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MAPS
Migration and Asylum Policies Systems

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MAPS
Migration and Asylum Policies Systems

CENTER FOR ANALYSIS
OF LAW AND POLICIES

OUTSOURCING AND COOPERATION WITH THIRD COUNTRIES:

DECONSTRUCTING THE FORMAL AND THE INFORMAL IN MIGRATION AND ASYLUM POLICIES

Edited by

Ana Nikodinovska Krstevska
Maria Gavouneli
Maja Savić Bojanić

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M.A.P.S NETWORK

Jean Monnet Activities are designed to promote excellence in teaching and research in the field of European Union studies worldwide. The activities also foster the dialogue between the academic world and policymakers. In particular Jean Monnet Networks aim to create and develop consortia of international players (Higher Education Institutions, Centers of Excellence, departments, teams, individual experts, etc.) in the area of European Union studies in order to gather information, exchange practices, build knowledge and promote the European integration process across the world. Activities include:

- gathering and promoting information and results on methodologies applied to high-level research and teaching on EU studies
- enhancing cooperation between different players and other relevant bodies throughout Europe and around the world
- exchanging knowledge and expertise to improve good practices
- fostering cooperation and exchanges with public actors and the European Commission services on highly relevant EU subjects

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PREFACE

This book is the second publication delivered within the Jean Monnet Network on Migration and Asylum Policies Systems (MAPS), born within the context of the past experiences of Jean Monnet activities carried out in the University of Naples "L'Orientale", and involving, as partners universities of other nine different European countries: National and Kapodistrian University of Athens; University of A Coruña; University Jean Moulin Lyon 3; University of Malta; University of Innsbruck; Queen Mary University of London; University Goce Delčev-Štip; University Sarajevo School of Science and Technology (SSST); Stiftung Europa-Universität Viadrina Frankfurt (Oder).

The aim of the MAPS project is to highlight key changes and best practices of the different migration and asylum policy systems through the participation of the partner universities in the project. Specifically, the purpose is to explore general principles and safeguards of asylum systems, and at the same time to analyze their weaknesses and compliance with international law obligations to protect asylum seekers, refugees, and migrants in general. Aside from other project activities, the partner universities University Goce Delčev in Štip, Kapodistrian University of Athens and Sarajevo School of Science and Technology organized three conferences during the period 2020-2021. Initially these events were scheduled to be held in 2020, but due to the breakout of COVID-19 pandemics, they were subject to postponement. Within this timeframe, the Sarajevo School of Science and Technology under the direction of prof. Maja Savić Bojanić organized a workshop in February 2020, entitled Migration and Asylum Policies Systems. In July 2020, prof. Maria Gavouneli from the Kapodistrian University of Athens organized a webinar on Outsourcing and cooperation with third countries. And the third conference was organized by the University Goce Delčev – Štip, under direction of prof. Ana Nikodinovska Krstevska and prof. Olga Koševaliska, entitled 'Outsourcing and cooperation with third countries: Deconstructing the formal and the informal in migration and asylum policies, which took place in hybrid format, both in

presence, at the University Goce Delčev in Štip in North Macedonia, and in online modality. As a matter of fact, most of the essays contained in this publication were presented during the conference at the University Goce Delčev in Štip. They discuss subject related to externalization of EU asylum and migration policies towards third countries and their impact upon human rights of migrants and refugees. Specifically, Aleksandar Dimovski, Trainer and FRONTEX Fundamental Rights Specialist from Republic of North Macedonia, and Milica Šutova, Assistant professor in Civil Law at the Faculty of Law, University Goce Delčev in Štip explore border cooperation in North Macedonia and the impact of border management upon human rights. The question that they try to answer within the border management environment and praxis is 'Are border practices upon migrants and refugees just or unjustifiable?' Anna Liguori, Associate professor in International Law at the University of Naples 'Orientale', explores the case-law of the EU Court of Justice related to the 2016 EU – Turkey Statement, giving a rich overview of the critical aspects concerning human rights and refugee law in relation to the Statement. Olga Koševaliska, Associate professor in Criminal Law at the Faculty of Law, University Goce Delčev in Štip, together with Ana Nikodinovska Krstevska, Associate professor in EU Law and Elena Maksimova, Assistant professor in Criminal Law at the same Faculty of Law, University Goce Delčev in Štip, examine the challenges of illegal migration in North Macedonia and European Union tailored approach to solidarity in confront, exemplifying the level of cooperation between North Macedonia during the refugee crisis until today. Remaining on the Balkan route, Žaneta Poposka, professor in Human Rights at the Faculty of Law, University Goce Delčev in Štip, in her essay elaborates the elements and features of hate crime on grounds of refugee, asylum seeker or migrant status during the Refugee crisis, but also assesses the key challenges in relation to the under-reporting of this type of hate crimes and the weak position of hate crime in national legislation of North Macedonia. Finally, Ester del Nonno, PhD Candidate in International Law at the University Jean Moulin Lyon III, together with Liliana Haquin Saenz, researcher in international law at the Centre de droit international, University Jean Moulin Lyon III, and Mehtap Akbay Kaygusuz, researcher in international law at the Centre de droit international, University Jean Moulin Lyon III and Dr.

at the İstanbul University, in their essay, explored the externalization of asylum in the European Union through the EU – Turkey statement, and furthermore they extended their research exploring also the recent Danish case and their 'radical' practices of externalization of the asylum process.

Aside from academic papers, this volume employs an interdisciplinary approach to Migration and Asylum Policies Systems, and it reproduces the academic artwork of the students from the Academy of Fine Arts from the Goce Delčev in Štip, under mentorship of prof. Jana Jakimovska, who for the activities of the project have elaborated posters related to migration and asylum, and human rights issues. Therefore, between the pages of this publication the reader will have the opportunity to enjoy a specimen of art posters elaborated from Aleksandra Ilieva, Bojana Toševska, Jana Jakimoska, Borče Valakov, Vangel Kristinovski, Ivana Ivanovska, Tatjana Jovanovska, Nataša Llefkova, Ankica Stevanovska, Zorica Peceva, Elena Cvetanovska, Elizabeta Toševska and Sergej Smilkov.

At the end we hope that this edited volume will raise interest among the public about the situation of asylum, refugees, and migration in the partner countries and beyond, but most of all we hope that it will serve as an inspiration to students as they represent new generation of actors who can make real changes to views, policies and policy making both in the EU and in the world.

Ana Nikodinovska Krstevska,
Associate professor in EU Law at the Faculty of Law,
University Goce Delčev in Štip

Maria Gavouneli, Ordinary professor in International Law,
Kapodistrian University of Athens

Maja Savić Bojanić, Assistant professor of Political Science,
Sarajevo School of Science and Technology

EXHIBITION OF POSTERS BY STUDENTS FROM THE FINE ART ACADEMY

MIGRATIONS

MENTOR:
Assoc. Prof. MA
Jana Jakimovska

PARTICIPANTS:
Aleksandra Ilieva
Bojana Toshevska
Vangel Krstinovski
Elena Cvetkovska
Elizabeta Toshevska
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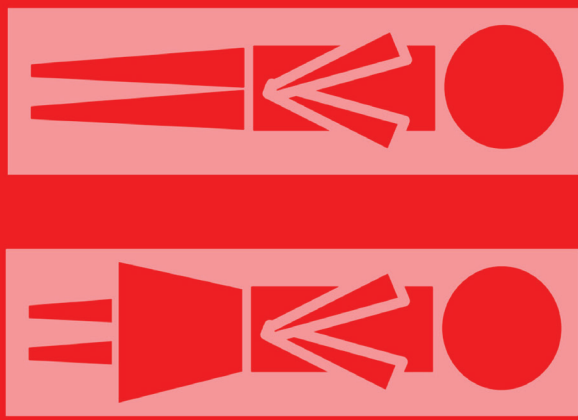
Natasha Lefkova
Zorica Peceva
Tatjana Jovanovska
Sergej Smilkov

Aleksandra Ilieva

Bojana Toševska



Equality in death we already have.
Equality in life is what we need.

Zorica Peceva

Zorica Peceva

BORDER COOPERATION AND HUMAN RIGHTS ISSUES THE JUST AND THE UNJUSTIFIABLE

Aleksandar Dimovski[1]
Milica Šutova[2]

1. Introduction

Living a life full of diversities, torn with biases, separated between borders of different cultures, we should be aware that that maybe what is just for us it's unjustifiable in the perception of others. Every nation has its own morale and cultural remarks, has different views of maybe the same thing, but thus we must be prepared that sometimes even the most just will be seen from someone as unjustifiable. We people, from the moment when we are born, we are learning what is just and what is unjustifiable, not only in schools but also in the place where we are living depending on our surrounding. But what is Just and what is Unjustifiable in the scope of Law? Just law means fair law, as in, a law which is put into practice to make sure everyone is treated in the same legal manner in any situation. In relation to equality in the legal system, we need to have a fair system where all people are treated in a fair and just manner, that is, in an equal manner that reflects the values of the society. Then what is the Unjustifiable? It's an opposite from Just and it's something that cannot be justified. But as we said everyone should be treated the same way and the principle of equality and proportionality are the corner stone from where everything is starting. We are living in a world where the persons are migrating, nor the reasoning for that, when they are moving across the countries, they are taking their views and perspectives with them for what is just and what is unjustifiable. We can see persons raised in a society where something was morally normal to go on the place where the same thing is forbidden or seen

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as something unjustifiable. When the persons are crossing the borders most of the time, they are not aware of diversities that they will cross to during their journey. But then we will ask our self how the human rights can be respected while people are entering from one cultural area to the next one? Who are the ones that should be aware of the diversities among the persons in migration flow? Border authorities. They are the ones that should have cultural awareness and the ones that should act just preventing the unjustifiable. If we look at the bigger picture than we can say how can someone who has right to restrict your rights to be the one who can protect you from unjustifiable. Border authorities has obligation to respect and protect the human rights of the persons crossing the border and has the twin duties to refrain from actions that unduly interfere with human rights and to take all the necessary and appropriate steps to protect those rights. It's important to know that in the last decades the border authority is reorganized and from an organization who is acting by force started to be the organization who provide services to the persons especially to the one in needs. That gives another direction to the policing and to the tasks of their organizations. And this is the point where we can say that again we come into an open end. There are border procedures as screening which means nationality assumption which in case of wider look seem unjustifiable. Someone will say I'm hiding my identity because I'm in fear of prosecution, someone will say I have right to keep my identity safe as my life is in danger in the place from where I came, etc. Then from the other side screening is just because this is the way how the border authorities can identify vulnerable persons, can identify stateless persons, can identify asylum seekers, can identify unaccompanied minors, and can save someone's life. In the following part we will get more into the operation of screening procedure and what is just and what is unjustifiable during this border activity.

2. Screening

Screening in the field of irregular immigration means to establish an assumption of the nationality or lack of nationality-statelessness of an undocumented person who has crossed, or has attempted to cross,

an external border irregularly with a view to returning the third-country national to his or her country of origin. As a procedure, screening is a visual, verbal, manual or electronic inspection of a person and their belongings aimed at establishing assumptions on the nationality or lack of nationality-statelessness of a person. In all these activities, border guards have to respect the fundamental rights of those who are screened. Border guards who have non-professional attitudes and disregard the procedural rules may infringe some fundamental rights of the persons screened. Besides establishing an assumption of nationality, screeners should have a proactive attitude to identify vulnerable persons. Failure to identify vulnerable persons, by disregarding their vulnerable position or mistreatment, may also violate some of the most important fundamental rights of the persons. Similarly, screeners should be able to recognize the persons in need of international protection and bear in mind that family members should not be separated at any stage. Failing to take these issues into account could also lead to the violation of the fundamental rights of the persons screened.

Efficient performance of a screening process depends on the preparatory work prior to the start of the process. Screenings that are properly prepared not only enable a better efficiency in establishing the nationalities or lack of nationality-statelessness but also prevent the violations of the fundamental rights of those screened. In cases where the arrival of a large number of persons is expected, the implications of the workload of the border control authorities is even higher. Preparation should be in organized in the format of plan, which specifies various measures, such as securing medical help and psychological support for the persons screened, accessing information on the counties of origin, providing interpreters and/or the cultural mediators, striving to secure the highest possible level of privacy and data protection and any other measures that can ensure a safe and secure screening environment. It is crucial to ensure that the interpreters are neutral and objective during the performance of their tasks. Providing a safe and secure screening environment, not only for the persons screened but also for the screeners and other persons involved in the screening process, can greatly improve screening efficiency, besides securing the fundamental rights of the persons screened. Often the preparation measures cannot be provided solely by border control authorities, which means that cooperation with

other international organizations, EU agencies and national authorities (e.g., the UNHCR, the IOM, EASO, the Red Cross/Crescent, health-care authorities, etc.) is strongly encouraged during this phase.

a. ***Right to life***

Screeners have the obligation to protect the right to life of the persons screened. They are required to take concrete measures at the organizational and operational level to guarantee the enjoyment of this fundamental right. This means that the border control authorities have to provide a screening environment where the lives of the persons screened, as well as the screeners or other per-sons involved in the screening process (e.g. interpreters), will not be endangered in any way. To protect the right to life of the persons screened, screeners have to detect and prevent any threat that might endanger the person's life, including those emanating from the internal relationships between the per-sons screened, for instance the trafficker, and the victim. In a case where such a threat exists, the screening process should be stopped until the threat has been eliminated. Similarly, the screener must maintain full awareness of his or her personal security during the screening process. Conducting screenings in an environment considered dangerous for the screener's life leads directly to the violation of the screener's right to life.

Example of good practice

Conducting screenings with vulnerable groups (e.g. in cases where a vulnerable person is in the final stage of pregnancy) may lead to the violation of the right to life if unaware of circumstances (e.g. premature birth and subsequent death of a child caused by stressful conditions).

b. ***Right to human dignity***

The screener should always maintain a professional attitude, with full respect for social, gender and cultural differences, while communicating with the per-son screened. Securing human dignity, in the broadest sense of the word, must be an essential element of any strategy regarding screening procedures. An improper performance during the interaction between a screener and a per-son screened leads to a violation of human dignity.

Example of good practice

During the interview, questions should be directed on issues connected with the origin of the migrant. Questions should be asked in a way that will not violate the person's integrity (e.g., a border guard should not talk too loudly, they should not gesticulate, and others should respect the discretion line). In a case where communication with an undocumented person is limited because of a language barrier, questions should be phrased using short sentences and well-known terms that the person in question can understand. In any case, the screener is not allowed to act in an offensive way. All other questions or measures that are not relevant to determining the nationality should be avoided.

c. ***Rights of vulnerable groups***

One of the main tasks of the screeners that needs to be emphasized, besides establishing an assumption of nationality or lack of nationality statelessness of the persons screened, is the identification of vulnerable groups. This means that the role of the screeners during the process of protection of vulnerable groups is critical. Concentrating on the establishment of the real nationality of the persons screened should not prevent screeners from recognizing indicators that may lead to a conclusion that a person might belong to a vulnerable group (e.g., a victim of human trafficking, a victim of slavery, etc.). The screeners must focus on groups of persons who are especially vulnerable to abuse that are structurally discriminated against (e.g., women) and those groups that have difficulties defending themselves and are therefore in need of special protection (e.g., children, unaccompanied minors, disabled persons, etc.). Failure to identify such persons can lead to the violation of the rights of vulnerable persons in further proceedings and to a situation in which such per-sons will not be granted special protection, even when needed.

Example of breach of rights

During the screening procedure, if a person declaring himself or herself to be an unaccompanied minor is refused special protection because the screener believes that he or she is adult (based only on a

first impression of the physical appearance of the person screened), a violation of rights of vulnerable persons occurs.

d. ***Right to international protection***

Everyone should have access to the asylum procedure as well as adequate in-formation concerning the procedure to be followed. Under the Qualification Directive and the Asylum Procedures Directive, a person may apply for 'inter-national protection' and be included in the asylum procedure, with a view to receiving protection in the form of either refugee status or subsidiary protection status. A refugee within the meaning of Article 1(A) of the 1951 Geneva Convention is a person who is outside his or her country of nationality or habitual residence, has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion and is unable or unwilling to avail himself or herself of the protection of that country, or to return there, for fear of persecution.

A 'person eligible for subsidiary protection' means a person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for the belief that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm and is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country. There is a set of detailed provisions in this directive describing the criteria of eligibility for this status.

Consequently, screeners are obliged to provide access to international protection to every person who demands it, at every stage of the screening process. Furthermore, screeners have an obligation to provide information regarding the possibilities of international protection to each person where they assume such a need may exist and there would be a risk of refoulement in the case of return, even when such a demand is not expressed by the person.

Access to international protection must not be limited or determined by the screener's evaluation of the reasons for such a claim. Any engagement in the evaluation of a claim, using it as a basis for providing access to international protection, on the screener's part would be a violation of the right to asylum if it led to impeding access to the procedure in contravention of both EU and international law.

Example of breach of rights

During the screening procedure, the screener told the person screened, who was willing to seek international protection, that an undocumented person cannot be referred to the asylum procedure.

i. ***The right of stateless persons to international protection***

Many individuals do not know that they might be stateless and will there-fore not put forward a request for a stateless status determination procedure. It is important for screeners to identify cases of potentially stateless individuals during the first stage of registration and refer the individual to relevant protection mechanisms, whether the person is applying for asylum or not. There are a number of ways to counter or mitigate the above difficulties, including the use of 'proxy questions' to ascertain statelessness. Thus, rather than (only) asking a person whether he or she is a citizen or is stateless a question that he or she may not know how to answer accurately questions regarding the forms of documentation that the individual possesses, for instance, can be asked, which may offer evidence of nationality or statelessness. Questions that will work as effective proxies in helping to identify the risk of statelessness can also be determined based on a closer analysis of the national context (country of origin). For instance, some applicants (claim to) belong to ethnic groups that are publicly known to be stateless (e.g., Rohingya from Myanmar).

The determination of a statelessness status should be exercised not by screeners or border guards but only by trained eligibility officers with nationality expertise. As a result, if someone claims to be stateless or is suspected of being stateless (or is unable to establish his or her nationality), they should be pro-vided with information and legal aid in a language they understand and referred to the statelessness determination procedure that can formally recognize their status and grant them the appropriate protection.

