



INSIGHT

## EU-TURKEY DEAL: VIOLATION OF, OR CONSISTENCY WITH, INTERNATIONAL LAW?

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**ABSTRACT:** This article examines whether the European Union-Turkey deal violates or adheres to international law. In particular, the article examines Turkey as a “safe third country” and seeing whether Turkey complies with the principle of *non-refoulement*. The article argues that the EU-Turkey deal violates international law in a number of ways: first, EU presumes Turkey to be a “safe third country”, where it is assumed that asylum claimants and refugees are able to apply for international protection. Second, Turkey is not part of the EU, and thus, EU laws do not apply to Turkey, so that procedural safeguards that are in place within the EU are not applicable to Turkey, so that in instances where the guarantees to the right to life and prohibition against torture are denied, it will be a direct violation of the principle of *non-refoulement* in the human rights context. Third, Turkey does not have a good record of according asylum claimants and refugees proper access to asylum procedures and does not have proper domestic mechanisms in place to ensure substantive and procedural protections for asylum claimants and refugees.

**KEYWORDS:** European Union – EU-Turkey deal – safe third country – *non-refoulement* – asylum claimants – refugees.

### I. SUMMARY OF THE EU-TURKEY DEAL

On March 7, 2016, high-level representatives from the European Union and the Prime Minister of Turkey came to an agreement (Deal)<sup>1</sup> to handle the massive influx of refugees into the EU and to come up with an action plan to tackle the problem of asylum

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<sup>1</sup> Statement of the EU Heads of State or Government of 7 March 2016 on Joint Action Plan of the EU-Turkey, [www.consilium.europa.eu](http://www.consilium.europa.eu).

claimants and refugees smuggling.<sup>2</sup> Under the Deal, for every Syrian Turkey admits from the Greek islands, the EU has agreed to take back a Syrian from Turkey (the 1:1 scheme).<sup>3</sup> International law commentators,<sup>4</sup> the United Nations High Commissioner for Refugees (UNHCR),<sup>5</sup> and nongovernmental organizations<sup>6</sup> have expressed concerns regarding the lack of international protection and procedural safeguards for asylum claimants and refugees which the Deal applies to. The concern stems from EU's presumption that Turkey is a "safe third country" from which asylum claimants and refugees may apply for international protection under the 1951 Convention Relating to the Status of Refugees (Refugee Convention),<sup>7</sup> and the fact that Turkey is not a member of the EU, the implications being that Turkey is not bound by EU legislation or directives, which offer procedural protections for third country nationals including asylum claimants and refugees.<sup>8</sup>

## II. SUMMARY OF THE LAW ON FORCED RETURNS

The principle under international law which deals with forced returns is the principle of *non-refoulement*. *Non-refoulement* is the right of the asylum claimant or refugee not to be sent back to his or her country of origin to face persecution.<sup>9</sup> Violations of the principle can take place either directly or indirectly. For instance, direct *refoulement* occurs when a State sends back an asylum claimant or refugee to persecution. Indirect *refoulement* occurs when a State sends back, through the Dublin rules in the EU context, to a second recipient State, where the sending State knew or ought to have known that the recipient state would not properly process the application of the asylum claimant or refugee, leading to a higher likelihood of a rejected application and potential *re-*

<sup>2</sup> Communication COM(2016) 166 final of 16 March 2016 from the Commission to the European Parliament, the European Council and the Council on the Next Operational Steps in EU-Turkey Cooperation in the Field of Migration, ec.europa.eu, p. 2.

<sup>3</sup> *Ibid.*, p. 5. The 1:1 Scheme is not the only measure agreed in the Deal. The other agreed actions include: accelerating the implementation of visa liberalization roadmap with all member states; speeding up the disbursement of 3 billion euros for the Refugee Facility for Syrians; preparing for decisions on the accession negotiations, and working with Turkey to improve the humanitarian conditions inside Syria.

<sup>4</sup> See M. GATTI, *The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)*, in *EJIL Talk!*, 18 April 2016, www.ejiltalk.org; M. GATTI, *The EU-Turkey Statement: A Treaty That Violates Democracy (Part 2 of 2)*, in *EJIL Talk!*, 19 April 2016, www.ejiltalk.org.

<sup>5</sup> United Nations High Commissioner for Refugees, *UNHCR Redefines Role in Greece as EU-Turkey Deal comes into Effect*, 22 March 2016, www.unhcr.org.

