi, p.390

<sup>25</sup> European Commission. (1993, November 24). *The commission adopts proposals on external borders convention and on a regulation on visa requirements for third country nationals* [Press release]. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_93\\_1039](https://ec.europa.eu/commission/presscorner/detail/en/IP_93_1039)

<sup>26</sup> Schengen Agreement entered into force on 26 March 1995, initially composed of seven Schengen member countries: France, Germany, Belgium, Luxemburg, Netherlands, Portugal, and Spain. (*The Schengen acquis*. (1985, June 4). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42000A0922%2802%29>)

<sup>27</sup> *Dublin Convention*. (1990, June 15). <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A41997A0819%2801%29> The Schengen acquis. (1985, June 4). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42000A0922%2802%29>

<sup>28</sup> Hurwitz, A. (1999). The 1990 Dublin Convention: A Comprehensive Assessment. *International Journal of Refugee Law*, 11(4), 646–677. <https://doi.org/10.1093/ijrl/11.4.646>, p. 652

<sup>29</sup> Newland, K., & Papademetriou, G. (1998). Managing International Migration: Tracking the Emergence of a New International regime. *UCLA Journal of International Law and Foreign Affairs*, 3(2), 637–657. <https://www.jstor.org/stable/45302103>, p. 643

parties mutually recognised themselves as safe countries of asylum under a conventional mechanism.<sup>30</sup> In 1999, the European Council adopted Regulation No 574/1999, “determining the third countries whose nationals must own visas when crossing the external borders” and the annexed list of countries, including all the ones from where most of the arrives where, such as Afghanistan, Iran, Iraq, Morocco and Algeria.<sup>31</sup> Finally, in 2009, the EU adopted Regulation (EC) No 810/2009, also called Visa Code, establishing the requirements for issuing short-term visas and posing additional challenges to the legal transit through Schengen area. Indeed, according to the Code, Member States can refuse to issue a transit visa if the applicant cannot prove to have enough money to cover the cost of the stay, having a criminal record or being considered a security risk, not having a valid medical insurance and not having a valid visa or residence permit for the destination country.<sup>32</sup> This new EU visa policy was designed to restrict the migration of unskilled workers and keep the number of asylum seekers as low as possible, gradually altering the migratory patterns of asylum seekers and other migrants who were not eligible for visas.<sup>33</sup>

As a result, people willing to cross European borders started to be obliged to take the risks of illegal travel and become increasingly dependent on human smugglers. Illegal journeys often implied dangerous means of transportation, such as underneath lorries, planes’ wheel bays, sealed containers, and ships’ engine rooms. Other risks were connected to the hostile conditions of the unconventional routes, such as the deep and fast-flowing Verso river, dividing Turkey and Greece, dense forests in which one can easily get lost and dangers of starvation and hypothermia, among others<sup>34</sup>. Crossing the sea also included a wide range of risks, such as bad weather conditions, poor visibility, and rough seas, associated with very low-quality vessels and inexperienced captains.<sup>35</sup> Therefore, between 2000 and 2010, the deaths during the journey through Europe reared up, as

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<sup>30</sup> Hurwitz, A., cit. p. 648

<sup>31</sup> *Council Regulation (EC) No 574/1999*. (1999, March 12). <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A31999R0574>

<sup>32</sup> European Parliament & European Council. (2009, July 13). Regulation (EC) No 810/2009. <http://data.europa.eu/eli/reg/2009/810/oj>

<sup>33</sup> Lucassen L., cit. p.391

<sup>34</sup> United Nations Publications. (2015). *Fatal Journeys: Tracking Lives Lost During Migration*. *United Nations*. <https://publications.iom.int/books/fatal-journeys-tracking-lives-lost-during-migration> p. 90

<sup>35</sup> Ibi, p. 91

demonstrated by two different datasets, UNITED and Fortress Europe<sup>36</sup>, with a peak between 2006 and 2008, when deaths reached 1900 per month.<sup>37</sup>

## 2.2 Migratory routes

As a direct consequence of the new barriers to legal migration in Europe, from the 1990s onwards, people on the move started to follow informal migratory routes towards and across European countries. A migration route, as defined by the European Commission, is “*The geographic route along which migrants and move via hubs in transit areas from their country of to their country of, often travelling in mixed migration flows*”.<sup>38</sup> The term “mixed”, should be intended as the presence on the same route of different categories of migrants, as defined by the legal regimes of destination countries.<sup>39</sup> The choice of these paths and their continuous adaptation was over the years influenced by many factors. About the Mediterranean area, the main independent variables playing a key role in shaping migration dynamics can be pointed out.<sup>40</sup>

The first variable is the migration pressure in the country of origin, often referred to as the “push factor”, forcing people to migrate. In the case of Mediterranean flows, the perpetuation of conflicts in countries like Syria and Iraq, or the worsening of the repressions in several African countries (such as Somalia and the Democratic Republic of Congo) substantially increased the “forced” component of the displacements. Therefore, this factor has been accompanied by an increase in asylum claims in the European Union. The Syrian civil war is a clear example of that. Millions of Syrians in need of protection fled to neighbouring countries such as Turkey, Lebanon and Jordan. From Turkey, many migrants chose to head to Europe following the “Western Balkan

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<sup>36</sup>UNITED dataset is a record of deaths of refugees and migrants attributed to immigration and border control policies (including deaths in detention centres, homeless people and victims of racist attacks) collected by a network of civil society actors. Fortress Europe’s methodology uses news and media as primary sources and civil society organizations as secondary sources. UNITED data shows the peak in 2006, while Fortress Europe shows it as being in 2008.

<sup>37</sup> United Nations Publications., cit. p. 95

<sup>38</sup> *migration route*. (n.d.). European Commission - Migration and Home Affairs. [https://home-affairs.ec.europa.eu/pages/glossary/migration-route\\_en](https://home-affairs.ec.europa.eu/pages/glossary/migration-route_en)

<sup>39</sup> Cortinovis, R. (2016). Migrants and Refugees En Route Across the Mediterranean. *Panorama – Insights Into Asian and European Affairs*, 103–114. [https://www.academia.edu/28762025/Migrants\\_and\\_Refugees\\_En\\_Route\\_Across\\_the\\_Mediterranean](https://www.academia.edu/28762025/Migrants_and_Refugees_En_Route_Across_the_Mediterranean), p.107

<sup>40</sup> Ibi, p. 104

route".<sup>41</sup> Another core factor shaping the shift to a specific route is the migration policies implemented by destination and transit countries. In 2014, the lack of effective control of external borders made many Syrians choose to access European shores by passing through Libya,<sup>42</sup> jointly with the increase in border controls over departures to Europe from Turkey<sup>43</sup>, and the deterioration of living and working conditions of many Syrians hosted there<sup>44</sup>. The third variable regards the smuggling activity operating along the routes. Empirical evidence on the activities along the Mediterranean routes shows that smuggling organisations rely on flexible networks and tend to be more embedded in the economies of countries of origin and transit.<sup>45</sup> Therefore, smuggling organisations tend to be more present in regions of high political instability, economic informality and low state effectiveness.<sup>46</sup>

The first migration route to be covered heading to Europe, the western Mediterranean route, was the shortest possible: only 15km long, from the shore of Tangier (Morocco) to Algeciras, in Spain. It constituted the way to access Europe for many migrants from western African states until 1991 when Spain imposed a visa on citizens from the Maghreb States.<sup>47</sup> The so-called Central Mediterranean route is the busiest. It heads from Libya, which constitutes the collection point for states of the Horn of Africa and Western Africa, through the Mediterranean Sea, to Italy and Malta. Despite the high death rates due to the frequent shipwrecks, the Central Mediterranean route is favoured by African migrants, because of the proximity of the European shores.<sup>48</sup> The Western Balkan route is nowadays mainly chosen by Asian and Middle Eastern migrants and, in the past decades, by Balkan state residents, mainly from Albania, Kosovo, Serbia and Bosnia-Herzegovina. Asian and Middle Eastern migrants arrive in Bulgaria mainly from Turkish and Greek borders, trying to head to Austria, Germany or northern countries (via

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<sup>41</sup> Ibi, p. 105

<sup>42</sup> Ibi, p. 106

<sup>43</sup> Monzini, P., Abdel Aziz, N., & Pastore, F. (2015). The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean. *IAI*. <https://www.iai.it/en/pubblicazioni/changing-dynamics-cross-border-human-smuggling-and-trafficking-mediterranean>, p. 32

<sup>44</sup> Ibi, p. 52

<sup>45</sup> Cortinovis, R., cit. p. 106

<sup>46</sup> Monzini, P., Abdel Aziz, N. & Pastore, F., cit. p. 15

<sup>47</sup> Fargues, P., cit. p.9

<sup>48</sup> Besenyő, J. (2016). Security preconditions: understanding migratory routes. *Journal of Security and Sustainability Issues*, 6(1), 5–26. [https://doi.org/10.9770/jssi.2016.6.1\(1\)](https://doi.org/10.9770/jssi.2016.6.1(1)), p.12



Hungary) by land, crossing Macedonia, Serbia and Croatia.<sup>49</sup> The last European route is the East Mediterranean, the second busiest, frequently used by migrants from Middle Eastern countries (mostly Syria, Afghanistan, Iran, Iraq and Pakistan) leaving Turkey and trying to get to Europe via Greece, Bulgaria and Cyprus.<sup>50</sup>

### 3. The 2015 “refugee crisis”

Between 2014 and 2015, Europe had to face a dramatic increase in arrivals (and in deaths), which revealed the structural limitations of the EU migratory policy, which led to a substantial failure of the national reception systems to enforce migrant’s rights, and to offer adequate reception conditions. This happened especially to the Italian and Greek systems, at slightly different times. It represented somehow a turning point and paved the way for a rethinking of the whole European approach towards asylum management.<sup>51</sup>

The first country to go under pressure was Italy, in 2014. The unprepared Italian reception system overloaded under the steep increase in arrivals,<sup>52</sup> mainly from Sahelian countries such as Mali, Nigeria, Gambia, Senegal, Ivory Coast and Ghana.<sup>53</sup> The total number of sea arrivals is estimated at around 170.100<sup>54</sup>, while the number of individual asylum applications was the highest on record, (63.700<sup>55</sup>), with an increase of 148% compared with the preceding year (2013).<sup>56</sup> The increasing pressure on the Central Mediterranean route was largely due to the worsening socioeconomic conditions in many Sub-Saharan countries, as well as the rise in complications along the Western route (increased border surveillance across the Strait of Gibraltar, pushbacks and readmission agreements signed between Spain and several countries of migrant’s origin)<sup>57</sup>. However, Italian numbers are barely comparable to what Greece experienced the following year. Only in 2015, there

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<sup>49</sup> Ibi, p.19

<sup>50</sup> Ibi, p.20

<sup>51</sup> Fargues, P., cit. p.11

<sup>52</sup> Ibi, p. 12

<sup>53</sup> I numeri dell’asilo | *Dipartimento Libertà Civili e Immigrazione*. (2015, November 11). Ministero Dell’Interno. Retrieved December 7, 2022, from

<http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/documentazione/statistica/i-numeri-dellasil>

<sup>54</sup> UNHCR. (n.d.-b). Mediterranean Situtaion - Italy. *Operational Data Portal - Refugee Situations*. Retrieved December 7, 2022, from <https://data.unhcr.org/en/situations/mediterranean/location/5205>

<sup>55</sup> The gap between the number of arrivals and asylum applications is largely explained by the fact that Italy is considered a transit country by migrants, which prefer to continue their journey towards northern countries (Fargues, P., p.15)

<sup>56</sup> UNHCR. (2015). Asylum and Refugee Status Determination. In *UNHCR Statistical Yearbook 2014* (14th ed., pp. 50–61). <https://www.unhcr.org/56655f4cb.html>, p. 54

<sup>57</sup> Fargues, P. (2017), cit. p.10

were approximately 856,723 arrivals by sea, and 4.907 arrivals by land, in comparison with 41.038 and 2.280 of the precedent year.<sup>58</sup> Overall, over one million refugees and migrants reached Europe by sea in 2015, and almost 4.000 people drowned in the Mediterranean Sea, attempting to reach European shores.<sup>59</sup>

The most important cause is to be found in the exacerbation of the Syrian war, especially from the summer of 2015, when Russia began to play a more active role in the conflict. In September, Russia launched its first air strikes against targets in Syria, originally claiming that the targets were the Islamic State in Iraq and the Levant (ISIL). It quickly became clear that they were targeting mostly rebels fighting against Assad, intending to bolster their ally.<sup>60</sup> By the end of 2015, the conflict caused 6.6 million internal displacements and 4.9 million Syrian refugees worldwide.<sup>61</sup> Additionally, many Syrians already displaced in other Middle Eastern countries (such as Turkey, Lebanon and Jordan) were forced into secondary movements towards Europe, due to the worsening of the ongoing tensions and humanitarian conditions.<sup>62</sup> Overall, in 2015, 50.2% of the asylum applicants in Europe were from Syria. A large percentage of applicants were also from Afghanistan (20.2%), followed by Iraq (7.1%), due to the worsening of political tensions and humanitarian situation, and Eritrea (4.2%).<sup>63</sup> Particularly, citizens from Eritrea, Somalia and other African and Asian failing states jointly formed a large percentage of applicants<sup>64</sup>, amounting to 11.2%.<sup>65</sup>

The enormous increase in arrivals soon led to the collapse of the reception system, especially in Italy and Greece, where the conditions of the reception and identification facilities became simply appalling. Many people were living in tents, warehouses and

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<sup>58</sup> UNHCR. (n.d.-a). Mediterranean Situation- Greece. *Operational Data Portal*. Retrieved December 7, 2022, from <https://data.unhcr.org/en/situations/mediterranean/location/5179>

<sup>59</sup> Clayton, J., Holland, H., & Gaynor, T. (2015, December 30). Over one million sea arrivals reach Europe in 2015. *UNHCR, the UN Refugee Agency*. Retrieved December 7, 2022, from <https://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>

<sup>60</sup> Syrian Civil War. (2023). *Encyclopaedia Britannica*. <https://www.britannica.com/event/Syrian-Civil-War>

<sup>61</sup> Kugiel, P. (2017). The Refugee Crisis in Europe: True Causes, False Solutions. *The Polish Quarterly of International Affairs*, 4, 41–59. <https://www.researchgate.net/publication/324223864>, p. 43

<sup>62</sup> Ibi, p. 44

<sup>63</sup> IOM UN Migration. (2015). Compilation of available data and information. *Mixed Migration Flows in the Mediterranean and Beyond*, p. 3

<sup>64</sup> Kugiel, P., cit. p. 43

<sup>65</sup> IOM UN Migration, cit. p. 3

barracks, even with temperatures under zero.<sup>66</sup> The lack of an effective system to identify vulnerable people increased physical and psychological risks for thousands of pregnant women, children, victims of torture and people with disabilities. Awful conditions and the uncertainty many asylum-seekers felt about their future were often the fuel for tensions, which ended in violence in many camps, which the local authorities rarely managed to address and prevent.<sup>67</sup> Lastly, many cases have been reported about lack of access to formal education for the vast majority of minors accommodated in camps, especially on the islands of Chios, Lesbos and Samos.<sup>68</sup>

Even though it is not possible to estimate the number of women refugees because of a lack of disaggregated data, the UN Refugee Agency (UNHCR) estimates that in 2016 about 20% of refugees were women, with a greater proportion than 2015.<sup>69</sup> Due to the worsening conditions in their country of origin, an increasing number of women choose to travel alone, either because they lost their husbands, or to apply for family reunification later. Compared to the male component, women refugees had to face the additional burden of gender-based violence in many forms.<sup>70</sup> Despite the European directives that obliged EU member states to consider gender issues in reception conditions and status determination, such Directives had little impact on guaranteed women's right to protection within national systems. The personnel demonstrated to be poorly trained to deal with victims of gender-based violence, and many women refugees and asylum seekers reported being sexually assaulted precisely by border guards during control operations and border tasks.<sup>71</sup> The inadequacy of the reception and accommodation facility often contributed to the exacerbation of the vulnerability of women beneficiaries to gender-based violence. On many occasions, women were forced to share with unknown men outside water taps and showers and the frequent lack of electricity and so illumination. Besides increasing

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<sup>66</sup> Skarstein, T. (2016, December 2). Terrible conditions for refugees in Greece. *Norwegian Refugee Council*. Retrieved December 7, 2022, from <https://www.nrc.no/news/2016/des/terrible-conditions-for-refugees-in-greece/>

<sup>67</sup> Amnesty International. (2021, June 17). *Messages from Greece: our hope is broken*. Retrieved December 7, 2022, from <https://www.amnesty.org/en/latest/campaigns/2016/09/greece-refugees-broken-hopes/>, p.5

<sup>68</sup> Human Rights Watch (2018, July 18), “*Without Education They Lose Their Future*”, from <https://www.hrw.org/report/2018/07/18/without-education-they-lose-their-future/denial-education-child-asylum-seekers>

<sup>69</sup> Freedman, J. (2016). Sexual and gender-based violence against refugee women: a hidden aspect of the refugee “crisis.” *Reproductive Health Matters*, 24(47), 18–26. <https://doi.org/10.1016/j.rhm.2016.05.003>. p. 18

<sup>70</sup> *Ibi*. p. 19

<sup>71</sup> *Ibi*. p. 21

women's exposure to gender-based violence risk, it increased their feelings of fear and insecurity. Finally, gender-based survivors rarely were given the possibility to report the abuses and receive support from local authorities, due to the stigma, shame and fear of reprisals and language barriers.<sup>72</sup>

### **3.1 The EU's response to the crisis**

At the dawn of the crisis, when Italy was struggling to manage the huge arrivals and, above all, rescue the high number of migrants from drowning in the Mediterranean, European Union action was limited to deploying a naval operation (*Triton*) to replace the Italian one, *Mare Nostrum*. However, its capacity was considerably smaller and with halved funding.<sup>73</sup> The Union only started to take a stronger position by April 2015, when, from first entry countries' (Italy and Greece), reception systems were overloaded and broken down, resulting in massive "secondary movements" towards Northern Europe, challenging the effectiveness of in-force Dublin System<sup>74</sup> in enforcing its main norm, according to which the EU member state of the first entry of an asylum applicant is responsible for examining his or her asylum application.<sup>75</sup>

The core component of the decisions taken was their emergency character. Structural limitations, including legal limits, were left apart. The key question remains about which limits were overcome, and which were respected. The scholar Augustin José Menéndez provides an interesting analysis of the European response to the crisis, where three main different phases of action can be distinguished: two waves of "supernational emergency" decisions (April-September 2015 and February 2016 onwards) and one of the national emergency decisions (October 2015 onwards).<sup>76</sup>

#### **3.1.1 The first wave of supernational emergency**

In May 2015, the Commission adopted the so-called European Migration Agenda, a political document outlining priorities in migration, asylum and border policies to address

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<sup>72</sup> *Ibi.* p. 23

<sup>73</sup> Menéndez, A. J. (2016). *Cit.* p. 396

<sup>74</sup> *Ibi.* p. 397

<sup>75</sup> Carrera, S., Blockmans, S., Gros, D., & Guild, E. (2015). The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities. *CEPS*, 20. <https://www.ceps.eu/ceps-publications/eus-response-refugee-crisis-taking-stock-and-setting-policy-priorities/>, p. 5

<sup>76</sup> Menéndez, A. J., *cit.* p. 397

the ongoing situation and to serve as a blueprint for future crises.<sup>77</sup> The agenda set out four levels of action "*for an EU migration policy which is fair, robust and realistic*"<sup>78</sup>, which are listed as follows:

1. Reducing the incentives for irregular migration
2. Border management: saving lives and securing external borders
3. Europe's duty to protect: a strong common asylum policy
4. A new policy on legal migration.

The Agenda brought together key steps for the EU to take immediately and in the coming years, "[...] *to build up a coherent and comprehensive approach to reap the benefits and address the challenges deriving from migration.*"<sup>79</sup> The immediate actions listed in the Agenda are:

*Saving lives at sea.* These actions translated into the increase of EU funding to Member States to be able to deploy more assets (ships and aircraft) and tripling the budget of Frontex<sup>80</sup> joint operations, to enlarge its operations' geographical scope and support national rescue operations.<sup>81</sup> In September 2016, Frontex has been transformed into European Border and Coast Guard (EBCG), with the EU Regulation 2016/1624. Through this new Regulation, Frontex can currently count on 1500 national experts at its disposal to share the responsibility of border management.<sup>82</sup>

*Targeting criminal smuggling networks,* meaning strengthening the Europol's<sup>83</sup> joint maritime information operation in the Mediterranean and establishing a Common Security and Defence Policy (CSDP) Operation in the Mediterranean, to fight smuggling networks by destroying their vessels.<sup>84</sup> Like Frontex, also Europol's capacity has been

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<sup>77</sup> Carrera, S., Blockmans, S., Gros, D., & Guild, E., cit. p.4

<sup>78</sup> European Commission. (2015, May 13). *A European Agenda on Migration*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0240>, p. 7

<sup>79</sup> Ibi. p.1

<sup>80</sup> Established in 2004, Frontex had the initial task to improve the management of EU external borders and facilitate cooperation among the EU Member States and Schengen-associated countries. (Horii, S. (2018). Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis. *Refugee Survey Quarterly*, 37(2), 204–230. <https://doi.org/10.1093/rsq/hdy005> p. 208)

<sup>81</sup> European Commission. (2015, May 13). cit. p. 3

<sup>82</sup> Horii, S., cit. p. 208

<sup>83</sup> The agency was established in 1999 to facilitate police cooperation among Member States. (Horii, S., cit. p. 209)

<sup>84</sup> European Commission. (2015, May 13), cit. p.3

strengthened since May 2017, ensuring its Parliamentary accountability and better access to information.<sup>85</sup>

*Relocation.* The Commission established a temporary redistribution mechanism of the state's responsibility to welcome asylum seekers and examine their asylum claim, to ensure a balanced participation of all Member States. The relocation scheme considered Member States criteria like GDP, size of the population, unemployment rate and past number of asylum seekers and resettled refugees.<sup>86</sup> The relocations were carried on under two Resolutions. The first one, of 14<sup>th</sup> September 2015, established the relocation of a total of 30.000 persons from Italy and Greece<sup>87</sup>. The second one, of 22<sup>th</sup> September 2015, established the relocation of additional 120.000 applicants.<sup>88</sup> The implementation of such resolutions has been particularly debated due to the lack of monitoring and reporting on rights and conditions available to relocated persons by the European Commission.<sup>89</sup> The rejection of relocation requests rate by many countries and the delays concerning the forecast times have also been questioned.<sup>90</sup> In 2016, the number of third-country national relocated from Greece and Italy was much lower, only 8.381.<sup>91</sup> As of April 2018, the relocated people from Greece were 21.767, and 11.610 from Italy.<sup>92</sup>

*Resettlement.* In addition to relocation, the EU committed to resettling displaced persons "in clear need of international protection", jointly with the international community and the UNHCR (with the task of identifying people in need of resettlement). The UNHCR endorsed a target of 20,000 resettlement places for the EU per year by 2020.<sup>93</sup> According

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<sup>85</sup> Horii, S., cit. p. 209

<sup>86</sup> European Commission. (2015, May 13), cit. p.3

<sup>87</sup> European Council. (2015a, September 14). *Council Decision (EU) 2015/1523*. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL\\_2015\\_239\\_R\\_0011](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL_2015_239_R_0011)

<sup>88</sup> European Council. (2015b, September 22). *Council Decision (EU) 2015/1601*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015D1601>

<sup>89</sup> Asylum Information Database (AIDA). (2018). Relocation of asylum seekers in Europe: A view from receiving countries. *European Council on Refugees and Exiles*. <https://reliefweb.int/report/world/relocation-asylum-seekers-europe-view-receiving-countries>, p. 1

<sup>90</sup> Ibi. p.4

<sup>91</sup> European Migration Network [EMN]. (2017). Annual Report 2016 on Migration and Asylum -Statistical Annex. In *European Commission -Migration and Home Affairs*, p. 6

<sup>92</sup> European Migration Network [EMN]. (2018). Annual Report on Migration and Asylum 2017. In *European Commission - Migration and Home Affairs*, p. 34

<sup>93</sup> European Commission. (2015, May 13), cit. p.4

to Eurostat data, except for 2016 and 2020, when respectively 15.906<sup>94</sup> and 10250 resettlements took place, for the years 2017,2018 and 2019 the target has been fulfilled.<sup>95</sup>

*Partnership with third countries.* Aiming to tackle migration upstream, this action envisages the collaboration between the Commission and the European External Action Service (EEAS) and partner third countries to put in place concrete measures for the prevention of dangerous journeys. Moreover, the Commission committed to deepening the Regional Development and Protection Program in North Africa, the Horn of Africa and the Middle East, through the allocation of an additional fund of EUR 30 million. Lastly, migration became a specific matter of the ongoing Common Security and Defence Policy (CSDP) missions, which were also strengthened on border management.<sup>96</sup>

*Hotspot approach.* It consists of the provision of operational support to Member States for the identification, registration, and fingerprinting of migrants suddenly when arriving at the entry points, to avoid secondary movements.<sup>97</sup> The operational support was provided by many EU Agencies, explicitly acting in inter-cooperation in one single operational framework.<sup>98</sup> The operational support was coordinated by the EU Regional Task Force, a coordination group composed of relevant EU agencies and Member States' authorities. Within the hotspot approach, each Agency had a specific task. Frontex assisted with registration procedures, including with the Eurodac database of fingerprints, nationality screening, and fingerprinting as well as conducted debriefing interviews to gather intelligence on smuggling routes and support the managing of repatriations. Europol represented second line checks to identify potential smugglers and report them to the national authorities. EASO (European Asylum Support Office) provided support in identifying persons wishing to apply for asylum regarding relocation and Dublin, to initiate them either to the regular asylum procedure or to relocation. Furthermore, it also provided information on the relocation procedure and operational support to the Dublin Unit.<sup>99</sup> This measure ended up with the creation of big areas for the first reception and

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<sup>94</sup> European Migration Network [EMN]. (2017), cit. p.5

<sup>95</sup>European Migration Network [EMN]. (2021). Annual Report on Migration and Asylum 2020: Statistical annex. In European Commission - Migration and Home Affairs. EMN, p. 4

<sup>96</sup> Ibi. p. 5

<sup>97</sup> Papadopoulou, A. (2016). The implementation of the hotspots in Italy and Greece - A study. *European Council on Refugees and Exiles*. <https://www.refworld.org/docid/584ad1734.html>, p. 10

<sup>98</sup> Horii, S., cit. p.205

<sup>99</sup> Papadopoulou, A., cit. p. 10

identification of migrants in Italy (among which Augusta, Lampedusa, Pizzulo and Taranto) and Greece (Lesvos, Chios, Samos, Leros, and Kos).<sup>100</sup> Hotspots have been heavily criticized by many international NGOs since in both Greece and Italy the reception conditions were strongly inadequate and below the standards (among others, big delays in the identification/registration procedures, poor information provided to migrants, lack of continued medical care, coercive measures and prolonged detention and staff shortage).<sup>101</sup>

### 3.1.2 Unilateral national emergency measures

During 2015, the speed of migratory flows progressively accelerated, and hundreds of thousands of forced migrants were moving across Europe. By the end of the summer, national governments started to consider unilateral emergency actions.<sup>102</sup> On 25<sup>th</sup> August 2015, the BAMF, German's federal agency for migration and refugees posted on Twitter: "*The #Dublin procedure for Syrian citizens is at this point in time effectively no longer being adhered to*"<sup>103</sup>. By this point, there were already more than 300.000 people attempting to seek asylum on European soil, more than 50% higher than the previous two years. The tweet was largely interpreted as an immediate suspension of the rule providing that the first country of entry in Europe is responsible for the examination of the asylum application. After this tweet, Germany became the first-choice destination for most Syrians. It also created a strong impression of confusion and loss of political control within the German government. Consequently, many refused to register in the transit countries where they were caught by the police, such as Hungary and Serbia, showing to the police and border officers their smartphones displaying the message. Moreover, Serbian police reported having found thousands of discarded passports on their side of the border, a sign that everyone was now trying to apply for asylum as Syrian nationals.<sup>104</sup> After two weeks of "virtually open borders," the management of the incoming flows

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<sup>100</sup> Carrera, S., Blockmans, S., Gros, D., & Guild, E., cit. p. 7

<sup>101</sup> Papadopoulou, A., cit. p. 11

<sup>102</sup> Menéndez, A. J., cit. p. 399

<sup>103</sup> BAMF [German's federal agency for migration and refugees]. (2015, August 25). BAMF tweet in Germany on not applying Dublin procedures to Syrian nationals. Twitter.