If a potentially stateless person also applies for asylum, it is equally important for screeners to detect and record his or her 'potentiality for statelessness'. It would be inappropriate to register an asylum applicant as 'having an unknown nationality' and process his asylum claim without further investigation into whether he has the nationality of a given country or not. It would thus be the responsibility of the eligibil-

ity officer, in coordination with the appropriate person/body in charge of the statelessness determination procedure, to determine whether the applicant is stateless. The determination of his statelessness will help inform the level of protection that should be afforded to him on the grounds of the relevant international and regional instruments.

3. Conclusion

Individual must respect one another's rights. The freedom and the rights of one person end where the freedom and rights of another person begin. All human rights regardless of their category, are indivisible and interdependent, which means realizing one right is an essential condition for, or is instrumental to, realizing other rights. As Confucius said: "What you do not want done to yourself, do not do to others". When exploring the idea about border authorities' intrusion and interference with human rights, we can say that action taken, because of their potentially intrusive nature, are generally "close" to an interference with a human right. As examples of just and unjustifiable situation we can mention Article 2 ECHR, right to life, and we can say any use of lethal force by the police is unjustifiable but using a force with the principle of necessity and proportionality is a just. For Article 5 from ECHR Right to liberty and security we can say that any restriction of physical movement of a certain duration can be seen as unjustifiable, but if this measure is a legal measure used with legal applications, then it's just. At the end we can say that it's every state obligation to promote and work on raising cultural awareness issues, diversities among the persons in mixed migration flows and give clarification for every step and measure taken as just so it would not be accepted as unjustifiable from the person affected from those measures and process.

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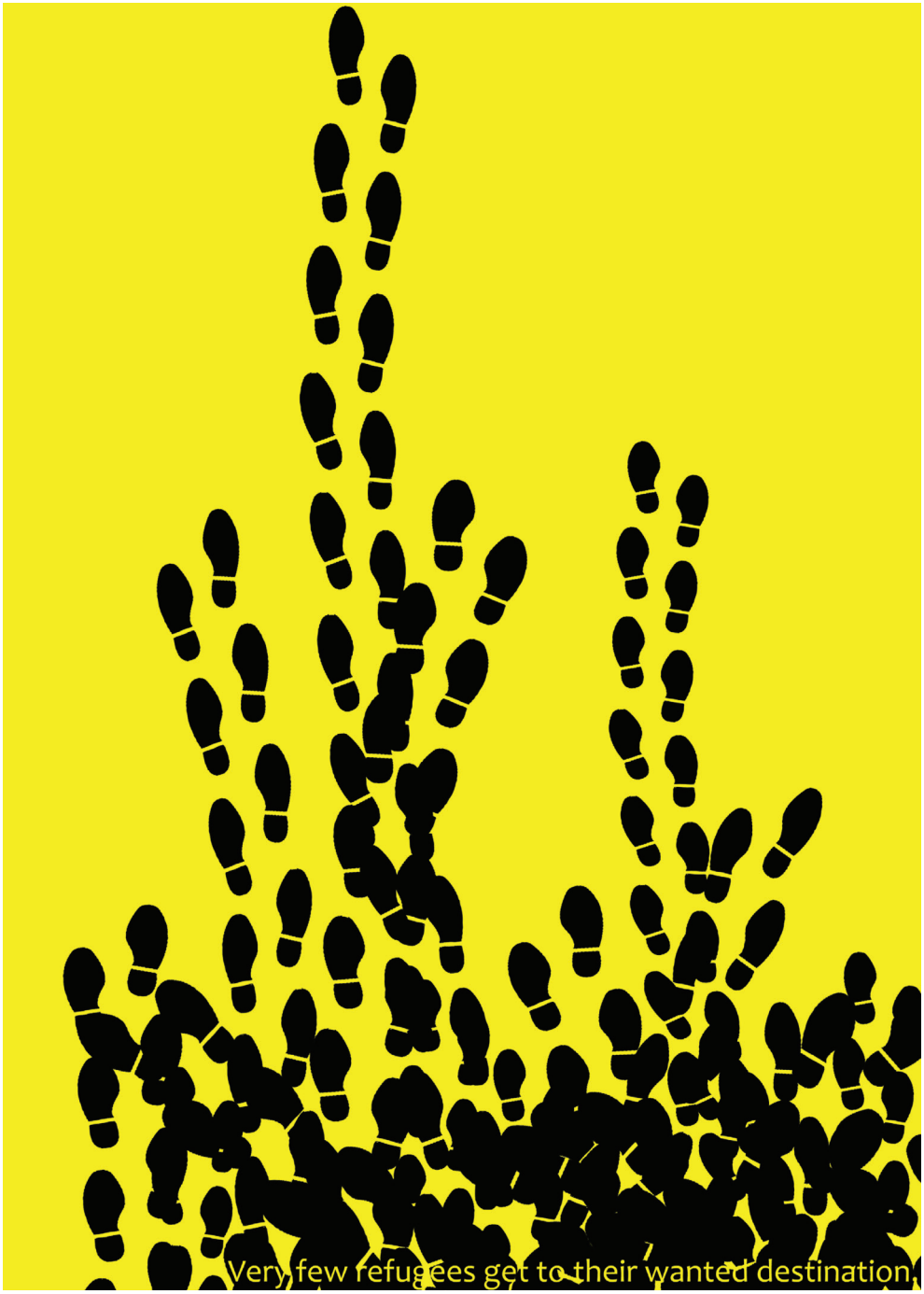
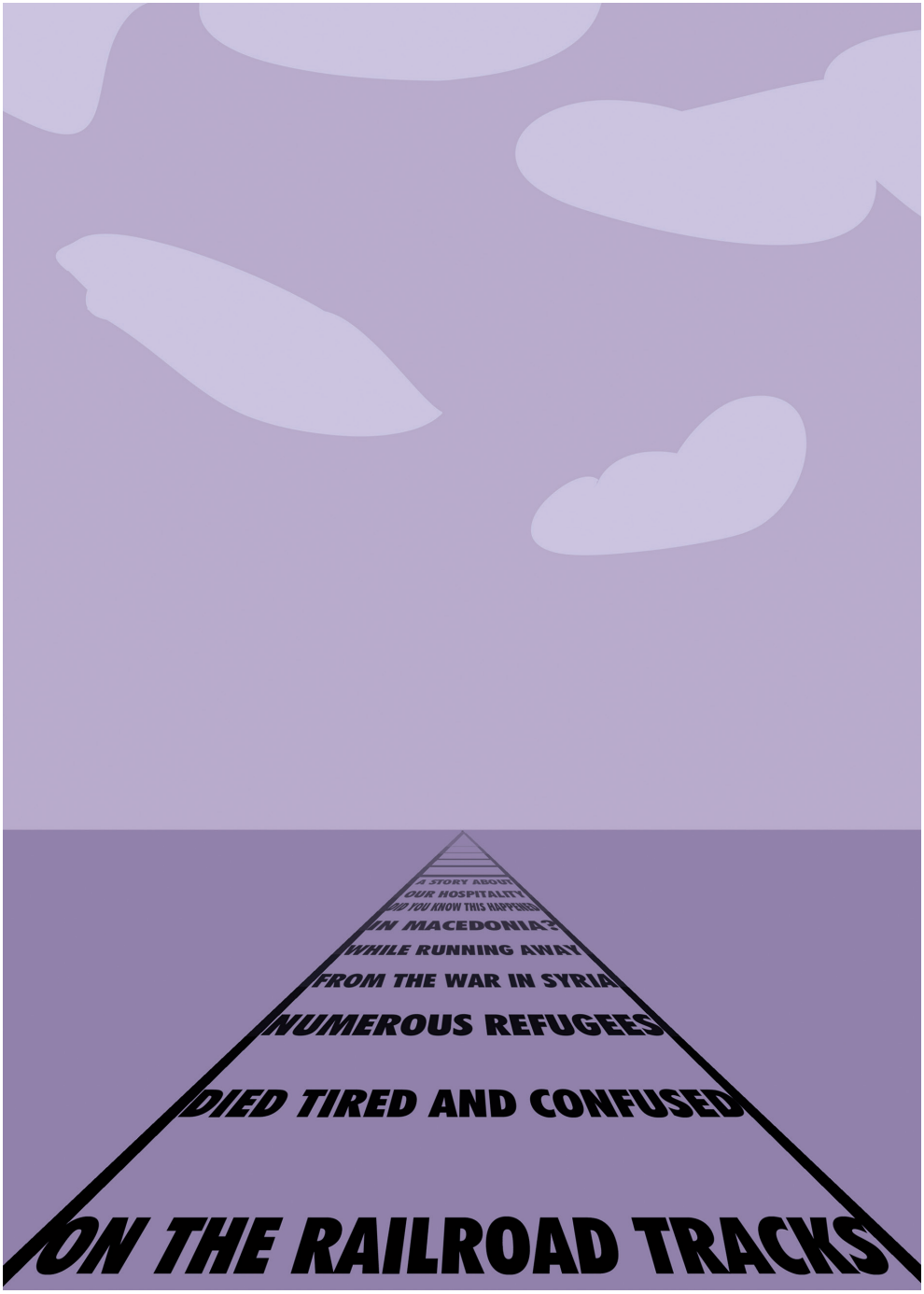
Borce Valakov



Ivana Ivanovska



Elena Cvetkovska

Ivana Ivanovska

THE CASE-LAW OF THE EU COURT OF JUSTICE ON THE 2016 EU-TURKEY STATEMENT

ANNA LIGUORI[1]

1. Introduction

On 18 March 2016, at the conclusion of a summit of the Heads of State and Government of the European Union, an EU-Turkey *Statement* was made public in a press release from the Council of the European Union[2].

This *Statement*, the legal nature of which is controversial[3] and for this reason will also be referred to here as *agreement/deal*, was welcomed with emphasis in the subsequent Communication from the Commission on the creation of a new partnership framework with third countries in the context of the European Agenda on Migration[4] – as it would establish "new ways to bring order to migratory flows and save lives" and would set up a "model" to follow for cooperation with other third countries; however, it marks a dangerous acceleration of the European Union towards externalization of border controls[5] in violation of refugees' and migrants' human rights.

[1] Associate professor in International Law at the University of Naples "L'Orientale".

[2] *EU-Turkey Statement*, Council of the European Union, Press Release 144/16, 18 March 2016, <www.consilium.europa.eu>(10/21).

[3] See ultra para 2.3 and literature quoted therein.

[4] COM (2016) 385 of 7 June 2016.

[5] See, *ex multis,* T. Gammeltoft-Hansen, J. Vedsted-Hansen (eds.), *Human Rights and the Dark Side of Globalisation*, Routledge, London and New York, 2017 and with respect to Europe in particular: T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, Cambridge, 2011; M. Den Heijer, *Europe and Extraterritorial Asylum*, Hart Publishing, Oxford, 2012; V. Moreno-Lax, *Accessing Asylum Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law*, Oxford University Press, Oxford, 2017; A. Liguori, *Migration Law and the Externalization of Border Controls. European State Responsibility,* Routledge, London, and New York, 2019.

The idea of outsourcing border controls is not really new: over the last few decades, many States, in different parts of the world[6], have been implementing various strategies to externalize border controls. However, what is particularly worrying in the current European debate is the intensification of this practice by multiple arrangements with unsafe third countries, exposing migrants and asylum seekers to human rights violations.

The new approach, inaugurated by what is known as the EU-Turkey deal, was presented as strategic for solving the "refugee crisis" which began in 2015. In reality, as pointed out, "the refugee crisis is first and foremost, a policy crisis"[7]. Indeed, the crisis exploded not because of the number of people reaching Europe, but because of the incapability of the EU to handle this crisis in an effective and integrated manner. In fact, with respect to the solutions concerning the 'internal dimension ' envisaged by the Agenda on Migration (COM (2015) 240 final[8], the

[6] With respect to US management of migration flows, it has varied between *refoulement* (endorsed by the Supreme Court in the *Sale* judgment) and prescreening in the Naval Base of Guantanamo, in Jamaica, and Turks and Caicos, violating human rights for conditions of detention and giving rise to difficulties in accessing fair procedures and the risk of *refoulement* to unsafe countries. See, *ex multis*, H. Koh, "The 'Haiti Paradigm' in United States Human Rights Policy", *Yale Law Journal*, Vol. 103, N. 8, 1994, p. 2391 ff.; S. Legomsky, "The USA and the Caribbean Interdiction Program", *International Journal of Refugee Law*, Vol. 18, N. 3–4, 2006, p. 680. With respect to Australia see A. Hirsch, "The Borders Beyond the Border: Australia's Extraterritorial Migration Controls", *Refugee Survey Quarterly*, Vol. 36, N. 3, 2017, p. 36 ff. On the influence of the Australian practice on Europe, see, in particular, J. McAdam, "Migrating Laws? The 'Plagiaristic Dialogue' between Europe and Australia", in H. Lambert et al. (eds.), *The Global Reach of European Refugee Law*, Cambridge University Press, Cambridge, 2013, p. 25 ff.

[7] M. Den Heijer, J. Rijpma, T. Spijkerboer, "Coercion, prohibition and high expectations: the continuation failure of the common European asylum system ", *Common Market Law Review*, 2016, p. 607 ff.

[8] G. Caggiano, "Alla ricerca di un nuovo equilibrio istituzionale per la gestione degli esodi di massa: dinamiche intergovernative, condivisione delle responsabilità fra gli Stati membri e tutela dei diritti degli individui", *Studi sull'integrazione europea*, 2015, p. 459 ff.; G. Morgese, "Recenti iniziative dell'Unione europea per affrontare la crisi dei rifugiati", *Diritto immigrazione e cittadinanza*, 2015, p. 15 ff.; G. Campesi, "Seeking Asylum in Times of Crisis: Reception, Confinement, and Detention at Europe's Southern Border", *Refugee Survey Quarterly*, 2018, p. 44 ff.

final result was rather to strengthen those elements of European law and politics which had provoked the crisis in the first place, namely "coercion towards asylum seekers, prohibition of travelling from third countries to the European Union and unrealistic expectations of what border controls can achieve"[9]. As a result, the measures adopted have proved ineffective and even counterproductive.

As for the 'external dimension', the approach was more 'effective' (with respect to the aim pursued, i.e., stemming the flow of migrants), but at a high cost in terms of respect for human rights and credibility for the European Union.

The present Paper, after analysing the EU- Turkey *Statement* of 18 March 2016, will examine an application based on the shortcomings arising from the abovementioned deal, both from human rights and EU constitutional standpoints, focussing on the orders handed down by the General Court and the Court of Justice of the European Union, respectively on 28 February 2017 and 12 September 2018.

2. The EU-Turkey Statement

The deal was made public via a press release of 18 March 2016[10] under the title "EU-Turkey Statement" which, after recalling the commitments of the Action Plan of November 2015[11] and the statement of 7 March 2016,[12] states as follows:

[9] M. Den Heijer, J Rijpma, T. Spijkerboer," Coercion, prohibition, and great expectations", cit., p. 642.

[10] *Council of the European Union*, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>(10/21).

[11] *Council of the European Union*, <https://www.consilium.europa.eu/en/press/press-releases/2015/11/29/eu-turkey-Peemeeting-statement/> (10/21).

[12] *Council of the European Union*, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/>(10/21). For an overview of the background of the Statement of 18 March 201, see S. Peers, E. Roman, "The EU, Turkey and the Refugee Crisis: What could possibly go wrong?", *EU Law Analysis*, 5 February 2016, <https://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee-crisis-what.html> (10/21).

The EU and Turkey today decided to end the irregular migration from Turkey to the EU. In order to achieve this goal, they agreed on the following additional action points:

1) All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR. Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey. Turkey and Greece, assisted by EU institutions and agencies, will take the necessary steps and agree to any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these arrangements. The costs of the return operations of irregular migrants will be covered by the EU.

2) For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly…

As counterpart for Turkey, the Statement provides for acceleration of the fulfilment of the visa liberalization process concerning Turkish citizens, upgrading of the Customs Union, disbursement of €3 billion (and the promise of an additional €3 billion by the end of 2018) and the commitment "to re-energize the accession process.[13]

[13] The EU-Turkey Statement, par. 8.

Many criticisms[14] have been raised since the very beginning, all based on two differing points of view: one concerning human rights issues, another based on European constitutional law, regarding *inter alia* whether it was an agreement or a non-binding political arrangement.

2.1. Criticism concerning human rights and refugee law

As pointed out[15], the first sentence of the deal "is a flagrant breach of EU and international law – but the rest of the paragraph then completely contradicts it". On the one hand, sending back 'all' persons crossing from Turkey to the Greek islands would violate the prohibition of collective expulsion provided for in the EU Charter and the European Convention on Human Rights (ECHR), as well as EU asylum legislation. On the other hand, the reference to the relevant international standards and to the principle of *non-refoulement*, together with the explicit provision for individual assessment, indicate that this should not be the case.

The *Statement* adds that "Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey". This means that it will also be possible to send back people in need of protection whose claims are considered 'inadmissible' (without examination of the merits), on the grounds that Turkey is either a 'safe third country' or a 'first country of asylum'. In other words, applications "would not be rejected on the basis that the person *wasn't a genuine refugee*, but that he or she either (a) *could have* applied for protection in Turkey ['Safe third country' concept] or (b) already *had* protection there" ['First country of asylum' concept][16].

[14] Part of the arguments developed in the present paper have been previously published in Liguori, *Migration Law*, cit., p. 57-66 and 75-80.

[15] S. Peers, "The Final EU/Turkey Refugee Deal: A Legal Assessment", *EU Law Analysis*, 18 March 2016, <http://eulawanalysis.blogspot.com/2016/03/the-final-eu-turkey-refugee-deal-legal.html>(10/21).

[16] Peers, Roman, *The EU, Turkey and the Refugee Crisis*, cit. According to Article 38(1) of the Asylum Procedures Directive, a third country can be considered 'safe' for asylum seekers if in the third country concerned: (a) life and liberty 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/

A number of concerns have been raised[17]. First of all, we must point out that, though Turkey is a member of the Geneva Convention,

EU; (c) the principle of non-refoulement in accordance with the Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention. According to Article 35 a third country can be a first country of asylum in two cases: a) if the applicant has been recognized as a refugee in that country and can still avail himself or herself of that protection; or b) if the applicant otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*.