<sup>6</sup> See K. ROTH, S. SHETTY, C. WOOLARD, *Say No To a Bad Deal with Turkey*, 17 March 2016, www.hrw.org.

<sup>7</sup> Communication COM(2016) 166, p. 3, cit.

<sup>8</sup> See the list of EU Member States, www.en.strasbourg-europe.eu.

<sup>9</sup> Art. 33 of the Convention Relating to the Status of Refugees, 189 UNTS 137, www.unhcr.org (Refugee Convention).

*foulement* to persecution.<sup>10</sup> In the human rights context, the principle is violated when states send back asylum claimants or refugees to face massive violations of human rights such as torture or other cruel, inhuman, degrading treatment or punishment.<sup>11</sup> The principle has been codified in various other international and regional conventions,<sup>12</sup> has entered into customary international law,<sup>13</sup> and is widely regarded as a *jus cogens* norm.<sup>14</sup> In the EU context, the principle is found under the Charter of Fundamental Rights of the European Union.<sup>15</sup> The Council of Europe has also recognised the significance of this principle, since the principle has appeared as the prohibition against torture in the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>16</sup> as well as in case law of the European Court of Human Rights.<sup>17</sup> Although EU is not a state party to the Refugee Convention, the TFEU provides that EU must abide by the Refugee Convention and 1967 Protocol Relating to the Status of Refugees and ensure its laws comply with the principle of *non-refoulement*.<sup>18</sup> Furthermore, EU institutions and Member States are bound by international agreements which they have concluded, so that, in the case of Member States being state parties to the Refugee Convention, they are bound, under the TFEU, to abide by the terms of the Refugee Convention, including *non-refoulement*.<sup>19</sup>

The Common European Asylum System (CEAS) provides for the common minimum standards for EU Member States to comply with on issues of asylum.<sup>20</sup> The Dublin System, comprising of the Dublin Convention (1990), Dublin II Regulation (2003), and Dublin

<sup>10</sup> See European Court of Human Rights, judgment of 7 March 2000, no. 43844/98, *T.I. v. the United Kingdom*.

<sup>11</sup> See: Art. 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, [www.refworld.org](http://www.refworld.org); Arts 6 and 7 of the International Covenant on Civil and Political Rights, 999 UNTS 171, [www.refworld.org](http://www.refworld.org) (ICCPR); Section III, para. 5, of the Cartagena Declaration on Refugees, [www.refworld.org](http://www.refworld.org); Art. 2, para. 3, of the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, [www.refworld.org](http://www.refworld.org); Art. 4 of the American Convention on Human Rights, [www.refworld.org](http://www.refworld.org).

<sup>12</sup> *Ibid.*

<sup>13</sup> United Nations High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, [www.refworld.org](http://www.refworld.org).

<sup>14</sup> *Ibid.* A *jus cogens* norm is a peremptory norm from which no derogation is permitted.

<sup>15</sup> Arts 2 and 4 of the Charter of Fundamental Rights of the European Union (Charter), [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>16</sup> Arts 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as amended, [www.echr.coe.int](http://www.echr.coe.int).

<sup>17</sup> See European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece* [GC]; Court of Justice, judgment of 21 December 2011, case C-411/10, *N.S. v. Secretary of State for the Home Department and ME* [GC]; European Court of Human Rights, judgment of 21 October 2014, no. 16643/09, *Sharifi and Others v. Italy and Greece*.

<sup>18</sup> Art. 78 TFEU.

<sup>19</sup> Art. 216, para. 2, TFEU.

<sup>20</sup> European Commission, *Common European Asylum System*, 23 June 2016, [ec.europa.eu](http://ec.europa.eu).

III Regulation (2013), is a key instrument under the CEAS which seek to harmonise EU standards on asylum across EU Member States. A number of key directives under EU law enables the Dublin System to be implemented by EU Member States under their respective domestic laws. These key directives include the Qualification Directive (2011/95/EU), the Asylum Procedures Directive (2013/32/EU), and the Reception Conditions Directive (2013/33/EU). The purpose of the Asylum Procedures Directive (APD) is to establish the minimum common procedures for EU Member States when they grant and withdraw international protection for third country nationals and stateless persons,<sup>21</sup> and also ensure EU Member States comply with the principle of *non-refoulement*.<sup>22</sup> As reiterated by the European Commission in its communication with the European Parliament, the European Council, and the Council on March 16, 2016, the APD lays down the fundamental legal safeguards to ensure that the Deal does not circumvent international and EU laws in protecting asylum claimants and refugees affected by it.<sup>23</sup>

Despite the promises of the European Commission and the procedural safeguards laid down by the APD, the Deal essentially heightens the risks of *refoulement* of asylum claimants and refugees facing massive expulsion by Turkey and therefore violates international law.