<sup>104</sup> Oltermann, P., & Kingsley, P. (2017, November 28). "It took on a life of its own": how one rogue tweet led Syrians to Germany. *The Guardian*. Retrieved December 10, 2022, from <https://www.theguardian.com/world/2016/aug/25/it-took-on-a-life-of-its-own-how-rogue-tweet-led-syrians-to-germany>



became unsustainable. From 13<sup>th</sup> September 2015, Germany started to introduce controls on the border with Austria, and several member states suddenly followed suit.<sup>105</sup> Austria introduced border controls with Slovenia, and, in October 2015, Slovenia introduced them with Hungary. Two months later, a similar domino reaction occurred among Scandinavian countries. Also, France and Malta announced the closure of their borders soon, on the grounds of receiving a "big influx of migrants".<sup>106</sup> While in the German case, the measure was "justified" by the necessity of keeping movements orderly, in other cases it was made rather explicit that the point was to discourage migrants' movements.<sup>107</sup>

The substantial reintroduction of border controls was often seen as a threat to the freedom of movement, the core value of the foundational narrative of the European Union, as well as one of the fundamental freedoms enshrined in the 1957 Treaty of Rome. Although this measure did not stop EU citizens from exercising their freedom of movement right *per se*, for European citizens and commercial enterprises, daily dependant on passages across frontiers within the Schengen zone, lengthy waits at border crossings impacted the quality of how the right to freedom of movement is exercised.<sup>108</sup> It has been calculated that the costs for states, businesses, and citizens of the end of free circulation in the Schengen Area would have been around 5 and 18 billion euros.<sup>109</sup> Finally, the controls on external borders were fortified, by the construction of walls and fences and the introduction of modern surveillance technology<sup>110</sup> such as drones, sensors and cameras and artificial intelligence devices.<sup>111</sup>

### 3.1.3 The second wave of supernatural emergency

Despite the approaching of the cold season, after the Summer of 2015, arrivals on the Italian and Greek shores did not decrease and, on the contrary, kept increasing. Only between January and February 2016, more than 100.000 forced migrants reached the Greek shores. At this point, the European approach to crisis management started to divert

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<sup>105</sup> Menéndez, A. J., cit. p. 400

<sup>106</sup> Byrne, R., Noll, G., & Vedsted-Hansen, J. cit. p.874

<sup>107</sup> Menéndez, A. J., cit. p. 400

<sup>108</sup> Byrne, R., Noll, G., & Vedsted-Hansen, J. cit. p.875

<sup>109</sup> Dennison, S. D. P. (2016, April 14). The Future of Schengen. *ECFR*. Retrieved December 10, 2022, from [https://ecfr.eu/special/schengen\\_flash\\_scorecard/](https://ecfr.eu/special/schengen_flash_scorecard/)

<sup>110</sup> Byrne, R., Noll, G., & Vedsted-Hansen, J. cit. p.876

<sup>111</sup> Ahmed, K., & Tondo, L. (2022, October 19). Fortress Europe: the millions spent on military-grade tech to deter refugees. *The Guardian*. Retrieved December 10, 2022, from <https://www.theguardian.com/global-development/2021/dec/06/fortress-europe-the-millions-spent-on-military-grade-tech-to-deter-refugees>

towards the prevention of migrants arriving in Europe. Two main decisions have been taken in this direction: the involvement of NATO in the patrolling operations in the Mediterranean and the very controversial EU-Turkey agreement.<sup>112</sup>

On 11<sup>th</sup> February 2016, NATO defence ministers decided to assist in the growing refugee crisis, following a request from the German, Greek and Turkish government. NATO deployed its maritime force in the Aegean Sea, to carry on the monitoring and surveillance of illegal crossings, in support of Greek and Turkish authorities and Frontex.<sup>113</sup> Regarding Frontex, the intervention of NATO was substantially aimed to extend the European action of migration containment to Turkey, since the latter is part of the NATO Security Alliance.<sup>114</sup> NATO's action happened within the framework of arrangements of cooperation directly linked with Frontex at operational level.<sup>115</sup> Overall, its main practice had appeared to be the return rescued migrants directly to Turkey, thus reducing the number of arrivals within the EU.<sup>116</sup>

Rendered public with a press release on 18<sup>th</sup> March 2016, through the EU-Turkish statement, Turkey committed itself to accept the implementation of the joint action plan of 29<sup>th</sup> November 2015.<sup>117</sup> The latter was aimed to “*step up cooperation for the support of Syrian refugees under temporary protection and their host communities in Turkey and to strengthen cooperation to prevent irregular migration flows to the EU.*”<sup>118</sup> Substantially, Turkey committed to accept back all the migrants crossing from Turkey into Greece, applying for asylum on whose application is considered unfounded or inadmissible from 20<sup>th</sup> March 2016 (according to international law, therefore excluding any kind of collective expulsion). Europe instead, committed to settling a Syrian citizen for every Syrian readmitted in Turkey from Greek islands. Lastly, Turkey was expected

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<sup>112</sup> Menéndez, A. J., cit. p. 401

<sup>113</sup> NATO. (2022, June 8). Assistance for the refugee and migrant crisis in the Aegean Sea. *North Atlantic Treaty Organization*. Retrieved December 10, 2022, from [https://www.nato.int/cps/en/natohq/topics\\_128746.htm](https://www.nato.int/cps/en/natohq/topics_128746.htm)

<sup>114</sup> Garelli, G., & Tazzioli, M. (2017). The biopolitical warfare on migrants: EU Naval Force and NATO operations of migration governance in the Mediterranean. *Critical Military Studies*, 4(2), 181–200. <https://doi.org/10.1080/23337486.2017.1375624>, p. 12

<sup>115</sup> NATO (2022, June 8), cit.

<sup>116</sup> Menéndez, A. J., cit. p. 401

<sup>117</sup> European Council. (2016, March 18). /

<sup>118</sup> European Commission. (2016, February 10). *Managing the Refugee Crisis: Commission reports on implementation of EU-Turkey Joint Action Plan* [Press release]. <https://reliefweb.int/report/turkey/managing-refugee-crisis-commission-reports-implementation-eu-turkey-joint-action-plan>, p. 1

to take “all the necessary measures” to prevent illegal migration to the EU, in exchange for a fund of 3 billion euros to be invested in facilities, health, education food and other living costs for the asylum seekers' reception system.<sup>119</sup>

The deal has been defined as controversial, since not only those who do not intend to apply for asylum, or whose request has been rejected, are returned, but also Syrians who had previously applied for asylum in Greece. Regarding Syrian nationals, while every asylum application will be duly processed by the Greek authorities, Hellenic legislation has changed (in harmonisation with the provisions foreseen by the Statement), so that their applications are now considered as inadmissible on the basis that Turkey is a “safe third country”. As a result, all asylum requests of Syrians coming from Turkey are reviewed under the Dublin “accelerated” procedure<sup>120</sup>, implying fewer procedural guarantees and a difference or treatment for such applicants, which will be further discussed later. In June 2021, through a new Joint Ministerial Decision, the Greek government Designated Turkey a "safe third country" not only for applicants for Syria but also for ones from Afghanistan, Somalia, Pakistan and Bangladesh,<sup>121</sup> thus extending the scope of the readmissions established by the EU-Turkey deal.<sup>122</sup> The legal insights of the EU-Turkish deal will be widely discussed in the following chapters.

#### **4. The current system: international refugee law and the European right to asylum and main institutional structures**

This section presents an overview of the current European asylum system and its main procedural guarantees, with the purpose to prepare the ground for the discussion about the EU-Turkey statement that will follow in the next chapters. Furthermore, some space is dedicated to brief discussions around the assessment of the new proposals to reform the current system.

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<sup>119</sup> European Council. (2016, March 18). *EU-Turkey statement* [Press release]

<sup>120</sup> Menéndez, A. J., cit. p. 402

<sup>121</sup> Joint Ministerial Decision 42799/2021. (2021, July 6). Greek Government.

<sup>122</sup> European Council on Refugees and Exiles. (2021). Country report: Greece. In *AIDA - Asylum Information Database*. <https://asylumineurope.org/reports/country/greece/>, p.85

#### 4.1 The EU legal system: primary laws, directives and procedural guarantees

The legal basis for the European Asylum Policy lies in Article 67(2) (about the absence of internal border controls), 78 (about the establishment of a common communitarian policy in the matter of asylum, subsidiary and temporary protection) and 80 (about the principle of solidarity and fair sharing Member States should apply to the policies of the Union)<sup>123</sup> of the Treaty on the Functioning of the European Union (TFEU) and Article 18 of the EU Charter of Fundamental Rights<sup>124</sup>, affirming the right to asylum under the 1951 Geneva Convention and the 1967 Protocol and with the Treaty Establishing the European Community.<sup>125</sup>

Since the adoption of the Treaty of Lisbon in 2009, the European asylum system underwent a sensible mutation. The already existing common standards were transformed into a proper common system with uniform asylum statuses (including subsidiary and temporary protection), procedures, standards for reception conditions and partnerships with non-EU countries.<sup>126</sup> Notwithstanding the slow negotiations, the Common European Asylum System was reformed, entering its "second phase". After the reforms, the main existing legal instruments are the recast Qualification Directive, the Eurodac Regulation, the Dublin III Regulation, the Reception Conditions Directive and the Asylum Procedures Directive<sup>127</sup>.

The current Qualification Directive of 2011 amending the Council Directive 2004/83/EC of 2004, sets out the criteria for applicants to qualify for refugee status or subsidiary protection. It also establishes the rights as status holders, including the right to a residence permit, travel document, healthcare and access to accommodation and integration facilities.<sup>128</sup> Created in 2000, Eurodac is the European database storing fingerprints of applicants of international protection, to determine in which Member State the applicant

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<sup>123</sup> *Consolidated version of the Treaty on the Functioning of the European Union*. (2012, October 26). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

<sup>124</sup> *Asylum Policy | Fact Sheets on the European Union*. (2022, June 1). European Parliament. Retrieved December 13, 2022, from <https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy>, p.1

<sup>125</sup> *Charter of Fundamental Rights of the European Union*. (2000, December 18). [https://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](https://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>126</sup> *Asylum Policy | Fact Sheets on the European Union*, cit. p.2

<sup>127</sup> *Ibi*, p. 3

<sup>128</sup> *Who qualifies for international protection*. (n.d.). European Commission - Migration and Home Affairs. Retrieved December 13, 2022, from [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/who-qualifies-international-protection\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/who-qualifies-international-protection_en)

arrived. Eurodac is currently regulated by Regulation (EU) No 603/2013 of 26<sup>th</sup> June 2013.<sup>129</sup> The 2013 Dublin III regulation sets out the criteria to determine which Member State is responsible for the examination of the asylum application. The responsibility criteria are, in hierarchical order: family considerations, recent possession of a visa or residence permit in a Member State and whether the applicant has entered the EU regularly or irregularly. Furthermore, it contains a series of additional procedural guarantees for minors, like the possibility for to apply for asylum in the same country their relatives are, if in their best interest. Concerning the previous Regulation, Dublin III also contains additional guarantees like the compulsory personal interview, the obligation to provide free legal assistance upon request and the obligation to guarantee the right to appeal a transfer decision.<sup>130</sup> The 2013 Reception Conditions Directive aims at guaranteeing common standards of reception conditions, among which the access of asylum seekers to housing, food, clothing, healthcare (particular attention is given to vulnerable subjects), education for minors and access to employment. It also includes rules regarding detention and possible alternatives in full respect of fundamental rights.<sup>131</sup> Lastly, the 2013 Asylum Procedures Directive establishes a set of guarantees to ensure that decisions on international protection are taken efficiently and fairly. Hence, it includes clear rules to manage all stages of the asylum procedure, registration, examination of the application, appeals (where subjects are entitled to free legal assistance) and subsequent application. Also here, special guarantees are provided to vulnerable applicants.<sup>132</sup>

#### **4.2 The future: reform proposals**

As mentioned before, the increased pressure on the national asylum and reception systems during the refugee crisis highlighted the need for more coordination and solidarity

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<sup>129</sup> *The Data Protection Commission*. (n.d.). Eurodac. Retrieved December 13, 2022, from <https://www.dataprotection.ie/>

<sup>130</sup> *Country responsible for asylum application (Dublin Regulation)*. (n.d.). European Commission - Migration and Home Affairs. Retrieved December 13, 2022, from [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation_en)

<sup>131</sup> *Reception conditions*. (n.d.). European Commission - Migration and Home Affairs. Retrieved December 13, 2022, from [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/reception-conditions\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/reception-conditions_en)

<sup>132</sup> *Asylum procedures*. (n.d.). European Commission - Migration and Home Affairs. Retrieved December 13, 2022, from [https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/asylum-procedures\\_en](https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/asylum-procedures_en)

mechanisms within the EU asylum and reception system.<sup>133</sup> In 2016, the European Commission drafted seven legislative proposals for reform of the Common European Asylum System, in two packages, published on 4<sup>th</sup> May and 13<sup>th</sup> July 2016.<sup>134</sup> The first package of proposals for CEAS reform contained the following initiatives:

- A proposal for the reform of the Dublin system, to better balance the responsibility solidarity for examining asylum applications
- A proposal for amendment of the Eurodac regulation, to increase its efficiency
- A proposal to strengthen the mandate of EASO (European Asylum Support Office), turning it into an EU Asylum Agency<sup>135</sup>

The second package of proposals included:

- The replacement of the Asylum Procedures Directive and the Qualification Directive with regulations, directly applicable in national asylum systems, aiming to harmonise procedures across EU countries
- Reforming the Reception Conditions Directive, aimed to ensure a more harmonized system and dignified reception standards for applicants for international protection
- The establishment of a permanent Union Resettlement Framework to provide legal and safe pathways to the EU<sup>136</sup>

Among all, the reform of the Dublin III Regulation is not only the one with the most impact but also the most controversial.<sup>137</sup> The proposed measures include sanctions for secondary movements, further limitations on applicants' right to an effective remedy, and a high likelihood of having their claim rejected as inadmissible before ever reaching the

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<sup>133</sup> *COMMUNICATION FROM THE COMMISSION on a New Pact on Migration and Asylum*. (2020, September 23). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:609:FIN> p. 3

<sup>134</sup> ECRE comments on Commission proposals for reform of the Common European Asylum System | European Council on Refugees and Exiles (ECRE). (2016, November 29). *European Council on Refugees and Exiles*. <https://ecre.org/ecre-comments-on-commission-proposals-for-reform-of-the-common-european-asylum-system/>

<sup>135</sup> European Parliament. (n.d.). *Reform of the Common European Asylum System (CEAS) | Legislative Train Schedule*. Retrieved December 13, 2022, from [https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-reform-of-the-common-european-asylum-system-\(ceas\)](https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-reform-of-the-common-european-asylum-system-(ceas))

<sup>136</sup> EASO European Union Agency for Asylum. (n.d.). *2.1.1 First and second phases of CEAS and the 2016 reform proposals*. <https://euaa.europa.eu/easo-asylum-report-2021/211-first-and-second-phases-ceas-and-2016-reform-proposals>

<sup>137</sup> Klaiber, D. (2019). A Critical Analysis of the Dublin-IV Proposal with Regards to Fundamental- and Human Rights Violations and the EU Institutional Battle. *Nordic Journal of European Law*, 2(2), 38–55. <https://doi.org/10.36969/njel.v2i2.20368> p.39

Dublin system. According to the European Council of Refugees and Exiles, despite some exceptions such as the expansion of the definition of family members, which should ensure broader possibilities for family reunification, asylum seekers would face stricter and unfair rules.<sup>138</sup> What also makes this proposal controversial and harsh to reach an agreement on it are the very different interests of the Member States. EU first-entry countries, such as Greece, Italy, Malta, Cyprus and Spain (also called Med-5) support a binding and fairer allocation of asylum seekers. Germany, France, the Benelux states and Sweden's interest are to limit secondary movements. Hence, they advocate for the implementation of more efficient reception policies in the country of first entry. Other states, especially the Eastern European states, Austria and Denmark are strictly opposed to mandatory relocation and advocate a very restricted reception system in the EU, with asylum procedures taking place in third countries.<sup>139</sup> Notwithstanding the difficulties in overlapping the preferences of the Council, the Parliament and the Member States<sup>140</sup>, in June 2018 the European Parliament and the Council presidency reached a provisional agreement on five proposals (reception conditions, qualifications for international protection, Eurodac legislation, asylum agency and resettlement framework).<sup>141</sup> However, these legal acts ended up being substantially frozen, due to the insistence of the European Parliament and several Member States on maintaining a “package approach”, meaning that all the reforms have to be adopted together, as a single package.<sup>142</sup>

On 23<sup>rd</sup> September 2020, the Von der Leyen Commission, after a set of extensive consultations with EU member states,<sup>143</sup> presented the New Pact on Asylum and Migration, bringing together comprehensive proposals in the areas of migration, asylum,

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<sup>138</sup> ECRE comments on Commission proposals for reform of the Common European Asylum System | European Council on Refugees and Exiles (ECRE). (2016, November 29). *European Council on Refugees and Exiles*. <https://ecre.org/ecre-comments-on-commission-proposals-for-reform-of-the-common-european-asylum-system/>

<sup>139</sup> Rasche, L., Welfens, N., & Engler, M. (2022). The EU Migration Pact at Two: What Remains of the Fresh Start? *Jaques Delors Centre*, 1–8. <https://www.delorscentre.eu/en/publications/the-eu-migration-pact-at-two>. p.2

<sup>140</sup> Smeets, S., & Beach, D. (2021). ‘It takes three to tango’: new inter-institutional dynamics in managing major crisis reform. *Journal of European Public Policy*, 29(9), 1414–1432. <https://doi.org/10.1080/13501763.2021.1958904> p.1428

<sup>141</sup> Think Tank Parlamento Europeo. (2022, December 12). EU pact on migration and asylum: State of play. *European Parliamentary Research Service*. [https://www.europarl.europa.eu/thinktank/it/document/EPRS\\_BRI\(2022\)739247](https://www.europarl.europa.eu/thinktank/it/document/EPRS_BRI(2022)739247) p.2

<sup>142</sup> Rasche, L., Welfens, N., & Engler, M. p.2

<sup>143</sup> Ibi. p.3

integration and border management.<sup>144</sup> The core aim of the Pact was to establish a predictable and reliable set of measures based on the principles of a fair sharing of responsibility of solidarity.<sup>145</sup> In terms of policy development, the novelty lies in the fact that the Commission seemed to have given up on the previous demand for mandatory relocations, turning it into an obligation to contribute, but more flexibly,<sup>146</sup> throughout a variety of support measures, such as relocation, sponsoring of returns, funding external cooperation in countries of transit, capacity building measures as well as operational support.<sup>147</sup> Indeed, Med-5 countries weakened their position towards mandatory relocations, acknowledging that they should be seen within the framework of “solidarity tools”.<sup>148</sup> Thus, the Pact remains a compromise for the Visegrád countries, who have been against mandatory relocation. In other words, it is a successful effort by a group of similar, non-liberal member countries to shift their policy preferences onto others.<sup>149</sup> Lastly, the New Pact also concerns the relationship with international partners. The Pact indeed proposes the creation of “mutually beneficial partnerships” with third countries, not only including migration policies, but also security, trade and investments.<sup>150</sup> Particularly, the Pact calls for a deeper collaboration with neighbour countries, in terms of sharing migrant reception and contrasting irregular migration.<sup>151</sup> This highlights a greater agreement among Member States for the involvement of non-EU states in European migration and asylum policies through foreign policy tools. This dimension is not new, but its importance has steadily increased on the EU agenda.<sup>152</sup>

Lastly, the Pact also represents an attempt to replace the “package approach” with a more gradual approach, aimed to break down the negotiations into a set of distinct stages,

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<sup>144</sup> Think Tank Parlamento Europeo., cit. p.2

<sup>145</sup> European Commission. (2020a, September 23). *A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity* [Press release].

<sup>146</sup> Hadj-Abdou, L. (2021). From the Migration Crisis to the New Pact on Migration and Asylum: The Status Quo Problem. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.3786906>, p. 10

<sup>147</sup> De Bruycker, P. (2020). The New Pact on Migration and Asylum: What it is not and what it could have been. *EU Immigration and Asylum Law and Policy*. <https://eumigrationlawblog.eu/the-new-pact-on-migration-and-asylum-what-it-is-not-and-what-it-could-have-been/>, p.35

<sup>148</sup> Nielsen, N., [EU observer reporter]. (2020, November 26). *Annex to the comment "Greece, Italy, Malta and Spain outline their positions on migration in this "non-paper." (. . .)* [Comment on “Twitter”]. <https://twitter.com/NikolajNielsen/status/1331856468186902529/photo/1>

<sup>149</sup> Hadj Abdou, L., cit. p.11

<sup>150</sup> *COMMUNICATION FROM THE COMMISSION on a New Pact on Migration and Asylum*. (2020, September 23). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:609:FIN>, p.17

<sup>151</sup> Ibi, p. 18

<sup>152</sup> Hadj Abdou, L., p. 11



outcoming in different pieces of legislation.<sup>153</sup> As part of the first stage, on 22<sup>nd</sup> June 2022, EU Member States adopted the Solidarity Declaration on *a modus operandi* of voluntary solidarity mechanisms, to be implemented by 27<sup>th</sup> June of the same year.<sup>154</sup> In such a Declaration, Member States commit themselves to:

*«Implementing a voluntary, simple and predictable solidarity mechanism designed to provide the Member States most affected by migratory flows in the Mediterranean and mainly under pressure, including the Western Atlantic route, with needs-based assistance from other Member States complementary to European support, by offering relocations (the preferred method of solidarity) and financial contributions, without prejudice to the respect of Union law, and in particular Regulation 604/2013 (Dublin III Regulation)»<sup>155</sup>*

Furthermore, Member States committed, when choosing not to contribute to solidarity with relocation, to contribute through financial assets (with a foreseen minimal amount) or cooperation projects in third countries likely to have a direct impact on the flows.<sup>156</sup>

## **5. Conclusions: what is the EU approach and what may change?**

Albeit a European common approach to asylum was conceived only in 1999, when the EU Council agreed in Tampere to start the works for the establishment of a Common European Asylum System<sup>157</sup>, there had already been some common tendencies among Member States. From the end of the Second World War until the early 1970s, many European states encouraged immigration to address the demand for a labour force in the expanding industrial sector.<sup>158</sup> After the first oil price crisis in 1973, European countries started to apply more protectionist policies towards their labour markets, which implied

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<sup>153</sup> Carrera, S., & Cortinovia, R. (2022). The Declaration on a Voluntary Solidarity Mechanism and EU Asylum Policy. *CEPS*, 1–13. <https://www.ceps.eu/ceps-publications/the-declaration-on-a-voluntary-solidarity-mechanism-and-eu-asylum-policy/>, p.1

<sup>154</sup> European Commission. (2022a, June 22). *Migration and Asylum: Commission welcomes today's progress in the Council on the New Pact on Migration and Asylum* [Press release]. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_3970](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3970)

<sup>155</sup> First step in the gradual implementation of the European Pact on Migration and Asylum: modus operandi of a voluntary solidarity mechanism. (2022, June 22). *French Presidency of the Council of the European Union*. Retrieved December 13, 2022, from <https://presidence-francaise.consilium.europa.eu/en/news/first-step-in-the-gradual-implementation-of-the-european-pact-on-migration-and-asylum-modus-operandi-of-a-voluntary-solidarity-mechanism-1/>

<sup>156</sup> *Ibi*.