[17] E. Roman, "L'accordo UE-Turchia: le criticità di un accordo a tutti i costi", *SIDI-Blog*, 21 March 2016, <http://www.sidiblog.org/2016/03/21/laccordo-ue-turchia-le-criticita-di-un-accordo-a-tutti-i-costi/> (10/21); M. Den Heijer, T. Spijkerboer, "Is the EU-Turkey Refugee and Migration Deal a Treaty?", *EU Law Analysis*, 7 April 2016, <http://eulawanalysis.blogspot.be/2016/04/is-eu-turkey-refugee-and-migration-deal.html>(10/21); H. Labayle, Ph. De Bruycker, "L'accord Union européenne-Turquie: faux semblant ou marché dedupes?", *Réseau Universitaire européen du droit de l'Espace de liberté, sécurité et justice*, 23 March 2016, <http://www.gdr-elsj.eu/2016/03/23/asile/laccord-union-europeenne-turquie-faux-semblant-ou-marche-de-dupes/>(10/21); C. Favilli, "La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?", *Diritti umani e diritto internazionale*, Vol. 10, N. 2, 2016, p. 405 ff.; G. Fernández Arribas, "The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem", *European Papers*, 2016; O. Corten, M. Dony, "Accord politique ou juridique: quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?", *EU Immigration and Asylum Law and Policy*, 10 June 2016, <http://eumigrationlawblog.eu/accord-politique-ou-juridique-quelle-est-la-nature-du-machin-conclu-entre-lue-et-la-turquie-en-matiere-dasile/>(10/21); F. Cherubini, "The 'EU-Turkey Statement' of 18 March 2016: A (Umpteenth?) Celebration of Migration Outsourcing", in S. Baldin, M. Zago (eds.), *Europe of Migrations: Policies, Legal Issues and Experiences*, EUT Edizioni Università di Trieste, Trieste, 2017, p. 32 ff.; M. Marchegiani, L. Marotti, "L'accordo tra l'Unione europea e la Turchia per la gestione dei flussi migratori: cronaca di una morte annunciata", *Diritto, Immigrazione e Cittadinanza*, 2016, p. 59 ff.; A. Rizzo, "La dimensione esterna dello spazio di libertà, sicurezza e giustizia. Sviluppi recenti e sfide aperte", *Freedom, Security & Justice: European Legal Studies*, 2017, p. 147 ff., <http://www.fsjeurostudies.eu/files/2017.1.-FSJ_Rizzo_8.pdf>(10/21); F. Casolari, "La crisi siriana, l'esodo dei rifugiati e la Dichiarazione UE-Turchia", in N. Ronzitti, E. Sciso (eds.), *I conflitti in Siria e Libia: Possibili equilibri e le sfide al diritto internazionale*, Giappichelli, Torino, 2018; F. De Vittor, "Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di 'accordi' per il controllo extraterritoriale della migrazione", *Diritti umani e diritto internazionale*, 2018, p. 5 ff.

it maintains the geographical limitation, applying the Convention only to European refugees. Non-European asylum seekers enjoy a form of temporary protection, which is stronger for Syrians, but at the time of the *Statement*, significantly less important than the one recognized under the Geneva Convention. Turkey however agreed to modify some of the most critical aspects of the protection enjoyed by Syrians and actually intervened on two crucial points of the legislation concerning Syrians, allowing those who had left Turkey not to lose protection once they were sent back to Turkey and to have access to the labour market there[18].

In light of these changes, Turkey could, in abstract, qualify as 'a first country of asylum'[19] for those Syrians who already enjoyed protection in Turkey and reached Greece. But can Turkey be considered 'a safe third country' for all the other asylum seekers? This is a much-debated question. According to Article 38 par. 1, e) "the possibility shall exist for the applicant to claim refugee status and to receive protection in accordance with the Geneva Convention". UNHCR's interpretation is that "access to refugee status and to the rights of the 1951 Convention must be ensured in law, including ratification of the 1951 Convention and/or the 1967 Protocol, and in practice"[20]. This interpretation is supported by two arguments, as convincingly argued[21]: the legislative history of the text and the *a contrario* rule. With regard to the first argument, the 2002 draft explicitly stated that the clause could apply if a State had not ratified the Convention. However, the text was later revised to its current version and the effort of some Member States to introduce the provision that alternative forms of protection were sufficient failed. With respect to the second argument, when the drafters of the Directive wanted to provide the possibility of applying for an alternative form of protection, they did so explicitly, as in Art. 35 for

[18] See COM (2016) 231 final, *First Report on the progress made in the implementation of the EU-Turkey Statement*, p. 4.

[19] See Favilli, *La cooperazione UE-Turchia*, cit., p. 415.

[20] See UNHCR Paper of 23 March 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,* <http://www.unhcr.org/56f3ec5a9.pdf>(10/21).

[21] See Peers, Roman, *The EU, Turkey and the Refugee Crisis*, cit.

the "first country of asylum" notion.[22] However, the real problem lies in the respect of human rights in practice[23], especially because of the harsh conditions of detention and the risk of *refoulement*, at least in some cases.

Although this paper will focus primarily on the respect for asylum seekers' human rights in Turkey – which was the specific object of the claim underlying the orders of the General Court and of the Court of Justice -, we must at least include a brief overview of an indirect but foreseeable consequence of the entry into force of the EU-Turkey agreement, namely the fact that the reception conditions in Greece, already critical before the aforementioned *Statement*, worsened very seriously after the adoption of the EU-Turkey deal, especially in the hotspots located in the Greek Aegean islands[24]. As explicitly recognized in the *Statement* of 18 March 2016, an individual evaluation of each application for international protection is necessary (in the initial Statement of 7 March 2016 the lack of any reference to the need for an individual examination had indeed raised vibrant protests from the UNHCR and numerous NGOs, and consequently, an explicit provision to this effect was inserted into the text of 18 March 2016). It was therefore up to Greece, the European country of first entry for asylum seekers from Turkey, to carry out this task, although it was well-known at the time of the adoption of the EU-Turkey *Statement* that there were

[22] *Ibidem*. See also Favilli, *La cooperazione UE-Turchia*, cit., p. 415. See *contra* D. Thym, "Why the EU-Turkey Deal is Legal and a Step in the Right Direction", *Verfassungsblog*, 9 March 2016, <https://verfassungsblog.de/why-the-eu-turkey-deal-is-legal-and-a-step-in-the-right-direction/>(10/21).

[23] See *inter alia* the "DCR/ECRE desk research on application of a safe third country and a first country of asylum concepts to Turkey" of May 2016, <https://www.ecre.org/desk-research-on-the-application-of-the-safe-third-country-and-first-country-of-asylum-concepts-to-turkey/> (10/21); Report from GUE/NGL Delegation to Turkey "What Merkel, Tusk and Timmermans should have seen during their visit to Turkey", 2–4 May 2016, <www.europarl.eu>(10/21).

[24] In addition to this, Greece was accused of human rights violations as a consequence of the escalation of geopolitical tension with Turkey in March 2020: on this point see R. Cortinovis, "Pushbacks and lack of accountability at the Greek-Turkish borders", *CEPS*, n. No. 2021-01, February 2021 and A. Spagnolo, "La crisi migratoria di inizio 2020 al confine greco turco. Brevi considerazioni alla luce delle prese di posizione degli attori coinvolti", *Quaderni di SIDIblog*, 2020.

many violations in Greece with respect to reception conditions and procedural guarantees for asylum seekers – as acknowledged by the European Court of Human Rights in several judgments directly condemning Greece (for the conditions of detention and violation of the procedural rights of asylum seekers) and indirectly condemning countries that wanted to send people back there in application of the Dublin regulation[25] (from the well-known ECtHR judgment *M.S.S. v. Belgium and Greece*[26] onwards, followed by the CJEU judgment *N.S.*[27]). For this reason, the so-called Dublin transfers had been suspended and this suspension was still in effect at the time of the adoption of the EU-Turkey agreement[28].

However, the first claim, in the case *J.R. and others v. Greece*[29] concerning the circumstances and the conditions of detention of three Afghan nationals in the Greek hotspot on the island of Chios as a con-

[25] See, *ex multis*, S. Peers, "The Dublin III Regulation", in S. Peers et al. (eds.), *EU Immigration and Asylum Law*, Vol. 3, 2nd Ed., Brill–Nijhoff, Leiden/Boston, 2015, p. 345 ff.; B. Nascimbene, "Refugees, the European Union and the 'Dublin System'. The Reasons for a Crisis", *European Papers*, 2016, p. 101 ff.; M. di Filippo, "The Allocation of Competence in Asylum Procedures under EU law: The Need to Take the Dublin Bull by the Horns", *Revista de Derecho Comunitario Europeo*, April 2018, p. 41 ff.

[26] ECtHR, *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011 [GC], applic. No. 30696/09.

[27] See CJEU, judgment of 21 December 2011, joined cases, *N. S. v Secretary of State for the Home Department*, case C-411/10 and *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, case C-493/10.

[28] Only on 8 December 2016 did the Commission adopt a recommendation suggesting the resumption of Dublin transfers for a critical appraisal of such a recommendation see B. Gotsova, "Rules Over Rights? Legal Aspects of the European Commission Recommendation for Resumption of Dublin Transfers of Asylum Seekers to Greece ", *German Law Journal*, 2019, p. 637 ff.

[29] ECtHR, *J.R. and others v. Greece*, judgment of 25 January 2018, applic. No. 22696/16. On this case, see F. L. Gatta, "Detention of Migrants with the View to Implement the EU-Turkey Statement: the Court of Strasbourg (Un)Involved in the EU Migration Policy", *Cahiers de l'EDEM*, 2018, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/judgment-of-the-european-court-of-human-rights-in-the-case-j-r-and-others-v-greece-appl-no-22696-16.html>(10/21) and A. Pijnenburg, "JR and Others v Greece: What Does the Court (Not) Say About the EU-Turkey Statement?", *Strasbourg Observer*, <https://strasbourgobservers.com/2018/02/21/jr-and-others-v-greece-what-does-the-court-not-say-about-the-eu-turkey-statement/>(10/21).

sequence of the implementation of the EU-Turkey *Statement*, was rejected by the Strasbourg Court in its judgment of 25 January 2018 with regard to the complaints lodged under Article 5 par. 1 (f) and under Article 3 ECHR (only the claim concerning Article 5 §2 was upheld, as the applicants were not accurately informed of the reasons for their deprivation of liberty nor of the available legal remedies).[30] With regard to the complaint under Article 5 par. 1 (f), the Strasbourg Court first had to decide if keeping migrants in the hotspots could be deemed 'detention', at least with respect to the first period of the applicants' stay in the centre (from 21 March to 20 April 2016), when it was a closed facility: from 21 April 2016 the Chios hotspot became a semi-open centre, where the applicants could move about during the day (while still subjected to a restriction of movement: i.e. leaving the island was forbidden).[31] On the merits, the Court affirmed that the one-month period of detention on the island of Chios could not be considered as arbitrary and unlawful as it "avait pour but de les empêcher de séjourner de façon irrégulière sur le territoire grec, de garantir leur éventuelle expulsion, et de les identifier et de les enregistrer dans le cadre de la mise en œuvre de la Déclaration UE-Turquie".[32]As pointed out, the judgment can be considered "as a sort of endorsement of the EU-Turkey *Statement* insofar as its implementation constitutes, under certain conditions, a legitimate reason for the detention of migrants"[33].

The most critical part of the decision, however, is the part that deals with the complaint as per Article 3 ECHR. As stated in the Grand Chamber judgment in the *Khlaifia* case,[34] the Court acknowledges that

[30] Indeed, the Greek government provided them with leaflets, but according to the ECtHR, the information was not sufficiently clear and comprehensible for the applicants.

[31] On the restriction of asylum seekers' freedom of movement, see C. *Ziebritzki, R. Nestler,* "Implementation of the EU-Turkey Statement: EU Hotspots and Restriction of Asylum Seekers' Freedom of Movement", *EU Immigration and Asylum Law and Policy*, 22 June 2018, <http://eumigrationlawblog.eu/implementation-of-the-eu-turkey-statement-eu-hotspots-and-restriction-of-asylum-seekers-freedom-of-movement/> (10/21).

[32] ECtHR, *J.R. and others v. Greece*, cit., par. 112.

[33] Gatta, *Detention of Migrants*, cit.

[34] ECtHR, *Khlaifia and others v. Italy,* judgment of 15 December 2016 [GC], applic. No. 16483/12.

"la Grèce a connu une augmentation exceptionnelle et brutale des flux migratoires" and comes to the conclusion that the conditions were not severe enough to be qualified as inhuman or degrading, although governmental and non-governmental organizations attest to dramatic conditions of physical violence, and lack of legal advice and adequate health care in Greek hotspots[35].

Furthermore, the reference to the migratory emergency situation as a justification for such a weakening of the absolute protection offered by art. 3 ECHR, already criticized by scholars with respect to the *Khlaifia* case[36], seems even more unacceptable in the case under consideration, because it does not derive from a cause of *force majeure* (like the situation that arose following the so-called Arab Spring, examined in Khlaifia) but from an act, the EU-Turkey agreement, directly attributable to the State defendant according to the interpretation supported by the General Court of the European Union, as we will see in the next paragraph, and indirectly endorsed by the European Court of Human Rights (see paragraph 7 of the abovementioned *J.R.* judgment, in which the Strasbourg Court refers to the Statement as an "accord sur immigration conclu… entre les États membres de l'Union européenne et la Turquie »). Indeed, it seems paradoxical for the European Court of Human Rights to balance an absolute right, such as Article 3 ECHR, on the one hand and circumstances, such as overcrowding and chaos, on the other: these circumstances were already present before - and inevitably, and predictably, destined to worsen because of the entry into

[35] Particularly interesting to this end are*, ex multis*, the Resolution adopted by the Parliamentary Assembly of the Council of Europe on 20 April 2016 (Resolution 2109 (2016), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22738&lang=en>(10/21) and the Preliminary observations made by the delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of the Council of Europe, issued after a visit to Greece in April 2018) <https://rm.coe.int/16808afaf6>(10/21).

[36] A. Saccucci, "I «ripensamenti» della Corte europea sul caso Khlaifia: il divieto di trattamenti inumani e degradanti e il divieto di espulsioni collettive «alla prova» delle situazioni di emergenza migratoria", *Rivista di diritto internazionale*, 2017, p. 555 cit. and A. Pacelli, "Khlaifia and others v. Italy: lights and shadows in the judgment of the Grand Chamber of the European Court of Human Rights", in G. Cataldi (ed.), *Migrations and Fundamental Rights: The Way Forward*, Editoriale Scientifica, Napoli, 2019, p. 53 ff. and doctrine cited there.

force of the EU-Turkey deal, as promptly pointed out *inter alia* by the UNHCR in a press release delivered on 22 March 2016, just a few days after the adoption of the *Statement*[37].

Nevertheless, the Strasbourg Court has so far reached similar conclusions also in the *O.S.A. and others v. Greece*[38] case and, even with respect to minors, in *Kaak and others v. Greece*[39]. However, all these judgments concern the first period after the entry into force of the EU-Turkey deal: unfortunately, in the following months the conditions in the Greek hotspots got worse and worse[40] and it is not inconceivable that in the future the European Court might come to a different conclusion[41].

2.2. Criticism concerning European Constitutional law

The *Statement* has also been criticized for being concluded without respecting the constitutional requirements set by the Treaty on the

[37] UNHCR Redefines Role in Greece as EU-Turkey Deal Comes into Effect, *Briefing Notes*, 22 March 2016, <https://www.unhcr.org/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>(10/21): "Under the new provisions, these sites have now become detention facilities. Accordingly, and in line with our policy on opposing mandatory detention, we have suspended some of our activities at all closed centres on the islands»".

[38] ECtHR, *O.S.A. and others v, Greece*, judgment of 21 March 2019, applic. No. 39065/16.

[39] ECtHR*, Kaak and others v. Greece,* of 3 October 2019, applic. No. 34215/16. On this point see A. Liguori, "Violazioni conseguenti all'attuazione della *Dichiarazione UE-Turchia* e giurisprudenza della Corte europea dei diritti umani sugli *hotspots* greci: la sentenza *Kaak e al. c. Grecia*", *Diritti umani e diritto internazionale*, 2020, p. 246 ff.

[40] To the point that in November 2019 the Director of the European Fundamental Rights Agency declared that the condition of migrants in the Greek islands "is the single most worrying fundamental rights issue that we are confronting anywhere in the European Union" (see N. Nielsen, "Greek migrant hotspot now EU's 'worst rights issue'", *EUobserver*, 7 November 2019, <www.euobserver.com>(10/21)).

[41] Since the functioning of the hotspots also directly involves European agencies, a responsibility of the European Union is also conceivable, as correctly outlined in the legal literature (see F Casolari, "The EU's Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?", *The Italian Yearbook of International Law*, 2016, p. 109 ff .; G. Lisi, M. Eliantonio, "The Gaps in Judicial Ac-countability of EASO in the Processing of Asylum Requests in Hotspots", *European Papers*, 2019, p. 589 ff.).

Functioning of the EU (hereafter, TFEU), in particular, for not having been submitted either to the European Parliament for approval (218(6) TFEU)[42] or to the preventive control of the Court of Justice (Article 218(11) TFEU).

Indeed, a debate arose in literature regarding the legal nature of the *Statement*, most scholars arguing that it a treaty[43]. The position of EU institutions on the matter was characterized by ambiguities and *revirements*. On 18 March 2016, the same day of the adoption of the EU-Turkey *Statement*, the President of the European Council affirmed that "Today, we have finally reached an agreement between the EU and Turkey"[44]; during a debate held within the European Parliament on 13 April 2016, both the President of the European Council and the President of the European Commission referred to the statement as a 'deal' between the European Union and Turkey[45]; on 20 April 2016, the Commission issued a press release in which it referred to the EU-Tur-

[42] The Lisbon Treaty strengthened the role of the European Parliament also in relation to EU international agreements, providing that in any case "the European Parliament shall be immediately and fully informed at all stages of the procedure" (Art. 218 para. 10) and that in a number of cases, approval is needed (Art. 218 para.6). Among these last cases, also the hypothesis of agreements "covering fields to which the ordinary legislative procedure applies", which is the case of the EU-Turkey deal.