### III. VIOLATION OF, OR CONSISTENCY WITH, INTERNATIONAL LAW?

The Deal violates international law in a number of ways. First, EU presumes Turkey to be a “safe third country”, where it is assumed that asylum claimants and refugees are able to apply for international protection as guaranteed under the Refugee Convention from the “safe third country” rule. Second, Turkey is not part of the EU, and thus, EU laws do not apply to Turkey, so that procedural safeguards that are in place within the EU are not applicable to Turkey, leading to instances where the guarantees to the right to life and prohibition against torture are denied in direct violation of the principle of *non-refoulement* in the human rights context. Third, Turkey does not have a good record of according asylum claimants and refugees proper access to asylum procedures and does not have proper domestic mechanisms in place to ensure substantive and procedural protections for asylum claimants and refugees.<sup>24</sup>

<sup>21</sup> Art. 1 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

<sup>22</sup> *Ibid.*, recital para. 3, Arts 9, para. 3, 28, para. 2, 35, let. b), 38, para. 1, let. c), 39, para. 4, 41, para. 1, let. b) and Annex I, let. c).

<sup>23</sup> Communication COM(2016) 166, cit., p. 3.

<sup>24</sup> For example, Amnesty International recently reported that Turkey forcibly returned around 30 Afghans, and Turkey has been cited as having a largely dysfunctional asylum system combined with inequalities in access to protection in M. GATTI, *The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)*, cit.; See S. PEERS, E. ROMAN, *The EU, Turkey and the Refugee Crisis: What could possibly go wrong?*, 5

### III.1. EU'S PRESUMPTION OF TURKEY AS A "SAFE THIRD COUNTRY"

The concept of "safe third country" originated from the Schengen Agreement,<sup>25</sup> which was created for the purpose of establishing "common rules regarding visas, the right to asylum and checks at external borders" to increase harmonization and friendly relations with the first five EU Member States, namely Germany, France, the Netherlands, Belgium and Luxembourg.<sup>26</sup> The APD specifies a list of procedural safeguards to ensure that the country designated as a "safe third country" complies with relevant international and EU laws, namely, that all four criteria are fulfilled: a) life and liberty of the asylum claimants and refugees are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; b) there is no risk of serious harm as defined in Directive 2011/95/EU; c) *non-refoulement* is respected; d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment is respected; and e) the possibility exists to request refugee status and, if found to be a refugee, to be accorded Refugee Convention protection.<sup>27</sup>

When processing asylum applications, asylum officials of some EU Member States determine whether the third country national or stateless person seeking asylum may be transferred to a "safe third country" pursuant to the APD.<sup>28</sup> The Dublin III Regulation provides the right for the EU Member State to send an asylum claimant to a "safe third country".<sup>29</sup> However, the "safe third country" rule pursuant to the APD allows the EU Member State to exercise discretion in determining which country is deemed "safe" and in what scenarios an asylum claimant may be sent to the "safe third country".<sup>30</sup> Further, it must be emphasised that there is no legal basis for a "safe third country" rule under international law, nor is there a rule which allows Refugee Convention contracting parties to transfer the responsibility of processing an asylum claimant to another coun-

February 2016, [www.eulawanalysis.blogspot.ca](http://www.eulawanalysis.blogspot.ca); Amnesty International, *Turkey 'safe country' sham revealed as dozens of Afghans forcibly returned hours after EU refugee deal*, 23 March 2016, [www.amnesty.org](http://www.amnesty.org).

<sup>25</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

<sup>26</sup> European Council on Refugee and Exiles, *History of CEAS: From Schengen to Stockholm, a history of the CEAS*, [www.ecre.org](http://www.ecre.org).

<sup>27</sup> Art. 38, para. 1, APD; Refworld, *Section 12: The Safe Third Country Concept*, [www.refworld.org](http://www.refworld.org), pp. 2-3.

<sup>28</sup> *Ibid.*, Art. 38, APD.

<sup>29</sup> Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 on the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation), Art. 3, para. 3.