<sup>157</sup> Presidency of the European Parliament. (1999, October 15). Conclusions of the Presidency - European Council Tampere. *European Parliament*. Retrieved December 13, 2022, from [https://www.europarl.europa.eu/summits/tam\\_en.htm](https://www.europarl.europa.eu/summits/tam_en.htm)

<sup>158</sup> Zetter, R., Griffiths, D., Ferretti, S., & Pearl, M. (2003). An Assessment of the Impact of Asylum Policies in Europe 1990-2000. *UK Home Office Development and Statistics Directorate*. <https://www.rsc.ox.ac.uk/publications/an-assessment-of-the-impact-of-asylum-policies-in-europe-1990-2000>, p. 4

the restriction to labour immigration. Thus, the main channel for migration became family reunification, humanitarian, and illegal migration.<sup>159</sup>

After 1979, at the EU level, it is possible to say that the legal framework reflected the protective policies of the Member States.<sup>160</sup> While the 1957 Treaty of Rome established a communitarian “Single Market”<sup>161</sup> and the creation of the Schengen Area in 1985 started a progressive removal of the barriers to mobility for EU citizens,<sup>162</sup> access to non-European individuals was progressively hindered by restrictive visa policies.<sup>163</sup> Especially during the 1990s, the increase of the demands for international protection was contrasted by Member States applying similar measures, such as the introduction of accelerated procedures for applicants coming from “safe countries”<sup>164</sup> and the reduction of social assistance for applicants and the rejection of work permits.<sup>165</sup> Furthermore, the creation of the Dublin system in 1990 represented the communitarian response to the need to deal with multiple asylum claims<sup>166</sup>. Curiously, despite the principle of responsibility-sharing in the international protection of refugees being a legally binding norm within the EU (as the TFEU explicitly states), the EU opted for the creation of the Dublin with the purpose to determine the responsibility of processing protection claims.<sup>167</sup> Rather than “responsibility-sharing”, the Dublin system appears to be the milestone representing the “responsibility-shifting” to frontline states.<sup>168</sup> The “irregular entry”, as a criterion for establishing the responsibility, encouraged first-entry states to prevent arrivals by implementing barriers (which respect for human rights is extremely questionable), such as walls and pushbacks, making so Europe a “Fortress” for migrants.<sup>169</sup> While many Member States reintroduced controls at their borders (as such Austria, Hungary,

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<sup>159</sup> Brücker, H., Epstein, S., McCormick, B., Saint-Paul, G., Venturini, A., & Zimmermann, K. (2001). Managing Migration in the European Welfare State. *Fondazione Rodolfo Benedetti*, 1–182. p. 85

<sup>160</sup> *Ibi*, p. 92

<sup>161</sup> *Treaty establishing the European Economic Community*. (1958, January 1). European Parliament. Retrieved December 11, 2022, from <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-rome>

<sup>162</sup> *Schengen, borders and visa*. (2022, November 23). European Commission - Migration and Home Affairs. [https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa\\_en](https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa_en)

<sup>163</sup> Brücker, H., Epstein, S., McCormick, B., Saint-Paul, G., Venturini, A., & Zimmermann, K., p. 96

<sup>164</sup> Zetter, R., Griffiths, D., Ferretti, S., & Pearl, M., p.35

<sup>165</sup> Brücker, H., Epstein, S., McCormick, B., Saint-Paul, G., Venturini, A., & Zimmermann, K., p. 94

<sup>166</sup> *Ibi*, p. 95

<sup>167</sup> Binetti Armstrong, A. (2019). You Shall Not Pass! How the Dublin System Fueled Fortress Europe. *SSRN Electronic Journal*, 20. <https://doi.org/10.2139/ssrn.3443667>, p. 349

<sup>168</sup> Byrne, R., Noll, G., & Vedsted-Hansen, J., cit. p. 878

<sup>169</sup> Binetti Armstrong, A., cit. p. 362

Slovenia), On April 2022, the Court of Justice of the EU (CJEU), decide that this measure was only possible for a period of six months, non-extendible, unless there is a “serious threat”.<sup>170</sup> Overall, the Dublin system sat the principle that each asylum request is the competence of one Member State only, leading to the paradox of an asymmetric asylum policy, where the abolishment of internal borders is only possible through the "nationalisation" of refugees.<sup>171</sup> In other words, the 1990s marked a change in Member States' approach, which began to shrink their responsibilities to receive asylum seekers and deal with their application, and the Dublin Convention is "one of the early manifestations" of this change.<sup>172</sup>

The 2015 crisis came as evidence of the inadequacy of the existing system. The collapse of the Italian and the Greek reception system highlighted the unsustainability of the Dublin system, lacking any form of sincere cooperation among Member States.<sup>173</sup> Moreover, the development of massive “secondary movements” inside the Union, while evidencing the success in abolishing internal borders, it also represented the failure to effectively manage the space and persons, once internal border controls were removed.<sup>174</sup> To address the crisis, the EU accelerated the already existing trend of the creation of more and more specialized EU agencies, as a middle ground between Member States and the Commission, delegating to them operational and technical tasks.<sup>175</sup> This progressive development of this trend advanced the issue of to what extent agencies can be considered accountable and transparent, especially during field operations, as well as dependent on the Member States' willingness to commit to their functioning.<sup>176</sup> Overall, the package of measures the EU implemented to address the crisis represented a policy shift towards a more centralized asylum policy, but with the explicit purpose of keeping the national responsibility for asylum seekers fully exclusive.<sup>177</sup> As a consequence, the reintroduction of border controls, the relocation mechanisms (when implemented), the hotspot approach

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<sup>170</sup> Pinggen, A. (2022, June 21). CJEU Rules on Reintroduction of Internal Border Checks for Longer than Six Months. *Eucrim.Eu*. Retrieved January 21, 2023, from <https://eucrim.eu/news/cjeu-rules-on-reintroduction-of-internal-border-checks-for-longer-than-six-months/>

<sup>171</sup> Byrne, R., Noll, G., & Vedsted-Hansen, J., cit. p. 893

<sup>172</sup> Newland, K., & Papademetriou, G., p. 643

<sup>173</sup> Byrne, R., Noll, G., & Vedsted-Hansen, J., cit. p. 877

<sup>174</sup> Menéndez, A. J., cit. p. 388

<sup>175</sup> Horii, S., cit. p. 207

<sup>176</sup> Ibi, p. 209

<sup>177</sup> Menéndez, A. J., cit. p. 403

and the other emergency measures adopted by the European Community failed to contain the crisis, while raising grave constitutional concerns.<sup>178</sup> Moreover, such policies reflected an approach seeing asylum seekers as "faking" to abuse the too-generous European normative commitment, rather than refugees waiting for their application to be examined.<sup>179</sup>

In the years following the crisis, the Dublin reform and the issue of solidarity continued to be major obstacles. Despite the numerous attempts at reconciliation of the Presidencies, a fundamental disagreement between States as to the meaning of solidarity in the framework of a common system has stuck the Council.<sup>180</sup> The impossibility to reach a serious agreement among Member States on the necessary reform of the Common European Asylum System led the Commission to bring up the New Pact on Migration and Asylum, conceived as the "fresh start" which would have finally provided the basis for a real reform of the asylum system, stalling for years.<sup>181</sup> Despite over three years of negotiations, the Pact does not appear to reflect a new consensus for the core components of the asylum system that could not be agreed upon back in 2015, such as a reform of the Dublin system, or a clearer agreement on relocation schemes.<sup>182</sup> The extreme flexibility of the solidarity mechanism expressed in the Pact is a clear example of that. Despite fulfilling the requests of the Member States of the Visegrad group, it is not likely to contribute to rebuilding trust among the EU Member States, which will remain divided about providing asylum. Such an arrangement is not a real pact reconciling different views, but rather an attempt to create a contradictory compromise.<sup>183</sup> Rather than focusing on the sponsor of the migrant's return,<sup>184</sup> the solidarity mechanism could have been designed to allow Member States not willing to take part in relocation by requiring them

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<sup>178</sup> Ibi, p. 388

<sup>179</sup> Ibi, p. 391

<sup>180</sup> Pollet, K. (2017, June 23). European Council Conclusions on the CEAS reform: Wrong signal at the wrong time. *European Council on Refugees and Exiles*. <https://ecre.org/european-council-conclusions-on-the-ceas-reform-wrong-signal-at-the-wrong-time-op-ed-by-kris-pollet-ecre-senior-legal-policy-officer/>

<sup>181</sup> Rasche, L., Welfens, N., & Engler, M., cit p.3

<sup>182</sup> Bruycker, P. D., cit. p.35

<sup>183</sup> Ibi, p. 36

<sup>184</sup> Bendel, P. (2021). Fresh Start Or False Start? The New Pact on Migration and Asylum. In *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees* (pp. 240–250). European University Institute (EUI). <https://doi.org/10.2870/541854>, p. 253

to positively support asylum procedures in other member states, enhancing their capacity, to reflect that it is common to all Member States.<sup>185</sup>

Furthermore, the Pact presents a model valuing accelerated decisions on asylum claims, sensibly reducing applicants' procedural guarantees.<sup>186</sup> The screening procedures supposed to cover identification, security checks and vulnerability assessment brought the implication that reception conditions should not kick in until the outcome of the screening process, creating a "hollow asylum seeker status" where benefits are denied.<sup>187</sup> Moreover, the establishment of more accelerated border procedures foreseen by the Pact is problematic as it is likely to bring the tendency of countries to deem an asylum claim inadmissible when the applicant comes to a country with a low recognition rate, in violation of the individual nature of the application of international protection.<sup>188</sup>

Finally, the Pact reflects the trend towards outsourcing migration management, which involves incorporating asylum management into foreign policy agreements that involve economic and development exchanges.<sup>189</sup> This approach includes the creation of comprehensive strategies in collaboration with third countries, especially neighbouring countries, aimed at containing irregular migration,<sup>190</sup> as well as concluding readmission agreements. A 'win-win' situation is expected, by combining different policy elements beyond migration. These new EU policies are very much in line with the 'UN global compact on migration' (New York 2016) aiming to reach a new and more integrated approach embedding more coordinated and structural cooperation with third countries.<sup>191</sup> Such an approach towards the establishment of a migration partnership framework is in many respects not new. Since the 1990s, European states have concluded many bilateral

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<sup>185</sup> Bruycker, P. D., cit. p. 36

<sup>186</sup> Carrera, S. (2021). Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum. In A. Geddes (Ed.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees* (pp. 1–24). European University Institute (EUI). <https://doi.org/10.2870/541854>, p.6

<sup>187</sup> Mouzourakis, M. (2020). More laws, less law: The European Union's New Pact on Migration and Asylum and the fragmentation of "asylum seeker" status. *European Law Journal*, 26(3–4), 171–180. <https://doi.org/10.1111/eulj.12378>, p. 173

<sup>188</sup> Carrera, S., cit. p. 8

<sup>189</sup> Spijkerboe, T. (2021). 'I Wish There Was a Treaty We Could Sign.' In S. Carrera & A. Geddes (Eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees* (pp. 61–70). European University Institute (EUI). <https://doi.org/10.2870/541854>, p. 65

<sup>190</sup> *COMMUNICATION FROM THE COMMISSION on a New Pact on Migration and Asylum*. (2020, September 23). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:609:FIN>, p. 18

<sup>191</sup> Zoomers, A., van Noorloos, F., & van Liempt, I. (2018, July 11). Between sticks and carrots: The future of EU migration deals. *Clingendael Spectator*. Retrieved December 21, 2022, from <https://spectator.clingendael.org/pub/2018/4/the-future-of-eu-migration-deals/>, p.3

migration agreements with transit countries, focusing on controlling migration (concentrating on fighting irregular migration, re-admission, and repatriation), often in combination with encouraging legal migration (by using migration quota, and circular migration) and/or stimulating co-development. The novelty lies in the fact that after the 2015 crisis, agreements have increasingly become focused on migration restriction and control, and the externalisation of the EU's migration control has intensified.<sup>192</sup> This trend is condensed in the iconic words of the Commissioner for Migration, Home Affairs and Citizenship Dimitris Avramopoulos, which in 2018 declared:

*«Four years on, we are better equipped than ever to protect our external borders and address migratory challenges inside and outside the EU. The time has come to consolidate the remaining building blocks of a comprehensive migration, borders and asylum system for the long run. A constantly evolving geopolitical context shows us that we cannot wait to react, but that we have to be ready for the future already now.»<sup>193</sup>*

The narrative used in the speech make it sound like a declaration of war, rather than a commitment to humanitarian effort to defend the human rights of asylum seekers.<sup>194</sup>

Lastly, the 2016 EU- Turkey deal represents the most evident example of this approach.<sup>195</sup> Not surprisingly the Deal and more in general this approach raised many concerns among scholars, non-governmental organisations and other stakeholders, especially for what concerns their efficacy, transparency, unequal power relations and the violation of migrants' human rights.<sup>196</sup> The EU-Turkish deal will be deeply discussed in the next chapters, with the aim of better framing the European approach towards externalisation of migration and asylum management, and imagining possible future scenarios.

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<sup>192</sup> Ibi, p. 4

<sup>193</sup> European Commission. (2018, December 4). *Managing Migration: Commission calls time on asylum reform stalling* [Press release]. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_6627](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6627)

<sup>194</sup> Klaiber, D., cit. p. 55

<sup>195</sup> Spijkerboe, T., cit. p. 65

<sup>196</sup> Zoomers, A., van Noorloos, F., & van Liempt, I., cit. p. 5



## **CHAPTER II - The EU-Turkey statement**

### **1. Introduction**

In this chapter I analyse the EU-Turkey statement from a legal point of view, aiming to assess its consistency with international and EU refugee law and its outcomes from a human rights perspective. The first part concerns an introduction to the Deal regarding political context, developments over the five years of implementation and the current state of play. Additionally, I frame the Deal into the broader discourse around the current tendency of the European Union towards implementing policies of externalisation of migration management and the Turkish response exploiting migration as a “foreign policy tool”.

The second section evaluates the positioning of the EU-Turkey statement within the framework of international and EU asylum and refugee legislation. I will discuss whether, besides Turkey, the EU as an organisation or the single States should be considered parties of the Statement. The analysis is conducted considering the reasoning of a relevant case of jurisprudence from the General Court (GC) of the Court of Justice of the European Union, which is confronted with several other arguments proposed by scholars and legal experts. Then, I will question the Statement’s legitimacy to produce legally binding obligations according to international and EU law. I will focus on the interdependence of concepts of “readmission” and “safe third country”, the backbones of the Deal, its legal premises and normative framework within the EU refugee law. Lastly, I will explain why these concepts may be problematic regarding asylum seekers’ fundamental rights.

In the last part, I assess whether Turkey can be considered a “safe third country” for readmitted migrants from Greece, considering its national asylum system and guarantees and their consistency with international standards. As further proof of the presented facts, data from reports from governmental and non-governmental organisations will also be provided. In conclusion, I will demonstrate that beyond the problematic nature of the readmissions under the “safe third country concept”, considering Turkey as a safe third country also raises several issues.



## 2. The grounds for the Deal

The EU-Turkey statement results from a wider set of negotiations between the European Union and Turkey, dating back to 2013, when the parties signed the Readmission Agreement (RA), establishing the mutual obligation for Turkey and EU Member States to readmit in their territory their own nationals, third-country nationals and stateless persons not fulfilling the conditions to reside on a Party's soil.<sup>197</sup> In that occasion, the "EU-Turkey Visa Liberalisation Dialogue" was launched<sup>198</sup>, with the final intent to abolish Schengen visa requirements for Turkish citizens during short stays within the Schengen Area (90 days within a period of 180 days).<sup>199</sup> A "Roadmap" was agreed, consisting in a series of legislative and administrative reforms Turkey had to undertake, "with a view to establishing a secure environment for a visa-free travel"<sup>200</sup>.

2015 was marked by large scale displacements to the European borders, resulting in the hugest migratory crisis in Europe since World War II.<sup>201</sup> On the Eastern Mediterranean route, it was estimated that 56% of migrants attempting to cross into Greek islands from Turkey were Syrians, 24% Afghani and 10% Iraqis.<sup>202</sup> Such unprecedented crisis led to the necessity to revise of the plans and schedules that had been agreed upon, between EU countries and Turkey. The EU and Turkey so agreed to step up their cooperation in the area of migration, by agreeing on a "Joint Action Plan" on 15<sup>th</sup> October 2015.<sup>203</sup> The Plan was mainly aimed to intensify the cooperation between Member States and Turkey on the support Turkish government's management of mass influxes of Syrian nationals in need of temporary protection.<sup>204</sup> Furthermore, on 7<sup>th</sup> March 2016, the EU Heads of State and

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<sup>197</sup> *Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation*. (2017, October 1). <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0507%2801%29>

<sup>198</sup> Idriz, N. (2017a). The EU-Turkey Statement or the 'Refugee Deal': The Extra-Legal Deal of Extraordinary Times? *T.M.C. Asser Institute For International & European Law*, 6, 1–15. <https://ssrn.com/abstract=3080881>, p.4

<sup>199</sup> *The Visa Liberalization Dialogue*. (2022, June 14). Republic of Türkiye, Ministry of Foreign Affairs - Directorate for EU Affairs. Retrieved January 9, 2023, from [https://www.ab.gov.tr/the-visa-liberation-dialogue\\_51819\\_en.html](https://www.ab.gov.tr/the-visa-liberation-dialogue_51819_en.html)

<sup>200</sup> *First meeting of the EU-Turkey visa liberalization dialogue - agreed minutes*. (n.d.). <https://www.mfa.gov.tr/turkey-and-the-european-union-have-launched-a-dialogue-on-visa-liberalisation-and-signed-the-readmission-agreement.en.mfa>, p.3

<sup>201</sup> Frontex. (2016). *Risk analysis for 2016*. <https://doi.org/10.2819/26690>, p.14

<sup>202</sup> Ibi, p.18

<sup>203</sup> Idriz, N. (2017a), cit. p.4

<sup>204</sup> European Commission. (n.d.-a). *EU-Turkey joint action plan* [Fact Sheet]. 15 October 2015, Brussels, p.1

Turkey Prime Minister agreed on a further measure to contrast people's movements Across the Aegean, prior to the entering into force of the RA, which were rendered public through a press release, on 18<sup>th</sup> March 2016.<sup>205</sup> Such measures can be summarized as follows:

- The return of all migrants crossing illegally from Turkey into Greek islands from 20<sup>th</sup> March 2016, who did not apply for asylum in Greece or whose application has been declared inadmissible.
- The implementation of a so-called 1-1 scheme, according to which for every Syrian national being returned to Turkey, another Syrian will be resettled into the EU, for a total of 74.000 persons.
- The activation of a Voluntary Humanitarian Admission Scheme once irregular crossings is reduced.
- The acceleration of the visa liberalisation roadmap for Turkish citizens.
- The disbursement of 3 billion euros (plus an additional 3 billion up to the end of 2018) under the Facility for Refugees (FRiT), a coordination mechanism pooling funds from existing EU budget instruments and Member States and, implemented in the form of humanitarian and development assistance.<sup>206</sup>
- The further allocation of further funds for projects (regarding healthcare, formal education activities, infrastructure, food and other costs) for beneficiaries of temporary protection in Turkey.
- A joint commitment to improve humanitarian conditions in Syria, especially in proximity to the Turkish border.
- The stepping up of measures against migrant smugglers, by the establishment of NATO activity on the Aegean Sea.<sup>207</sup>

In accordance with the agreement reached in the Council, the Commission was in charge of overseeing and coordinating the implementation of the agreement and establishing and supervising the Facility for Refugees. The at the time president of the Commission, Jean

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<sup>205</sup> Idriz, N. (2017a), cit. p. 5

<sup>206</sup> European Commission. (n.d.-b). *The EU Facility for Refugees in Turkey* [Fact Sheet]. September 2020, p.2

<sup>207</sup> European Council. (2016, March 18). *EU-Turkey statement* [Press release]. <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>

Claude Juncker, appointed Marteen Verwey as the EU Coordinator to carry out the provisions of the statement.<sup>208</sup>

## 2.1 The implementation of the Deal

According to the Seventh Report on the Progress made in implementation of the EU-Turkey Statement, dating 6<sup>th</sup> September 2017, which is a year after the conclusion of the EU-Turkey statement, it had substantially led to three main outcomes: declining number of arrivals, the slight improvement of the situation of refugees in Turkey and the increase in numbers of returns and resettlements.<sup>209</sup> In the Report, the Commission reported significant drops in border crossings from Turkey, from an average of 11.900 arrivals per week in the first 11 weeks of 2016, to around 650 arrivals per week from right after the conclusion of the Statement.<sup>210</sup> Similarly, the number of deaths also dropped substantially, from 1.150 reported deaths during a year preceding the Statement, to 113 records since its activation.<sup>211</sup> For what concerns the situation in Turkey, the commission recorded that the funding for the Facility for Refugees was having a significant impact on the ground, also thanks to the Turkey's contribution. 860.000 vulnerable refugees had been helped by the Emergency Social Safety Net and the Commission aimed to reach 1.3 million by the end of 2017.<sup>212</sup> The Commission reported also that several humanitarian projects were ongoing in collaboration with the United Nations and other partners in the area of health care, education, protection (refugee registration, support and service referral) as well as non-humanitarian assistance, such as work programmes, language training and women empowerment.<sup>213</sup> Overall, since the precedent report (from 9<sup>th</sup> June 2017 to 31<sup>st</sup> August 2017), the EU took several measures to help local infrastructure and services. For instance, in the first migrant health centre in Kilis around 15.000 Syrians received medical assistance, including 600 pregnant women, and a new migrant health centre was expected to open in Ankara in September.<sup>214</sup> Lastly, in the Report, the

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<sup>208</sup> Idriz N. (2017a), cit. p.5

<sup>209</sup> Van Liempt, I., Jill Alpes, M., Hassan, S., Tunaboylu, S., Ulusoy, O., & Zoomers, A. (2017). Evidence-based assessment of migration deals: The case of the EU-Turkey statement. *Utrecht University, Faculty of Geosciences-Human Geography and Planning*. <https://migratiedeals.sites.uu.nl/> p. 9

<sup>210</sup> European Commission. (2017). *Seventh Report on the Progress made in the implementation of the EU-Turkey Statement* (COM(2017) 470 final), p.3

<sup>211</sup> Ibi, p. 2

<sup>212</sup> Ibi, p. 11

<sup>213</sup> Ibi, p. 12

<sup>214</sup> Ibi, p. 12

Commission acknowledged that, even if a total of 1896 returns were carried on since the date of the Statement, the number remained much lower than the number of arrivals, and Greek reception facilities were still under too much pressure.<sup>215</sup> Concerning resettlements, the total number of Syrians resettled from Turkey under the 1-1 scheme was 8.834 (plus 1.831 persons waiting) in 15 Member States. The Commission evaluated positively such results and foresaw the reach of 25.000 resettlements by the end of the year.<sup>216</sup>

However, one can make several considerations about such outcomes. With relation to the significant drop in arrivals and deaths, several other factors lie behind, other than the implementation of the Statement. This is further confirmed by data from the UNHCR, showing that the number of arrivals on the Greek islands had started to decrease slightly before the Statement.<sup>217</sup> A factor may be the significant weakening of the smuggling industry in Turkey no longer operating as freely as before. Additionally, while in 2015 Syrian refugees were not required to have visas to enter Turkey and the land border was more accessible, in 2016, Turkey imposed visa restrictions on Syrians travelling by air and sea and began constructing a 700-kilometre wall along its border with Syria which, once completed, will be the third worldwide longest wall. Furthermore, with the closure of the Balkan corridor, fewer asylum seekers have been willing to undertake the risky journey to Greece, as the likelihood of being able to continue the journey to other European countries is almost non-existent and those attempting the journey are often left stranded in inhumane conditions in Greece.<sup>218</sup> For what concerns alleged improvements of the situation for refugees in Turkey, several NGOs have reported how the situation remained desperate and legally insecure. How will explained further in this chapter, Turkey denies full refugee status to non-Europeans. According to Turkish law, Syrian applicants are rather given temporary protection status, which gives them access to basic health care, education, and work permits, and prevents them from being forcibly settled in refugee camps. However, many Syrians faced difficulties finding jobs and receiving

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<sup>215</sup> Ibi, p. 5

<sup>216</sup> Ibi, p. 9

<sup>217</sup> Spijkerboer, T. (2017). Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice. *Journal of Refugee Studies*, 31(2), 216–239. <https://doi.org/10.1093/jrs/fex038>, p.14

<sup>218</sup> Batalla Adam, L. (2017). The EU-Turkey Deal One Year On: A Delicate Balancing Act. *The International Spectator*, 52(4), 44–58. <https://doi.org/10.1080/03932729.2017.1370569>, p.3

an education, and their prospects for long-term naturalisation remained uncertain. Many Syrians choose to leave Turkey because of these difficulties and the temporary nature of their legal status.<sup>219</sup> Overall, the majority of the 3 million refugees in the country, as non-Europeans, could not be self-reliant. The Turkish government failed to meet the basic needs of these individuals, and as a result, refugees and asylum seekers were unable to live with dignity.<sup>220</sup> The assessment of the situation of Syrians and other refugees in Turkey will be discussed further up ahead in the chapter.

Finally, the number of resettlements concluded under the 1-1 scheme cannot be considered satisfactory, since the initial goal was to resettle 74.000 persons or more, considering the 3 million Syrians in Turkey. Only 15 out of 28 EU countries participated in the resettlement scheme.<sup>221</sup> Among the countries which refused to accept relocations, it is relevant the reluctant approach of Hungarian government, which, in September 2016, held a referendum on the acceptance of the relocations. 89% of the participants voted against the admission to refugees. Despite such result has been considered void, since just 43% of the citizens voted, it was sold by the Government as a great result and paved the way for other countries to coalize against the relocations.<sup>222</sup> In 2017, Slovakia, Hungary, Czech Republic and Romania, asked to the Court of Justice of the European Union to annul the decision on the relocations, claiming that, besides being unnecessary to address the crisis, it was vitiated by procedural errors and an inappropriate legal basis.<sup>223</sup> Eventually, The Court dismissed the argument of a vitiated legislative process, which should have been followed in accordance with Article 78(3) of the TFEU (requires consultation of the European Parliament when adopting a measure based on it). The Court noted that a legislative process is only applicable if the Treaties explicitly refer to it. The contested decision was seen a non-legislative act and therefore could be adopted through a non-legislative procedure. Furthermore, according to the Court, Article 78(3) of the TFEU the EU institutions have the power to quickly and effectively address emergencies

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<sup>219</sup> Van Liempt, I., Jill Alpes, M., Hassan, S., Tunaboyle, S., Ulusoy, O., & Zoomers, A., cit. p.9

<sup>220</sup> Gogou, K. (2017, April 20). E.U.-Turkey Deal Hinges on Fate of Syrian Locked Up on Lesbos: Amnesty. *Refugees*. <https://deeply.thenewhumanitarian.org/refugees/community/2017/03/20/e-u-turkey-deal-hinges-on-fate-of-syrian-locked-up-on-lesbos-amnesty>

<sup>221</sup> Batalla Adam, L., cit. p.7

<sup>222</sup> Kingsley, P. (2016, October 2). Hungary's refugee referendum not valid after voters stay away. *The Guardian*. Retrieved February 14, 2023, from <https://www.theguardian.com/world/2016/oct/02/hungarian-vote-on-refugees-will-not-take-place-suggest-first-poll-results>

<sup>223</sup> Batalla Adam, L., cit. p.8

caused by a sudden influx of displaced persons through measures can temporarily deviate from legislative acts. These conditions were met in this case.<sup>224</sup>

Lastly, there have been reports of illegal forced returns of Syrian refugees to Turkey. In October 2016, Amnesty International documented the forced removal of 13 people, which had expressed their wish to claim asylum, from the camp of Leros, from where they were transferred to Turkey, without being previously informed.<sup>225</sup> In the same month, UNHCR expressed its concern about a group of 131 people arrived in the Peloponnese, 33 of whom were taken to an unknown location, and denied access to UNHCR legal representatives.<sup>226</sup> This is a clear violation of the legal obligation to perform full and individual risk assessments of all refugees crossing its borders to decide whether their return would place them at risk. Additionally, all returns should be subjected to procedural guarantees, including access to legal assistance and the opportunity to appeal the decision on their asylum application.<sup>227</sup>

## 2.2 Further developments and current state of play

Between 2018 and 2019 the Turkish Government launched two military operations<sup>228</sup> in North-East Syria (Rojava), in the Kurdish Autonomous Administration, aimed to fight terrorism from Da'esh and create buffer zones to return Syrians to their homeland.<sup>229</sup> This change of attitude was probably due to the rising of malcontent towards Syrians among Turkish population, intensified by anti-Syrian rhetoric put in practice by several political leaders, within the context of the deteriorating economic situation in the country.<sup>230</sup>

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<sup>224</sup> Court of Justice of the European Union [CJEU]. (2017, September 6). *Press Release No 91/17* [Press release]. <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf>

<sup>225</sup> Amnesty International. (2016, October 28). *Greece: Evidence points to illegal forced returns of Syrian refugees to Turkey* [Press release]. <https://www.amnesty.org/en/latest/press-release/2016/10/greece-evidence-points-to-illegal-forced-returns-of-syrian-refugees-to-turkey/>

<sup>226</sup> UNHCR. (2016, October 16). *UNHCR concern over the return of 10 Syrian asylum-seekers from Greece*. <https://www.unhcr.org/news/briefing/2016/10/5809e78d4/unhcr-concern-illegal-return-10-syrian-nationals-greece.html>

<sup>227</sup> Amnesty International. (2016, October 28) cit.

<sup>228</sup> Operation Olive Branch, launched on March 2018, and Operation Peace Spring, launched in October 2019 (Stanicek, B. (Ed.). (2019). *Turkey's military operation in Syria and its impact on relations with the EU* [Briefing]. European Parliament.)

<sup>229</sup> ERDOĞAN, M. (2019). Syrian Refugees in Turkey. *Konrad Adenauer Stiftung*, 1–26., p.22

<sup>230</sup> hurriyetdailynews.com. (2019, July 1). The outcome of local elections might unleash anti-Syrian rhetoric. *Hürriyet Daily News*. Retrieved January 11, 2023, from <https://www.hurriyetdailynews.com/opinion/barcin-yinanc/the-outcome-of-local-elections-might-unleash-anti-syrian-rhetoric-144610>

Moreover, the topic of Syrians in Turkey received significant attention during the local elections on 31<sup>st</sup> March 2019. This was a result of the government party not achieving their desired outcomes in many areas, particularly in Ankara and Istanbul, leading to the belief that Syrians played a role in the election's failure. For the first time, Syrians have been a prominent issue on the political agenda in the eight years since the start of the refugee crisis and it is expected to remain a significant topic in future elections as well.<sup>231</sup> The Council condemned the operations for violating the rights of local populations and for seriously undermining the stability of the whole region.<sup>232</sup> Furthermore, in October, the Parliament adopted a resolution calling for a withdrawal of the Turkish troops and defining the creation of the *buffer zone* as a grave violation of international refugee law.<sup>233</sup> On 1<sup>st</sup> March 2020, Turkey launched a new operation, “Spring Shield”, in retaliation to the large-scale bombing of the Turkish army by Assad's forces on 27<sup>th</sup> February. The escalation of the Syrian conflict and the potential scenario of a new humanitarian crisis further exacerbated disappointment towards Europe for the lack of progress on elements of the EU-Turkey statement and lack of support for Turkey's military operation in Syria. This frustration reached a peak when President Erdoğan decided to allow thousands of refugees to cross the border into the EU.<sup>234</sup> This is what President Erdoğan declared during a press conference on February 2020.