[43] For the thesis that it is not a treaty see S. Peers, "The Draft EU/Turkey Deal on Migration and Refugees: Is It Legal?", *EU Law Analysis*, 16 March 2016, <http://eulawanalysis.blogspot.be/2016/03/the-draft-euturkey-deal-on-migration.html>(10/21). *Contra* E. Cannizzaro, "Disintegration Through Law?", *European Papers*, 2016, p. 3 ff., <http://europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2016_1_2_Editorial_EC.pdf >(10/21); Spijkerboer, *Is the EU-Turkey refugee*, cit.; Corten, Dony, *Accord politique ou juridique*, cit. In this direction see also Spagnolo, *La crisi migratoria*, cit., p. 353 ff., arguing that the attitude of the actors involved in the migration crisis of March 2020 at the Greek – Turkish border confirms that the *Statement* provides legal obligations between the EU and Turkey.

[44] European Council, "Remarks by President Donald Tusk after the meeting of the EU heads of state or government with Turkey", 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/tusk-remarks-after-euco-turkey/> (10/21).

[45] European Parliament, "Minutes of the debate of Wednesday 13 April 2016", 13 April 2016, <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20160413&secondRef=ITEM-005&language=EN> (10/21).

key *Statement* as the "*EU-Turkey Agreement*.[46] However, *revirements* occurred in the following weeks: during a debate in the European Parliament on 28 April 2016, the President-in-Office of the Council referred to it as "*a political agreement between the Member States and Turkey – between Europe and Turkey – …*"[47]; on 9 May 2016, the legal service of the European Parliament stated that the EU-Turkey *Statement* "*was nothing more than a press communiqué*"; finally, in its controversial order of 28 February 2017, which will be examined in the following paragraph, the General Court issued no decision as to whether the EU-Turkey *Statement* is a political arrangement or a legally binding treaty in the sense of Articles 216–218 TFEU and dismissed the claim for lack of jurisdiction, stating that the *Statement* was concluded by the Member States and not by the EU:

> [I]independently of whether it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects, the EU-Turkey statement, as published by means of Press Release No 144/16, cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union[48].

An appeal was lodged before the Court of Justice, which by an order of 12 September 2018, dismissed it without taking a position on this point. Before going through both orders (in the next paragraph), it is noteworthy to recall that in the above-mentioned judgment of 25 January 2018 regarding the case *J.R. and others v. Greece,* the European Court of Human rights aligned itself with the EU courts with regard to the question of attribution, but did not take a clear position on the legal nature of the *Statement*: indeed, at par. 7, it refers to the *Statement*

[46] European Commission, "Implementing the EU-Turkey Agreement – Questions and Answers", 20 April 2016, <http://europa.eu/rapid/press-release_MEMO-16-1494_en.htm> (10/21).

[47] European Parliament, "Minutes of the debate of Thursday 28 April 2016", 28 April 2016, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bCRE%2b20160428%2bITEM-002%2bDOC%2bXML%2bV0%2f%2fEN&language=EN> (10/21).

[48] Order of the General Court of 28 February 2017 case T-192/16, para 71.

as "un *accord*[49] sur l'immigration conclu le 18 mars 2016 entre les États membres de l'Union européenne et la Turquie", while at par. 39, it states that "Le 18 mars 2016, les membres du Conseil européen et le gouvernement turc se sont entendus sur une *déclaration*[50] visant à lutter contre les migrations irrégulières".

The EU-Turkey *Statement* is not, however, an isolated case: also, in the EU-Afghanistan 'Joint Way Forward on migration issues', the Commission has clearly affirmed that the text is not binding although its wording is very similar to formal readmission agreements concluded so far by the European Union.[51]

3. **The case law concerning the EU-Turkey *Statement***

Both aspects (human rights concern and constitutional issues) have been the object of three applications before the General Court of the European Union, raised respectively by two Pakistani citizens and an Afghan citizen, who had reached Greece from Turkey and had requested international protection there. As they risked being repatriated to Turkey after the entry into force of the EU-Turkey deal, they decided to go to the General Court : assuming that the *Statement* constituted an international agreement between the European Union and Turkey, they therefore introduced an application for annulment under Article 263 Treaty on the Functioning of the European Union (TFEU) of the EU-Turkey deal, concerning both non-compliance with the Charter of Fundamental Rights of the European Union - invoking in particular Articles 1 (dignity), 18 (right of asylum) and 19 (prohibition of refoulement and collective expulsions), and constitutional issues (non-compliance with article 218 TFEU, concerning the conclusion of international agreements).

[49] Italics added.

[50] Italics added.

[51] L. Limone, "EU-Afghanistan 'Joint Way Forward on Migration Issues': Another 'Surrealist' EU Legal Text?", *European Area of Freedom, Security & Justice*, 11 April 2017, <https://free-group.eu/2017/04/11/euafghanistan-joint-way-forward-on-migration-issues-anothersurrealist-eu-legal-text/> (10/21).

In three orders of 28 February 2017 – *NF, NG, and NM v. European Council*[52] – the General Court dismissed the actions for annulment of the EU-Turkey *Statement* as inadmissible. Since the General Court's approach and reasoning is the same in all three cases, to simplify matters we will only refer to the *NF v. European Council* case.

The court limits its analysis to the question of whether it has jurisdiction, more specifically as to whether the *Statement* is to be attributed to the EU, concluding, by an intricate reasoning, that this is not the case.

The Court starts by remembering that

> generally, the European Union Courts have no jurisdiction to rule on the lawfulness of a measure adopted by a national authority (judgments of 3 December 1992, Oleificio Borelli v Commission, C-97/91, para. 9)…or measures adopted by the representatives of the Member States physically gathered in the grounds of one of the European Union institutions and acting, not in their capacity as members of the Council or European Council, but in their capacity as Heads of State or Government of the Member States of the European Union (judgment of 30 June 1993, Parliament v Council and Commission, C-181/91 and C-248/91, para. 12)[53]

It adds however, that

> In order to qualify a measure as a 'decision of the Member States' of the European Union, … it is still necessary to determine whether, having regard to its content and all the circumstances in which it was adopted, the measure in question is not in reality a decision of the European Council (judgment of 30 June 1993, *Parliament* v *Council and Commission*, C-181/91 and C-248/91, para. 14).[54]

The Court then stresses that the meeting of 18 March 2016 was the third of three since November 2015, and that in the two previous meetings (respectively, on 29 November 2015 and on 7 March 2016) it was the representatives of the Member States who participated in their capacity as Heads of State or Government of the Member States of the European

[52] Orders of the General Court of 28 February 2017 cases T-192/16, T-193/16, T-257/16.

[53] Para. 44.

[54] Para. 45.

Union and not as Members of the European Council. Afterwards, the Court admits that the wording of the statement, as published following the meeting of 18 March 2016 by means of Press Release No 144/16, was different from previous statements. However, it adds that this is due "to simplification of the words used for the general public in the context of a press release" and expresses regret for the ambiguity.

Finally, the Court goes on to explore a number of preparatory documents of the meeting of 18 March 2018, concluding that

> In those circumstances… the expression 'Members of the European Council' and the term 'EU', contained in the EU-Turkey statement as published by means of Press Release No 144/16, must be understood as references to the Heads of State or Government of the European Union.[55]

The order has been criticized for many reasons.[56] First of all, it appears evident that relying on the wording of the *Statement*, which employs explicit terms ('Members of the European Council' and 'EU') "would have been more straightforward, and therefore more convincing than the one adopted by the court".[57]

[55] Para. 69.

[56] E. Cannizzaro, "Denialism as the Supreme Expression of Realism. A Quick Comment on NF v. European Council", *European Papers,* 15 March 2017, p. 251 ff. <http://www.europeanpapers.eu/it/system/files/pdf_version/EP_EF_2017_I_021_Enzo_Cannizzaro_4.pdf>(10//21); L. Limone, "Today's Court (Non) Decision on the (Non) EU "deal"? with Turkey", *European Area of Freedom Security & Justice FREE Group*, 1 March 2017, <https://free-group.eu/2017/03/01/the-todays-court-non-decision-on-the-non-eu-deal-with-turkey/>(10/21); S. Carrera, L. Den Hertog, M. Stefan, "It Wasn't Me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal", *CEPS Policy Insights* N. 2017, 15, April 2017, <https://www.ceps.eu/system/files/EU-Turkey%20Deal.pdf>(10/21); C. Danisi, "Taking the 'Union' out of the 'EU': The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law", *European Journal of Int. Law: Talk!,* 20 April 2017, <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/>(10/21); N. Idriz, "Taking the EU-Turkey Deal to Court?", *Verfassungsblog*, 20 December 2017, <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/>(10/21).

[57] T. Spijkerboer, "Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice", *Journal of Refugee Studies*, 2018, p. 224.

Indeed, the General Court most probably deliberately avoided such an interpretation in order to get out of a difficult alternative. If it had examined the compatibility of the EU-Turkey *Statement* with European and international asylum and refugee law, it would either have come to a conclusion of nonconformity or have opted for a narrow interpretation of asylum and refugee law[58]: both choices could have fuelled – for opposite reasons – a hot political situation.

In other words, the impression is that the Court exercised a sort of self-restraint to avoid taking a position on a sensitive issue. However, by adopting such an attitude - labelled in literature both as 'realism'[59] and "judicial passivism"[60]- the Court missed a good opportunity to authoritatively reaffirm that the EU is a legal order based on the principles of the rule of law (Art. 2 TEU) and conferred powers (Art. 5 TEU), thus setting a dangerous precedent.

First of all, the order contravenes the ERTA doctrine,[61] codified by the Lisbon Treaty in Article 3(2) TFEU, which states *inter alia* that "the Union shall also have exclusive competence for the conclusion of an international agreement in so far as its conclusion may affect common rules or alter their scope". As pointed out[62], "the Heads of State and Government of the MS do not have an unfettered power to select the capacity in which they are acting. By virtue of EU constitutional constraints, when the effect of their acts encroaches upon existing EU legislation, they lose their power to act outside the EU framework, as mere representatives of their States".

Therefore, the Court should not have investigated the 'intent' of persons wearing different hats at the same meeting, i.e., acting at times as representative of Member States, other times as part of the European Council and thus as EU. Conversely, it should have analyzed the con-

[58] *Ibidem*.

[59] Cannizzaro, *Denialism*, cit., p. 257.

[60] See I. Goldner Lang, "Towards "Judicial Passivism" in EU Migration and Asylum Law?", in T. Ćapeta, I. Goldner Lang & T. Perišin, *The Changing European Union: A Critical View on the Role of Law and Courts*, Hart Publishing (forthcoming).

[61] Court of justice, judgment of 31 March 1971, case 22/70, *Commission of the European Communities v. Council of the European Communities*, concerning the European Road Transport Agreement (ERTA).

[62] Cannizzaro, *Denialism*, cit., p.253.

tent and all the circumstances in which the *Statement* was adopted.[63] Indeed, as convincingly argued[64], the application of this test would have led to "the conclusion that an international instrument that plainly falls within the competence of the EU, negotiated by the President of the European Council and by the President of the European Commission .., adopted at a meeting of the European Council and Turkey held in the headquarters of the European Council, communicated in the form of a press release of the European Council and posted on its website, whose wording immediately conveys the idea that its consent has been agreed upon by Turkey and the EU, cannot but be attributed to the EU".

Moreover, choosing to place the EU-Turkey *Statement* outside the scope of EU law is extremely regrettable also because by doing so the Court supports (instead of opposing) the approach of Member States and of EU institutions aiming at circumventing political and judicial controls (respectively by the European Parliament and the Court of Justice) by resorting to arrangements which do not fall within the scope of Article 218 TFUE. As pointed out,[65] "This case illustrates how the checks and balances built into the system can be completely bypassed when the EU institutions collude with Member States to act outside the Treaty framework".

The order was appealed, but unfortunately the Court dismissed it

[63] See CJEU, judgment of 30 June 1993, *European Parliament v. Council of the European Communities and Commission of the European Communities*, joined cases C-181/91 and C-248/91, para. 14.

[64] See Cannizzaro, *Denialism*, p. 256. Indeed, as above mentioned, an EU-Turkey Readmission Agreement had already been signed in 2013 and had entered into force on 1 October 2014, except its provisions relating to the readmission of third country nationals: these provisions were destined to enter into effect three years after the date of entry into force of the EU-Turkey Readmission Agreement: see Article 24(3).

[65] Idriz, *Taking the EU-Turkey Deal to Court?* cit. However, as pointed out (J. Rijpma, "External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory", *European Papers*, 2017, p. 595, <http://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2017_2_7_Article_Jorrit_J_Rijpma.pdf> (10/21), "in its implementation the Member States must still be considered as acting within the scope of EU law when declaring an asylum request inadmissible or issuing a return decision".

without examining it on the merits.[66] In fact, the Court observed that the appeals thus simply make general assertions that the General Court disregarded a certain number of principles of EU law, without indicating with the requisite degree of precision the contested elements in the orders under appeal or the legal arguments specifically advanced in support of the application for annulment[67]

and concluded that

> by their arguments, the appellants merely express their disagreement with the General Court's assessment of the facts, while requesting that those facts be assessed again, without claiming or establishing that the General Court's assessment of the facts is manifestly inaccurate, which is inadmissible in an appeal[68]

As pointed out[69], the impression is that the Court resorted to an "usage stratégique du droit procédural" to avoid taking a stand in a controversial debate.

Similarly, also in the previous judgment *X and X* of 7 March 2017[70],

[66] CJEU, order of 12 September 2018, *NF, NG and NM v. European Council*, cases C-208/17 P, C-209/17 P and C-210/17 P.

[67] Para. 16.

[68] Para. 29.

[69] See P. Van Malleghem, "C.J.U.E., Aff. jointes C-208/17 P à C-210/17 P, ordonnance du 12 septembre 2018, NF, NG et NM, ECLI:EU:C:2018:705", *Centre Charles De Visscher pour le droit international et européen*, 4 October 2018, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/c-j-u-e-aff-jointes-c-208-17-p-a-c-210-17-p-ordonnance-du-12-septembre-2018-nf-ng-et-nm.html#_ftn17>(10/21); see also D. Vitiello, "Il contributo dell'Unione europea alla governance internazionale dei flussi di massa di rifugiati e migranti: spunti per una rilettura critica dei Global Compacts", *Diritto, Immigrazione e Cittadinanza*, 2018. p. 37.

[70] CJEU, judgment of 7 March 2017, *X and X* [GC], case C-638/16 PPU. On this judgment see A. Liguori, "Two Courts but a Similar Outcome -no humanitarian visas", in G. Cataldi, A. Del Guercio, A. Liguori (eds.), *Migration and Asylum Policies Systems Challenges and Perspectives*, Editoriale Scientifica, Napoli, 2020, p. 177 ff. ; E. Brouwer, "The European Court of Justice on Humanitarian Visas: Legal integrity vs. political opportunism?", *CEPS Commentary*, 16 March 2017, <https://www.ceps.eu/system/files/Visa%20Code%20CJEU%20E%20Brouwer%20CEPS%20Commentary_0.pdf > (10/21); H. De Vylder, "X and X v. Belgium: a missed opportunity for the CJEU to rule on the state's obligations to issue humanitarian visa

the Court of Justice had adopted a self-restraint decision, stating that the granting of humanitarian visas at embassies does not fall within the scope of EU law but solely within that of national law, notwithstanding the fact that Advocate General Mengozzi had convincingly suggested a different possible interpretation.

In other words, in both cases (concerning the EU-Turkey Statement on the one hand, and the granting of humanitarian visas at embassies on the other), by resorting to hyper formalistic reasoning, the Court of Luxembourg has deliberately chosen a *modus interpretandi* which passes the buck to the States, sidestepping fundamental values which are the very foundations of the European Union[71].

4. Conclusions

In conclusion, although it has shown a creative and progressive approach in dealing with national sovereign powers, also in migration

for those in need of protection", *Strasbourg Observer*, 14 April 2017, <https://strasbourgobservers.com/2017/04/14/x-and-x-v-belgium-a-missed-opportunity-for-the-cjeu-to-rule-on-the-states-obligations-to-issue-humanitarian-visa-for-those-in-need-of-protection/>(10/21); G. Raimondo, "Visti umanitari: il caso X e X contro Belgio, C-638/16 PPU", *Sidiblog*, 1 May 2017, <http://www.sidiblog.org/2017/05/01/visti-umanitari-il-caso-x-e-x-contro-belgio-c%E2%80%9163816-ppu/>(10/21); A. Del Guercio, "La sentenza X. e X. della Corte di giustizia sul rilascio del visto umanitario: analisi critica di un'occasione persa", *European Papers*, 2017, p. 271 ff.<http://www.europeanpapers.eu/en/europeanforum/la-sentenza-x-e-x-della-corte-di-giustizia-sul-rilascio-del-visto-umanitario >(10/21); C. Favilli, "Visti umanitari e protezione internazionale: così vicini così lontani", *Diritti umani e Diritto internazionale*, 2/2017, p. 553 ff.; G. Cellamare, "Sul rilascio di visti di breve durata (VTL) per ragioni umanitarie", *Studi sull'integrazione europea*, N. 3/2017, p. 527 ff.; F. Calzavara, "La sentenza della Corte di giustizia in tema di visti umanitari: quando la stretta interpretazione rischia di svilire la dignità umana", *Ordine internazionale e diritti umani,* 2017, p. 546 ff. <http://www.rivistaoidu.net/sites/default/files/5_Calzavara_0.pdf >(10/21).

[71] Notwithstanding the formal commitment of the European Union to ensure respect of the rule of law and human rights, as stated in Articles 2 and 6 (TEU) and reiterated in Article 21 TEU with specific regard to the Union's External Action.

matters in the past [72], the CJEU seems to have abdicated this role when confronting delicate issues concerning externalization.

In particular, as pointed out, the Court's "decision not to decide has enabled the EU-Turkey *Statement* to endure and for similar agreements to be concluded with third countries outside the scope of EU law and exempt from the judicial review of the CJEU"[73].

Indeed, although the EU-Turkey *Statement* was much criticised from the very beginning, on 7 June 2016 the EU Commission adopted a *Communication establishing a new Migration Partnership Framework with third countries*[74] which refers to the EU-Turkey deal as a source of inspiration and a model of effectiveness[75].

Such a preference for soft law instruments is indeed confirmed also in the *New Pact on Migration and Asylum*, a programmatic document adopted by the European Commission on 23 September 2020[76]. In this regard, the explicit reference to the possibility of 'arrangements' also with respect to cooperation on readmission, where "legal safeguards, democratic accountability and monitoring seem all the more necessary", is particularly problematic[77].