<sup>30</sup> Art. 38, para. 2, let. b), APD.

try.<sup>31</sup> Nonetheless, the UNHCR has accepted the legality of “safe third country” returns, so long as these returns do not contravene *non-refoulement* obligations and do not prevent the asylum claimant from accessing domestic procedural guarantees.<sup>32</sup>

Despite procedural protections as stated above, the EU has presumed Turkey as a “safe third country”, without first inquiring whether Turkey fits all four of the above criteria, despite a proposal to do so by the European Commission.<sup>33</sup> A presumption of Turkey as a “safe third country” may also increase instances of *refoulement* where Turkey does not have the proper asylum procedures in place to adequately examine asylum applications by merit, but instead, accord the asylum claimant or refugee with a simple interview,<sup>34</sup> after which mass expulsion of these claimants take place.<sup>35</sup>

Another problem inherent in the Deal is that asylum claimants and refugees are not guaranteed the procedural protections accorded to them under the APD in its current form based on the fact that Turkey is not bound by EU law.<sup>36</sup> This is a problem because where proper procedural safeguards are not in place to protect asylum claimants and refugees in Turkey, there is a higher likelihood of rejected applications, and a heightened risk of subsequent *refoulement* to persecution.

### III.2. TURKEY IS NOT PART OF THE EU

Since Turkey is not part of the EU, despite the APD listing procedural safeguards which the “safe third country” must comply with in order to be designated as such, the APD procedural safeguards do not apply to Turkey. The danger inherent in the lack of pro-

<sup>31</sup> In fact, the safe third country concept was derived from an omission in the Refugee Convention for having no specific provisions against the concept in J.C. HATHAWAY, M. FOSTER, *The Law of Refugee Status*, Oxford: Oxford University Press, 2014, p. 33 *et seq.*

<sup>32</sup> United Nations High Commissioner for Refugees, *Position on a Harmonized Approach to Questions concerning Host Third Countries in 3<sup>rd</sup> International Symposium on the Protection of Refugees in Central Europe*, Report and Proceedings, Geneva: UNHCR European Series Volume 3, 1997; See V. MORENO-LAX, *The Legality of the ‘Safe Third Country’ Notion Contested: Insights from the Treaties*, in G.S. GOODWIN-GILL, P. WECKEL (eds), *Migration & Refugee Protection in the 21<sup>st</sup> Century: Legal Aspects*, Leiden/Boston: Martinus Nijhoff, 2015, p. 671.

<sup>33</sup> Communication COM(2016) 166, p. 3, cit. In fact, the UNHCR has reiterated the concern that Turkey must ensure a fair and proper determination of asylum claims is given to asylum claimants and refugees being returned to Turkey, and that assurances against *refoulement* must be in place in United Nations High Commissioner for Refugees, *UNHCR on EU-Turkey Deal: Asylum Safeguards Must Prevail in Implementation*, 18 March 2016, [www.unhcr.org](http://www.unhcr.org).

<sup>34</sup> See National Legislative Bodies of Turkey, *Temporary Protection Regulation*, 22 October 2014, Art. 11, where temporary protection accorded may be terminated, but where there are no provisions that oblige the Turkish official to release reasons for decisions on such termination (TPR), [www.refworld.org](http://www.refworld.org).

<sup>35</sup> Mass expulsion of aliens is a direct contravention of international and EU law, such as, Art. 13, ICCPR and Protocol no. 4 relating to Art. 4, ECHR.

<sup>36</sup> The EU Commission has proposed to replace the APD from a directive to a regulation. See Commission Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final.

cedural safeguards as listed above is that asylum claimants and refugees no longer have the guarantee of the right to life, prohibition against torture, or other cruel, inhuman or degrading treatment or punishment, and the right not to be returned to persecution. Further, by using the “safe third country” rule improperly, Turkey may in essence return asylum claimants and refugees back to their countries of origin to face persecution without first examining the merits of their application or according them with an individual interview where they may make their case to the asylum official.<sup>37</sup>

The only provision within the APD which applies in this situation is the designation of Turkey as a “safe third country” by EU pursuant to Art. 38 of the APD.<sup>38</sup> Art. 38 of the APD obliges EU member states to apply the “safe third country” concept, but doing so subjected to the rules laid down under national law.<sup>39</sup> An improper application of Art. 38 of the APD by EU member states sending asylum claimants to Turkey, which they designate as a “safe third country”, could potentially lead to an indirect violation of *non-refoulement*. Improper application of Art. 38 of the APD takes place when the national laws of the EU member state in question do not comply with the APD. For instance, Art. 38, para. 2, let. b) and let. c) of the APD obliges EU Member States to comply with relevant international law, including considering the safety of the third country in question on a case-by-case basis for a particular claimant, having individual examinations for asylum claimants, and permitting these claimants to challenge the decision to send them to a “safe third country”.<sup>40</sup> An EU Member State improperly applies its APD obligations when a third country, such as Turkey, is designated as “safe” without complying with Art. 38, para. 2 criteria such as those listed prior. Moreover, an EU Member State may violate *non-refoulement* indirectly where the sending Member State transfers the asylum claimant, pursuant to the APD, to a recipient Member State designated as a “safe third country”, where the sending member state knew or ought to have known that the recipient member state does not fit the criteria laid down in Art. 38, para. 1 or has a deficient asylum system which does not process applications properly.<sup>41</sup>

A poor record of asylum procedures is another problem inherent in the Deal.