*«What we said months ago: "At this rate, we will have to open the borders." They didn't believe us. What did we do yesterday? We opened the borders, as of this morning, it was 18 thousand (refugees). Today, it can probably reach 25,000-30,000 (refugees). We will not close these borders in the following period, and this will continue. Why? The EU must keep its promise. We do not have to take care of that many refugees and feed them. If you are honest, if you are sincere, then you will make a share from here. If you do not, we will open these doors»<sup>235</sup>*

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<sup>231</sup> ERDOĞAN, M., cit. p.22

<sup>232</sup> European Council. (2019, October 14). *Northeast Syria: Council adopts conclusions* [Press release]. <https://www.consilium.europa.eu/en/press/press-releases/2019/10/14/council-conclusions-on-north-east-syria/>

<sup>233</sup> European Parliament (Ed.). (2019). *Resolution on the Turkish military operation in northeast Syria and its consequences* (2019/2886(RSP)). [https://www.europarl.europa.eu/doceo/document/TA-9-2019-0049\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2019-0049_EN.html)

<sup>234</sup> Ianni, A., Açığöz, M., & Giannotta, V. (2021). The Refugee Issue in Turkey's relations with the EU. *CeSPI-Centro Studi di Politica Internazionale*. p.19

<sup>235</sup> CNN Turkey. (2020, February 29). *Cumhurbaşkanı Erdoğan: Kapıları açtık bundan sonraki süreçte de kapatmayacağız: (President Erdoğan: We have opened the doors and we will not close them in the following process)* [Video]. YouTube. Retrieved January 11, 2023, from <https://www.youtube.com/watch?v=11ARMk4dR74>

Consequently, thousands of people headed towards the Greek border following encouragement and assistance from Turkish authorities, facilitated by Turkish authorities, which made available free transportation at the land borders with Greece.<sup>236</sup> Some asylum seekers and their families residing steadily in Turkey even abandoned their housing and spent all their savings to make the journey. Greek authorities responded by preventing their crossing by strengthening border control and, according to several NGOs reports, deploying police and army forces who employed methods such as tear gas, water cannons, plastic bullets, and live ammunition to control the movement.<sup>237</sup> Furthermore, on 13<sup>th</sup> April 2020, in light of the outbreak of the COVID-19 pandemic, Turkey suspended all the returns under the EU-Turkey statement.<sup>238</sup>

The NGO Border Violence Monitoring Network (BVMN) defines pushbacks as the illegal and forced removal of individuals or groups to another country without due process, in contrast to the legal process of deportation and the formal procedure of readmission which is based on agreements between countries. In recent years, pushbacks have become a significant, though unofficial, aspect of the migration policies of EU countries and beyond. The practice is now a defining feature of border externalisation.<sup>239</sup> The most serious risk of pushbacks is the risk of *refoulement*, in violation of the 1951 United Nations Convention Relating to the Status of Refugees and the European Convention on Human Rights. This practice also carries a high risk of inhuman or degrading treatment in the sense of the European Convention on Human Rights.<sup>240</sup> Pushbacks have been a component of Greek "border protection" for some time, but before 2020, pullbacks were more commonly reported. In a pullback, the boat is either still in Turkish waters or has crossed the border but is then returned to Turkey by Turkish

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<sup>236</sup> Stevis-Gridneff, M., & Gall, C. (2020, March 1). Erdogan Says, 'We Opened the Doors,' and Clashes Erupt as Migrants Head for Europe. *The New York Times*. Retrieved January 7, 2022, from <https://www.nytimes.com/2020/02/29/world/europe/turkey-migrants-eu.html>

<sup>237</sup> Amnesty International. (2020, April 6). Greece/Turkey: Asylum-seekers and migrants killed and abused at borders. *Amnesty International*. Retrieved January 11, 2023, from <https://www.amnesty.eu/news/greece-turkey-asylum-seekers-and-migrants-killed-and-abused-at-borders/>

<sup>238</sup> Ministry of Foreign Affairs, Republic of Türkiye. (2020, April 13). *QA-22, 13 April 2020, Statement of the Spokesperson of the Ministry of Foreign Affairs, Mr. Hami Aksoy, in Response to a Question Regarding the Claims of Greek Minister for Migration and Asylum Notis Mitarachi in Ethos Newspaper* [Press release]. [https://www.mfa.gov.tr/sc\\_-22\\_-yunanistan-goc-bakani-nin-iddialari-hk-sc.en.mfa](https://www.mfa.gov.tr/sc_-22_-yunanistan-goc-bakani-nin-iddialari-hk-sc.en.mfa)

<sup>239</sup> BVMN [Border Violence Monitoring Network]. (n.d.). *Understanding Pushbacks*. [www.borderviolence.eu](http://www.borderviolence.eu). Retrieved January 12, 2023, from <https://www.borderviolence.eu/legal-framework/>

<sup>240</sup> Kemény, G., & Vít, M. (2020). Contradictions in Frontex Operations: The Push-back. *Magyar Rendészet*, 20(4), 85–92. <https://doi.org/10.32577/mr.2020.4.5> p.88



authorities. Since 2020, the practice of pushbacks increased dramatically in many European countries, especially on the Aegean Sea and at the land Greek-Turkish border.<sup>241</sup> Since 2020, many human rights organisations documented a sharp increase in pushbacks and other correlated violent practices. In December 2022, the independent network Border Violence Monitoring Network (BVMN) published a 3000+ pages book of testimonies of pushbacks across Europe. From 2017 to 2022, they collected 1.680 testimonies, affecting 28.893 persons. Deponents reported to have suffered from several violent practices, in particular beating with batons or hands, theft, and destruction of personal belongings, kicking, insults, threats with guns, and exposure to weather and water immersion.<sup>242</sup> On average, 45% of the testimonies reported the involvement of minors.<sup>243</sup> BVMN has collected 168 testimonies of pushbacks from Greece to Turkey, affecting approximately 11.183 persons. What is remarkable is that despite the number of arrivals having decreased, the number of suspected pushbacks has nearly doubled.<sup>244</sup> Many of these cases have been brought to the European Court of Human Rights (ECtHR) as domestic remedies were ineffective. Legal professionals have also had to resort to bringing cases directly to the ECtHR or to UN Committees.<sup>245</sup> The most troubling aspect of the events was the reported use of weaponry and technological tools to detect human presence in an area against asylum seekers by Greek forces, an accusation that has been consistently denied as "fake news" by the Greek government. It is alleged that the arrests were carried out not only by police, the Greek Coast Guard and the Greek army but also by individuals in civilian clothes working with the Greek police. These accounts confirm previous evidence of the systematic use of extra-judicial detention by Greek authorities and the involvement of paramilitary groups in informal arrests and returns.<sup>246</sup> As a response, EU institutions maintained, for a long time, a soft line, avoiding explicit condemnation of the abuses. On 3<sup>rd</sup> March 2020, the President of the Commission Von der Leyen expressed gratitude towards the Greek authorities and Frontex “for their

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<sup>241</sup> mareliberum. (2020). *Pushback report 2020*. Retrieved January 11, 2023, from <https://mareliberum.org/en/pushback-report/> p.9

<sup>242</sup> BVMN [Border Violence Monitoring Network]. (2022a). *Black Book of Pushbacks: Vol. I*. BVMN. <https://left.eu/issues/publications/black-book-of-pushbacks-2022/> p. 7

<sup>243</sup> Ibi, p. 8

<sup>244</sup> BVMN [Border Violence Monitoring Network]. (2022b). *Black Book of Pushbacks: Vol. IV*. BVMN. <https://left.eu/issues/publications/black-book-of-pushbacks-2022/> p. 191

<sup>245</sup> BVMN (2022A) cit. p. 14

<sup>246</sup> Cortinovic, R. (2021). Pushbacks and lack of accountability at the Greek-Turkish borders. *Liberty and Security*, CEPS, 1, 1–29, p. 7

*tireless effort*".<sup>247</sup> In November of the same year, the European Anti-fraud Office (OLAF), opened an internal investigation regarding the misconduct of Frontex and its potential involvement in pushbacks activities.<sup>248</sup> The Report was rendered public only in 2022. The document outlines several concerns regarding the actions of Frontex personnel and resources, such as aerial surveillance vehicles. These include instances where staff or assets may have witnessed or covered up knowledge of asylum seekers being pushed back from Greek territory. The document further reveals that some Frontex employees were worried about potential negative consequences from local authorities for reporting such violations. Eventually, the investigation led to the resignation of the executive director, Fabrice Leggeri.<sup>249</sup>

Despite such developments, and the complications of the relationship with Turkey, in 2020 the Commission continued affirming the efficacy of the EU-Turkey statement in lowering irregular arrivals, contributing to the support of Syrian refugees by funding projects in Turkey and on Greek islands.<sup>250</sup> In April 2021, the visit of President Von der Leyen and President Michel to Ankara appeared to signal a renewed effort to improve relations with Turkey. According to the official statement of the President of the European Commission, the meeting with President Erdoğan, among other topics, also focused on cooperation on migration. In the letter, she emphasized that Turkey remains a valid partner and that the EU was committed to continuing funding facilities for migrants as a demonstration of European solidarity with Turkey and an investment in shared stability.<sup>251</sup> In June 2021, a Greek Joint Ministerial decision designated Turkey as a 'safe third country' even for people from Afghanistan, Bangladesh, Pakistan, Somalia, besides Syria. As consequence, asylum applications of people from these five nationalities are no longer examined based on their individual circumstances and the risks they face in their

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<sup>247</sup> Von Der Leyen, U. (2020, March 3). *Remarks by President von der Leyen at the joint press conference with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel*. [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_20\\_380](https://ec.europa.eu/commission/presscorner/detail/en/statement_20_380)

<sup>248</sup> European Anti-Fraud Office [OLAF]. (2021). *Final Report CASE No OC/2021/0451/A1*. Retrieved February 17, 2023, from [https://cdn.prod.www.spiegel.de/media/00847a5e-8604-45dc-a0fe-37d920056673/Directorate\\_A\\_redacted-2.pdf](https://cdn.prod.www.spiegel.de/media/00847a5e-8604-45dc-a0fe-37d920056673/Directorate_A_redacted-2.pdf) p.3

<sup>249</sup> Fallon, K. (2022, October 19). EU border agency accused of serious rights violations in leaked report. *theguardian.com*. Retrieved February 17, 2023, from <https://www.theguardian.com/global-development/2022/oct/14/eu-border-agency-frontex-human-rights-violations-report>

<sup>250</sup> European Commission (Ed.). (2020). *EU-TURKEY STATEMENT Four years on*. p.1

<sup>251</sup> Ianni, A., Açıkgöz, M., & Giannotta, V. cit. p.21

country of origin, rather, the claims are deemed admissible only if Turkey is proven not to be safe. Therefore, since Turkey is still refusing to admit accepting returns, people whose applications as deemed as “inadmissible” are literally stuck in a legal limbo, where they have no access to asylum or documents indicating their legal status, and no right to housing, cash assistance, work, and only to emergently national health service.<sup>252</sup>

### **2.3 The EU-Turkey statement between externalisation of migration management and foreign policy tool**

In the context of the EU migration policies, the expression “externalisation of migration management” describes a set of measures designed to prevent the access of migrants (including asylum seekers) into its territory, even before they attempt to do so, or by returning them to the countries of origin or transit right after their arrival into an EU Member State. Therefore, externalisation of migration management can be seen as the expression of two rationales, namely the prevention of the access of migrants to the EU’s territory and the diversion of the “burden” of protection management beyond it.<sup>253</sup> According to this vision, externalisation is deemed “successful” if it reduces the “burden” of management at the borders and contributes to the lowering of migrant’s access to the EU’s territory.<sup>254</sup> According to the International Refugee Law, outlined in the Refugee Convention, there are fundamental obligations towards refugees, that are not limited by a “jurisdiction” clause. This implies that the States parties must adhere to the Treaty even when carrying on conducts outside their territory.<sup>255</sup> Therefore, there is a good faith duty within the cooperation among countries and responsibility-sharing conducts is implicit in the framework of the international refugee law.<sup>256</sup> Likewise, the externalisation of border control’s practices are not automatically unlawful, rather, its legality is determined by the specific form and impact of the measure. For instance, externalized border control practices such as visa requirements do not necessarily require

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<sup>252</sup> IRC Deutschland. (2022, March 17). What is the EU-Turkey deal? The *IRC in the EU*. <https://eu.rescue.org/article/what-eu-turkey-deal>

<sup>253</sup> Berfin Nur, O. (2019). *Rethinking Rightlessness: the “Right to Have Rights” and the EU-Turkey Statement* [MA Thesis]. Tampere University., p. 37

<sup>254</sup> *Ibi*, p. 36

<sup>255</sup> Cantor, D., Tan, N. F., Gkliati, M., Mavropoulou, E., Allinson, K., Chakrabarty, S., Grundler, M., Hillary, L., McDonnell, E., Moodley, R., Phillips, S., Pijnenburg, A., Reyhani, A. N., Soares, S., & Yacoub, N. (2022). Externalisation, Access to Territorial Asylum, and International Law. *International Journal of Refugee Law*, 34(1), 120–156. <https://doi.org/10.1093/ijrl/eeac023>. p. 124

<sup>256</sup> *Ibi*, p. 125

a physical presence on the territory of another state and are generally considered permissible. However, they may be considered illegal if they are implemented in a discriminatory manner or in individual cases where a decision to deny a visa leads to a violation of protected human rights.<sup>257</sup> Within the EU legal framework, externalisation on migration management is set out as a comprehensive approach towards migration in the 1999 Tampere Conclusions. Despite it appears in previous legal instruments, in the Tampere Conclusions, the EU leaders, for the first time emphasized that migration management should be part of a broader framework for external action and cooperation with third countries.<sup>258</sup> Furthermore, a solid legal basis for externalisation agreements is given by Articles 77(1)(c), 77(2)(d), 78(2)(g) and 79(1) of the Treaty on the Functioning of the European Union, namely the articles regarding “*Policies on Border Checks, Asylum and Immigration*”.<sup>259</sup> Finally, according to Article 67(2) of the 2012 Treaty of Lisbon, EU’s migration policy is a shared competence between member states. While the EU does not have a supranational immigration policy that binds all its members to a common practice, it does have legal tools that require harmonisation and is designed to manage migration through cooperation with countries of origin and transit.<sup>260</sup>

When it comes to EU-Turkey relations, the Readmission Agreement, jointly with the Joint Action Plan and finally the EU-Turkey statement, constitute a clear example of EU’s externalisation of migration management, through the adoption of a set of legal, political, operational and financial instruments that formalized migration regime on a multilateral initiative.<sup>261</sup> By giving Turkey a key role in managing part of the migratory flows towards the EU territory, it has become one of the third countries in the EU’s scheme of strengthening its external borders and curbing migratory inflows. Furthermore, it represented EU countries’ choice to evade financial and social opportunities that would have resulted from the inclusion and naturalisation of migrants into Member States.<sup>262</sup> It

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<sup>257</sup> Ibi, p. 135

<sup>258</sup> Heijer, M., den. (2011). Europe and extraterritorial asylum [Doctoral Thesis]. University of Leiden. <https://hdl.handle.net/1887/16699> p. 177

<sup>259</sup> *Consolidated version of the Treaty on the Functioning of the European Union*. (2012, October 26). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> Art. 77(1)(c), 77(2)(d), 78(2)(g) and 79(1)

<sup>260</sup> Muftuler-Bac, M. (2021). Externalization of migration governance, Turkey’s migration regime, and the protection of the European Union’s external borders. *Turkish Studies*, 23(2), 290–316. <https://doi.org/10.1080/14683849.2021.1943661> p. 4

<sup>261</sup> Ibi, p. 2

<sup>262</sup> Berfin Nur, O. cit. p. 55

has been argued that the increasing EU's tendency towards externalisation of migration management, especially after the 2015 migratory crisis, resulted from an EU's incapacity to adopt an "European solution", namely built around the principles of solidarity and responsibility sharing, as stated in the main EU's official regulations and treaties regarding migration management.<sup>263</sup> The adopted instruments, especially the Joint Action Plan and the Statement, can be seen as crisis-based, ad-hoc, political dialogues, that reflects the EU's interest in developing integration in regard to the external dimension.<sup>264</sup> Particularly, the concept of "safe third country" (which will be analysed further in this chapter), has been seen as a potential blueprint for future cooperation models with transit countries.<sup>265</sup>

On the other side, Turkey has responded to the EU's externalisation approach by using migration as a foreign policy tool. For example, Turkey began making veiled threats to open its borders as early as 2016, despite the most significant moves came in 2020, with Erdoğan's decision of opening the borders towards the EU to all migrants.<sup>266</sup> Turkey's approach can be interestingly ridden under the analysis of the political analyst Kelly M. Greenhill. According to her, a state may decide to use "coercive engineered migration" (CEM), namely "*cross-border population movements that are deliberately created or manipulated by state or non-state actors to induce political, military and/or economic concessions from a target state or states*" as a strong bargaining tool.<sup>267</sup> A state taking advantage of CEM does not necessarily play a role in the creation of the migration crisis, but take advantage of its existence as a "weapon" to obtain such concessions. Furthermore, a State sees it as an opportunity its possibility to threaten to close its borders and thereby create a humanitarian emergency unless the state targeted takes the desired action.<sup>268</sup> According to this reasoning, Turkey used the Syrian mass migration as a tool of bargaining for its foreign policy, acting as an "opportunistic coercer", taking advantage

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<sup>263</sup> Saatçioğlu, B. (2019). The European Union's refugee crisis and rising functionalism in EU-Turkey relations. *Turkish Studies*, 21(2), 169–187. <https://doi.org/10.1080/14683849.2019.1586542> p.6

<sup>264</sup> GÖKALP ARAS, N. (2021). The European Union's Externalisation Policy in the Field of Migration and Asylum: Turkey as a Case Study. In <https://respondmigration.com/> (Paper 2021/76). Swedish Research Institute in Istanbul (SRII). p. 31

<sup>265</sup> Ibi, p. 32

<sup>266</sup> Ibi, p. 32

<sup>267</sup> Greenhill, K. M. (2016). Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis. *European Law Journal*, 22(3), 317–332. <https://doi.org/10.1111/eulj.12179>, p. 320

<sup>268</sup> Ibi, cit. p. 320

of European's wish to avoid the "hypocrisy costs"<sup>269</sup> of welcoming thousands of people seeking asylum as well as its lack of solidarity and collective action.<sup>270</sup> This was mainly possible because, within the EU's context, despite human rights are deemed a central part of its agenda, individual member states and their citizens have differing views on how to respond to refugees, and these divisions have become more pronounced over time. Right-wing ultranationalists in Europe have taken a hard-line stance on immigration, and national-level responses are prioritized over universal, supranational ones. This resistance presents an opportunity for coercers to exploit, as it can harm a leader's relationship with their supporters or even incite unrest within the target state or states.<sup>271</sup>

Finally, none of the parties (the EU and Turkey) at any point during the crisis, called for an end to the EU-Turkey statement itself, which testimonies the mutual dependence of both Turkey and the EU on maintaining their relationship, albeit for different reasons. Despite ongoing tensions and crises in the relationship, both sides are reluctant to deal any fatal blows to cooperative ventures, further highlighting the bilateral dependency of both sides and their reasons for it.<sup>272</sup> In light of this reasoning, the outcome of the EU-Turkey statement can be seen as situation where migrants are used as a bargaining tool, giving Turkey the chance to not only making progress in the Customs Union and its accession to the EU but also to enhance its geopolitical power towards the EU in a more general sense. On the other hand, the European Union could claim that thanks to the Statement, its external borders were strengthened, and it effectively worked to reduce migratory flows (despite other factors contributing, as previously mentioned). On the third side, asylum seekers remained trapped in legal limbo, with uncertain guarantees for the assessment of their asylum claims and in appalling conditions at reception facilities in Greece. Therefore, while the EU and Turkey are benefitting, refugees are losing in this win-win-lose situation.<sup>273</sup> To conclude, externalisation is the way the EU has made third

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<sup>269</sup> According to Greenhill, "hypocrisy costs" can be defined as the gap between a democracy's commitment to liberal norms and its concrete actions to support them (Greenhill, M. (2010). *Weapons of Mass Migration: Forced Displacement, Coercion, and Foreign Policy* (1st ed.). Cornell University Press. <https://www.jstor.org/stable/10.7591/j.ctt7v70q> p.4)

<sup>270</sup> Gokalp Aras, N. E. (2019). Coercive Engineered Syrian Mass Migration in the EU-Turkey Relations: A Case Analysis for Future Reference. *International Migration*, 57(2), 186–199. <https://doi.org/10.1111/imig.12566> p.191

<sup>271</sup> Greenhill, K. M. (2016), p. 324

<sup>272</sup> GÖKALP ARAS, N. (2021), cit. p. 32

<sup>273</sup> Berfin Nur, O., cit. p. 55

countries their external border guards, but it fails to offer a human rights-based solution to the humanitarian refugee crisis. By using conditionality to sustain its political realism instead of the universal rights of refugees and asylum seekers, it appears clear the EU sees its neighbouring countries as mere “service suppliers”, rather than real partners.<sup>274</sup>

### 3. The EU-Turkey statement from a legal point of view

This section analyses the EU-Turkey statement from a legal point of view. Within the scope of the EU constitutional law, two main issues have been questioned. The first one is about *who* are the Parties, besides Turkey, which are part of the Statement: the EU, Member States or both. The second is whether what is agreed upon between parties, made public in the form of a press release, can be considered as an international agreement source of binding obligations between the Parties, or the mere report of a meeting between the “Members of the European Council” and Turkey.<sup>275</sup> The last part investigates how the return of individuals under the grounds of “safe third country”, core provision of the Deal, should be scrutinized in the context of international and EU human rights law. Other aspects of the Deal, such as the relocation scheme, are not further contemplated in the scope of this research work.

#### 3.1 Who are the Parties

In the scope of the cooperation with Turkey on migration, the EU has always played as an autonomous actor, expressing its willingness distinctly from the Member States. The EU substantially enjoyed its international role to speed up the cooperation, also initiating a new relation with Turkey in the broader context of Turkey’s pathway towards EU membership.<sup>276</sup> It is not a case that, after the launch of the negotiations in 2005, the EU’s commitment to support Turkey to “Europeanize” this policy field was also coherent with the progressive securitisation of the migration policy at the EU level (strengthening

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<sup>274</sup> Kaya, H. (2020). *The EU-Turkey Statement On Refugees: Assessing Its Impact On Fundamental Rights*. Edward Elgar Publishing. <https://doi.org/10.4337/9781789909210> p. 73

<sup>275</sup> Cherubini, L. (2017). The ‘EU-Turkey Statement’ of 18 March 2016: A (Umpteenth?) Celebration of Migration Outsourcing. In M. Zago (Ed.), *Europe of Migrations: Policies, Legal Issues and Experiences* (pp. 34–47). EUT Edizioni Università di Trieste. <http://hdl.handle.net/10077/15219> p.41

<sup>276</sup> Danisi, C. (2017, April 20). Taking the ‘Union’ out of ‘EU’: The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law. *EJIL:Talk!* Retrieved January 26, 2023, from <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/> p.2

external border controls, fighting smuggling and trafficking, etc.).<sup>277</sup> In this context, what has been called the “EU-Turkey statement” (and not the “EU Member States-Turkey statement”) was made public on the EU Council’s website with the express acknowledgment that “*the EU and the Republic of Turkey had decided to end irregular migration headed to the Union*”.<sup>278</sup> Furthermore, in several declarations made by the Head of the Council, Donald Tusk, and the President of the Commission, Jean-Claude Juncker, they addressed the Statement as an agreement between “the EU and Turkey”. Thus, everything was leading to the general assumption that it had been concluded by the Council on behalf of the European Union.<sup>279</sup>

However, in 2017, a Decision of the General Court of the European Union on three cases<sup>280</sup> remarkably challenged this assumption. Three individuals, two from Pakistan and one from Afghanistan, who had fled to Greece from Turkey, claimed asylum in Greece. In light of the possibility of seeing their application deemed inadmissible on the ground of the “safe third country” grounds coming from the Statement, they requested the annulment of the EU-Turkey statement before the General Court of the European Union under Article 263 of the TFEU. The Statement, which they affirmed being an international agreement between the EU and Turkey, allegedly violates the rules of the TFEU Treaty, regarding the conclusion of international agreements by the EU. On the other side, the European Council has argued that the court lacks the authority to hear the case, pursuant to Article 130 of the Rules of Procedure of the General Court. Eventually, despite acknowledging that the press release of 18<sup>th</sup> March 2016 presented several language inaccuracies regarding the recognition of the Parties, the Court dismissed the cases, declaring that it lacked jurisdiction to examine the merits of the actions under Article 263 of the TFEU since no EU institution can be identified as Party in the “agreement” (even supposing it is a formal agreement). According to the Court, the adoption of the Statement occurred during a meeting ascribable to an international summit, where the Heads of the States participated as leaders of their governments, and not as members of the EU Council. Therefore, the EU-Turkey statement should be seen

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<sup>277</sup> Kale, B., Dimitriadi, A., Sanchez-Montijano, E., & Süm, E. (2018). Asylum Policy and the Future of Turkey-EU Relations: Between Cooperation and Conflict. *FEUTURE*, 18. <https://hdl.handle.net/11511/84543> p.6

<sup>278</sup> Danisi, C. cit. p.5

<sup>279</sup> Spijkerboer, T. cit. p.6

<sup>280</sup> Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM v European Council



as an agreement concluded by the Heads of State or Governments of the Member States of the EU and the Turkish Prime Minister.<sup>281</sup>

The Court's decision was contested by many legal experts, which have proposed alternative arguments that the Court seems to not have considered. Firstly, the Statement's main objective is to implement the "*return of all migrants not in need of international protection crossing from Turkey into Greece*"<sup>282</sup>. This central aspect of the deal falls under the area of freedom, security, and justice, a shared competence between the EU and Member States, as specified in Article 4(2)(j) TFEU. The relevant provision, in this case, is Article 79 TFEU, which follows the ordinary legislative procedure. As per Article 218(6)(a)(v) TFEU, agreements in fields subject to the ordinary legislative procedure must be concluded by the Council with the consent of the European Parliament. The Union has been granted the express power to conclude such agreements under Article 79(3) TFEU. In areas of shared competence between the EU and Member States, the Member States can exercise their competence only to the extent that the EU has not already exercised its competence or if it has stopped exercising it (Article 2(2) TFEU). Concerning the readmission of third-country nationals by Turkey, the EU-Turkey Readmission Agreement (RA) clearly outlines the EU's exercise of competence in this specific area. Therefore, Member State's ability to conclude a separate agreement with Turkey on this topic should have been pre-empted by the existence of the RA.<sup>283</sup> Furthermore, the legal consequences of the Deal were intended not only to apply to Member States as sovereign entities but also to the Union, which was directly involved in managing the migratory crisis through the European Council. The EU Commission reported that at its meeting on December 15, 2016, the European Council reaffirmed its commitment to fully and non-discriminatorily implementing the statement and endorsed the Joint Action Plan that had been developed for this purpose.<sup>284</sup> As if that were not enough, the costs outlined in the Statement are funded by the EU and the EU's Agencies Frontex and EASO are actively involved in implementing it on the front line. The EU Commission regularly reports on the progress of the Statement, demonstrating that it has

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<sup>281</sup> General Court of the European Union. (2017, February 28). *PRESS RELEASE No 19/17* [Press release]

<sup>282</sup> European Council. (2016, March 18). *EU-Turkey statement* [Press release]. <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>

<sup>283</sup> Idriz, N. (2017b). Taking the EU-Turkey Deal to Court? *Verfassungsblog*. <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/>

<sup>284</sup> Danisi, C. cit.

created binding obligations for the EU and that the Union is working with Member States to carry it out.<sup>285</sup> In conclusion, the General Court likely made a deliberate choice to not examine these elements to sidestep a difficult situation. Had it been decided, it would have either found the Statement to be non-compliant or taken a limited interpretation of asylum and refugee law, both of which could have intensified the already politically charged issue. This approach has been characterized as "judicial passivism," where the Court consciously refrains from using its powers in a particular situation.<sup>286</sup>

### 3.2 Is the Statement legally binding?

The second issue is whether the Statement can be considered legally binding for the Parties, on the same level as an international agreement. The relevance of the matter lies in the fact that, if a legally binding agreement was concluded, It would have happened without complying with the requirements foreseen by European constitutional law reported in the TFEU.<sup>287</sup> Particularly, it would have been in contrast Article 218(2), which foresees the authorisation by the Council to start the negotiations and Article 294(2), which obligates the Council to present the proposal for an act to the Parliament.