[72] See C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford, Oxford University Press, 2016

[73] See Goldner Lang, *Towards 'Judicial Passivism'*, cit.

[74] COM (2016) 385 final, p. 6.

[75] Ibidem, p. 3.

[76] COM (2020) 609 final. See *ex multis* S. Carrera, "Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum", *CEPS* n. 22, September 2020, <https://www.ceps.eu/wp-content/uploads/2020/09/PI2020-22-New-EU-Pact-on-Migration-and-Asylum.pdf>(10/21); D. Thym, "European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum", *EU Immigration and Asylum Law and Policy*, 28 September 2020, <https://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/>(10/21); P.G. Andrade, "EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm?", *EU Immigration and Asylum Law and Policy,* 8 December 2020, <https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/>(10/21); A. Liguori, "Il nuovo Patto sulla migrazione e l'asilo e la cooperazione dell'Unione europea con i Paesi terzi: niente di nuovo sotto il sole?", *Diritti umani e diritto internazionale*, 2021, p. 67 ff.

[77] See Andrade, *EU cooperation on migration with partner countries within the New Pact*, cit.; see also A. Ott, "Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges", *Yearbook of European Law*, Volume 39, 2020, p. 569 ff.

This aspect, added to the Pact's emphasis on cooperation with third States[78], amplified by, among other things, the provision of pre-screening procedures at the borders, which are thus intended to be considered extraterritorial zones for these purposes[79], simply push the European Union further towards externalization practices which are extremely problematic in terms of human rights[80].

Given the attitude of the CJEU vis-à- vis externalization, would the European Court of Human Rights be the appropriate international forum for an effective protection against human rights violations deriving from these practices of externalized border controls? It is difficult to predict how the ECtHR will deal with these issues, especially after its most recent case-law, i.e. the *revirements* in the *N.D. and N.T. v. Spain* and *Ilias and Ahmed v. Hungary* cases, and the inadmissibility decision in the *M.N. and others v. Belgium* case: as pointed out, these three point to "a new and more cautious direction of the Court in regard

[78] As emerges from the words of the vice-president of the Commission Margaritis Schinas, on the occasion of a press conference held on 11 September 2020. In announcing the imminent proposal of the New Pact using the image of a three-storey house, Schinas located on the first floor "a very strong external dimension with agreements with countries of origin and transit to keep people, for a better life, in their countries": <https://euobserver.com/migration/149417>(10/21).

[79] See L. Marin, "The 2020 proposals for pre-entry screening and amended border procedures: a system of revolving doors to enter (and leave) Europe?", *ADIM Blog*, November 2020; L. Jakulevičienė, "Re-decoration of existing practices? Proposed screening procedures at the EU external borders", *EU Immigration and Asylum Law and Policy*, 27 October 2020 <https://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/> (10/21); J. Vedsted-Hansen, "Border Procedure: Efficient Examination or Restricted Access to Protection?", *EU Immigration and Asylum Law and Policy*, 18 December 2020, <https://eumigrationlawblog.eu/border-procedure-efficient-examination-or-restricted-access-to-protection/> (10/21); G. Campesi, "The EU Pact on Migration and Asylum and the dangerous multiplication of 'anomalous zones' for migration management", *ASILE*, November 2020, <www.asileproject.eu>(10/21).

[80] See on this point Marin, *The 2020 proposals*, cit. See also Carrera, *Whose Pact?* cit., p. 5, arguing that, «pending the results of screening procedures, the person is presumed not to have legally entered into member states' territory. In this way, the proposed policies can be expected to encourage *de-territorialisation*, i.e., EU member states unlawfully reframing specific parts of their borders as 'non-territory'».

to migration related rights under the ECHR"[81]. The pending claims[82] concerning the outrageous violations arising from another infamous agreement, the 2017 Italy-Libya Memorandum of Understanding, will be the "Litmus test" for the Strasbourg Court to show its willingness to follow the path indicated by the landmark decision delivered in the *Hirsi* case[83] and stand as an effective bulwark against States' attempts to circumvent their international obligations by resorting to the externalization of border controls.

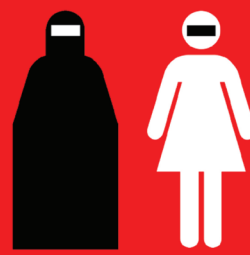
[81] See T. Gammeltoft-Hansen, N. F. Tan, "Adjudicating old questions in refugee law: MN and Others v Belgium and the limits of extraterritorial refoulement", *EU Immigration and Asylum Law and Policy*, 26 May 2020, <https://eumigrationlawblog.eu/adjudicating-old-questions-in-refugee-law-mn-and-others-v-belgium-and-the-limits-of-extraterritorial-refoulement/> (10/21) and literature quoted therein.

[82] As the *S.S. and Others v. Italy* case, applic. No 21660/18: on this case see V. Moreno-Lax, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the «Operational Model»", in *Migration And Asylum Policies Systems Challenges And Perspectives,* cit, p. 183 ff. and A. Fazzini, "Il caso S.S. and Others v. Italy nel quadro dell'esternalizzazione delle frontiere in Libia: osservazioni sui possibili scenari al vaglio della Corte di Strasburgo", *Diritto Immigrazione e Cittadinanza*, n. 2020/2, p. 87 ff.

[83] ECtHR, *Hirsi Jamaa and Others v. Italy*, judgment of 23 February 2012 [GC], applic. No. 27765/09. In this judgment, a cornerstone for the respect of migrants' and asylum seekers' human rights, the Grand Chamber of the European Court of Human Rights stigmatized externalization practices such as interceptions on the high seas when conducted under the effective control of Contracting States. On this case see: F. Messineo, "Yet Another Mala Figura: Italy Breached Non-Refoulement Obligations by Intercepting Migrants' Boats at Sea, Says ECtHR", *European Journal of Int. Law Talk!,* 24 February 2012, <https://www.ejiltalk.org/yet-another-mala-figura-italy-breached-non-refoulement-obligations-by-intercepting-migrants-boats-at-sea-says-ecthr/>(10/21); A. Liguori, "La Corte europea dei diritti dell'uomo condanna l'Italia per i respingimenti verso la Libia del 2009: il caso Hirsi", *Rivista di Diritto internazionale*, 2012, p. 415 ff.; V. Moreno-Lax, "Hirsi v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?", *Human Rights Law Review*, 2012, p. 574 ff.; N. Napoletano, "La condanna dei 'respingimenti' operati dall'Italia verso la Libia da parte della Corte europea dei diritti umani: molte luci e qualche ombra", *Diritti umani e diritto internazionale*, 2012, p. 436 ff.; M. Den Heijer, "Reflections on Refoulement and Collective Expulsion in the Hirsi Case", *International Journal of Refugee Law*, 2013, p. 265 ff.

Ankica Stevanovska

EVEN
WHEN
IT
SEEMS
DIFFERENT

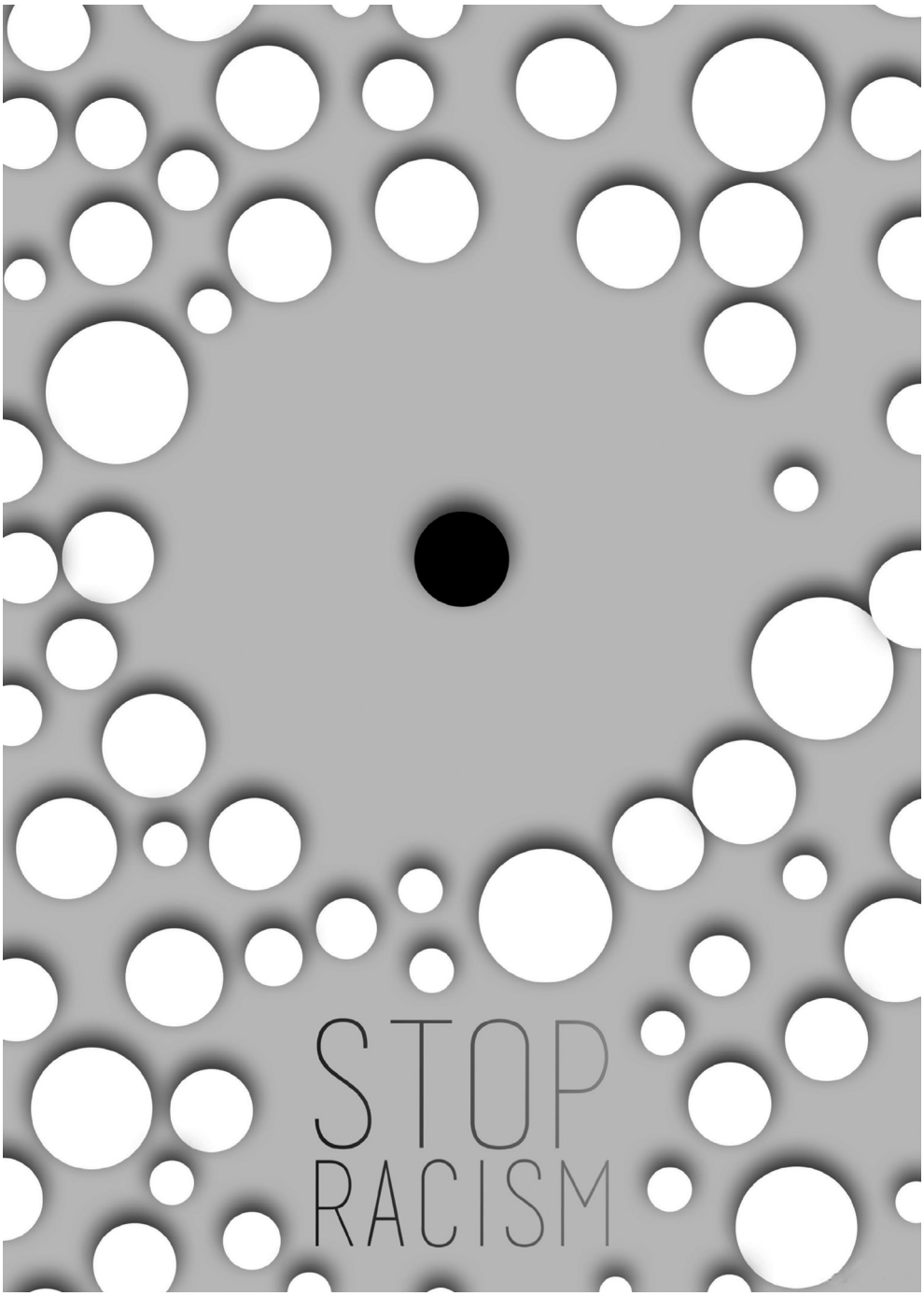


CENSORSHIP
IS
THE
SAME

Jana Jakimovska

NO INDIVIDUAL GUILT WE ARE ALL GUILTY

Elizabeta Toshevska



Sergej Smilkov

'STUCTURED' SOLIDARITY OF THE EUROPEAN UNION TOWARDS ILLEGAL MIGRATION CHALLENGES IN NORTH MACEDONIA

Olga Koševaliska[1]
Ana Nikodinovska Krstevska[2]
Elena Maksimova[3]

1. The concept of solidarity in Asylum policy of EU

In the European Union (EU), an area of open borders and freedom of movement, countries share the same fundamental values and need to have a joint approach to guarantee high standards of protection for migrants. Procedures must at the same time be fair and effective throughout the EU and impervious to abuse. This was one of the reasons for the establishing of the EU's Common European Asylum System (CEAS) that aimed to ensure that the rights of migrants under international law are protected in its member states. The migration crisis that caught the EU has put to the test not only the respecting of the laws from the member states but also has disturbed the respecting of the basic principles that are in the foundation of the EU, such as the principle of solidarity.

Migration had become a problem of the highest priority in the EU. Šabic, has made a good parallel of the goodwill for accepting migrants: *the will or ability to receive migrants had been steeply declining, almost on the same scale as the migration pressure was increasing.*[4]

European nations had come to fear migration. In the first decade of 2000, migration was seen as a normal phenomenon in light of globalization, world without borders concept, demands for economic develop-

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[4] Šelo Šabic (2017), p.4.

ment, etc. However, during the last decade migration became gradually perceived as a threat to security, identity and the economic wellbeing of Europe. The anti-immigration agenda has become a dividing ideological line in political battles across nations.[5]

As stated in 2015 Working document of the European Parliament[6] solidarity at EU level can be divided into two categories:

- *internal solidarity, which refers to the solidarity shown between Member States, between the European Union as a whole and its Member States, or between EU citizens and third-country nationals present in the EU, and*
- *external solidarity, which refers to solidarity by the EU towards people in third countries who are fleeing war, persecution, hunger, or violent conflicts in their country of origin, and solidarity with third countries that currently receive huge numbers of refugees fleeing war, persecution, and hunger in neighbouring countries.*[7]

Solidarity is one of the core values of the European Union and therefore it is represented as one of foundations of the Union.[8] In article 67 of TFEU is implied that

> "*It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals*"

Also, Article 80 of TFEU applies to all matters falling within the policy area of border checks, asylum, and immigration. For geographical and geopolitical reasons, migration does not affect European states in the same way, either as destinations or as transit countries.[9] Migrants do not land in the middle of the EU territory, they first enter from the Member

[5] Ibid.

[6] Online document: Working Document on Article 80 TFEU – Solidarity and fair sharing of responsibility, including search and rescue obligations (INI report on the situation in the Mediterranean and the need for a holistic EU approach to migration) available at https://www.europarl.europa.eu/doceo/document/LIBE-DT-564907_EN.pdf last accessed 10.07.2021.

[7] Radjenovic, (2020), p.3,

[8] Marin, Penasa, and Romeo, (2020) p.2; Biondi, Dagilytė, Küçük, (Eds) (2018); Moreno Lax, V. (2017) p. 744.

[9] Marin, Penasa, and Romeo, (2020) p.3.

states or third countries (gatekeepers) that are on the external borders of the EU and therefore these Member States or third countries, are affected more severe than the others. That is why the solidarity approach must be assured and respected. States with high numbers of arrivals seek burden sharing for obvious financial, administrative, social, and political reasons and that is why the real sharing of responsibilities is the actual expression of this solidarity.[10] One may ask, what is responsibility sharing actually? The main actors involved in this "sharing" practices, such as states, humanitarian organizations, and governmental agencies use different terms with similar concepts for expressing the means of Art.80 of the TFEU, such as 'sincere cooperation', 'mutual trust', 'balance of effort', 'burden sharing',[11] and 'responsibility sharing'.[12] Thus, is in favor of the conceptual uncertainty that we already have additional to *the variety of legal regimes (international refugee law, international human rights law, European Union law) involved in the area of asylum, along with solidarity's strong political, social and moral connotations that add a further level of complexity.*[13] Moreover, in the Opinion of the Advocate General Bot in the case *Slovakia and Hungary v. Council*, he stressed that *"solidarity is among the cardinal values of the Union and is even among the foundations of the Union"*. According to Bot, "*solidarity is both a pillar and at the same time a guiding principle of the European Union's policies on border checks, asylum and immigration*".[14]

[10] Vanheule, et all. (2011) p. 122.

[11] On burden-sharing see e.g., Noll, (2000); Noll, and Vested-Hansen, in Guild, and Harlow (eds), (2001) 195–224; Thielemann, (2003) p. 253.

[12] Alberto Miglio states that 'it is interesting, however, to compare the relationship between responsibility and solidarity in this context and within the EMU. Whereas in the latter context solidarity operates as a countervailing principle to the dominant logic of individual responsibility of each Member State, Article 80 TFEU does not oppose responsibility and solidarity. On the contrary, since it indicates how responsibilities shall be allocated, the concept of fair sharing should be viewed as an element of solidarity or, to be more precise, as a criterion that helps define the content of the principle of solidarity in this particular policy area.' See Miglio, (2018). in Kuzelewska, Weatherburn, Kloza (Eds.), pp. 23-50), and also see Gray, (2013) p. 175, 177, 182.

[13] Karageorgiou, (2016), p.2.

[14] Opinion of Advocate General Bot, 26 July 2017, Cases C-643/15 and C-647/15, Slovak Republic, Hungary v. Council of the European Union, ECLI:EU:C:2017:618, Slovak Republic and Hungary v. Council of the European Union, Judgment of the

The fact that solidarity is referred to as a "principle" indicates that its nature differs from strict binary rules that prescribe or prohibit certain behavior ("do this – don't do that").[15] Instead, solidarity and fair sharing as enshrined in Article 80 TFEU is to be realized to the highest degree that is actually and legally possible, depending on the circumstances at hand.[16] Circumstances defer between Member states, we can acknowledge that fact, but what most differs between Member states is their real willingness to accept asylum seekers openhanded. Over the past decade, financial incentives of solidarity have been one of the most controversial issues of EU migration and asylum policies.[17] There are contradictions in the EU regarding the policy that the Member States must follow. While countries of Western and Northern Europe are willing to accept migrants, those from Central and Eastern Europe are trying to keep them out. Extremely interesting is the position of the Visegrád Group Countries (The Czech Republic, Poland, Hungary, and Slovakia) on migrant issues differs from that of the leading countries in the EU.[18] We also question the real solidarity between Member States in the light of the decisions for the relocation of refugees in the EU.[19]

And while the EU is struggling to respect the principle of solidarity in the inside, we question the real solidarity of the EU towards non-EU states that are the "gate-keepers" of the external borders of the EU. EU law fails to provide a definition and a clear indication of what solidarity entails, especially as for its external reach.[20]

One of the purposes of this article is to explore the circumstances in the case of the solidarity of the EU towards North Macedonia

Court (Grand Chamber) of 6 September 2017, EU:C:2017:631 see https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf last retrieved 30.07.2021.

[15] For solidarity as principle see Ovádek, 2017.

[16] Alexy, (2000) p, 294.

[17] Online document Goldner Lang, Financial Implications of the New Pact on Migration and Asylum: Will the Next MFF Cover the Costs? in EU agencies, EU funds for migration and border management, New Pact on Migration and Asylum, Solidarity available at https://eumigrationlawblog.eu/financial-implications-of-the-new-pact-on-migration-and-asylum-will-the-next-mff-cover-the-costs/ last retrieved at 20.07.2021.

[18] See Ivanova, 2016.