### III.3. POOR RECORD OF ASYLUM PROCEDURES

Turkey is a signatory of the Refugee Convention, however, Turkey has adopted the Refugee Convention with reservations, namely, that the Refugee Convention is applicable to Turkey, but with “geographical limitations”.<sup>42</sup> This geographical limitation would

<sup>37</sup> M. GATTI, *The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)*, cit.; see Arts 33, 34 and 38 APD.

<sup>38</sup> Art. 38 APD.

<sup>39</sup> Art. 38, para. 2, APD.

<sup>40</sup> Art. 38, para. 2, let. b) and c), APD.

<sup>41</sup> *T.I. v. the United Kingdom*, cit.

<sup>42</sup> Refugee Solidarity Network, *Refugees & Asylum in Turkey*, [www.refugeesolidaritynetwork.org](http://www.refugeesolidaritynetwork.org).

mean that Turkey may only provide limited (instead of full) protection to asylum claimants and refugees *not* coming from within the EU, including preventing these claimants and refugees from being able to integrate into Turkish society.<sup>43</sup> Another problem with Turkey's domestic asylum procedure is that it accords protection to groups of asylum claimants and refugees based on their status and countries of origin, rather than by merit of their applications. For instance, those coming from Syria are accorded a Temporary Protection Regulation (TPR) on the basis of political discretion rather than by merits of application.<sup>44</sup> Furthermore, the implementation of TPR for Syrian refugees in Turkey meant that their applications for international protection will be suspended under the temporary protection scheme, regardless of whether they fit the Convention definition of a refugee.<sup>45</sup> The existence of TPR for Syrian refugees, therefore, would mean that they were precluded from international protection otherwise guaranteed under the Refugee Convention, such as preventing Syrian refugees from accessing the labour market, housing, and education.<sup>46</sup> Further, it has been cited by a nongovernmental report that Turkey reads the definition of *non-refoulement* narrowly, in that asylum claimants and refugees are not provided with a "right to access the territory [of Turkey]";<sup>47</sup> so that persons at the Turkish border without valid travel documents may be denied access to Turkish territory at the sole discretion of the Turkish Government,<sup>48</sup> without first granting the asylum claimant or refugee with an opportunity to be heard.

#### IV. IMPLICATIONS AND CONCLUSION

The importance of addressing the Deal by ensuring proper legal and procedural safeguards for asylum claimants and refugees cannot be undermined. Asylum claimants and refugees whose rights are not protected may be at risk of being forcibly returned to their countries of origin to face persecution, where for some, it may mean death, torture, or other cruel, inhuman or degrading treatment or punishment, or other massive violations of human rights.

The implications of the Deal are that asylum claimants and refugees fleeing from a "well-founded fear of persecution" are not protected from *refoulement*. Not only are these claimants and refugees not granted a proper individual interview with an opportunity to make their case, they are also not granted a merits-based review of their application. Instead, political discretion is used by the Turkish Government to determine

<sup>43</sup> *Ibid.*

<sup>44</sup> Asylum Information Database, *Asylum Information Database Country Report – Turkey* (AIDA Report), 18 May 2015, [www.asylumineurope.org](http://www.asylumineurope.org) (AIDA Report), p. 65; see TPR, cit.

<sup>45</sup> Provisional Art. 1, para. 1, TPR, cit.

<sup>46</sup> AIDA Report, cit., p. 66; provisional Art. 1, para. 1, TPR, cit.; see Arts 17, 21 and 22 of the Refugee Convention, cit.

<sup>47</sup> AIDA Report, cit., p. 72; see Art. 17 TPR, cit.

<sup>48</sup> *Ibid.*



whether the claimants and refugees are admitted. With the ongoing political strife in Syria, and the massive influx of refugees across the EU, now more than ever, the right against *refoulement* of asylum claimants and refugees must be safeguarded.