Always within the scope of the processes above cited, the General Court has asked the European Council if the meeting of 18<sup>th</sup> March 2016, resulting in the Statement, had led to a written agreement. The Council claimed that there was no legally binding agreement between the EU and Turkey following Art. 218 TFEU or Art. 2(1)(a) of the Vienna Convention on the Law of Treaties. This argument relied on the fact that the EU-Turkey statement was not intended to have any binding obligations, nor was considered an agreement or treaty, but rather a mere political agreement. The Council stated that it was not involved in the discussions between the Member States and Turkey or the actions of the President of the European Council leading to the statement.<sup>288</sup> Eventually, the General Court did not decide on this matter: regardless of its classification, the European Union is not a signatory to it.<sup>289</sup>

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<sup>285</sup> Ibi.

<sup>286</sup> Liguori, A. (2019). *Migration Law and the Externalization of Border Controls: Vol. I*. Routledge. <https://doi.org/10.4324/9780429439100> p. 77

<sup>287</sup> Spijkerboer, T. cit. p. 6

<sup>288</sup> Idriz, N. (2017a), cit. p.7

<sup>289</sup> Spijkerboer, T. cit. p.9

One may say that the argument that the Statement does not create legal obligations has some merit since the "statement" modality is typical of non-binding instruments. Even if less relevant, it has also been argued that the language used in the statement has a characterisation as non-binding, as it uses the word "will" instead of "shall," which is likely typical of non-binding arrangements rather than binding international agreements. However, the Statement presents several characteristics of an international agreement. According to international law, an international agreement is defined as a treaty between states or international organisations that is legally binding, regardless of its name or the number of instruments it is embodied in. The International Court of Justice (ICJ) has stated that international agreements can take many forms and have different names,<sup>290</sup> while the EU's Court of Justice has ruled that an international agreement is any binding commitment between entities subject to international law.<sup>291</sup> What matters is not the form of the agreement, but its actual terms and the circumstances in which it was created. Any international instrument that specifies what has been agreed between the parties and lists their commitments creates rights and obligations under international law and is therefore considered an international agreement. The ICJ's case law has shown that even unconventional instruments, such as meeting minutes or joint communiqués, can be international agreements.<sup>292</sup> In effect, the EU-Turkey statement does list Parties' commitments and, it significantly became the international legal basis on which a national state, namely Greece, changed its national asylum legislation to implement individual returns to Turkey, as foresaw by the arrangements contained in the Statement.<sup>293</sup>

At the end of the day, the choice of using misleading language, as well as rendering what was agreed between the Parties public under the form of a press release, is allegedly intentional. The European Council may have wanted to present the agreement with Turkey as a non-binding instrument to avoid the complicated procedures for negotiating international agreements as required by Article 218 of the TFEU. This would have

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<sup>290</sup> It has been noted within the scope of the ICJ's ruling on the case of Qatar v. Bahrain (1991)

<sup>291</sup> *Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation*. (2017, October 1). <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0507%2801%29>

<sup>292</sup> Gatti, M. (2016, April 18). The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2). *EJIL:Talk!* Retrieved January 28, 2023, from <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>

<sup>293</sup> Idriz, N. (2017b), cit.

allowed for negotiation in the intergovernmental framework, rather than entrusting it to the Commission. Moreover, the leaders of the EU member state may have wanted to avoid the need for consultation with the European Parliament and national parliaments.<sup>294</sup>

### 3.3 The concept of “safe third country”

Behind the whole project of the EU-Turkey statement, there is a core common assumption: all *irregular migrants* must be returned to Turkey as of 20<sup>th</sup> March 2016.<sup>295</sup> The expression “irregular migrants” presumably refers to, either whose accession is not in compliance with the parameters provided by the Schengen Borders Code (which is anyway not mentioned within the Statement) and do not apply for asylum, or their application are found inadmissible by the Greek Asylum Service.<sup>296</sup> The legal basis of the return is the bilateral Readmission Agreement (RA) between the EU and Turkey, signed in 2013. Despite the RA being destined to enter into force in October 2017, the ongoing refugee crisis pushed the parties to take measures to somehow ‘anticipate’ the effects of the Agreement. Therefore, the EU-Turkey Statement and the JAP should be seen as a move aimed to strengthen commitments already taken, in light of the 2015 refugee emergency.<sup>297</sup> According to Article 4 of the RA, “*Turkey shall readmit all third-country nationals or stateless persons who do not, or who no longer, fulfil the conditions in force for entry to, presence in, or residence on, the territory of the requesting Member State*”.<sup>298</sup> Article 18(1) states that “*The agreement shall be without prejudice to the rights, obligations and responsibilities of Union, its Member States and Turkey arising from international law including from international conventions to which they are party*”.<sup>299</sup> For what concern returns, the minimum relevant international law to comply, is the respect of the principle of non-refoulement. Therefore, the returning State must conduct an individual assessment of the risk of refoulement (direct or indirect, namely the risk

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<sup>294</sup> Gatti, M. cit.

<sup>295</sup> European Council. (2016, March 18) cit.

<sup>296</sup> Cherubini, L. cit. p. 37

<sup>297</sup> Ibi, p. 34

<sup>298</sup> *Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation*. (2017, October 1). <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0507%2801%29>, Art. 4

<sup>299</sup> Ibi, Art. 18

that the third country may in turn refool the subject).<sup>300</sup> According to Article 18(3) the readmissions under RA have to be implemented according to the rights and procedural guarantees laying in the Directive 2008/115/EC of the European Parliament and of the Council of 16<sup>th</sup> December 2008 on common standards and procedures in the Member States for returning illegally staying third-country nationals.<sup>301</sup> Article 5 of the Directive, returns should occur in full respect of the principles of the non-refoulement, best interest of the child (in case of minors involved), family life and state of health. Moreover, according to Article 12(1), the subject of the return decision has the right to obtain reasons in fact and in law, information about available legal remedies, and, upon request, such elements should be translated into a language the subject can understand [Art. 12(2)]. Article 13 states the right of the subject to an effective remedy to appeal against the return decision, before a competent judicial or administrative body whose members are impartial. Finally, Article 14(d) imposes to consider special needs for vulnerable persons.<sup>302,303</sup>

In the specific case of the EU-Turkey statement, asylum applications must be treated on a case-by-case basis. It has been made clear that this should happen in line with all the EU and international law requirements and the principle of non-refoulement mentioned above. Operationally, this includes individual interviews and assessments and the right of appeal, without automatic return decisions. There are two legal possibilities under which an application can be declared “inadmissible” concerning Turkey as safe third country and therefore, rejected without examining the substance.

1. First country of Asylum (Article 35 of the Asylum Procedure Directive), when the applicant has already been recognized as a refugee in a third country or enjoys sufficient protection there.

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<sup>300</sup> Cantor, D., Tan, N. F., Gkliati, M., Mavropoulou, E., Allinson, K., Chakrabarty, S., Grundler, M., Hillary, L., McDonnell, E., Moodley, R., Phillips, S., Pijnenburg, A., Reyhani, A. N., Soares, S., & Yacoub, N. p. 146

<sup>301</sup> *Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation.* cit. Art 18

<sup>302</sup> Vulnerable persons are defined minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence. (European Parliament & European Council. (2008, December 16). *Directive 2008/115/EC*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115>, Art 3(9))

<sup>303</sup> European Parliament & European Council. (2008, December 16). *Directive 2008/115/EC*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115>

2. Safe third country (Article 28 of the Asylum Procedure Directive), when the applicant, albeit is not receiving protection in the third country, can be guaranteed effective access to protection by it.<sup>304</sup>

According to the 2013 Asylum Procedures Directive (APD), personal interview on admissibility is personal, and to be conducted by trained personnel, particularly about international human rights law, the Union asylum agreements and interview techniques. Article 46(1) of the APD states the right to an effective remedy before a competent court, and the suspension of the removal from the territory while the procedure is pending (Art. 46.8). Lastly, applicants shall be given the right to consult in effectively a legal adviser (Article 22.1).<sup>305</sup>

As mentioned above, with relation to the concept of “safe third country”, Member States may deem an application for international protection inadmissible if the third country is considered a safe third country for the applicant, according to Article 38 of APD. Under Article 38(1) APD, a country can be considered as safe third country for an applicant where the competent authorities have well-founded reasons to retain that the applicant will be treated in the third country by the following principles:

1. An individual's life and freedom will not be put in danger based on their race, religion, nationality, membership in a specific social group, or political beliefs.
2. There is no risk of serious harm, as defined in Directive 2011/95/EU<sup>306</sup>.
3. The principle of non-refoulement, in line with the Geneva Convention, is respected.
4. The prohibition of removal, which violates the right to freedom from torture and cruel, inhuman, or degrading treatment as laid down in international law, is respected.

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<sup>304</sup> European Commission (Ed.). (2016). *Implementing the EU-Turkey Statement – Questions and Answers* [Fact Sheet]. p.4

<sup>305</sup> European Parliament & European Council. (2013, June 26). *Directive 2013/32/EU*. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032>

<sup>306</sup> European Parliament & European Council. (2011, December 13). *Directive 2011/95/EU*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>

5. The ability to seek and, if found eligible, receive refugee status and protection following the Geneva Convention is available.<sup>307</sup>

In the following section, the concept of “safe third country” is further investigated, to examine its critical nature, especially regarding readmission under the EU-Turkey statement.

### **3.3.1 The problematic nature of "safe third country" readmissions from a human rights perspective**

Many scholars, governmental and nongovernmental organisations argue that readmissions based on the concept of “safe third country” are problematic from a human rights perspective for several reasons. The main risk is that readmissions may violate the right to seek asylum as a fundamental right within the 1948 Universal Declaration of Human Rights, and the principle of non-refoulement, as stated in Article 33(1) of the 1951 Refugee Convention and 1967 Protocol. These two rights, inevitably interrelated, are universally accepted principles and constitute the fundamental legal basis for international refugee protection.<sup>308</sup> Although the EU is not part of the Refugee Convention and Protocol, the TFEU clearly states that the EU must adapt to their principles and ensure the law is in line with the principle of nonrefoulement.<sup>309</sup> Courts, at both the national and international level, particularly the European Court of Human Rights, consistently refer to fundamental principles in their legal interpretations of the human rights of refugees.<sup>310</sup>

The right to seek asylum is threatened by readmissions since they carry the assumption that no one has the actual right to choose an EU country as a safe place to seek asylum, if there are other safe places available.<sup>311</sup> The restriction to the access to asylum has forced people escaping from persecution to access safety by using irregular channels and exposing to the risks of human smuggling. Consequently, the irregular position has

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<sup>307</sup> UN High Commissioner for Refugees [UNHCR] (Ed.). (2016). *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*. p. 5

<sup>308</sup> Kaya, H. cit. p.37

<sup>309</sup> Poon, J. (2016). EU-Turkey Deal: Violation of, or Consistency with, International Law? *European Papers*, 1(3), 1195–1203. <https://doi.org/10.15166/2499-8249/0> p.1197

<sup>310</sup> Kaya, H. cit. p.38

<sup>311</sup> Lehner, R. (2018). The EU-Turkey-’deal’: Legal Challenges and Pitfalls. *International Migration*, 57(2), 176–185. <https://doi.org/10.1111/imig.12462> p. 5

brought them within the scope of readmission agreements, although they are in genuine need of international protection<sup>312</sup> Furthermore, readmissions carry the risk of refoulement, in several ways. First, it requires an individual examination of the risks that the readmission to a third country may imply, independent of the merits of the application for international protection. However, neither the APD nor the Return Directive (Directive 2008/115/EC), provide robust guarantees for that.<sup>313</sup> It must be emphasized that there is no international legal basis for the concept of “safe third country” returns pursuant the APD, which has been accepted as legal by the UNHCR as long as not in contravention with the principle of non-refoulement.<sup>314</sup>

According to Recital 44 of the APD, Member States are not obliged to assess the merits of an application of international protection if the applicant can “*reasonably be expected to seek protection in that third country*”, due to a *sufficient connection* with that country.<sup>315</sup> Within the scope of the EU-Turkey statement, the transit through Turkey appears to be considered such a connection. According to UNHCR, such a condition is not sufficient, “*unless there is a formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards.*”<sup>316</sup> The insights into the Turkish asylum system will be further explained later in the chapter. However, it appears clear that since Turkey is not a member of the EU means that the procedural protections that are in place within the EU are not available in Turkey.<sup>317</sup> Furthermore, Turkey has adopted the 1951 Refugee Convention with the reservation of geographical limitation, meaning that Turkey might only provide limited (instead of full) protection to asylum applicants and refugees not coming from the EU.<sup>318</sup> Therefore, readmissions to Turkey considering it as a “safe third country” can lead to situations where the refugees’ human rights are not upheld, in direct violation of the principle of non-refoulement in the context of human rights.<sup>319</sup>

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<sup>312</sup> Kaya, H. cit. p. 40

<sup>313</sup> Cherubini, L. cit. p. 42

<sup>314</sup> UN High Commissioner for Refugees [UNHCR]. (1992, December 1). *UNHCR’s Position on a Harmonized Approach to Questions Concerning Host Third Countries*. Retrieved January 17, 2023, from <https://www.refworld.org/docid/3ae6b31d47.html>

<sup>315</sup> European Parliament & European Council. (2013, June 26), cit. Recital 44

<sup>316</sup> UN High Commissioner for Refugees [UNHCR] (Ed.). (2016), cit. p.6

<sup>317</sup> Poon, J. cit. p.1198

<sup>318</sup> Ibi, p.1202

<sup>319</sup> Ibi, p.1198



The Return Directive, which applies when a request for international protection is lacking, also lacks a solid procedural framework to protect non-refoulement, in relation to the EU-Turkey statement.<sup>320</sup> The problem arises from the law adopted by the Greek Government (Law no: 4375/2016) in April 2016, to adequate to it. The law introduced a so-called “fast-track procedure” for asylum applications at the borders. According to this law, having entered from a safe third country is a ground for the inadmissibility of the asylum claim, independently from its merits. Since Turkey is designated as a safe third country, virtually all applications made at the borders can be rejected as inadmissible.<sup>321</sup> Furthermore, the procedural guarantees under the fast-track procedure are extremely reduced, not providing adequate safeguards for applicants.<sup>322</sup> Indeed, the asylum procedure shall be concluded in a period not exceeding two weeks, and the deadline to appeal the decision is shortened to only 5 days from the notification.<sup>323</sup> In combination, the initial admissibility test and fast track procedure work together to significantly decrease the chances for individuals who have recently arrived in Greece to have their asylum claims evaluated fairly before being sent back to Turkey.<sup>324</sup>

#### **4. Is Turkey a safe third country?**

The designation of Turkey as a “safe third country” for returned applicants of international protection has been judged as highly controversial by many scholars, non-governmental organisations, and other stakeholders. The reasons are both of legal and humanitarian order and lie in the Turkish legal framework concerning international protection, as well as its practical implications on individuals. The level of protection and guarantees also results in differences, according to the applicant’s nationality. Indeed, because of the EU-Turkey statement, Syrians are given a different legal status respect to non-Syrian applicants.

According to UNHCR, within the framework of the EU-Turkey statement, from 2016 to 2020 (when the Turkish government announced the stop of readmissions), a total of

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<sup>320</sup> Cherubini, L., cit. p. 42

<sup>321</sup> Ulusoy, O., & Battjes, H. (2017). Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement. *Migration Law Series*, 15, 1–42. [https://rechten.vu.nl/en/Images/UlusoyBattjes\\_Migration\\_Law\\_Series\\_No\\_15\\_tcm248-861076.pdf](https://rechten.vu.nl/en/Images/UlusoyBattjes_Migration_Law_Series_No_15_tcm248-861076.pdf). p. 14

<sup>322</sup> aida [Asylum Information Database] & ecre [European Council on Refugees and Exiles]. (2016). Country Report: Greece. In ecre.org. p. 58

<sup>323</sup> Ibi, p. 60

<sup>324</sup> Ulusoy, O., & Battjes, H. cit. p.14

2140<sup>325</sup> individuals have been officially readmitted to Turkey. 19% are Syrian nationals, while the others are mostly from Pakistan (35%), Algeria (10%) and Afghanistan (7%). It has also been calculated that 23% of readmitted persons did not express their will to apply for asylum in Turkey.<sup>326</sup> This data can have many explanations, spacing from the hope to move again from Turkey and applying somewhere else, or the impossibility to express their will to apply for asylum before Turkish authorities. The dynamics of what happens in Turkey are further investigated in the following paragraphs.

#### 4.1 The national asylum legal framework

First, it is worth noticing that Turkey signed and ratified the 1951 Refugee Convention in 1961. However, Turkey, under Article 1(B)(1) of the Convention, declared it would have implemented the Convention with a geographical limitation over the definition of “refugee”, which would have only applied to European applicants.<sup>327</sup> Such limitation was maintained also upon the 1967 Protocol. As a result, Turkey only formally recognizes asylum for refugees fleeing events in Europe, albeit the vast majority of applicants come from countries outside of Europe.<sup>328</sup> In April 2013, the Turkish Government eventually adopted the Law on Foreigners and International Protection (LFIP), establishing a comprehensive legal framework for asylum in Turkey, addressed to all applicants, regardless for their nationality. The law also introduced the Directorate General of Migration Management (DGMM), namely the agency in charge of migration and asylum, designed to conduct status determination procedures.<sup>329</sup> In the LFIP, the geographical restriction on the application of the definition of a refugee is still maintained (Art. 61). However, the Law introduces two additional statuses of international protection, namely the “Conditional refugees” (Art. 62) and “Subsidiary Protection” (Art 63). “Conditional refugee” applies to the applicants who have suffered events of persecution (as per Refugees) *outside European countries*. According to LFIP, while Refugees are entitled

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<sup>325</sup> This data excludes people who have suffered illegal pushbacks and deportations.

<sup>326</sup> UN High Commissioner for Refugees [UNHCR]. (2020, March 31). *Returns from Greece to Turkey*. reliefweb.int. Retrieved February 8, 2023, from <https://reliefweb.int/report/turkey/returns-greece-turkey-31-march-2020>

<sup>327</sup> Kaya, H., cit. p.111

<sup>328</sup> Ibi, p. 112

<sup>329</sup> aida [Asylum Information Database] & ecre [European Council on Refugees and Exiles]. (2022, August 17). *Country Report: Introduction to the asylum context in Türkiye*. asylumineurope.org. Retrieved January 30, 2023, from <https://asylumineurope.org/reports/country/turkiye/introduction-asylum-context-turkiye/>

to protection according to the 1951 Convention, Conditional Refugees can be granted only temporary permission to reside in Turkey, until they are resettled to a third country. The Subsidiary Protection status applies to foreigners or a stateless person not eligible for Refugee or Conditional Refugee statuses but cannot be returned to their countries of origin because of the risk of being sentenced to death, torture or inhuman degrading treatment or indiscriminate violence in situations of armed conflict.<sup>330</sup> Finally, hereafter the failed *coup d'état* in 2016, the Presidential Decree No. 676 made significant changes, permitting the expulsion of asylum seekers and beneficiaries of any kind of international protection at any time if they are considered a member of a terrorist organisation without the need for a court decision or formal process. The amendment also eliminated the automatic suspension of deportation orders in the case of appeals, meaning that Turkish law no longer respects the principle of non-refoulement. Such provision severely augmented the risk of refoulement under national law.<sup>331</sup>

In 2014, the Turkish government approved the "Regulation on Temporary Protection" (RTP) as part of the 2013 Act, which specifically addresses Syrian refugees and others who arrive in large groups and cannot have their protection claims processed individually. The legislation clarifies that temporary protection does not provide "residency permits" or a specific length of time to live in Turkey that could lead to obtaining permanent status. Individuals under temporary protection are not registered for international protection until the temporary protection regime ends, causing confusion among Syrian refugees as some believe this eliminates their right to register for international protection and may lead to their deportation if they later claim international protection within Europe.<sup>332</sup> According to RTP, beneficiaries are entitled basic rights such as non-refoulement and non-punishment of illegal entries and stays (Art. 6), and they have the right to access to social services such as healthcare and education (Art.7).<sup>333</sup> However, according to the Law,

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<sup>330</sup> *Law 6458 on Foreigners and International Protection (YUKK)*. (2013, April 4). Republic of Türkiye. <https://en.goc.gov.tr/lfip> Art. 61, 62. 63

<sup>331</sup> ALPES, M. J., TUNABOYLU, S., ULUSOY, O., & HASSAN, S. (2017). Post-deportation risks under the EU-Turkey statement: what happens after readmission to Turkey? *European University Institute*, 30. <https://doi.org/10.2870/132639> p.3

<sup>332</sup> Baban, F., Ilcan, S., & Rygiel, K. (2016). Syrian refugees in Turkey: pathways to precarity, differential inclusion, and negotiated citizenship rights. *Journal of Ethnic and Migration Studies*, 43(1), 41–57. <https://doi.org/10.1080/1369183x.2016.1192996> p.7

<sup>333</sup> *Turkey: Temporary Protection Regulation*. (2014, October 22). Republic of Türkiye. <https://www.refworld.org/docid/56572fd74.html>, Art. 6, Art.7

beneficiaries of temporary protection are not entitled to accommodation neither cash assistance.<sup>334</sup> Furthermore, according to Article 29 of RTP, the access to labour market is bounded to “specific sectors” and “geographical areas”.<sup>335</sup> The lack of clearly defined employment rights for Syrian refugees under the temporary protection regime is a significant source of insecurity for them. Many work illegally, which exposes them to abuse and exploitation. Only a very limited number of work permits have been issued, suggesting that access to employment is still very restricted.<sup>336</sup>

For what concerns non-Syrian applicants, before 2018, they had to navigate two separate asylum systems. Upon arrival, they would register with the Association for Solidarity with Asylum-Seekers and Migrants (ASAM), a UNHCR partner, in Ankara, where they would have assigned a location to register their protection claim at the Provincial Directorate of Migration Management (PDMM). While awaiting their interview with the DGMM regarding their application for international protection under Turkish law, they would also be interviewed by the UNHCR in Ankara, who would conduct a Refugee Status Determination (RSD) on their case. However, in September 2018, the UNHCR announced to stop registration and processing of applications for international protection, directing applicants to the PDMM instead. Currently, those whose applications for international protection are accepted by the DGMM receive either conditional refugee status or subsidiary protection.<sup>337</sup> Within the scope of the EU-Turkey statement, although the Turkish government promised the EU to uphold the non-refoulement principle for non-Syrian asylum seekers and refugees in a written statement, it is crucial to note that this statement is not legally binding in Turkish national law.<sup>338</sup> Only international treaties gain legal force in Turkish national law after being approved by the Turkish Parliament. Hence, as previously discussed regarding the legal standing of the EU-Turkey Statement,

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<sup>334</sup> Van Liempt, I., Jill Alpes, M., Hassan, S., Tunaboyle, S., Ulusoy, O., & Zoomers, A., cit. p. 20

<sup>335</sup> *Turkey: Temporary Protection Regulation*, cit. Art.29

<sup>336</sup> Rygiel, K., Baban, F., & Ilcan, S. (2016). The Syrian refugee crisis: The EU-Turkey ‘deal’ and temporary protection. *Global Social Policy*, 16(3), 315–320. <https://doi.org/10.1177/1468018116666153>, p. 318

<sup>337</sup> Leghtas, I., & Thea, J. (2018). “You Cannot Exist in This Place:” Lack of Registration Denies Afghan Refugees Protection in Turkey. In *refugeesinternational.org*. Refugees International. Retrieved January 31, 2023, from <https://www.refugeesinternational.org/reports/2018/12/13/you-cannot-exist-in-this-place-lack-of-registration-denies-afghan-refugees-protection-in-turkey> p.7

<sup>338</sup> Al Jazeera. (2022, May 9). President Erdogan pledges Turkey will ‘not expel’ Syrian refugees. *Recep Tayyip Erdogan News | Al Jazeera*. Retrieved February 14, 2023, from <https://www.aljazeera.com/news/2022/5/9/president-erdogan-pledges-turkey-will-not-expel-syrian-refugees>

the declaration made by the Turkish government is a mere statement and cannot be legally contested in courts.<sup>339</sup>

Overall, the implementation of the EU-Turkey deal further separated Syrian refugees from other refugees by only allowing Syrians to be eligible for relocation to Europe. The Statement left the status of non-Syrian refugees unclear and only stated that they would be returned to Turkey with no additional information on their conditions. In reality of facts, very few non-Syrians who were deported from Greece to Turkey were able to apply for international protection status, and only a small number were granted protection.<sup>340</sup> In the first year of the implementation of the Deal, out of the 1,144 non-Syrians returned to Turkey, only 57 were able to apply for international protection from within Turkish detention centres. In the span of one and a half years, only two of these 57 applicants have been granted refugee status, while nine have received negative decisions, 39 are still waiting for a decision, and 831 have been sent back to their home countries.<sup>341</sup>

#### 4.2 The current situation of readmitted migrants

As shown, the legal pathways for Syrian and non-Syrian applicants are slightly different. This also implies several differences in the conditions people live in Turkey. Several scholars and NGOs have collected testimonies from readmitted applicants, lawyers, and human rights defenders. For what concern the situation of readmitted Syrians, after the identification procedure they are given the choice to either stay in closed camps or live in a so-called “satellite city”, living with their means. Once they register at the DGMM, they are given a temporary protection card (Kimlik), through which they have access to public services, and they have to show up at the local police weekly.<sup>342</sup> Despite they are given the possibility to live in cities, no housing program is foreseen by the law. The vast majority of applicants (92%) decide to live outside the camps to increase their opportunities to work and avoid isolation, due to the lack of any information and limited access to services.<sup>343</sup> In camps, people reported to have faced poor access to food as well

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<sup>339</sup> Kaya, H. (2020), cit. p.124

<sup>340</sup> Almasri, S. (2022). Why is Syria a War but Not Afghanistan? Nationality-based Aid and Protection in Turkey’s Syria Refugee Response. *Refugee Survey Quarterly*. <https://doi.org/10.1093/rsq/hdac028> p. 19

<sup>341</sup> European Commission. (2017), cit. p. 5,6

<sup>342</sup> Van Liempt, I., Jill Alpes, M., Hassan, S., Tunaboyle, S., Ulusoy, O., & Zoomers, A., cit. p. 22