[19] Šelo Šabic (2017), p.1-11.

[20] Moreno-Lax, 2017.

in the coping with the 'everlasting' migrant crisis. We'll try to give a short insight to the migrant crisis in North Macedonia to show the "tailor-made" solidarity of the EU towards North Macedonia.

2. Migrants at the gates - The beginning of the migrant crisis in North Macedonia

North Macedonia since the disintegration of Yugoslavia has had specific relationship with the European Union and its Member States, characterized with many difficulties throughout the European Integration process,[21] and during the years it has witness many migrations crisis on its soil. Starting from the crisis in Albania, when in 1991 the country received around 1,200 persons from the border regions with Albania, who sought protection and received protection by North Macedonia.[22] In a following episode, in 1992, North Macedonia offered protection to 35,000 people fleeing from the war in Bosnia and Herzegovina.[23] In aftermath of the Kosovo crisis in 1999, North Macedonia was as protagonist in the Kosovo refugee crisis, hosting around 360,000 people Kosovars on national territory.[24] Furthermore, during the internal conflict in 2001, the country produced around 90,000 internally displaced persons.

Lastly, in 2015 North Macedonia was stroke by the unprecedented influx of migrants and refugees which transited through the country in order to reach their destinations in Northern Europe.[25] The migration/

[21] After resolving the "name dispute" with Greece and the signing of the Prespa Agreement, a new challenge form another neighbor has aroused – the "language dispute" with Bulgaria. For more see Online document Folker Pabst, Locked-up in the waiting room for EU, last retrieved 25.07.2021.

[22] See Online resource New Protests in Albania; Crisis Mounts, by David Binder, Special To the New York Times, (02/1991), Section A, Page 3, New York Times available at https://www.nytimes.com/1991/02/22/world/new-protests-in-albania-crisis-mounts.html last accessed at 10.07.2021.

[23] Kosevaliska, Nikodinovska Krstevska (2020) p.110-111.

[24] Online article Markovski, Evropksata begalska kriza — predizvik od globalni razmeri [European refugee crisis — a challenge with global proportion], available at http://respublica.edu.mk/blog/2016-02-25-10-02-17 last accessed 11.07.2021.

[25] Legis, 2015.

refugee crisis that was happening alongside in Europe aggravated the already fragile political relations in the country and it highly affected upon the socio-economic and institutional stability of the State. Not only did North Macedonia found itself to be in the middle of the Balkan migration route, as a transit country, but at the same time it became a gate keeper of "Fortress Europe" with a clear role to defend and protect the external borders of the Union from an unwanted migrant influx.

In fact, until September 2016 more than 800,000 transited through North Macedonia (which is half of the country's population[26]). Even though their final destination was not North Macedonia, as it is acknowledged from the low number of asylum seekers or temporary protection requests in the country,[27] however the massive migration caused severe consequences upon the political, economic, institutional system of the country and also other countries from the Balkan route.[28] The short period in which the big migration wave was registered did not leave time for national authorities to prepare and respond with adequate measures to manage the influx of migrants and refugees. Actually, legal legislation was way behind, registration of migrants was inadequate or not made at all, improper measures were taken towards migrants that contained administrative limitations which were often subject to variation and changes and sometimes accompanied by unproportioned repression.[29] North Macedonia had even made it on the headlines of world newspapers when it detained 1003 refugees and migrants at Gazi Baba Reception Center from 1 January until 15 June 2015.[30]

The legislation concerning asylum policy was amended at the very same time when the number of migrants reached its very peak, and the given solutions at that time was not the most appropriate one but bearing in mind that the government should had come to a solution faster

[26] The total population of the country according to the last census from 2001 amounts in 2.022.547 citizens (State Statistical Office 2019).

[27] Amet, 2018, p.140.

[28] Weber, 2016.

[29] Koshevaliska, Nikodinovska Krstevska, 2020, p.113.

[30] See Veigel, et all. (2016) p. 103-119.

than ever, it solved the problem temporary by introducing the 72 hours rule to transit throughout the territory of North Macedonia.[31]

North Macedonia has steadily strengthened its asylum system over the years. The legislative framework has been improvement and is today largely in line with international standards. But significant weaknesses persist in the asylum system in practice. The country has not been able to ensure that asylum-seekers have access to a fair and efficient asylum procedure, and this is reflected, amongst other, by the fact that North Macedonia has not yet put in place protection sensitive screening mechanisms at the border to identify those who may be in need of protection and to refer the individuals concerned to appropriate procedures.

3. Modus operandi – how is North Macedonia managing the influx of migrants

Even though North Macedonia is not a frontline country to the Schengen zone, still its geographical position being on the crossroad on the Balkan, puts it in a very controversial situation in the migration crisis context. To cope with the overwhelming number of illegal migrant's form 2015, the country declared the state of emergency on both the south and north border, which is still in force. The state of emergency triggered several consequences: firstly, the Crisis Management Center was activated and was given the coordinative role in the refugee crisis, i.e., it participated in the formation and completely took over the coordination procedure of the transit camps. Secondly, the Army of North Macedonia was engaged along the borders as necessary for the management of the illegal migration and the other safety risks

[31] See Amendments to the Law on Asylum and Temporary Protection, published in the Official Gazette of the Republic of Macedonia No. 49/2003, 66/2007, 142/2008, 146/2009, 166/2012, 101/2015, 152/2015, 55/2016 and 71/2016. After these changes in the legislation, it was more than obvious that a new Law for asylum and for foreigners should see the daylight. In the first quarter of 2018 the new Law for international and temporary protections came into force (Law for international and temporary protection, Official Gazette No.64 from 11.04.2018), replacing the law for asylum, and in June a new Law for foreigners replaced the old one.

arising from the process. And lastly foreign police forces from several EU Member States (mostly Visegrád countries) were deployed on the Macedonian-Greek border and still are patrolling alongside the border in mixed teams with the Macedonian police.[32]

The posting of border officers from Czech Republic, Poland, Slovakia, Slovenia, Austria, Hungary, and Croatia, together with Serbia as a non-EU country in 2016, later greatly contributed to the halt in migratory flow through the Western Balkan corridor.[33] Currently, based on this modus operandi, there is still a contingent deployed on the Greek-Macedonian and two contingents at the Serbian-Bulgarian border and Serbian-Macedonian border. Since then, the barriers and additional security measures and procedures have not, however, managed to prevent the irregular flows from reoccurring.

Enhanced cooperation with the Western Balkan partners led to a decrease in the migratory flows by late 2016, but further work is needed today, as we are witnessing an increase in the migratory flows from 2019 until now.[34]

4. How does solidarity really look like?

The state of emergency triggered several consequences that put a heavy financial burden on the already empty state budget. The human and financial resources that the country allocates for border management are significant and having in mind that irregular migration continues to flow, it is assumed that the financial burden imposed upon the country exceeds its capacities. Acting as a so called 'gate keeper to the Fortress Europe' North Macedonia alarmed the EU and still makes efforts to raise the awareness

[32] See Nikodinovska Krstevska, Kosevaliska, (2021).

[33] The cooperation furthermore includes mutual training, exchange of information and coordination. At the beginning of this cooperation a total of 166 foreign police and in 2019 this number was 1550. Data from free access to public information No. 16.12-386/1 from 11.03.2020 – Sector for Public relations of the Ministry for internal affairs.

[34] See Online document Publication: State of art of the asylum in North Macedonia in 2018-2019 available at https://myla.org.mk/wp-content/uploads/2020/11/Sostojba-so-azil-RSM-2018-2019.pdf also see field reports of the Macedonian Young Lawyer Association, available at https://myla.org.mk/wp-content/uploads/2021/01/Q4-Field-Report-October-November-December-2020.pdf last accessed on 28.07.2021.

regarding its capability-expectations gap, outlining that the crisis is exceeding its national capacities – in financial and human resources, and that it urgently needs material and logistical support to effectively deal with irregular migration as well as humanitarian assistance to refugees and migrants. Therefore, it is necessary to reflect upon EU's effective solidarity towards the country in the migration context, starting from financial help, technical and logistic assistance, and of course well-organized and efficient police cooperation as well as access to relevant data basis, which are deemed crucial towards coping with challenges that arise from illegal migration and consequences upon human rights issues.

In terms of financial help, the Minister of internal affairs, Mr. Spasovski stated on more occasions[35] that the legal amendments and changes in the relevant laws in asylum policy led to additional engagement of human resources of employees form the Ministry of internal affairs, the Ministry of labor and social policy, Ministry of health, the Army, and other relevant institutions. These additional human and material-technical resources of all competent institutions are additional burden to the budget and North Macedonia is not capable to bear this financial burden. Financial help was given on several occasions' trough the Instrument of Pre-Accession, I, II and now III,[36] also from IOM,[37] UN-

[35] See Online Statement of Mr. Olvier Spasovski Minister of internal affairs available at https://mvr.gov.mk/vest/1109 , last accessed on 30.07.2021. Ministry of the Interior, Minister Spasovski at the Conference "Irregular Migration as One of the Challenges of Macedonia Today"' (21 September 2016) https://mvr.gov.mk/vest/2607 accessed 30.07.2021. Also see the statement of the Chief of the Bureau for Public Security, Mr. Saso Tasevski who stated that financial help and international cooperation are more than necessary for coping with the migrant crisis, available at https://nkeu.mk/2019/12/21/second-cycle-first-session-of-working-group-4-chapter-24-waiting-on-frontex-the-border-security-through-the-prism-of-the-mixed-migration-flows/ last retrieved on 25.07.2021.

[36] For the Instruments of Pre-Accession (IPA I and II) visit the relevant links on https://ec.europa.eu/neighbourhood-enlargement/instruments/funding-by-country/north-macedonia_en and also European Commission: Cross Border Cooperation, Program 2021-2027, Republic of North Macedonia and Albania, available at https://ipacbc-mk-al.eu/assets/files/IPA%20III%20CBC%20MK-AL%20First%20draft%20final_07.12.2020.pdf last accessed on 25.07.2021.

[37] Online document: Assistance to North Macedonia in addressing the 2015 - 2019 refugee crisis, available at https://coebank.org/en/donors-and-trust-funds/beneficiaries-donor-funds/migrants-and-refugees-north-macedonia/ last retrieved on 25.07.2021.

HCR and donations from several Member States.[38] In addition, there were several generous donations from the Check Republic, Germany, and EC in equipment basically vehicles, offroad vehicles, thermal cameras and other equipment that helped the Macedonian police to patrol the southern border with Greece. However, this equipment is still not sufficient, as the country still copes with a high number of illegal migrants trying to enter its borders with Greece and Serbia.

Strong police cooperation between certain EU Member countries in particular the Visegrad countries (Poland, Czech Republic, Slovakia and Hungary) with North Macedonia and other transit countries has been found essential for preventing and ending migrant smuggling as well as other interlinked types of crime, which exploit migratory flows. Therefore, on these grounds the country had established strong and fruitful cooperation with the other countries and with FRONTEX, whereby it has deployed 'guest police officers' on the southern border with Greece, who execute mixed patrols with the Macedonian police preforming duties for prevention of illegal migration and fight against smuggling of migrants. Other that that the country has established cooperation with FRONTEX, IOM and UNCHR.

The level of regional cooperation and progress achieved so far in dealing with migratory flows and organized crime are in no way to be underestimated, but still when looking at the statistics – it comes out that this is not enough. From interviews, reports, and relevant research,[39] border police officers estimate that their capacities to deal with irregular migrations on the borders, without the assistance of foreign police officers, would be reduced 5 times lower than if they collaborated with the foreign border police officers. As a matter of fact, this type of cooperation proved to have solid results, despite the fact that the Macedonian segment of the Balkan route is the most expensive ones. Namely, the cost for smuggling from Turkey to Germany is around 5000 euros/per person. The part cut off for smuggling throughout the territory of North Macedonia is between 1200-1500 euros (almost 30% of the total sum).[40] Hence, the cooperation has been performed based

[38] For more see Kamberi (2020).

[39] Nikodinovska Krstevska, Kosevaliska, (2021).

[40] See Nikodinovska Krstevska, Kosevaliska, (2021).

on the already existing know-how and the available regional legal bases but needs further development.

In July 2018, European Commissioner Dimitris Avramopoulos and Macedonian Interior Minister Oliver Spasovski agreed on a status agreement that enables teams from the European Border and Coast Guard Agency to be deployed in North Macedonia. The Agreement allows the Agency to conduct joint operations in the country in case of urgent or sudden migratory challenges. The draft version of the Agreement foresees that a Member State team from the Agency would perform tasks and execute the Agency mandate on the territory of North Macedonia under instructions from and in the presence of national border guards or other relevant staff.[41] There are new trends, new routes, new modus operandi and in this manner, this seeks for new ways to answer.

[41] The new agreements will allow Frontex and EU border officials to carry out all executive powers necessary for border control in a third country. This will no longer be a competence reserved for border authorities of the host third country. These agreements are part of EU's contingency plan to avoid a duplication of the events of late 2015 and early 2016. It will provide Frontex border guards with executive powers to conduct different types of operations in this south-eastern European region. In essence, status agreements will allow Frontex to duplicate what it is doing inside the EU also in the Western Balkan region. A status agreement defines the procedures, scope, civil and criminal liability, tasks, and powers of the actions to be taken, which can be a joint operation, a rapid border intervention or a return operation. The Commission developed a model status agreement in November 2016. With the adoption of the Decision on 8 March 2017 to agree on status agreements, the Council smooth the way for the Commission to open negotiations with Serbia and North Macedonia. It is not a coincidence that these are the two countries with which an agreement like this was aimed to be signed first. Belgrade and Skopje cooperated closely with member states when the latter embarked on the objective of reducing the number of migrants on the so-called 'Balkan route'. These countries already have a working arrangement with the Agency. In October of the same year, the Commission also launched talks with Albania, Bosnia and Herzegovina and Montenegro. However, on 1 May 2019, Albania became the first country from the region with a fully operational status agreement. 20 days later, the Agency launched its first fully fledged joint operation outside the EU to support Albania in controlling its external borders and fighting cross-border crime. Three Status agreements have already been initialized with North Macedonia (July IDSCS Policy Brief No.6/2019 - July 2019), Serbia (September 2018), Bosnia and Herzegovina (January 2019) and Montenegro (February 2019). They are currently pending finalization. The status agreement with North Macedonia is postponed until resolving the language dispute with Bulgaria.

5. Conclusion

During these past years since migration become an issue in EU asylum and migrations policy, North Macedonia has witness in its asylum and migration policy, the intersection of two different policy approaches. One – that of the EU through the external solidaristic approach, and the other one from the EU member states, exemplifying in a pure security approach to migration and asylum. Concerning the first, North Macedonia has been engaged in the process of EU integration, and within it, the country has made serious efforts to harmonize its legal system with the EU *acquis* in asylum and migration. The whole process in terms of legislative changes and amendments, strengthening capacities in border management, trainings, etc. was and still is generally put through with the financial help of the European Union, meaning the EU IPA fund. Until now these approaches have been characterized as humanitarian approaches to migration and asylum, since they were addressed to solving the pressure of the migrant influx in North Macedonia, not only towards the country but above all towards migrants and refugees. On the other hand, the bilateral police cooperation between EU member states and North has strengthened the security dimension of asylum and migration, focusing on prevention of illegal migration and fight against smuggling of migrants, and proved to be a very successful policy tool, giving visible results concerning prevention of irregular migration, but at the same time raising concerns about the humanitarian dimension of these practices. These two approaches have put North Macedonia in the middle, being not only on the crossroads on the Balkan route but also on the crossroad of the different policy approaches to solidarity that depict a quite conflicting image of the European Union. Therefore, the tailor-made solidarity approach to migration and asylum depends on who is the main actor in EU migration and asylum policy, how does migration influx impact upon EU Member states and on the coherency of internal solidarity within the EU. To conclude, North Macedonia is not in condition to create its own policy regarding asylum and migration, having in mind that the country is in the process of European Integration, so it is dependent upon EU's legislative rules and of course EU's economic benefits using the carrot and sticks instrument to enlargement policy. While, on the other hand the

country has established solid border police cooperation with EU Member states that give the country a crucial role in the border management of the external borders of the Union. So basically, these two different approaches collide into a tailor – made approach to solidarity in North Macedonia in the field of asylum and migration while looking at the challenges of illegal migration. Therefore, it is still yet to see which of these approaches will prevail in the future.