<sup>343</sup> Şimşek, D. (2017). Turkey as a “safethirdcountry”? The impacts of the EU-Turkey Statement on Syrian refugees in Turkey. *Perceptions*, 22(4), 161–182. <https://discovery.ucl.ac.uk/id/eprint/10081403> p. 170

as unsatisfactory bureaucratic pathway: they often remain in an ambiguous status, due to indefinite waiting for the procedures.<sup>344</sup> In satellite cities, finding affordable housing is one of the main problems applicants encounter, since prices triggered in certain neighbourhoods after the arrivals.<sup>345</sup> For what concern the access to the labour market, Syrians mostly rely on the informal economy and ethnic networks. The ones who not having strong social networks are generally found to struggle to find an occupation. The risk of labour exploitation in this environment is severe. People usually don't have a work permit, and their need to work to afford accommodation pushes them to accept the worst conditions, in terms of work safety and extremely low wages.<sup>346</sup> The *Kimlik* also enables Syrian children to access education. However, language barriers, lack of awareness of the enrolment procedures for status holders by school institutions and lack of economic means by Syrian families, often prevent children to enjoy their right to education. As a result, it has been esteemed that outside camps, only 14% of children regularly attend schools.<sup>347</sup>

The situation for non-Syrians is not better. After they are returned from Greece, they are immediately detained. People in detention reported being unable to express their will to apply for asylum, access legal aid and access to any means to communicate with the exterior.<sup>348</sup> The percentage of individuals who have been able to apply for international protection is low. By September 2017, only 5 percent of non-Syrians returned from Greece requested international protection in Turkey and only two of them were granted protection.<sup>349</sup> Furthermore, many of them where somehow forced to sign papers they could not understand, or that would lead to their return.<sup>350</sup> On the other hand, several individuals reported to have voluntary signed to be returned because they did not see any other way to get out of detention.<sup>351</sup> According to Human Rights Watch, there are several

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<sup>344</sup>Baban, F., Ilcan, S., & Rygiel, K. (2016). Syrian refugees in Turkey: pathways to precarity, differential inclusion, and negotiated citizenship rights. *Journal of Ethnic and Migration Studies*, 43(1), 41–57. <https://doi.org/10.1080/1369183x.2016.1192996> p. 5

<sup>345</sup> Şimşek, D., cit. p.170

<sup>346</sup> Ibi, p. 172

<sup>347</sup> Baban, F., Ilcan, S., & Rygiel, K., cit. p.10

<sup>348</sup> ALPES, M. J., TUNABOYLU, S., ULUSOY, O., & HASSAN, S., cit. p.4

<sup>349</sup> Alfred, C., & Howden, D. (2018, March 20). Expert Views: The E.U.-Turkey Deal After Two Years. *TheNewHumanitarian.Org*. Retrieved February 2, 2023, from <https://deeply.thenewhumanitarian.org/refugees/community/2018/03/20/expert-views-the-e-u-turkey-deal-after-two-years>

<sup>350</sup> ALPES, M. J., TUNABOYLU, S., ULUSOY, O., & HASSAN, S., cit. p.5

<sup>351</sup> ALPES, M. J., TUNABOYLU, S., ULUSOY, O., & HASSAN, S., cit. p.6

case of Afghani nationals who have been returned to Afghanistan, either through immediate deportation, either after signing for a voluntary return they were forced to sign.<sup>352</sup> HRW also reported cases of Afghans who have been deported to Syria, where they also suffered pushbacks when trying to cross back in Turkey.<sup>353</sup> For what concern the right to healthcare services, due to the scarce possibility to register for international protection, it is often accessible only in emergencies or for vulnerable people, while the others have to afford private medical care.<sup>354</sup> The lack of registration also implies the impossibility to access to education for accompanied and unaccompanied minors, and the possibility to work legally.<sup>355</sup>

## 5. Conclusions

The relevance of the EU-Turkey statement lies in multiple aspects, such as the political background in which it developed, its legal framework, the controversial aspect of its provisions and the actual situation of readmitted people. Its success, claimed by the European Union, in containing migratory flows, ameliorating reception conditions in Turkey and implementing the 1-1 resettlement scheme, is highly debatable. Likewise, the scenario of migration management through international arrangements which includes bargaining for people's rights and economic benefits is worrying for several reasons. Indeed, the EU-Turkey statement represents the final act of a set of arrangements between the EU and Turkey, aimed to negotiate migration management and visa liberalisation for Turkish citizens, namely the Readmission Agreement, the Visa Liberalisation Roadmap, and the EU-Turkey Joint Action Plan. The Statement can be defined as the clearest representation of the increased tendency towards externalisation of migration and border management by the European Union. On the Turkish side, it rather represents a mere bargaining "tool". Turkey has demonstrated to be ready to exploit the management of migratory flows in its borders with the EU as a threat to obtain benefits in its economic relations with the European Union or some kind of tacit relief on its military operations

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<sup>352</sup> Human Rights Watch. (2022). "No One Asked Me Why I Left Afghanistan": Pushbacks and Deportations of Afghans from Turkey. In *hrw.org*. Retrieved February 2, 2023, from <https://www.hrw.org/report/2022/11/18/no-one-asked-me-why-i-left-afghanistan/pushbacks-and-deportations-afghans-turkey>, p. 49

<sup>353</sup> *Ibi*, p. 52

<sup>354</sup> *aida* [Asylum Information Database] & *ecre* [European Council on Refugees and Exiles]. (2021). Country Report: Türkiye. In *asylumineurope.org*. European Council on Refugees and Exiles. p. 102

<sup>355</sup> Leghtas, I., & Thea, J. (2018)., cit. p. 12,13

in the Middle East. This was overall possible because of the lack of cohesion and solidarity by the EU in its response to the crisis.

From a legal perspective, the Statement's significance is unclear. Despite the General Court ruling that the parties are single States, instead of the EU as a supranational organisation, the way the Statement's provisions have been implemented, in terms of joint actions and funding, does not seem to be coherent with what is ruled by the Court. This is demonstrated by both juridical and practical evidence. From a legal perspective, there is an incoherence between the arrangements contained in the Statement, falling under the area of freedom, security and justice, and the provisions contained in the TFEU, which forbid Member States to exercise their competence only when the EU has not already exercised it on its own. Since a Readmission Agreement with Turkey is already existing, the single Member States should not have had the capacity to conclude an additional agreement with Turkey. On a practical level, on various occasions the EU acted as if it was a party in the Statement, by actively involving EU agencies in the frontline operations at the borders, regularly reporting on the progress of the Statement, and using communitarian funds to finance the Facility for Refugees in Turkey.

Furthermore, the Statement's legal validity itself is a matter of debate. On a side, it can be argued that its public announcement through a press release makes it likely to be a non-binding agreement. Moreover, the EU Council has repeatedly affirmed the non-binding nature of the Deal. However, this reasoning conflicts with the approach adopted by the International Court of Justice and the CJEU on other occasions, which led to the affirmation that an international agreement is any binding commitment between entities subject to international law, no matter the form, but its actual terms and the circumstances in which it was created. In the case of the Statement, it is easy to see how it was created in the context of a set of official international summits, and it contains clear commitment points for both parties. Furthermore, it is undeniable it led to significant changes in Greek asylum legislation (which will be further discussed in the next chapter). This further suggests that the Statement has a degree of legal significance. However, its legal status remains unclear, as the parties involved. This brings to the conclusion that the whole arrangement of the EU-Turkey statement lies in a grey zone, where States Parties, the EU



and Turkey are free to act without being required to be accountable towards a defined system of legal remedies since its legal status is itself unclear.

Furthermore, particularly crucial is the provision of readmission of migrants to Turkey, under the concept of “safe third country”. Despite in theory, it results in line with the principles of international law, its practice in the context of the Statement seriously risks threatening asylum seekers’ human rights. On a quantitative level, readmissions under the EU-Turkey statement have not been a massive phenomenon. Since 2016, the number of official readmissions remained substantially low. By 2020, namely the last year the readmissions were officially carried on, the number of total returns was 2.140.<sup>356</sup> However, what is worrying is the number of “non-official” readmissions (taking place through pushbacks, deportations, and other unlawful practices) conducted by the Turkish and Greek authorities, which especially after 2020, increased dramatically. Tracking data on pushbacks and other hidden return practices results extremely hard for several reasons, including the reluctance of victims to report violations, fearing it will affect their asylum procedure, the unofficial nature of such practices, and the juridical doggedness of the authorities towards human rights organisations trying to investigate.<sup>357</sup>

Overall, the situation of readmitted migrants, both Syrians and non-Syrians, is marked by instability and uncertainty in different fields, such as legal status and access to social rights.<sup>358</sup> According to some scholars, the divergence in treatment between Syrians and non-Syrians has been exacerbated by the implementation of the EU-Turkey deal, which seems to have created a sort of artificial distinction between Syrian refugees and people in need of protection from other conflict zones, such as Iraq and Afghanistan.<sup>359</sup> Eventually, those who pay the consequences for such lack of accountability of the system are only the asylum seekers, who face the uncertainty of living in a legal limbo, where their rights are too easily violated and they have scarce possibilities of become an active part of the society they are living in.

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<sup>356</sup> UN High Commissioner for Refugees [UNHCR]. (2020, March 31). Cit.

<sup>357</sup> BVMN [Border Violence Monitoring Network]. (2022b)., cit. p.193

<sup>358</sup> Baban, F., Ilcan, S., & Rygiel, K., cit. p.5

<sup>359</sup> Almasri, S., cit. p.19

## **CHAPTER III – The implications of the EU-Turkey statement on the Greek asylum system**

### **1. Introduction**

This last chapter focuses on the implications of the EU-Turkey statement on the Greek asylum system and who undergoes it. After a brief overview of the Greek asylum system before the EU-Turkey statement, I provide insights on the most significant changes after 18<sup>th</sup> March 2016 (namely when the Statement was signed). Ample space is given to implementing the so-called hotspot approach in the Eastern Aegean islands and how the living conditions have evolved from 2016 to the present.

Furthermore, I retrace and critically discuss the most remarkable changes in the Greek asylum procedures. I will pay particular attention to the so-called fast-track procedure, the accelerated asylum procedure applied to international protection applicants, established by the Greek government to adapt to the EU-Turkey statement. Mainly, I will highlight how the reduced timings and deadlines hinder asylum applicants from enjoying adequate guarantees in their procedure. As part of the *fast-track* procedure, I will also critically analyse the admissibility procedure about the concept of “safe third country”, namely the assessment, before examining the asylum claim on its merits, of whether the application should be examined in Greece or Turkey. Lastly, I will briefly introduce the concept of vulnerability of specific categories of asylum seekers and explain how this concept became problematic in the context of the *fast-track* procedure.

The last part will present the outcomes of the interviews with six legal caseworkers working in several grassroots organisations in Greece. The interviews were conducted to gather evidence from the frontline and provide a qualitative assessment of several aspects of the situation of asylum applicants undergoing the fast-track procedure, regarding access to the asylum procedure, procedural guarantees they benefit from, and human rights violations people are victims of.

### **2. The Greek asylum system before the EU-Turkey Statement**

Overall, the literature has widely demonstrated as, over the decades, proactive policies towards immigration and inclusion of migrants into society were rarely a priority for

Greek governments.<sup>360</sup> Within the decade of 1990-2000, which can be defined as the “early” period of development of national immigration and asylum policies, strict control and repressive approaches were implemented towards migrants.<sup>361</sup> In that period, Greece was characterised by a strong presence of Albanian immigrants, accessing the Country from mountainous borders and the costs, often victims of human trafficking for labour exploitation purposes.<sup>362</sup> Since 1991, Greek immigration policy has been mainly focused on exclusion, without considering labour market demands or providing a viable option for legal immigration from Balkan countries.<sup>363</sup> The immigration laws and procedures adopted by the Government in that decade provided very poor and restricted guarantees and possibilities of regularisation.<sup>364</sup>

In the early 2000s, immigrants crossing Greece originated from Georgia, Pakistan, Bangladesh, Iraq, and Egypt, besides Albania.<sup>365</sup> In this period, the concept of “transit migration” appeared, namely the tendency of people on the move to just transit in certain countries, with the intention to move further. This phenomenon led to the direction of the EU institutions and national governments to treat Greece and other southern countries experiencing migratory flows from the Global South as the “EU external borders”. Hence, these countries were expected to “contain” migrants’ mobility and avoid them moving further to other EU countries. Therefore, from the late 1990s, Greece started serving as the EU's external border by tightening control at its entries and preventing departures via air or sea. Despite a lack of harmonised migration policies, both political parties, PASOK and Nea Dimokratia, who took turns governing the country, adopted conservative and restrictive policies towards migration to redirect public dissatisfaction by promoting anti-migrant sentiments.<sup>366</sup> Law 3386/2005 on *Codification of Legislation on the Entry,*

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<sup>360</sup> Tramountanis, A. (2022). Pathways to Integration and Dis-integration: An Assessment of the Greek Immigration Policy for the Inclusion of Immigrants, Applicants and Beneficiaries of International Protection. In *Challenging Mobilities in and to the EU during Times of Crises* (pp. 263–282). Springer. [https://doi.org/10.1007/978-3-031-11574-5\\_13](https://doi.org/10.1007/978-3-031-11574-5_13), p. 263

<sup>361</sup> Ibi, p. 264

<sup>362</sup> Baldwin-Edwards, M. (2004). Albanian emigration and the Greek labour market: Economic symbiosis and social ambiguity. *Journal for Labour and Social Affairs in Eastern Europe*, 7(1), 51–65. <https://www.jstor.org/stable/43293028>, p. 52

<sup>363</sup> Ibi, p. 56

<sup>364</sup> Ibi, p. 57

<sup>365</sup> International Organization for Migration [IOM]. (2015). Migration in Greece: A Country Profile 2008. In *publications.iom.int*. IOM. Retrieved February 11, 2023, from <https://publications.iom.int/books/migration-greece-country-profile-2008> p. 17

<sup>366</sup> Mantanika, R., & Arapoglou, V. (2022). The Making of Reception as a System. The Governance of Migrant Mobility and Transformations of Statecraft in Greece Since the Early 2000s. In *Challenging*

*Residence and Social Integration of Third Country Nationals on Greek Territory* established “Special facilities for aliens”, where undocumented migrants had to be detained upon their arrival.<sup>367</sup> Greece adopted a system of facilities that functioned like detention centres and could be established anywhere, such as regular police cells, police stations or border guard stations, and makeshift locations that were converted for this purpose. In this context, the possibility of seeking asylum was almost inexistent.<sup>368</sup> For what concerns unaccompanied minors, they were addressed with the same treatment. Undocumented minors could be detained and deported using the same procedures as adult migrants.<sup>369</sup>

Between 2005 and 2008, the European Union adopted directives establishing common minimum legal standards for handling refugees. Soon after, reports from NGOs and EU international bodies acknowledged the perpetration of human rights violations at the Greek borders, barriers to access to asylum, poor procedural guarantees, inadequate social support, and inhumane detention conditions for migrants, drawing attention to the shortcomings of Greece's asylum system. In response to criticism and pressure from the European Commission and the rising arrivals of people escaping conflicts in the Middle East, Greece attempted to reform its asylum laws and practices between 2010-2011.<sup>370</sup> Law 3907/2011 finally established three autonomous services under the Ministry of Citizen and Protection: the Asylum Service, the Appeals Authority and the First Reception Service (FRS). The latter became operational in 2013, intending to process new arrivals through an appropriate assessment of the needs of assistance for asylum seekers, including accommodation facilities.<sup>371</sup> Furthermore, the FRS designed the first reception procedures for all third-country nationals entering irregularly, namely verifying

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*Mobilities in and to the EU during Times of Crises* (pp. 201–220). Springer. <https://doi.org/10.1007/978-3-031-11574-5> p. 206

<sup>367</sup> Greece: Law No. 3386/2005, Codification of Legislation on the Entry, Residence and Social Integration of Third Country Nationals on Greek Territory. (2005, June). <https://www.refworld.org/docid/4c5270962.html>, Art 81

<sup>368</sup> Mantanika, R., & Arapoglou, V., cit. p. 207

<sup>369</sup> Human Rights Watch [HRW]. (2008). Left to Survive. Systematic Failure to Protect Unaccompanied Migrant Children in Greece. In *hrw.org*. <https://www.hrw.org/report/2008/12/22/left-survive/systematic-failure-protect-unaccompanied-migrant-children-greece> p. 41

<sup>370</sup> McDonough, P., & Tsourdi, E. (2012). The “Other” Greek Crisis: Asylum and Eu Solidarity. *Refugee Survey Quarterly*, 31(4), 67–100. <https://doi.org/10.1093/rsq/hds019>, p.69

<sup>371</sup> Papatzani, E., Leivaditi, N., Ilias, G. I. & E. P., & Petracou, E. (2020). Global Migration: Consequences and Responses: Reception Policies, Practices and Responses Greece Country Report. *RESPOND Working Papers*, 42. p. 17

their identity and nationality, registration procedure, medical examination, and information about their rights and obligations, particularly regarding the application for international protection and the identification of vulnerable applicants.<sup>372</sup> However, the availability of reception capacities remained scarce, and most applicants remained excluded, being forced to live in tents in the streets or squatted buildings, especially in Athens and Patras, relying only on the assistance of NGOs and local charity organisations.<sup>373</sup>

In 2015, a significant change occurred in Greece's political landscape when SYRIZA (Coalition of the Radical Left) and the national-conservative ANEL (Independent Greeks) formed a government in a paradoxical coalition. During this period, the new government brought about some changes in the narrative on migration, incorporating pro-migrant rhetoric at a time when migrant inflows to Greece were reaching their peak.<sup>374</sup> Since establishing the Asylum Service in June 2013, UNHCR acknowledged noticeable improvements in handling asylum cases, such as a quicker examination process, better quality interviews and decisions, and protection of procedural rights.<sup>375</sup> However, the substantial increase in arrivals in 2015 further challenged the new government's attitude, making clear that the strict policies on controlling migration after 2016 were implemented to counteract the pro-migrant rhetoric of the coalition's initial time in power.<sup>376</sup> With the rising number of arrivals in Italy and Greece in 2015, in May, the European Union launched the New EU Agenda on Migration to improve the management of identification and registration procedures of displaced people on European territory. The EU approach *de facto* formalised the creation of the so-called hotspots on the Greek Aegean Islands.<sup>377</sup> Overall, the primary purpose of hotspots was to put the responsibility of processing, screening, and managing asylum applications in the country of first arrival, which was the frontline state. Greece was asked to establish the hotspots as early as June 2015. The

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<sup>372</sup> Papatzani, E., Leivaditi, N., Ilias, G. I. & E. P., & Petracou, E., cit. p. 18

<sup>373</sup> McDonough, P., & Tsourdi, E., cit. p.81

<sup>374</sup> Mantanika, R., & Arapoglou, V., cit. p. 210

<sup>375</sup> UN High Commissioner for Refugees [UNHCR]. (n.d.). *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 2nd Cycle, 25th Session GREECE*. p.2

<sup>376</sup> Mantanika, R., & Arapoglou, V., cit. p. 210

<sup>377</sup> Kourachanis, N. (2018). Asylum Seekers, Hotspot Approach and Anti-Social Policy Responses in Greece (2015–2017). *Journal of International Migration and Integration*, 19(4), 1153–1167. <https://doi.org/10.1007/s12134-018-0592-y> p. 1154

first hotspot was established in October 2015 in Lesbos, and the islands of Samos, Leros, Chios and Kos followed soon after.<sup>378</sup> Initially, the hotspots served mainly as registration centres, where migrants underwent nationality screening and registration and received a paper that allowed them to board ships to Athens or Thessaloniki. Most aimed to reach the mainland to continue their journey to northern Europe. Registration served several purposes. For instance, it helped facilitate returns to Greece under Dublin Procedure, as arrivals were recorded in the EURODAC system. It also assisted with the relocation process defined under the EU Agenda. In solidarity with frontline states, the European Commission proposed triggering the emergency response system under Article 78(3) of the EU Treaty to redistribute people needing international protection, which would mean suspending the Dublin rules. However, the relocation scheme never occurred as the hotspots changed their role after the EU-Turkey Statement in March 2016.<sup>379</sup>

### 3. What changed after 18<sup>th</sup> March 2016?

While in 2014, the total number of asylum applications registered at the Greek Asylum Service was 9.432<sup>380</sup>, it increased to 13.197 in 2015<sup>381</sup>. In 2016, asylum applications tripled concerning the previous year, to 44.375 in November.<sup>382</sup> This was mainly because, besides the increasing in arrivals, the EU-Turkey statement entailed the closure of the Balkan route and the substantial compel for people who arrived on the Greek islands after 18th March 2016, to remain there, with the only option to apply for asylum in Greece. Hence, Greece passed from being a transit country to being a destination.<sup>383</sup> This section provides insights into how the Greek Asylum System changed from the EU-Turkey

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<sup>378</sup> Dimitriadi, A. (2017). Governing irregular migration at the margins of Europe. The case of hotspots on the Greek islands. *Etnografia E Ricerca Qualitativa*, 78–95. <https://doi.org/10.3240/86888>, p. 79

<sup>379</sup> Ibi, p. 80

<sup>380</sup> Greek Asylum Service. (2015, January). Στατιστικά στοιχεία από τη λειτουργία της νέας Υπηρεσίας Ασύλου (για το διάστημα, Ιανουάριος – Δεκέμβριος 2014) [*Statistics from the operation of the new Asylum Service (for the period January - December 2014)*]. migration.gov.gr. Retrieved February 12, 2023, from <https://migration.gov.gr/en/statistika/>

<sup>381</sup> Greek Asylum Service. (2016a, January). Στατιστικά στοιχεία της Υπηρεσίας Ασύλου (για το διάστημα, 1.1.2015 – 31.12.2015) [*Statistics of the Asylum Service (for the period 1.1.2015 - 31.12.2015)*]. migration.gov.gr. Retrieved February 12, 2023, from <https://migration.gov.gr/en/statistika/>

<sup>382</sup> Greek Asylum Service. (2016b, December). Στατιστικά στοιχεία Υπηρεσίας Ασύλου (1.1.2016 - 30.11.2016) [*Asylum Service statistics (1.1.2016 - 30.11.2016)*]. migration.gov.gr. Retrieved February 12, 2023, from <https://migration.gov.gr/en/statistika/>

<sup>383</sup> Garcés Mascareñas, B. (2020). Four Years On of the EU-Turkey deal. In *CIDOB Opinion*. Retrieved February 12, 2023, from [https://www.cidob.org/en/publications/publication\\_series/opinion/migraciones](https://www.cidob.org/en/publications/publication_series/opinion/migraciones) p.2

statement, with particular attention to the reception in the hotspot and the leading legal changes.

### 3.1 The hotspots in Eastern Aegean Islands

In April 2016, the Greek government approved Law 4375/2016 to transpose the 2013 Asylum Procedures Directive (APD) provisions into Greek legislation<sup>384</sup>. The law was designed to allow the implementation of the hotspot approach and the EU-Turkey statement on the maritime border.<sup>385</sup> According to the Law, at the institutional level, the reception system's responsibility was transferred by the Ministry of Labour and Social Security to the General Secretariat for Reception, containing the Reception and Identification Service (RIS).<sup>386</sup> The latter is responsible for establishing, operating, and overseeing four regional services: the R.I.C. (performing the recording, identification, and data Verification), the Reception and Identification Mobile Units, the Open Accommodation Structures for asylum seekers, and the pre-departure accommodation structures for those undergoing deportation. These services operate in the context of the five hotspots on the Eastern Aegean Islands.<sup>387</sup>

At the operational level, people who arrived in the islands after 10 March 2016 have been transferred to Reception and Identification Centres and placed under a status of “restriction of liberty” for purposes of identification, which could be extended until 25 days.<sup>388</sup> In 2017, such a practice was replaced by the introduction of a geographical restriction, which prevented newcomers from leaving the island until the conclusion of the whole asylum procedure. Hence, since 2016, the only ways for migrants to leave the islands were to be granted international protection, to be exempt from the procedure due to vulnerability, to be eligible for family reunification under the Dublin Regulation, or to be included in transfers carried out by the government from time to time to reduce

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<sup>384</sup> *Greece: Law No. 4375 of 2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC.* (2016, April 3). <https://www.refworld.org/docid/573ad4cb4.html>

<sup>385</sup> Dimitriadi, A. (2022). Governing Migrant (Im)mobility in Greece After the EU-Turkey Statement. In *Challenging Mobilities in and to the EU during Times of Crises* (pp. 221–240). Springer. <https://doi.org/10.1007/978-3-031-11574-5, p.226>

<sup>386</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2016). Country Report: Greece. In [ecre.org](http://ecre.org). p. 92

<sup>387</sup> Kourachanis, N., cit. p.1157

<sup>388</sup> *Greece: Law No. 4375/2016*, Art. 14

overcrowding.<sup>389</sup> Moreover, on 20<sup>th</sup> November 2019, Greek authorities announced that the island RICs would have been transformed into Closed Reception and Identification Centres that would simultaneously function as Pre-Removal Detention Centres, further exasperating the restriction on residents' movements.<sup>390</sup> Many scholars have argued that the geographical restriction, besides creating a stigmatisation of asylum seekers, is also being used as a deterrent to avoid secondary movements towards other European countries, acting as a "double preventive border".<sup>391</sup> According to Tazzioli and Garelli (2018), after the EU-Turkey statement, hotspots passed from being transit facilities to being proper spaces for the "containment" of migrants, to hold in the islands and disrupt their mobility or to force them into "institutional channels of mobility", such as the relocation schemes, internal forced transfers.<sup>392</sup>

In this context, hotspot facilities have been used as a "hybrid" scheme of detention of the newly arrived people (for the first 25 days) and then become an accommodation centre, with all the additional facilities for the temporary accommodation of vulnerable groups (families, people with physical and mental issues and unaccompanied children) only run by NGOs.<sup>393</sup> Overall, the EU-Turkey statement and the subsequent policy containment of migrants have caused the overcrowding of almost all the hotspots on the islands. In 2017, 4.563 people were present in Lesvos, while the camp's capacity was 3.500 people. In Samos, 1.659 people were residing in a facility with a capacity of 850 spots. In Kos, 1702 people were accommodated in a camp of 1.000 people.<sup>394</sup> Furthermore, during an on-site observation, the Greek Refugee Council discovered that the actual capacity of the hotspots is usually much more limited than what was declared. This is due to several reasons, including damage or destruction of containers in the hotspots, which may be due to their old age or actions taken by residents, often due to the status of frustration with the overall conditions.<sup>395</sup> The overcrowding of the hotspots has often caused appalling

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<sup>389</sup> Dimitriadi, A. (2022)., cit. p.227

<sup>390</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2021). Country Report: Greece. In *ecre.org*. p. 169

<sup>391</sup> Kourachanis, N., cit. p. 1155

<sup>392</sup> Tazzioli, M., & Garrelli, G. (2018). Containment beyond detention: The hotspot system and disrupted migration movements across Europe. *SAGE Journals*, 38(6), 1–19. <https://doi.org/10.1177/026377581875933>, p.14

<sup>393</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2016). Cit. p. 100

<sup>394</sup> *Ibi*, p. 101

<sup>395</sup> *Ibi*, p. 101



hygienic conditions, lack of medical care and substandard provision of basic needs, such as clean water and food.<sup>396</sup> In winter, the situation dramatically worsened due to the low temperatures and the scarce access to adequate heating. In February 2017, due to the freezing temperatures, three men in Lesbos built rudimentary heating devices, which eventually killed them due to the inhalation of carbon monoxide. The previous year, a Kurdish kid and his grandmother had died after the explosion of their tent caused by a cooking gas container.<sup>397</sup> In 2016, the European Union Agency for Fundamental Rights (FRA) reported several incidents in Lesbos, Samos and Chios, including suicidal attempts, riots and fires.<sup>398</sup> Lastly, the situation has been particularly challenging for children, who, due to overcrowding, have been exposed to the risk of abuse, and pregnant women, jeopardising both their and their baby's health due to poor sanitary conditions and the lack thereof of access to medical care.<sup>399</sup>

In March 2020, due to the spread of the COVID-19 pandemic, the Asylum Service suspended all asylum procedures. It announced lockdown measures in the hotspots, which implied that all special activities and facilities within the refugee camps were suspended. During this time, no visitors were allowed in the refugee camps, including members from aid organisations and agencies providing essential services, like non-formal schools. The residents were restricted from leaving the facilities and even moving around within them without a valid reason, as strict controls would be in place.<sup>400</sup> These measures further exacerbated the difficulties for children in camps to access public education, in a situation that was already critical due to the unavailability of transportation from camps to schools, understaffing and malfunctioning of reception classes and the spread of resistance by

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<sup>396</sup> European Council on Refugees and Exiles [ecre]. (2021). *Asylum in Greece: a situation beyond judicial control?* <https://ecre.org/wp-content/uploads/2021/06/ECRE-Legal-Note-9-on-Asylum-in-Greece-A-Situation-Beyond-Judicial-Control-June-2021>, p.34

<sup>397</sup> Cossé, E. (2020, October 28). Death and Despair in Lesbos. *Human Rights Watch*. Retrieved February 14, 2023, from <https://www.hrw.org/news/2017/02/03/death-and-despair-lesbos>

<sup>398</sup> European Agency for Fundamental Rights [FRA]. (2016). FRA Opinion on fundamental rights in the “hotspots” set up in Greece and Italy. In *fra.europa.eu*. Retrieved February 14, 2023, from <https://fra.europa.eu/en/publication/2018/fra-opinion-fundamental-rights-hotspots-set-greece-and-italy>, p.40

<sup>399</sup> Joint Letter to Prime Minister Tsipras re Deteriorating Conditions for Asylum Seekers Trapped on the Aegean islands. (2017, October 23). *Human Rights Watch*. Retrieved February 14, 2023, from <https://www.hrw.org/news/2017/10/23/joint-letter-prime-minister-tsipras-re-deteriorating-conditions-asylum-seekers>

<sup>400</sup> Refugee Support Aegean [RSA]. (2020, March 25). Greece: Move Asylum Seekers, Migrants to Safety. *R.S.A.* Retrieved February 14, 2023, from <https://rsaagean.org/en/greece-move-asylum-seekers-migrants-to-safety/>

school administrations against the enrolment of migrant children.<sup>401</sup> As if that were not enough, in September 2020, a fire destroyed the Moria camp in Lesbos, leaving 13.000 people without a shelter and more than 3000 guests who have reported suffering after exposure to smoke.<sup>402</sup> It took four days to put out the fire, and for over a week, thousands of refugees were left without medical attention, food, or water, surrounded by barricades. The camp was almost entirely, but thankfully, no lives were lost in the blaze.<sup>403</sup> One year after the Moria refugee campfire, there has been little progress in addressing the needs of asylum seekers. Despite pledges to improve conditions and support the affected individuals, they still face harsh living conditions in camps on the islands and mainland.<sup>404</sup>

Furthermore, in April 2020, Greek government adopted a new Joint Ministerial Decision (JMD no 3063) further hampering the work of non-governmental organizations operating in the field of migration and asylum.<sup>405</sup> Besides the already existent requirement of registration in the Registry of Greek and Foreign Non-Governmental Organizations (NGOs), the new JMD imposed the mandatory “certification<sup>406</sup>” (Article 5 and 6). Such a requirement became necessary for NGOs engaged in activities like receiving migrants and asylum seekers to be allowed to operate in reception facilities such as refugee camps and identification centres, and to receive funding from both the EU and national authorities to support their activities related to the reception and social integration of such individuals.<sup>407</sup> NGOs seeking to register under the JMD and Article 58 are now required

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<sup>401</sup> ANSA. (2021, March 11). Greece: Refugee children lack access to education, NGOs say. *InfoMigrants.Net*. Retrieved February 14, 2023, from <https://www.infomigrants.net/en/post/30806/greece-refugee-children-lack-access-to-education-ngos-say>

<sup>402</sup> BBC News. (2020, September 9). Moria migrants: Fire destroys Greek camp leaving 13,000 without shelter. *BBC News*. Retrieved February 14, 2023, from <https://www.bbc.com/news/world-europe-54082201>

<sup>403</sup> Markham, L. (2022, May 9). ‘A disaster waiting to happen’: who was really responsible for the fire at Moria refugee camp? *The Guardian*. Retrieved March 4, 2023, from <https://www.theguardian.com/world/2022/apr/21/disaster-waiting-to-happen-moria-refugee-camp-fire-greece-lesbos>

<sup>404</sup> Refugees International. (2021, September 8). ‘Little Has Changed’ One Year after the Moria Fire in Greece [Press release]. <https://reliefweb.int/report/greece/little-has-changed-one-year-after-moria-fire-greece>

<sup>405</sup> Amnesty International. (2020, August 2). Greece: regulation of NGOs working on migration and asylum threatens civic space. *Amnesty.org*. Retrieved March 13, 2023, from <https://reliefweb.int/report/greece/greece-regulation-ngos-working-migration-and-asylum-threatens-civic-space>

<sup>406</sup> It is remarkable to notice that the certification requirement has been imposed only on organizations working in the field of migration and asylum (Ibi).

<sup>407</sup> Ibi.

to provide extensive documentation about their activities, which can be overly burdensome, especially for smaller organizations. Some requirements are also intrusive and may violate the right to privacy. For instance, financial data and project reports for the previous two years are required for registration. These requirements can be particularly challenging for newly established NGOs, which may not have been active for two years and are effectively excluded from working in Greece in the future if they fail to register.<sup>408</sup> Moreover, in December 2020, the Greek government established a law which prohibits workers, including volunteers and government civil servants, from publicly disclosing any information regarding refugee camps and their inhabitants, even after they have left their positions. As a result, NGO workers are not permitted to voice any concerns publicly regarding potential violations against asylum seekers or the poor living conditions, such as overcrowding, insufficient infrastructure, limited food and water supplies, and unsanitary conditions in the camps.<sup>409</sup>

Currently, the geographical restriction for people arriving in the Eastern Aegean islands is still in force, reiterated by Law 4636/2019, namely the International Protection Act (IPA).<sup>410</sup> Furthermore, despite a decrease in overcrowding, the situation for refugees and asylum seekers on Greek islands remains dire, with inadequate and dangerous living conditions causing harm to their mental health. Despite available capacity, facilities still lack proper access to heating and electricity, and reports of sexual harassment, violence, and fatal events have been documented. The living conditions in the camps, including the presence of rats, garbage, and limited access to essential services, are described as shameful and frightening.<sup>411</sup> Safety is also a matter of concern. In a report published by Refugee Rights Europe, relying on interviews with residents of the camps in Lesbos, 88.15%<sup>412</sup> of respondents declared they do not feel safe in the camp. 48.2% of respondents

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<sup>408</sup> Ibi.

<sup>409</sup> Euro-med Monitor. (2020, December 12). *Greece's new confidentiality law aims to conceal grave violations against asylum seekers* [Press release]. <https://reliefweb.int/report/greece/greece-s-new-confidentiality-law-aims-conceal-grave-violations-against-asylum-seekers>

<sup>410</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2021), cit. p. 160

<sup>411</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2021), cit. p. 177

<sup>412</sup> Gallagher, C., Lucas, A., & Welander, M. (2018). *An Island in Despair: Documenting the situation for refugees and displaced people in Lesbos, Greece* (H. Eynon, Ed.). Refugee Rights Europe. <https://resourcecentre.savethechildren.net/document/island-despair-documenting-situation-refugees-and-displaced-people-lesvos-greece/>, p. 9

witnessed at least a refugee death. The main reasons for death were reported to be violence by refugees (53.4% of the cases), health problems (40.5%) and cold weather (12.2%).<sup>413</sup> In January 2023, the European Commission issued several letters of formal notice of infringement decisions to Greece for failing to fulfil obligations under EU law. Two of the letters pertain to the reception conditions of asylum seekers and the qualifications for international protection. One of the letters issued by the European Commission concerns discriminatory criteria that exclude recognised refugees from most social benefits in Greece. The other letter relates to the arbitrary detention of asylum seekers during screening procedures, referred to as "restriction on freedom" according to Greek law, inside Reception and Identification Centres on the islands, the land border, and two locations on the mainland.<sup>414</sup>

### **3.2 Amendments to the Greek law: the *fast-track* procedure**

The most relevant change in the Greek national law, connected with the EU-Turkey statement, is the introduction of the so-called "fast-track" procedure, foreseen by Article 60(4) of Law 4375/2016.<sup>415</sup> The legal basis for the fast-track procedure lies in Article 43 of the Asylum Procedure Directive (APD), foreseen "*in the event of arrivals involving a large number of third country nationals or stateless persons lodging applications for international protection at the border or in a transit zone [...] and for as long as these third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone*".<sup>416</sup> The procedure applies to all the applicants subject to the EU-Turkey statement, namely those who arrived in Lesbos, Chios, Samos, Kos, and Leros after 20<sup>th</sup> March 2016 (meaning that on the other islands and the mainland, different procedures are applied). However, unaccompanied minors, applicants falling under the Dublin procedures for family reunification and vulnerable applicants are excluded from that procedure. It was supposed to be an exceptional procedure to address

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<sup>413</sup> Gallagher, C., Lucas, A., & Welander, M., cit. p. 10

<sup>414</sup> European Council on Refugees and Exiles [ecre]. (2023, February 3). Greece: Infringement Letters from the European Commission, NGOs Urge More Oversight on Greek Islands, Joint Civil Society Rule of Law Submission, Hundreds of Thousands 'Prevented' Entry. *Ecre.Org*. Retrieved February 21, 2023, from <https://ecre.org/greece-infringement-letters-from-the-european-commission-ngos-urge-more-oversight-on-greek-islands-joint-civil-society-rule-of-law-submission-hundreds-of-thousands-prevented-entr/>

<sup>415</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2016). Cit. p. 58

<sup>416</sup> European Parliament & European Council. (2013, June 26). *Directive 2013/32/EU*. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032>, Art. 43

a large number of arrivals, which could not last beyond 3<sup>rd</sup> January 2017.<sup>417</sup> The fast-track procedure was initially implemented through the Joint Ministerial Decision (JMD) No.13257/2016 on the *application of the provisions of paragraph 4 of article 60 of Law 4375/2016 (A 51)*. According to Article 1 of the JMD, the stages of the procedure can be conducted by staff of the Greek Police or the Armed Forces, with the assistance of the Asylum Service and EASO personnel to conduct the interviews. Furthermore, the whole procedure should not last more than 14 days.<sup>418</sup>

After registering the asylum application, according to Law 4375/2016, the applicant has the right to a “reasonable amount of time” to prepare for the interview and request legal aid.<sup>419</sup> When the interview takes place in accordance with Art. 60(4), this time is one day.<sup>420</sup> International protection decisions must be issued no later than the day after the interview and communicated to the individuals concerned no later than the day after they are issued.<sup>421</sup> Regarding the right to appeal the decision, the deadline to submit it is five days from the notification of the decision and it shall be reviewed within three days of their submission.<sup>422</sup> In the fast-track procedure, the examination of an appeal shall be concluded no later than three months.<sup>423</sup> If the appellants formally requests it, or if the case is retained “particularly complicated”, the Appeals Committee should invite them to an oral hearing.<sup>424</sup>

Although the procedure was supposed to last for a maximum of six months, the procedure has been continuously extended through amendments to the Law and is still in force.<sup>425</sup> Indeed, Law 4375/2016 has been implemented until the end of 2019, while, from January 2020, asylum procedures are ruled by the International Protection Act (IPA). The IPA

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<sup>417</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2016). Cit. p. 59

<sup>418</sup> Joint Ministerial Decision οικ. 13257/2016 on the implementation of the special border procedure. (2016, October 26). *Gazette B/3455/26.10.2016*. <https://www.e-nomothesia.gr/kat-allodapoi/prosphuges-politiko-asulo/koine-upourgike-apophase-oik-13257-2016.html>, Art. 1

<sup>419</sup> Greece: Law 4375/2016, art 52(5)

<sup>420</sup> *Ibi*, art 60(4)(c)

<sup>421</sup> *Ibi*, art 60(4)(d)

<sup>422</sup> *Ibi*, art 61(1)(d)

<sup>423</sup> *Ibi*, art 62(6)

<sup>424</sup> *Ibi*, art 62(1)

<sup>425</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2021)., cit. p. 94

was then amended in May 2020 by Law 4686/2020.<sup>426</sup> Despite the amendments, the procedure remained nearly the same, with few differences. According to Article 90(3) of the IPA, the time to complete the procedure has been extended to 28 days.<sup>427</sup> The deadline to appeal against a negative decision is ten days,<sup>428</sup> but it no longer has the automatic suspensive effect of deportation, readmission or return, which may follow the first instance rejection.<sup>429</sup> The second instance decision should be issued by seven days from the lodging of the appeal.<sup>430</sup>

According to the JMD 15996/2020, the fast-track procedure stopped being applicable from the 1<sup>st</sup> of January 2022. However, in most cases, this provision is not complied with by the authorities in the islands. Furthermore, border procedures falling under Article 43(1) of the Asylum Procedures Directive are still in effect on the Greek islands, foreseeing the same deadlines of the fast-track procedure.<sup>431</sup> From the spring of 2016 until the end of 2021, over 155.000 asylum applications were processed under the fast-track procedure, which has been for nearly half of the country's total asylum caseload, significantly more than any other EU member state employing similar border procedures.<sup>432</sup>

Overall, the procedure has been criticised by several legal organisations. First, to adapt its national law to the EU-Turkey Statement, the Greek Government *de facto* legitimised the division of the asylum procedures applied in the Country. Those who arrived after 20 March 2016 are subject to a truncated procedure, with fewer guarantees, the imposition of geographical restriction on the island of first reception, the exclusion to any form of relocation to Europe and the risk of being returned to Turkey in case their application is rejected.<sup>433</sup> The Greek Council of Refugees (GCR) expressed concern for the prolonged derogation from a regular procedure, which seriously undermines the effective exercise

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<sup>426</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2020), cit. p. 93

<sup>427</sup> *Greece: Law No 4636 On International Protection and other provisions*. (2020, May 27). Art 90(1)

<sup>428</sup> *Ibi*, Art 90(3)(c)

<sup>429</sup> *Ibi*, Art 104(1)

<sup>430</sup> *Ibi*, Art 90(3)(c)

<sup>431</sup> Equal Rights Beyond the Borders, HIAS Greece, & Refugee Support Aegean. (2022, October 11). The state of the border procedure on the Greek islands. *rsaegean.org*. Retrieved February 23, 2023, from <https://rsaegean.org/en/border-procedure-greek-islands/>, p.4

<sup>432</sup> *Ibi*, p.8

<sup>433</sup> Papatzani, E., Leivaditi, N., Ilias, G. I. & E. P., & Petracou, E. (2018). Global Migration: Consequences and Responses: Reception Policies, Practices and Responses. Greece Country Report. *RESPOND Working Papers*, 04. <https://zenodo.org/record/1418569#.ZANZdXbMK3B>, p. 68

of asylum seekers' rights. Notably, the highly reduced times impede applicants from enjoying necessary procedural guarantees, such as the right to free legal assistance, interview preparation and the possibility of receiving an adequate vulnerability assessment.<sup>434</sup> Furthermore, in 2016, in his follow-up country visit to Greece, the UN Special Rapporteur on the human rights of migrants remarked that the fast-track procedure does not provide adequate safeguards, especially for identifying vulnerable people. Moreover, he claimed the impossibility of adequately assessing an applicant's situation in such a short time.<sup>435</sup> The European Council on Refugees and Exiles noted how the procedure is likely to compromise the procedural guarantees provided by international and European law, including the right to be assisted by a lawyer. This is particularly concerning since it is practically impossible for an applicant to submit an appeal on their own without requesting legal aid.<sup>436</sup>

### 3.2.1 The admissibility procedure

The admissibility procedure of an asylum claim consists of an investigation on the merits before the examination of the claim on whether the latter should be examined in the state the application is lodged. According to Article 33 of the 2013 APD, a Member State is not required to examine an asylum claim on its merits (and therefore, the application is considered inadmissible) if:

1. Another Member State has already granted international protection to the applicant, or it has accepted the responsibility of the asylum claim under the Dublin Regulation;
2. The application is a subsequent application,<sup>437</sup> and the applicant could not provide any “new essential elements”;

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<sup>434</sup> Greek Refugee Council [GCR]. (2016, April 11). Οι παρατηρήσεις του ΕΣΠ επί του νόμου 4375/ 2016 [*GCR's comments on law 4375/2016*]. gcr.gr. Retrieved February 22, 2023, from <https://www.gcr.gr/en/ekdoseis-media/reports/item/551-oi-paratiriseis-tou-esp-epi-tou-nomou-4375-2016>

<sup>435</sup> UN Human Rights Office of the High Commissioner [OHCHR]. (2016, May 16). UN Special Rapporteur on the human rights of migrants concludes his follow-up country visit to Greece. Ohchr.Org. Retrieved February 20, 2023, from <https://www.ohchr.org/en/statements/2016/05/un-special-rapporteur-human-rights-migrants-concludes-his-follow-country-visit>

<sup>436</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2021), cit. p. 100

<sup>437</sup> A subsequent application is a new application for asylum lodged after a second instance rejection, based on new and essential elements that arose after the first application, as well as elements the applicant could not provide on his/her first application for reasons beyond his/her capacity (Asylum Information Database [aida]. (2022, May 30). Subsequent applications. *asylumineurope.org*. Retrieved February 20, 2023, from <https://asylumineurope.org/reports/country/greece/asylum-procedure/subsequent-applications/>)

3. A family member has, without justification, submitted a separate claim to the family application;

4. The applicant comes from a “safe third country” or a “first country of asylum”.<sup>438</sup>

According to Article 34 APD, admissibility is examined through a personal interview, which explores the grounds for admissibility without concerning the merits of the asylum claim.<sup>439</sup>

In Greek national law, the admissibility procedure is foreseen by Article 54 of Law 4375/2016, transposed on Article 84 of Law No 4636/2019 (amended in 2020). According to Greek law (which since 2016 traces the EU-Turkey statement), the admissibility of applications is determined based on interviews conducted by personnel from EASO and the Greek Asylum Service. Regarding the “safe third country” admissibility, the Greek Asylum Service decides whether Turkey can be considered a safe country for each applicant on a case-by-case basis. From 2016 to 2021, applicants deemed admissible were required to remain on the islands until their application was processed in Athens, while those deemed inadmissible were given the right to appeal. If the appeal was rejected, they were deported to Turkey.<sup>440</sup> In the scope of the fast-track procedure, the admissibility of the asylum claim related to the examination of circumstances the applicant faced in Turkey, aiming to assess whether Turkey should be considered a safe third country for applicants on the islands and therefore consider their application inadmissible. In practice, the admissibility procedure has been applied to Syrian nationals or applicants from any other country with a recognition rate over 25% arrived on the islands, and therefore subject to the EU-Turkey statement.<sup>441</sup> In practice, this led to a differentiation of the procedures according to nationality. Initially, priority was given to processing Syrian cases, the only nationality subject to admissibility assessment, and applicants from countries with low recognition rates, such as Morocco, Algeria, Tunisia, Pakistan, and Bangladesh. The registration and processing of other nationalities with recognition rates over 25%, such as Afghanistan and Iraq, began in December 2016 to

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<sup>438</sup> European Parliament & European Council. (2013, June 26). Cit. Art 33

<sup>439</sup> *Ibi*, Art 34

<sup>440</sup> Skleparis, D., cit. p. 4

<sup>441</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2017), cit. p. 95



conduct admissibility assessments before examining the merits of their applications.<sup>442</sup> Several NGOs highlighted that since the First Reception Service was registering arrivals based on nationality, instead of by the date of arrival and vulnerability, this has resulted in Syrians being given priority based on their nationality, while other nationalities, such as Afghans, who may have arrived months ago, had to wait months to be registered.<sup>443</sup>

In 2021, the Greek government released a Joint Ministerial Decision (JMD 42799/2021) containing a list of safe third countries, determining Turkey as safe third country for applicants from Syria, Pakistan, Bangladesh, Somalia and Afghanistan, meaning that their applications are now also examined on admissibility grounds prior to merits.<sup>444</sup> The national list of safe third countries in JMD directly resulted in a sharp increase in inadmissibility decisions based on the “safe third country” concept, from 2,839 in 2020 to 6,424 in 2021, concerning both the fast-track procedure and the subsequent applications made on the mainland.<sup>445</sup>

Beyond the previously mentioned problematisation of the safe third country concept, the admissibility procedure is problematic for several reasons. First, the quality of the interviews conducted by EASO and Greek Asylum Offices has been heavily criticised. The concerns regarded especially the use of inappropriate communication methods and unsuitable questions, which may lead to an incomplete assessment of the applicant's case. The concerns included no opportunity to explain their case, failure to consider factors that may impact the applicant's ability to express themselves (like the lack of consideration for applicants' mental health conditions or prior traumas), lack of clarification, potential inconsistencies, misunderstandings (often due to the unavailability of translators), and overall violation of the right to be heard.<sup>446</sup> Furthermore, EASO staff has been found to

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<sup>442</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2016), cit. p. 91

<sup>443</sup> Dimitriadi, A. (2016). The Impact of the EU-Turkey Statement on Protection and Reception: The Case of Greece. *Istituto Affari Internazionali*. <https://www.iai.it/en/pubblicazioni/impact-eu-turkey-statement-protection-and-reception-case-greece> p. 7

<sup>444</sup> *Greece: Joint Ministerial Decision 42799/2021*. (2021, June 8). Government Gazette 2425/B/7-6-2021 (Codified). Retrieved February 22, 2023, from <https://www.e-nomothesia.gr/kat-allodapoi/prosphuges-politiko-asulo/koine-upourgike-apophase-42799-2021.html>

<sup>445</sup> Refugee Support Aegean [RSA]. (2022, March 10). The Greek asylum procedure in figures: most asylum seekers continue to qualify for international protection in 2021. *Rsaegean.Org*. Retrieved February 20, 2023, from <https://rsaegean.org/en/asylum-statistics-2021/>

<sup>446</sup> Asylum Information Database [aida] & European Council on Refugees and Exiles [ecre]. (2022), cit. p. 100

be unprepared regarding the situation and violations displaced people face in Turkey, often relying their decisions on presumptions and assumptions regarding the existing legal framework and implementation.<sup>447</sup>

Beyond the interviews conducted by EASO, the judgement quality of the Asylum Service is also questioned. In response to several queries posed by the ProAsyl foundation, the lawyer Yiota Masodriou made several relevant considerations about recent case law. She highlighted how, when it comes to assessing the admissibility of an asylum claim, the Asylum Services bases its judgement of Turkey as a safe country basing on a mere review of outdated and superficially referenced Turkish law and press articles dating back to 2016 and which therefore does not consider the subsequent introduction of exceptions on the principle of nonrefoulement.<sup>448</sup> Furthermore, she noticed how the Asylum Service only references the titles of the reports in their decisions, without specific references to the legal analysis in those reports or to the facts provided by the applicants, bringing to the suspect that the Asylum Service is not properly examining cases individually.<sup>449</sup> Furthermore, referring to the specific case law of a Syrian woman appealing her inadmissibility decision, she reported that her case had been examined only from the file without hearing the appellant (as pursued by law 4375/2016). The rejection decision by the Appeal Authorities merely followed the logic the Asylum Service applied in the first instance decision.<sup>450</sup>

Overall, the Asylum Service is dismissing thousands of asylum claims (in 2021, 7.005 inadmissibility decisions were issued) as inadmissible based on the 2021 JMD<sup>451</sup>, with absolute disregard for the fact that Turkey has unilaterally suspended readmissions from Greece under the EU-Turkey deal since March 2020. In addition, Turkey has stopped using COVID-19 emergency as an excuse to deny returns and has made it clear that no

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<sup>447</sup> Dimitriadi, A. (2016), cit. p. 7

<sup>448</sup> Masouridou, Y. & PRO ASYL Foundation & Refugee Support Aegean. (2019, October). *Legal Opinion on the case law of the Greek Appeals Committees and Administrative Courts with regard to the application of the » safe third country « concept*. proasyl.de. Retrieved February 20, 2023, from <https://www.proasyl.de/en/material/legal-opinion-on-the-case-law-of-the-greek-appeals-committees-and-administrative-courts-with-regard-to-the-application-of-the-safe-third-country-concept/> p. 1

<sup>449</sup> Ibi, p. 2

<sup>450</sup> Ibi, p. 4

<sup>451</sup> Equal Rights Beyond the Borders, HIAS Greece, & Refugee Support Aegean. (2022, October 11). *The state of the border procedure on the Greek islands*. rsaegean.org. Retrieved February 23, 2023, from <https://rsaegean.org/en/border-procedure-greek-islands/>, p. 19

returns will occur until Greece ends pushbacks and cancels its list of safe third countries.<sup>452</sup> Although rejected asylum applicants cannot be returned to Turkey, the Asylum Service is simply not applying Article 86(5) of Law 4636/2919 (amended), which allows the examination of an application's merits when a third country does not allow the applicant to enter its territory.<sup>453</sup> As a result, the Greek government has not examined the merits of most asylum applications that were rejected on the grounds of safe third country. Asylum seekers rejected on safe third country grounds are detained for readmission or ordered to leave voluntarily within 30 days. However, since there have been no readmissions to Turkey since March 2020, their detention for readmission lacks a legal basis. Additionally, rejected asylum seekers may be unable to return to their home country due to conflicts and persecution and lack of legal documents to enter another country. Therefore, the decision for voluntary departure clearly violates human rights laws.<sup>454</sup>

Albeit the worsening conditions of refugees in Turkey, on 1<sup>st</sup> December 2022, Greek authorities announced that Turkey remained on the list of safe third countries for applicants from Syria, Afghanistan, Somalia, Bangladesh and Pakistan.<sup>455</sup> On 3<sup>rd</sup> February 2023, the Plenary of the Greek Council of State published its judgment regarding the judicial review application lodged by Refugee Support Aegean (RSA) and the Greek Council of Refugees (GCR) in October 2021 regarding the legality of the national list of safe third countries contained in the JMD 42799/2021. In its judgement, the Greek Council of State has claimed that the 2019 International Protection Act fully complies with the standards pursued in Article 38 of the APD since it set out a system foreseeing the application of the “safe third country” concept on an individual basis, as well as the national list of safe third countries contain countries designated as “generally safe” for specific categories of applicants for international protection. Furthermore, the Council claimed that although Turkey has ratified the Geneva Convention subject to a geographical restriction, it can be designated as “safe third country” insofar as it complies

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<sup>452</sup> European Commission. (2022, May 24). *Sixth Annual Report on the Facility for Refugees in Turkey*. eur-lex.europa.eu. Retrieved February 24, 2023, from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0243>

<sup>453</sup> Greece: Law No 4636/2019

<sup>454</sup> Equal Rights Beyond the Borders, HIAS Greece, & Refugee Support Aegean. Cit. p. 22

<sup>455</sup> European Council on Refugees and Exiles [ecre]. (2023b, March 3). Greece: Further “Fortification” of Borders and More Vessels for Hellenic Coast Guard as Situation for Refugees in Türkiye Worsens Following Earthquakes, Series of Reports on Systematic Detention and Abuse. *Ecre.Org*. <https://mailchi.mp/ecre/ecre-weekly-bulletin-03032023>

with the principle of non-refoulement and “offers sufficient protection of certain fundamental rights, including the right to access to health care and the labour market”.<sup>456</sup>