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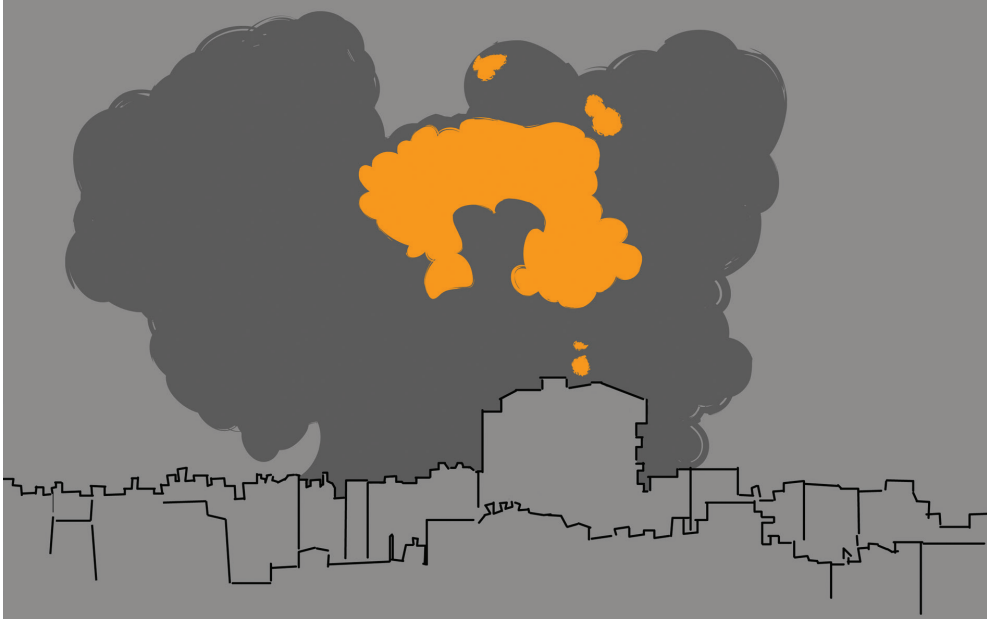
Jana Jakimovska

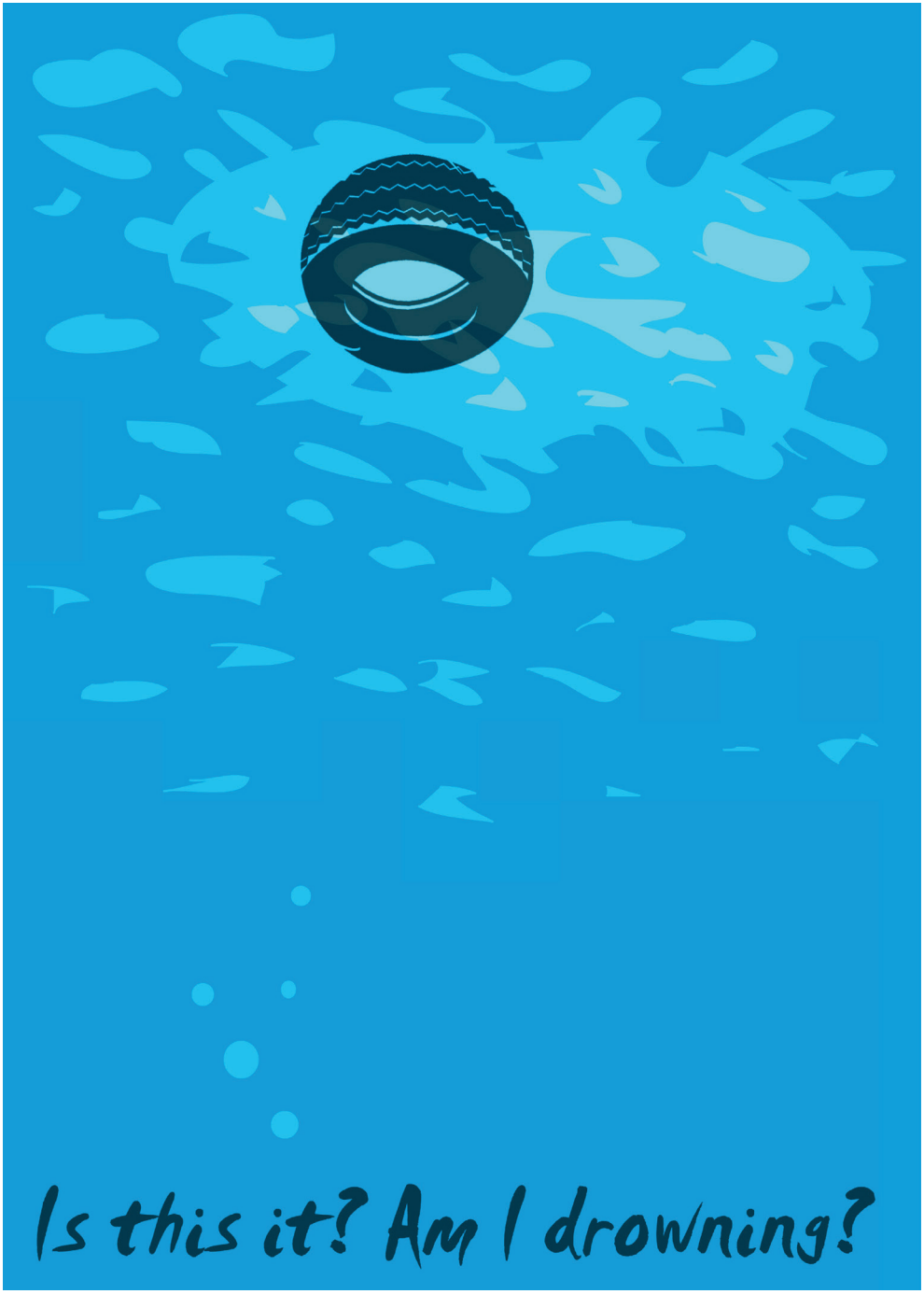
HOME IS WHERE



THE BOMBS ARE

Jana Jakimovska

Elizabeta Toshevska



Natasa Lefkova

HATE CRIME AGAINST MIGRANTS ALONG THE BALKAN ROUTE

Žaneta Poposka[1]

1. Introduction

Contemporary societies consider that law is a powerful tool that construes the social reality and inclusion of all individuals in the modern societal life. Nowadays, this is used to tackle discrimination and crime which results from different treatment and targeting of people with a certain protected characteristic such as ethnic background, sex and gender, disability, religion and belief, age, sexual orientation, status of migrant, asylum seeker or refugee and similar, as well as the stereotypes and prejudicial attitudes of people against these people or groups, stigma, and social exclusion. Stereotypes and prejudices against a certain group in the society impose limits to individual choices for members of the respective group and lead to subordination, inequality, discrimination, stigmatization, hate speech and eventually to bias-motivated violence.

Prejudices and stereotypes against different groups of people, including refugees, asylum seekers and migrants, are deeply rooted in the everyday life. Prejudices are antipathies based on wrong or inflexible generalization which may be expressed, felt as well as directed towards a group of people with a certain protected characteristic, *inter alia* refugees, asylum seekers and migrants, as a whole or towards an individual with this status, only because of the fact that they belong to this particular group. These stereotypes and prejudices against refugees, asylum seekers and migrants prevent one to perceive the members of the affected group as individuals and members of the society that need to be assessed on individual basis. On the contra-

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ry, they are seen as members of the respective social group which is created through mostly negative beliefs and attitudes of the majority which are based on such prejudices and stereotypes against refugees, asylum seekers and migrants. Having generalized the stereotypes, the concrete attributes are then imposed to individuals just because of the fact that they belong to this group, and one derogates the fact that every individual is unique (Poposka, 2015).

The case law of the European Court of Human Rights (ECtHR) as elaborated by Poposka (2015) shows that prejudices are both the reason and manifestation of discriminatory treatment, and if not condemned as unacceptable in the society it shall give rise to hate speech that further potentially can be developed into hate crime. Status of refugee, asylum seeker and/or migrant is not an exception to this rule. If these prejudices and stereotypes remain unchallenged in the society, there is a risk that they can be legalized and institutionalized by the legal system.

Thus, the state has the obligation to recognize, identify the detrimental effects and tackle the existing stereotypes and prejudices in the society and challenge them by modifying the social and cultural trends of behavior of different groups. If this is not tackled by applying the anti-discrimination legislation, they can largely give rise to hate crimes. As demonstrated in the case law of the European Court of Human Rights, the escalation of violence against any group, including refugees and migrant and especially women and girls with refugee and migrant status in view of their extreme vulnerability are very likely to occur, and low-level harassment can easily turn into full-scale violence if left unresolved by the institutions.

2. Constitutive elements and features of hate crime on grounds of refugee, asylum seeker or migrant status

Hate crime against migrants is a form of hate crime arising from bias or prejudices of the perpetrator on grounds of refugee, asylum seeker or migrant status. As with the other forms of hate crime, it does not only affect individual victims, but conveys a negative message to an entire group of persons that has the same status. In this respect, hate

crimes are 'message crimes' by which the perpetrator sends a message to the society as a whole that refugees and migrants are inferior and do not belong to society. Hate crimes have the potential to reinforce the marginalization, exclusion and isolation of disempowered groups such as persons with refugee and migrant status and consequently damage relationships within communities (ENIL, 2014). Such crimes have the potential to divide societies, and to create cycles of violence and retaliation. Thus, the state authorities have a positive obligation to protect all, including persons that are transiting the country, from violent behavior and to engage in a vigorous response to such crimes.

2.1. The protected characteristic

Defining the ground – refuge, asylum seeker and/or migrant status, is essential to understanding the scope of its protection. However, practice has shown that states find it difficult to define this particular ground due to various reasons, some of them being; its evolving character that changes; hard to strike a difference between this ground and other grounds such as race and ethnicity, nationality, religion and belief and similar; existing different models of viewing migration thorough history and nowadays; and refuges, asylum seekers and migrants being such a diverse group. One can say that the scope of the protected ground encompasses the actual or perceived characteristic of the victim, also "in association with" i.e., cover people that does not have the protected characteristic but are in close relationship with one that belong to the protected group. Such as human rights activists and politicians who are "pro-refugee" and who are advocating for the rights of this group. Finally, persons who are having this status and have other vulnerable characteristics – due to their socio-economic status, ethnicity, age, disability, religion, or gender – face an increased risk of violence. Thus, multiple characteristics, i.e., inter-sectionality between refugee, asylum seeker and/or migrant status and other personal characteristics should be included inherently under the personal scope of protection on this ground. For example: women and girls on the move are especially susceptible to inter-sectional hate crime and gender-based violence, thus Istanbul Convention has separate two articles discussing their vulnerability (Arts. 60 and 61).

2.2. Features of hate crime on grounds of refugee, asylum seeker or migrant status

Even though comparatively this ground is less often taken into consideration when hate crime legislation is drafted, still as other types of hate crime, hate crime on grounds of refugee, asylum seeker and/or migrant status can be seen as a globally spread phenomenon taking many forms, from verbal abuse and damaging property, to assault and murder. Research by the EU Agency for Fundamental Rights (FRA) shows that violence, harassment, threats, and xenophobic speech targeting asylum seekers and migrants remain pervasive and grave across the European Union (EU), whether committed by state authorities, private companies or individuals, or vigilante groups. Human rights activists and politicians perceived as 'pro-refugee' are also targeted and threatened. FRA data shows that political rhetoric on asylum seekers and migrants in many Member States made reference to their presumed Muslim religion and the alleged risk this poses to Europe's values and traditions. Reports from Member States also suggest that women who are visibly Muslim are especially targeted – both for being women and for being Muslim and this is one of the sub-groups of migrants, asylum seekers and refugees that rarely reports hate crimes. With data on hate crime against asylum seekers and migrants scarce, including on perpetrators, FRA's first survey on discrimination against immigrants and minorities (EU-MIDIS I), remains the most comprehensive source of comparative data on the issue. The survey found that respondents perceived between 1 % and 13 % of perpetrators of crimes to be members of right wing/racist gangs; between 12 % and 33 % as someone from the same ethnic group; between 12 % and 32 % as someone from another ethnic group; and between 32 % and 71 % as someone from the majority population (FRA, 2012, p.13).

Even though, all hostility against refugees, asylum seekers and migrants are not criminal, still all intentional and targeted violence against them have one factor in common: they are motivated by prejudice and victims are targeted only because their status of being refugee, asylum seeker and/or migrant, are perceived as such, or are associated with a person with this status. Offenders thus convey a particularly humiliating message, as they victimize people for what they represent, inferior

persons, rather than who they are, and the victim remains at risk of repeat victimization. Violence and hostility might have wide-ranging consequences, including emotional, physical and sexual implications, or even the death of the victim.

As mentioned above, abuse against women and men with refugee, asylum seeker and/or migrant status can take many forms, some being name-calling in public, mistreatment in public space, theft, abuse off-line and on-line, threats of violence, or violence and sexual abuse in reception centers, by smugglers, on borders or in institutions. One can say that the term 'abuse' refers to matters across a wide spectrum, which includes criminal acts, breaches of professional ethics, practices falling outside agreed guidelines or seriously inadequate care. Some falls in the ambit of discrimination, and the ones that have bias motivation against persons with refugee, asylum seeker and migrant status for committing the crime falls in the hate crime spectrum. Furthermore, it is very important to consider the hate incidents, which refers to actions that could be similar to a hate crime on grounds of refugee, asylum seeker or migrant status, but falls below the threshold of a crime. Hate incidents can become a hate crime once the incident is considered and classed as a criminal offence (ENIL, 2014).

While governments cannot guarantee that abuse will not happen, they must do their utmost to establish protection and the strongest possible safeguards. They should provide information in accessible and understandable format on how to avoid the occurrence of violence and abuse, how to recognize it, and how to report it. States should ensure access to the criminal justice system and provision of redress and compensation to persons with refugee, asylum seeker and/or migrant status who have been victims of abuse. In addition, persons who experience abuse or violence should have access to appropriate support and services, especially women and girls. They must have a system in which they can have sufficient confidence to report abuse and expect follow-up action, including individual support. In other words, if a system aims to be effective and decrease the potential hate crimes on this ground, the response of the authorities to this problem should shift from reactive to proactive by protecting women and men, girls and boys with refugee, asylum seeker and/or migrant status from all acts of violence.

3. Standards of protection against hate crime on grounds of refugee, asylum seeker or migrant status

3.1. United Nations

The 1951 Refugee Convention, which is a *lex specialis* on asylum, in its Article 1A paragraph 2 defines what a refugee is – any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it". The Convention was first intended to protect the European refugees fleeing the atrocities of the war. But due to the rapid emergence of new refugee situations, many people could not satisfy the required criteria to receive protection under the Convention. Therefore, its application would be expanded to all the refugees around the world, by the 1967 Protocol relating to the status of refugees.

A person may become a refugee, outside the country of nationality or habitual residence in two situations: either he abandoned his home because he himself suffered a well-founded fear of persecution, or he was already outside his country, as a student, traveler etc. when an event happened that made him fear persecution, torture or inhumane treatment, if he were to return to his home country. In the second situation, that person is qualified as a *refugee sur place*.

Article 33 of the Convention prescribes the principle of non-refoulement. Unfortunately, the same Convention lacks specific mentioning of asylum seekers. Thus, we turn to other sources defining this category. Individuals, who seek international protection (refugee status or subsidiary protection status) are called asylum seekers. According to UNHCR, "asylum seekers are individuals who have sought international protection and whose claims for refugee status have not yet been determined". Thus, a refugee is initially an asylum seeker, as he originally applies for asylum in the host country, but an asylum seeker is not necessarily a refugee at the beginning but can become one if he

falls under the provisions of the 1951 Refugee Convention definition. However, certain provisions of the 1951 Refugee Convention may also apply to asylum seekers, like the principle of non-refoulement.

3.2. OSCE

At the Ministerial Council meeting held at Maastricht in December 2003, the participating States of the Organization for Security and Co-operation in Europe (OSCE) collectively recognized the dangers posed by hate crimes and committed themselves to combating such crimes. Subsequently, OSCE participating States adopted a number of decisions that mandated the Office for Democratic Institutions and Human Rights (ODIHR) to work on hate crimes, such as Ministerial Council Decision No. 12/04, Permanent Council Decisions No. 607 and No. 621 (ODIHR, 2009). As set out in the OSCE Ministerial Council Decision 9/09, the participating States are recognizing that hate crime is a criminal offence committed with a bias motivation. However, there is no consensus among participating States as to which groups should be specifically protected against hate crimes and which bias motivations should be monitored. This is left to each country to decide and regulate by itself depending on the national context. ODIHR have produced an accessible and informative online resource - the Hate Crime Reporting Website at www.hatecrime.osce.org - to collect data and promote understanding.

While official monitoring of hate crime on grounds of refugee, asylum seeker and/or migrant status is limited, OSCE ODIHR have recognized it as a prevalent issue facing our communities. Upon direct request from the author and for research purposes only, OSCE ODIHR reported that there is no official statistics of this type of hate crime in the countries along the Balkan route of migration. Only, civil society and IGOs has reported hate crime on grounds of refugee, asylum seeker and/or migrant status. Namely, this status as a (i) bias motivation, and (ii) victim identity, as per export from ODIHR's hate incident database (reports by CSOs and IGOs) is presented in Table 1 below[2].

[2] The two categories overlap to such an extent that exporting the data separately would be useless, victim is not a refugee/migrant in incidents motivated by bias against them, only if the attack targets property (i.e., no victim at all).

Table 1: Registered hate crime on grounds of refugee, asylum seeker and/or migrant status along Balkan migration route by OSCE ODIHR

Country	2015	2016	2017	2018	2019	2020
Greece	-	25	32	15	46	75
Serbia	-	0	0	0	0	4
Bosnia and Hercegovina	-	0	0	3	2	4
Croatia	-	3	4	4	2	1[3]
Slovenia	-	3	-	-	-	-

Source: ODIHR's hate incident database, author's interpretation

There is no data for 2015 as OSCE ODIHR had different approach in collecting data and the current database was not operational. For Slovenia only data for 2016 is available when UNHCR reported to OSCE ODIHR and there are not civil society organization working on the subject matter there, so data is scarce.

In North Macedonia[4], there is no official data recording system on hate crime in the country established and maintained by the intuitions, for which the country has been criticized regularly. From another side, with support of the OSCE Mission to Skopje, since February 2013 till

[3] This is recorded as one incident within total of 75 victims, in relation to police ill-treatment during a push-back operation on the Croatian border.

[4] The country's Criminal Code contains a substantive-offence provision and general penalty enhancements (Article 39 par 5) for hate crime since early 2009, further amended in 2014 which expanded the list of protected characteristics and harmonizing the Criminal Code with the Anti-discrimination Law. Amendments of the Criminal Code adopted in December 2018 introduced a definition of a hate crimes, and changes in the special criminal acts which were supplemented with the bias motivation. These criminal acts are the following: murder (Art. 123), bodily injury (Art. 130), severe bodily injury (Art. 131), coercion (Article 139), unlawful deprivation of liberty (Art. 140), torture and other cruel, inhuman or degrading treatment and punishment (Art. 142), threatening the safety (Art. 144), prevention or disturbance of public gathering (Art. 155), rape (Art. 186), sexual assault of a helpless person (Art. 187), sexual assault upon a child who has not turned 14 years of age (Art. 188), not providing medical help (Art. 208), damage to objects of others (Art. 243), abuse of official position and authorization (Art. 353), act of violence (Art. 386) and desecration of a grave (Art. 400). In all of them bias against refugee and migrants is included.

nowadays, the Helsinki Committee for Human Rights in the country is maintaining the website www.zlostorstvaodomraza.com where citizens can register a hate crime or incident. By November 2021, a total of 736 hate incidents have been registered. Most of the incidents recorded in the past years were based on ethnicity, sexual orientation, and political affiliation of the victim, whereas in 2015 the most numerous attacks were against refugees and migrants (all during the transit route, from Gevgelija, Demir Kapija, Veles, Skopje, Kumanovo to Tabanovce border crossing). Types of crime varies, from unlawful deprivation of freedom, robbery, attack, and assault to gunshots wound, kidnaping and torture. First case registered on this ground was back in April 2014, and the last in October 2020. Moroccans, Syrians, Iraqi and Afghan refugees, asylum seekers and/or migrants are victims. Total number of hate crime cases registered on grounds of refugee, asylum seeker and/or migrant status are presented in Table 2 below.