### 3.2.2 Vulnerability assessment

According to Article 21 of the 2013 EU Directive on the *standards for the reception of applicants for international protection* (RCD), vulnerable people are minors and unaccompanied minors, people with disability, serious illnesses or mental disorders, elderly people, single parents, pregnant women, human trafficking victims, and persons who have been subjected to torture, rape, or other severe forms of psychological, physical or sexual violence.<sup>457</sup> The APD requires Member States to give more procedural guarantees to vulnerable people, such as prioritising their examination of international protection applications, as per Article 31(b).<sup>458</sup> In principle, vulnerabilities are paramount in asylum procedures, as they can affect an individual's ability to communicate their story and provide important information about their reasons for fleeing. The European Court of Human Rights (ECtHR) has acknowledged that the vulnerability of asylum applicants is an inherent feature which stems solely from their status as migrants and the trauma of their flight and is not contingent upon any particular conditions or circumstances. However, the current Directives lack a unified system of guarantees for vulnerability that is not limited to their specific purpose and application. As recognised by the ECtHR, the lack of a comprehensive protective approach allows Member States to establish their own requirements for vulnerable individuals. As a result, national practices often combine the obligations towards vulnerable individuals with general obligations towards all asylum seekers, leaving those who are not officially recognised as vulnerable without the protection they need.<sup>459</sup>

Concerning Greek law, in 2007, the Presidential Decree (P.D) 220 identified several categories of vulnerable groups pursuing the RCD, such as “*minors, in particular unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious*

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<sup>456</sup> Refugee Support Aegean [RSA]. (2023, February 17). Key points of the Greek Council of State ruling on the “safe third country” concept. *Rsaegean.Org*. Retrieved March 4, 2023, from <https://rsaegean.org/en/border-procedure-greek-islands/>

<sup>457</sup> European Parliament & European Council. (2013, June 26). Cit. Art. 21

<sup>458</sup> Ibi, Art 31(b)

<sup>459</sup> European Council on Refugees and Exiles [ecre]. (2021) cit. p.13

forms of psychological, physical or sexual violence.”<sup>460</sup> This definition was maintained in Law No 4375/2016 and the subsequent International Protection Act (amended in 2020). According to both the 2016 Law and 2019 Law, special procedural guarantees for vulnerable people include a priority in the examination of the application, adequate support during the interview (such as the possibility to express preferences regarding the sex of the interpreter for women applicants, allowing additional break times and more considerable tolerance for applicant’s contradictory and inaccurate declarations).<sup>461</sup> Furthermore, vulnerable applicants are excluded from the fast-track procedure when adequate support cannot be provided, especially in cases of survivors of torture, gender-based violence or any other form of physical and psychological violence.<sup>462</sup> Therefore, the assessment of the vulnerability is paramount to determine the asylum procedure the applicant will undergo, as well as the quality of the decision-making process. After the implementation of the EU-Turkey statement, vulnerability assessment was conducted by EASO caseworkers.<sup>463</sup>

The implications of the EU-Turkey statement on the vulnerability assessment are questionable for several reasons. According to the law, a medical team from a RIC should identify vulnerability within three days of an asylum seeker's arrival during the initial registration and identification process. However, this has proved challenging in practice, as registration is not a linear process and can take a long time, both inside and outside RICs. Identification of vulnerable individuals can therefore take longer and may require specific expertise.<sup>464</sup> Moreover, due to the backlog faced by the personnel, the vulnerability assessment is usually conducted based on the applicant’s file rather than a medical check and interview with the applicant.<sup>465</sup> Furthermore, it seems to be a tendency to prioritize protection for vulnerable groups with a visible vulnerability or who have a

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<sup>460</sup> Greece: Presidential Decree No. 220 of 2007 on the transposition into the Greek legislation of Council Directive 2003/9/EC from January 27, 2003 laying down minimum standards for the reception of asylum seekers. (2007, November 6). Retrieved February 24, 2023, from <https://www.refworld.org/docid/49676abb2.html>, Art. 17

<sup>461</sup> Law No 4636/2019, Art 67.2 and Law 4375/2016, Art 52(6)

<sup>462</sup> Law No 4636/2019, art. 67(3)

<sup>463</sup> HIAS Greece & Islamic Relief USA. (2018). *EASO’s Operation on the Greek Hotspots An overlooked consequence of the EU-Turkey Deal*. Greece Refugee Rights Initiative. [https://hias.org/wp-content/uploads/hias\\_greece\\_report\\_easo](https://hias.org/wp-content/uploads/hias_greece_report_easo), p. 5

<sup>464</sup> Papada, E. (2021). Engaging the Geopolitics of Asylum Seeking: The Care/control Function of Vulnerability Assessments in the Context of the EU–Turkey Agreement. *Geopolitics*, 28(1), 257–281. <https://doi.org/10.1080/14650045.2021.1884548>, p.11

<sup>465</sup> HIAS Greece & Islamic Relief USA., cit. p. 7

pre-existing condition before the arrival in the camp (for example, those with disabilities, victims of torture or exploitation, or who are more dependent on others, such as pregnant women). However, the failure to identify vulnerable individuals early on means that those with less visible indicators, such as individuals with mental health issues or who are victims of torture, may not receive the necessary services or expedited processing they require.<sup>466</sup> This calculus is particularly problematic since it excludes the form of vulnerability that may have arisen within the hotspots, which, as has been widely demonstrated, easily subjects people to physical and psychological shattering conditions.<sup>467</sup> This situation is further exacerbated by the fact that, due to delays and capacity gaps, Greek authorities often deem the identification procedure concluded before the individual can undergo the medical check and vulnerability assessment. Therefore, they process their asylum claim without properly assessing a possible vulnerability.<sup>468</sup> According to the already mentioned report by Refugee Rights Europe, 86.2% of the respondents declared to have seen their health conditions worsening after their arrival in the camps, either because of the unhealthy environment (57%) or the mental distress experienced (49%).<sup>469</sup>

As if it was not enough, in 2017, Human Rights Watch reported that many caseworkers disclosed to feel political pressure, in the form of multiple communications, to lower the number of people deemed as “vulnerable” and, therefore, reduce the number of applicants eligible to leave the islands and undergo the regular procedure on the mainland.<sup>470</sup> In response to this pressure, a new vulnerability assessment policy has been introduced since September 2018. The policy differentiates between those classified as “first-degree” vulnerability, eligible to be sent to the mainland, such as unaccompanied minors, pregnant women, or victims of trafficking. Those with “second-degree” vulnerability, such as

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<sup>466</sup> Kofman, E. (2018). Gendered mobilities and vulnerabilities: refugee journeys to and in Europe. *Journal of Ethnic and Migration Studies*, 45(12), 2185–2199. <https://doi.org/10.1080/1369183x.2018.1468330>, p. 9

<sup>467</sup> Spathopoulou, A., Carastathis, A., & Tsilimpounidi, M. (2020). ‘Vulnerable Refugees’ and ‘Voluntary Deportations’: Performing the Hotspot, Embodying Its Violence. *Geopolitics*, 27(4), 1257–1283. <https://doi.org/10.1080/14650045.2020.1772237> p. 14

<sup>468</sup> Equal Rights Beyond the Borders, HIAS Greece, & Refugee Support Aegean., Cit. p.15

<sup>469</sup> Gallagher, C., Lucas, A., & Welander, M., cit. p.16

<sup>470</sup> Human Rights Watch [HRW]. (2017, June 1). EU/Greece: Pressure to Minimize Numbers of Migrants Identified As ‘Vulnerable.’ *Hrw.Org*. Retrieved February 24, 2023, from <https://www.hrw.org/news/2017/06/01/eu/greece-pressure-minimize-numbers-migrants-identified-vulnerable>

people with disabilities or post-traumatic stress disorder, instead, must remain on the islands and are transferred to a different accommodation centre out of the camps. This includes UNHCR apartments or humanitarian camps like Kara Tepe (Lesvos). The policy was developed by the Greek Reception and Identification Service and EASO, based on a Standard Medical Assessment Template.<sup>471</sup> Therefore, after the EU-Turkey statement, vulnerability has tragically turned into a type of currency, granting individuals access to special procedural guarantees, better quality living, necessities for survival and the possibility to remain in Greece.<sup>472</sup>

#### **4. An additional angle: feedback from human rights defenders**

This section reports the findings of six interviews conducted in February 2023 with caseworkers from several grassroots organisations in Greece (among them, Mobile Info Team, Equal Legal Aid, I Have Rights, Refugee Legal Support), legally assisting and advising asylum seekers, refugees and undocumented people. The respondents have been working on the frontline since 2014 to the current period. The type of interaction they have with clients is primarily face-to-face or through the hotlines. The service the respondents provides is mainly general assistance through legal asylum procedures, legal support for appeals, interview preparations, strategic litigations, and advocacy. Following the outline present in the Annex 1, respondents were asked to evaluate the situation of asylum seekers and undocumented people in Greek islands and how it evolved from March 2016 to the current period. Particularly, they were asked for opinions on four aspects of the asylum procedure in Greece: access to the Greek borders, access to the asylum procedure, admissibility procedure and overall assessment.

##### **Access to the borders**

Respondents were asked if cases of pushbacks and police misconduct have been reported to them, with which frequency and on which forms. They were also asked to assess the available national remedies for the victims.

All the respondents stated that cases of pushbacks are extremely frequent, especially after 2020. According to two respondents, people rarely manage to arrive in Greece on their first attempt, and almost all applicants have been victims of pushbacks more than once.

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<sup>471</sup> Spathopoulou, A., Carastathis, A., & Tsilimpounidi, M. cit. p. 16

<sup>472</sup> Ibi, p. 15

Two other respondents declared to have seen cases of applicants who have suffered up to 10 pushbacks. The pattern of the practices reported on the land is mostly verbal and physical aggression, the use of dogs for intimidation, drowning and deprivation of all people's personal belongings (including clothes and shoes). At sea, the most common pushback practices are, once a dinghy is located, the unleashing of highly violent waves through a powerful propeller engine until they cause the capsizing of the boat and the destruction of the boat's engines. It often happens that these practices are not only violent but also deadly for the victims. According to the respondents, survivors cannot always identify the perpetrators since they usually act with their faces covered. However, many of them were able to describe the uniforms, which have been mainly attributed to Greek police, coastguard and Frontex. Violence by the authorities has also been reported inside the closed camps, where people are immediately closed upon their arrival for the quarantine period.

For what concern the remedies, all the respondents agreed there are no effective national remedies available, nor is the matter investigated during asylum interviews. Furthermore, most survivors are reluctant to file formal complaints due to the fear of repercussions on their asylum claim, their mistrust in the authorities and the difficulty of proving it. So far, local NGOs have organised informal networks to collect testimonies from survivors. The Greek Refugee Council is in the procedure of bringing several cases before the European Court of Human Rights.

### **Access to the asylum procedure**

Respondents were asked to assess the access to the fast-track procedure and the effectiveness of the services provided by the Greek government.

Respondents generally reported the difficulty for people to get registered due to the overcrowding of reception and identification facilities and the lack of information provided by the Greek government about asylum procedures. One respondent reported that NGOs are neither allowed to hold info sessions nor distribute flyers in the quarantine areas. Before 2020 they were waiting up to six months to receive their interview date. Currently, as soon as they get out of quarantine, they are immediately registered and rushed into the asylum interview without the time to prepare for it and receive adequate information on their rights. The result is that important information is often not taken into account in the interview because beneficiaries were not aware they should have reported



it. The quality of the interviews is also questioned. Interviews often occur in places where people's privacy cannot be adequately respected, and applicants are frequently asked inappropriate questions by the personnel, such as leading questions, directed 'to answer yes or no', or 'get to the point'. Four respondents reported the constant lack of interpreters at the asylum service during the identification procedures and the asylum interview, especially for minority languages. Often applicants are encouraged to have the interview in a language different from their mother tongue (i.e. English) due to the unavailability of interpreters. In other cases, if there are misinterpretation issues during the interview, the personnel pushes to continue with the interview, instead of rescheduling and getting a new interpreter. Furthermore, applicants who request the transcript of their interview (in their legal right) are often refused, their requests ignored, or told 'ask your lawyer to request it' even when the applicant has no lawyer and even though no state lawyers are provided by the Greek government at this stage of the procedures. Without seeing their transcripts, applicants have no opportunity to request any recording error by the caseworker (who is both interviewing and transcribing the interview, often resulting in typing errors). Lastly, respondents reported the very poor quality of the vulnerability assessment. The speed of the procedure has challenged the recognition of vulnerabilities on time before the asylum interview. For example, in Samos, the situation was exacerbated by the absence of a permanent state doctor in the facility. It is common that doctors' vulnerability assessment consists of a quick check, and only 'visible' vulnerabilities are actually referred. Survivors of torture, trafficking and sexual and gender-based violence are often not recognised as such. There have been many rejection decisions where the fact that the applicant was a trafficking survivor and the risk of them being re-trafficked in their country of origin (a ground for international protection) was not explored at all by the caseworker. The absence of vulnerability assessments and medical reports only exacerbates this problem.

### **Admissibility procedure**

Respondents were asked to provide records of applicants whose application had been deemed "inadmissible" after the interview, despite Turkey could manifestly not be considered a safe third country for them.

After the 2021 Joint Ministerial Decision, declaring Turkey a safe third country not only for Syrian nationals but also for people from Somalia, Afghanistan, Pakistan and

Bangladesh, the number of inadmissible decisions raised by a lot. Besides two respondents answering that generally, this situation happened with a lot of single Syrian men, four of the respondents could provide at least a specific case of an applicant they have legally assisted, whose application was deemed inadmissible on Turkey basis, although they have suffered a violation of their rights in Turkey. One individual was denied the possibility to apply for asylum in Turkey; He was detained and was forced to sign a document, most probably a voluntary return, to get out of detention. In the other three cases reported, applicants had been victims of violence by Turkish authorities or nationalist groups. In all four cases, the respondents declared that the applicants had presented accurate evidence of what happened, and their testimonies were coherent and reliable.

### **Appeal**

Respondents were asked to assess the appeal procedure in terms of deadlines, legal assistance and information provided by the Greek government.

All respondents agreed that the deadlines to appeal the first instance decision within the fast-track procedure are too short. Applicants have the right to free legal aid to lodge an appeal. However, lawyers provided by the state are constantly overworked, and they do not have the capacity to properly assist all their clients. Two respondents reported that clients often have the opportunity to talk with their lawyer for no more than 15 minutes by phone. Another two respondents reported that legal NGOs usually do not have the capacity to follow appeals because they are time-consuming and with a very low success rate. Furthermore, the information provided by the Asylum Office is often superficial (for instance, they are told 'they have the right to free legal aid', but nothing is said about how to get free legal aid) and is common among applicants going through an appeal procedure without being adequately aware of what is going on. Lastly, the contents of the decisions deemed often look botched up. Three respondents reported having seen decisions containing information not provided by the applicant, but which instead seemed to belong to someone 'else, as well as decisions which looked copy pasted with each other.

### **Overall assessment**

Respondents were asked to express the issues of major concern generally, which need to be addressed with priority.

The most frequent issue of major concern has resulted in the awful quality of the information provided by Greek authorities about applicants of international protection rights and asylum procedures. Furthermore, respondents addressed the very short deadlines, which do not give the opportunity to people to properly enjoy their procedural rights. The quality of the vulnerability assessment and the fact that decisions are issued more quickly in the fast-track procedure also raised concerns, and the vague and unelaborated reasons for the rejection, often just citing a lack of internal credibility without further explanation, means that challenging these rejections at the appeal stage is incredibly challenging as the rejection has not been thoroughly justified.

## **5. Conclusions**

Although the General Court of the CJEU ruled that the EU-Turkey statement is not a legally binding international agreement, it produced remarkable changes in the Greek asylum law, with direct consequences on asylum seekers' access to their human rights. Since the 1990s, proactive migration policies and social inclusion were not a priority for Greek governments. As Greece did not have a solid asylum and migration legal framework, the working conditions of migrants, detention centres, the situation at the borders and access to asylum were always critical. Something started to change only from 2010-2011, when, due to the increasing arrivals, especially from middle Eastern countries, and official reports from EU agencies reporting human rights violations at Greek borders, Greek governments adjusted national laws on migration and asylum to the EU standards. In 2015, when the Crisis occurred, Greece was still in the process of adaptation. The urgency of the EU to contrast secondary movements of masses of refugees willing to seek asylum in Central European countries led to the creation of hotspot in Greek islands aimed at registering, screening, and processing the asylum claims of all the arriving people.

In this context, the EU-Turkey statement worked as a “facilitation tool” of the EU plan to keep people at the borders of Europe and prevent their mobility. With the pretext of the readmission agreement, hotspots became a proper buffer zone where people were not allowed to leave the island. They were, forced to live in tents in overcrowded facilities, in appalling hygienic and safety conditions, waiting for their asylum claim to be processed or the return to Turkey. The restriction measures implemented by Greek Government to

address the Covid-19 emergency further exacerbated the already critical situation. For a year, asylum procedures were suspended, and the imposing of lockdowns in camps impeded NGOs from providing humanitarian aid, medical care and non-formal educational activities and prevented many kids, residing in the camps from attending school.

To adapt the asylum procedures to the EU-Turkey statement, the Greek government introduced the *fast-track* procedure, a special border procedure with a truncated timeline, aimed to process a large number of applications in a short time and easily carry on returns to Turkey to all those not qualifying for international protection in Greece. The significantly shortened times and deadlines caused the reduced access of applicants to their procedural rights, such as access to legal aid and adequate preparation to the asylum interview. Furthermore, the introduction of the admissibility procedure, aimed at assessing whether Turkey could be considered a safe third country for the applicant, as part of the fast-track procedure (initially only for Syrian nationals, extended to four other nationalities after 2021), led Greece to heavily reduce the number of processes of asylum applications on the merits. Furthermore, the admissibility procedure has been criticised for the scarce preparation personnel conducting the interviews has demonstrated, as well as the superficiality of the written decisions. Notwithstanding, this accelerated procedure was due to be an emergency provision to last for a maximum of six months; it has been continuously extended through amendments to the asylum law and is still in force.

The vulnerability assessment is a core part of the procedure since it aims at identifying groups of applicants who, according to the relevant EU legal framework, should benefit from more procedural rights in the procedure, aimed to protect them as more vulnerable, among which, the right to not to undergo the fast- fast track procedure and see their asylum application processed in the Greek mainland, in the regular procedure. However, after the EU-Turkey statement, vulnerability assessment has been used as a “tool” to “regulate” the fluxes of applications processed through the regular procedure. The narrowing of the standards to be considered vulnerable, as well as the very low quality of the vulnerability assessment conducted in the reception and identification centres in the islands, prevented many asylum applicants from fully enjoying their rights and contributed to converting vulnerability into a sort of currency which grants the access to

a better-quality asylum procedure, as well as higher possibilities to revive international protection.

The interviews with human rights defenders aimed at providing an additional point of view about asylum applicants undergoing the fast-track procedure, with a more people-centred focus. Eventually, they confirmed what had been presented in the literature. What has been referred by the respondents highlights how the situation is overall alarming in terms of human rights and how little has changed since 2016. From what has been reported, in a nutshell, one manages to arrive on Greek islands, with a significant probability as a survivor of pushbacks and police violence. Right after the arrival, one is detained in specific areas for quarantine, where it is not possible to receive any information about asylum procedures and the applicant's rights. Right after, people are rushed into the asylum procedure without the necessary time to become aware of their rights and adequately prepare for asylum interviews. Once the decision is issued, the deadlines to appeal are extremely short, and the quality of the free legal aid provided very scarce, making the outcome of the appeal procedure almost impossible to be different from the first instance decision. During all the procedures, the applicant's rights to receive adequate information at the arrival (Art. 8 APD) adequate procedural rights for vulnerable groups (Art. 32(6)(b) APD), the possibility to explain themselves during the interview (Art.16 APD) and the general right to interpretation (Par. 28 APD) are often disregarded.

## Conclusions

The pathway of externalisation of migration management is not a novelty in the history of the European Union's legal approach. Since the 1999 Tampere Conclusions, the concept of external action and cooperation with third parties to manage migratory flows appeared in the EU's policy programme. This concept was further reiterated in the legal framework established by the TFEU and the Treaty of Lisbon. In 2015, the steep increase of people arriving in Europe challenged the unprepared reception and asylum system, which eventually failed to enforce asylum seekers' human rights, including the right to life.

In such a high emergency, measures of positive reception, such as the resettlement scheme, have been embraced by a number of countries, while some others countries have excluded themselves from such initiatives, leading to partial failure. The attempt by Germany to bypass the Dublin procedure for Syrian asylum seekers lasted only a few months. In this context, the EU opted to implement measures aimed at hindering and containing migratory flows, such as increasing border controls, Frontex's capacity and allowing NATO joint operations in the Mediterranean. In this context, the EU-Turkey statement served as an international arrangement to shift the management of migratory flows to Turkey through returns and the transaction of funds dispatched to reception facilities. From the Turkish side, the Deal has been seen as the opportunity to "weaponize" the humanitarian crisis, using it as a deterrent to bargain economic and foreign policy arrangements.

The Statement's legitimacy with the international legal framework is questionable for several reasons. The unclear definition of the Statement's parties has led the General Court of the Court of Justice of the European Union to dismiss a case of human rights violations without examining its merits. This raises the concern that the EU courts will not address human rights violations committed in pursuit of the Statement's provisions after national remedies have been exhausted. Consequently, it creates a significant accountability issue for the Statement itself. Furthermore, despite the General Court and the EU Council reiterating the Deal's inadequacy to produce legally binding obligations, this is inconsistent with the reality of the facts, since the Greek government adapted the whole Greek asylum system to the Statement. This aspect further contributed to creating

a contest of unclarity about the arrangements made by the EU (or its Member States) and Turkey. In addition, the provision of readmission of migrants to Turkey, under the concept of "safe third country," is particularly crucial in the EU-Turkey statement. While it may appear to be in line with the principles of international law in theory, its practice within the context of the statement poses a significant risk to the human rights of asylum seekers. Although readmissions under the EU-Turkey statement have not been widespread on a quantitative level, the potential impact on the lives and well-being of affected individuals cannot be understated. The situation for readmitted asylum seekers is critical due to the frequent lack of access to asylum procedures, the labour market, education, and the demonstrated implementation of refoulement.

As a result, it can be concluded that the EU-Turkey statement's entire arrangement lies within a legal grey zone, where the parties involved, States Parties or the EU, and Turkey, are not obligated to be accountable under a well-defined system of legal remedies due to the agreement's unclear legal status. The absence of clear legal obligations and accountability mechanisms has raised concerns about the statement's legitimacy and effectiveness in addressing the ongoing humanitarian crisis. The legal uncertainty has also contributed to challenges in enforcing the statement's provisions, particularly in cases of human rights violations. Overall, the legal ambiguity surrounding the EU-Turkey statement creates significant challenges for ensuring that the rights and interests of all parties involved are appropriately safeguarded.

As mentioned, the EU-Turkey statement had significant implications for Greek asylum law, impacting the human rights of asylum seekers. The situation of migrants in Greece was already critical before 2015, with an almost inexistent asylum system, awful working conditions for migrants, detention centres, and border violence. The Crisis in 2015 led to the creation of hotspots on Greek islands, where people were not allowed to leave and lived in overcrowded facilities, waiting for their asylum claims to be processed or returned to Turkey. In accordance to the Statement, the Greek government introduced the fast-track procedure, a special border procedure with a truncated timeline aimed at processing many applications quickly and efficiently carrying out returns to Turkey. This accelerated procedure has been continuously extended through amendments to the asylum law and is still in force, resulting in reduced access to procedural rights. The access to asylum procedures has been further hampered by the introduction of the admissibility

procedure, which prevents an asylum claim from being examined on its merits on the grounds that Turkey can be considered a safe third country for the applicant. After the 2021 Joint Ministerial Decision, stating that Turkey should be viewed as a safe third country for applicants from Syria, Afghanistan, Somalia, Pakistan, and Bangladesh, this has become a reality for most applicants arriving on the Greek islands. The vulnerability assessment is a crucial part of the procedure, aimed at identifying groups of applicants who should benefit from more procedural rights in the procedure, but after the EU-Turkey statement, vulnerability assessment has been used as a "tool" to "regulate" the flow of applications processed through the regular procedure. The narrowing of the standards to be considered vulnerable and the low quality of the vulnerability assessment conducted in the reception and identification centres in the islands also prevented many asylum applicants from thoroughly enjoying their rights.

Human rights defenders confirmed that the situation in terms of human rights is alarming, with a slight improvement since 2016. Asylum seekers arrive on Greek islands, with a high probability as survivors of pushbacks and police violence. They are then detained in specific areas for quarantine, where they cannot receive any information about asylum procedures and their rights. They are rushed into the asylum procedure without adequate time to prepare for interviews, and deadlines to appeal are extremely short, with low legal aid provided. Their rights to receive sufficient information, procedural rights for vulnerable groups, the possibility to explain themselves during interviews, and the unrestricted right to interpretation are often disregarded.

To conclude, the EU-Turkey statement significantly reduced access to a fair asylum procedure, where procedural rights following the international and EU legal standards are guaranteed and respected. The ineffectiveness of national remedies and the legal grey zone in which the Statement lies makes it difficult for individuals to bring their cases before international courts and see their rights enforced. Although the EU institutions may claim the EU-Turkey statement effectively reduced the pressure on the Member State's reception system regarding the number of asylum claims processed, it is creating conditions of despair and uncertainty among asylum applicants. The role of non-profit organisations has revealed crucial to make individuals aware of their rights as asylum seekers and assist them during the asylum procedure, as well as to carry advocacy



activities at the international level to raise awareness about the ongoing situation, too often treated with superficiality by the mainstream media channels.

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# Annex

## EU-Turkey statement - direct and less direct implications on asylum applicants in Greece

- The purpose of the survey is to gain a comprehensive understanding of the impact that the EU-Turkey statement has on individuals seeking international protection who fall within its scope, concerning obstacles, legal guarantees, and human rights.
- The questions are designed to be open-ended to encourage respondents to share their perspectives and adapt the answer to their experiences.
- Privacy is of utmost importance. Therefore, respondents will not be asked to provide any information which may identify an individual. They may also choose to use a pseudonym if they prefer.

### Questions to caseworkers

Name:

Period of working:

Organization:

Type of working (face-to-face, hotlines), please describe your interaction with the clients and provide a rough estimate of how the number of cases you handed:

Did you assist clients who applied for asylum on:

- Mainland
- Islands
- Both

#### 1. Access to the borders

According to your experience with clients, were you reported cases of pushbacks (land and sea), police violence or misconduct? (violent acts, abuse of power, appropriation/damage of people's personal belongings) Please provide a brief overview of the patterns you acknowledged.

According to your opinion, how would you evaluate the available national remedies for people who have been victims of pushback/border police misconduct?

#### 2. Access to the Asylum procedure

How would you assess the access to the fast-track procedure for applicants falling under the EU-Turkey statement and its procedural guarantees? (information, interpretation and other tools provided by the Greek government to applicants)

#### 3. Admissibility

Do you have any record of clients whose application has been deemed "inadmissible" after the interview, despite Turkey could manifestly not be considered a safe third country for them? If yes, may you provide an example?

#### 4. Appeal

How would you assess the appeal procedure in terms of deadlines, legal assistance and information provided by the Greek government to the applicants?

#### 5. Overall information

According to your experience, which are the main difficulties that applicants falling under the fast-track procedure encounter?

6. How would you evaluate the current situation? Which are the current issues that should be addressed with priority? Do you have any recent relevant case law?

#### 7. Additional comments (if any)

## Annex 1