Table 2: Registered hate crime on grounds of refugee, asylum seeker and/or migrant status in North Macedonia by the Macedonian Helsinki Committee

Country	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**
North Macedonia	19	10	3	5	-	3

Source: MHC's hate crime database, author's interpretation

The inter-sectional element in this type of cases is often omitted and unseen. For example: after the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) from the side of North Macedonia, in 2018 the first asylum application has been submitted due to persecution based on gender-based violence in the country of origin. It was a woman from the United Arab Emirates which sought international protection in North Macedonia. Despite drawing the attention to reports, witness statement of the asylum seeker and the Istanbul convention, the Sector within the Ministry of Internal Affairs rejected the asylum application without an essential examination, and this decision was confirmed both by the Administrative Court and the Higher Administrative Court in an expressly short time. Much needs to be done to increase the understanding and sensitivity of the state institutions as to multiple vulnerability of victims, especially women and girls on the move.

3.3. European Convention of Human Rights

At the level of European legislation, hate crimes violate the rights to human dignity, protection from inhuman and degrading treatment and punishment, and non-discrimination enshrined in the European Convention of Human Rights. The European Court of Human Rights has thus obliged states to make the bias motivation behind hate crimes explicit, i.e. to 'unmask' the motivation behind the crime, stating that "treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights" (*Identoba and Others v. Georgia*, App. no. 73235/12, from 12 May 2015, para 67, *Bekos and Kotropoulos v. Greece*, App. no. 15250/02, from 13 December 2005, para 69, *Šečić v. Croatia*, App. no. 40116/02, from 31 May 2007, para 66).

3.4. European Union

Article 78 (1) of the Treaty on the Functioning of the European Union and Articles 18 and 19 of the EU Charter of Fundamental Rights prohibit refoulement – meaning the return of an individual to a risk of persecution or serious harm – and collective expulsions. In the European Union, in addition to the Charter of Fundamental Rights of the European Union (Article 21 and 26), also hate crime legislation exist - Council Framework Decision 2008/913/JHA requires EU Member States to take measures to punish public incitement to violence or hatred directed against a person or persons belonging to a group defined by reference to race, colour, religion, descent or national or ethnic origin and the commission of such acts by public dissemination or distribution of tracts, pictures or other material. It requires national laws to treat racist motivation as an aggravating factor in already established offences.

The Victims' Rights Directive (2012/29/EU), from another side, provides the EU with a set of rules to protect victims of crime. Although applicable to all victims of crime, it recognizes the particular vulnerability of victims of hate crime and their right to be protected according to their specific needs.

4. Key challenges in relation to hate crime on grounds of refugee, asylum seeker or migrant status

Some of the key challenges in relation to hate crime on grounds of refugee, asylum seeker and/or migrant status are: the under-reporting of the hate crimes on this ground, both pre-emptive and post-fact; the lack of official data on the prevalence of hate crime on this ground; and insufficient victim support. Low reporting renders the issue invisible.

Aside from the general underreporting of hate crimes, the vulnerable situation of asylum seekers and migrants must be highlighted. As per the FRA research *Current migration situation in the EU: hate crime*, from 2016, civil society organizations have identified several factors that may undermine asylum seekers and migrants' willingness to report this type of crimes. These include.

- A lack of information and understanding of what hate crime is and how to report it.
- A lack of knowledge about means of protection against hate crime, including legislation, criminal proceedings, and the potentially positive effects of reporting incidents to counselling centres or the police.
- General suspicion and distrust of the police, including due to previous, negative experiences with official authorities, and the police in particular.
- Fear of arrest, deportation and negative effects on their asylum applications.
- Language barriers when reporting crime.
- A lack of alternative ways to report the incidents, including anonymously.
- Feelings of shame, guilt and not wanting to be stigmatized as victims.
- A belief that a criminal complaint will not bring anything positive and may lead to further victimization, threats and abuse.
- A belief that nothing would or could be done about the matter.
- Fear of retaliation by the perpetrator against themselves, their family, friends, and their community — especially if the perpetrator lives in the immediate neighbourhood or is a member of a hate group or even a public authority representative.

- Fear of not being believed.
- Fear of being discriminated against or stigmatized in criminal proceedings, resulting in further victimization.
- A sense of resignation about attacks — they become habitual.
- Fear of revealing their religious, ethnic, or political identity to public authorities where there is a hostile climate towards their community.
- The general societal climate – for example, after witnessing xenophobic remarks by politicians and in the media (FRA, 2016, pp.8-9).

From another side, Article 7 of the Victims' Rights Directive states that EU Member States shall ensure that "victims who do not understand or speak the language of the criminal proceedings concerned are provided, upon request, with interpretation in accordance with their role in the relevant criminal justice system in criminal proceedings, free of charge". According to Article 22 of the Directive, particular attention must be paid to victims who have "suffered a crime committed with a bias or discriminatory motive." Among the Member States, victim support services tailored to the needs of refugees, asylum seekers and migrants are quite rare. The interviewed practitioners highlighted that access to services is hampered by several factors – for example, language barriers or a lack of awareness of the services among the personnel with whom asylum seekers and migrants come into contact (FRA, 2016, p.10).

It is advisable for legislation to be adopted that obliges States to collect and publish disaggregated hate crime data *inter alia* on grounds of refugee, asylum seeker and/or migrant status as well as multiple characteristics such as ethnicity-, and gender-specific. Official data collection of hate crimes should be supplemented by crime victimization surveys that include questions on bias-motivated crime in order to shed light on the nature and extent of underreporting, the experiences of refugee, asylum seekers and migrants' victims of crime with law enforcement, reasons for not reporting incidents of hate crime, and rights awareness among the general population (FRA, 2012).

To improve this situation, the OSCE ODIHR has produced a guide to hate crime data collection and monitoring that provides ten practical steps to improve recording systems, provide a better understanding

of the extent of underreporting, and encourage victims to report hate crimes (ODIHR, 2014). Also, OSCE ODIHR published a practical guide *Hate Crime Victims in the Criminal Justice System* addressing the gaps in integrating assistance efforts to victims of hate crime with criminal justice processes. It also provides practical recommendations on adapting procedures, policies and laws, while taking into account the realities and complexities of criminal justice and victim support systems.

Good example

In Greece, refugees and migrants who may be victims of hate crimes are excluded from the return procedure and may be granted humanitarian visas. Possible victims of hate crimes are also exempted from paying a deposit when they sue the perpetrators.

Attacks and violence against asylum seekers and migrants in the EU are fostered by a societal climate in which intolerant views are more openly and violently expressed. Despite the worsening demographics and shrinking populations, anti-migrant sentiments run strong in Bulgaria, Greece, Croatia and the entire region of the Balkans; both politicians and ordinary citizens are worried that the wave of people coming into Europe from the Middle East, Afghanistan and elsewhere will overwhelm their fragile economies and weaken their national cultures. Evidence from the research shows that for the past few years, views on the cultural and social effects of the latest migration waves to Europe are persistently negative, which in turn encourages nationalist sentiments among the population (Coalition of Positive Messengers, 2017, p.16). Political actors share responsibility for the development of such a climate, as fears relating to the arrival of migrants are enhanced. Against this background, Member States lack comprehensive data to support efforts to prevent racist incidents, to respond to them effectively and lastingly, to improve access to justice for refugees, asylum seekers and migrants who become hate crime victims.

Finally, institutional anti-migrant sentiments provide for climate on institutional bias on grounds of refugee, asylum seeker and/or migrant status that often leads to violation of their human rights. UN Special Rapporteurs on the human rights of migrants and on torture and other forms of ill-treatment jointly called on Croatia to investigate reports of excessive use of force by police in migrant pushback operations,

including acts amounting to torture and ill-treatment, and punish those responsible (FRA, 2021, p.147). As a response to this, in Croatia, by 31 December 2020, the Internal Control Department of the Ministry of the Interior had reviewed 633 complaints, finding 75 well-founded and 132 partially founded, and some 30 police officers had been punished, according to the Ministry of the Interior. However, other countries are rarely doing that! Namely, in many cases, authorities state that claims are looked into, but that they do not contain enough information to initiate criminal investigations. In some, authorities deny the reported allegations. Still, FRA report shows that national preventive mechanism of Croatia faces obstacles to accessing migrants' files in 2020. Similarly, to Croatia, in November 2020, the European Committee for the Prevention of Torture published a report on Greece finding inhuman and degrading conditions in immigration detention, pushbacks and ill-treatment of detained migrants by the police.

5. Conclusion

Violence on grounds of refugee, asylum seeker and/or migrant status takes many forms and occurs in diverse settings. There are various causes of violence, ranging from negative societal attitudes based on prejudice and a lack of knowledge or understanding about the targeted group to professional or individual attitudes rooted in intolerance towards the 'other'.

While hate crime legislation has developed over recent years, it still does not fully cover this status. Some measures that could be taken at the national level to improve the situation is ranging between ensuring wide personal scope of protection under this ground, ensuring that desegregated data on hate crime on ground of refugee, asylum seeker and/or migrant status is collected systematically and regularly, and that victims are encouraged and have trust to report their experiences to the authorities. The states should ensure that any case of alleged hate crime is effectively investigated, prosecuted, and tried in accordance with international standards and relevant case law of the European Court of Human Rights. Finally, victims should receive the needed support with due consideration taken to their inter-sectionallity.

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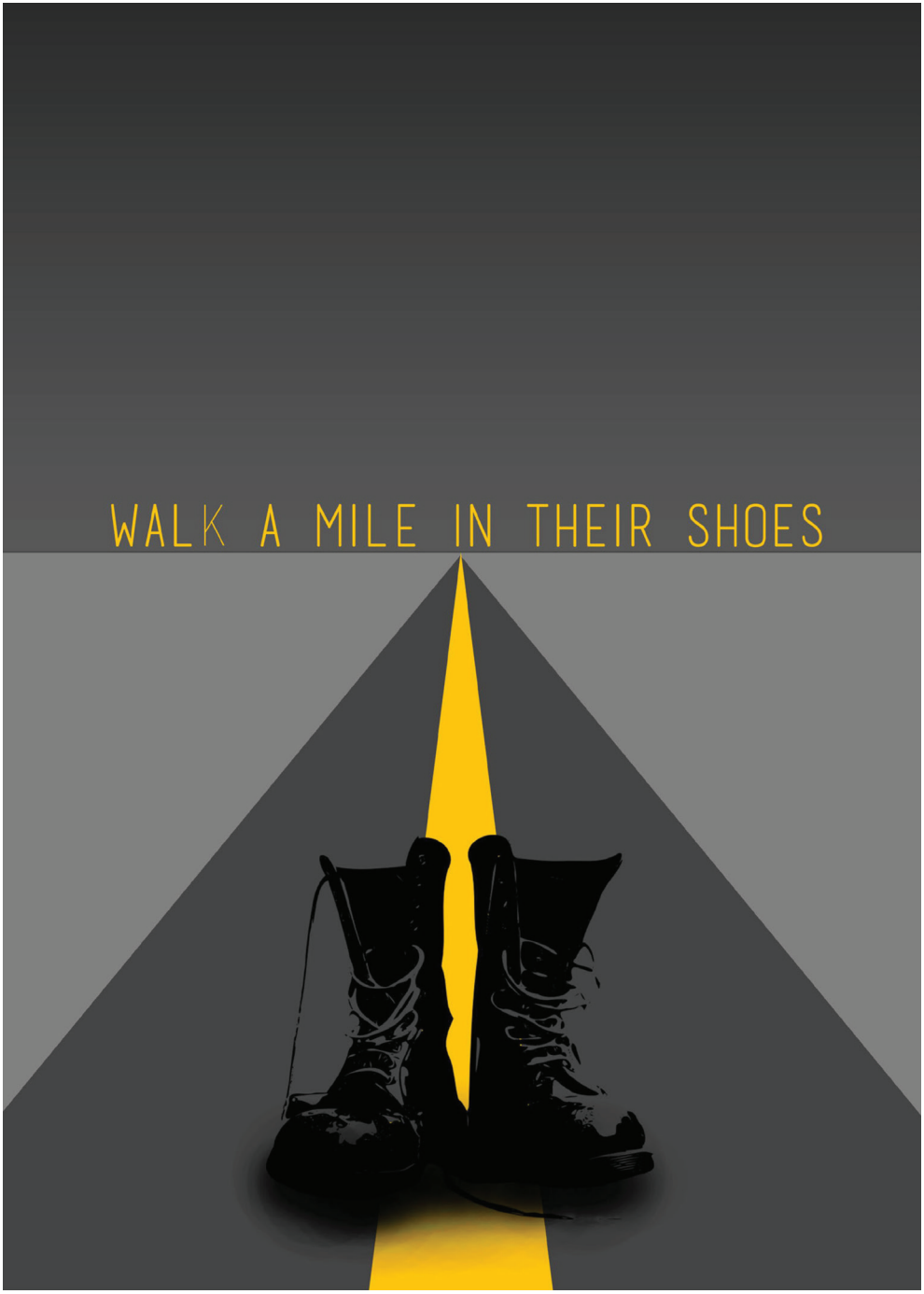
WALK A MILE IN THEIR SHOES



Sergej Smilkov

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THE EXTERNALIZATION OF ASYLUM: A PROCESS TO LIMIT ASYLUM?

Ester Del Nonno
Liliana Haquin Saenz
Mehtap Kaygusuz Akbay

1. Introduction

The term 'asylum' has been derived from a Greek word, "asylo" whose Latin counterpart is "asylum", and it means "without right from seizure"[1]. Literally, "an inviolable place". No international legal instrument provides a definition of asylum. At the universal level, there are few declarations that provide the 'right to asylum'. For instance, article 14 of the Universal Declaration of Human Rights[2], paragraph 23 of the Vienna Declaration on Human Rights and Program of Action[3]. We can also mention the Convention on Political Asylum concluded in 1933 by the Seventh International Conference of American States, which is the first convention on the matter, but it only applies to the regional level[4]. Article 33(1) of the 1951 Convention Relating to Status of Refugees prohibits the expulsion or return (refoulement) of refugees and asylum-seekers if their *"life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"*[5]. The New York Declaration for Refugees and Migrants adopted by the United Nations General Assembly in 2016 also reaffirms this right[6].

[1] Online etymology dictionary, (https://www.etymonline.com/word/asylum, last access 26/12/2021.

[2] United Nations, Universal Declaration of Human Rights, 1948.

[3] United Nations, World Conference on Human Rights, Vienna Declaration and Programme of Action, 1993.

[4] Seventh International Conference of American States, Convention on Political Asylum, 1933.

[5] United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Convention relating to the Status of Refugees, 1951.

[6] United Nations, New York Declaration for Refugees and Migrants, 2016

At EU's level, neither the Treaty on the Functioning of the European Union (TFEU) nor the Charter of Fundamental Rights provide a definition of the terms "asylum" and "refugee", but both make explicit reference to the Geneva Convention and its Protocol. According to article 67(2), of the TFEU: *"It* [The Union] *shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals* […]*".* Article 78 of the TFEU states that: *"The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties* […]*".* And according to article 80 of the TFEU: *"The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle".*

We can also find a specific provision under article 18 of the Charter of Fundamental Rights of the EU: *"The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union".*

Today's European Union's (EU) asylum policy aims at offering an appropriate status to third-country nationals. To this end, the Union has worked on the development of a Common European Asylum System (CEAS). Derived from the Lisbon Treaty, the CEAS includes a uniform asylum status, a uniform status of subsidiary protection, a common system of temporary protection, common procedures for granting or withdrawing asylum or subsidiary protection status, criteria and mechanisms for determining the Member State responsible for examining an application, standards for reception conditions, and partner-

ship and cooperation with third countries[7]. The main legal instruments on asylum are the Qualification Directive[8], the "Eurodac" Regulation[9], the Dublin III Regulation[10], the Directive laying down minimum standards for the reception of asylum seekers[11], and the Directive on asylum procedures[12].

Since 2016, attempts to reform the Common European Asylum System have failed. On 23 September 2020, the European Commission published the new agreement on migration and asylum aiming to establish a new balance between responsibility and solidarity amongst Member countries. This proposal includes the asylum procedure within the overall management of migration by associating it with prior checking and return. In recent years, the EU's external cooperation in migration and asylum has continued to increase in terms of instruments of cooperation with third partner countries. The EU and some

[7] See https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system_fr, last access 26/12/2021.

[8] Directive No 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

[9] Regulation No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

[10] Regulation No 604/2013 of the European Parliament and of the Council of June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

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

[12] 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.

its Member States in particular, are moving towards the externalization of immigration control. In order to do so, they have started employing a range of practices that prevent people from leaving the State they are in as well as their irregular arrival at State frontiers.

Externalizing migration controls prevents asylum seekers from entering the territories of destination countries[13]. For instance, in 2016, the EU and Turkey agreed on the outsourcing of the processing of asylum requests. This practice aims at preventing irregular migrants, including asylum seekers, from reaching the EU. But outsourcing the processing of asylum claims also puts an end to territorial asylum regimes as we know them.

Territorial asylum is granted when a State provides asylum within its own territory. Every sovereign State has an exclusive control over its territory along with the right to grant territorial asylum. In 1948, territorial asylum was incorporated in the United Nations Human Rights Declaration under article 14 according to which Everyone has the right to seek and to enjoy in other countries asylum from persecution. Later in 1967, the United Nations General Assembly passed a 'Declaration on Territorial Asylum'. According to article 3(1) of the Declaration: "*No person [...] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum. expulsion or compulsory return to any State where he may be subjected to persecution*".

At the regional level, in 1954, the Organization of American States adopted the Convention on territorial asylum. According to article 1 of the Convention: "*Every State has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other State*".

In this context the peculiar externalization proposal made by the Social Democrat -led government in Denmark on February 4, 2021, which was recently approved by the Danish Parliament, will be analyzed in the last part of this article. The aim of the legislative reform of the Aliens Act is to externalize asylum processing and the State's obligations under refugee law from Danish territory. According to this proposal, the

[13] See Frelick, et al. "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants" *in Journal on Migration and Human Security*, Vol. 4, n° 4, 2016, pp. 190-220.

asylum seekers would be transferred to camp-structures outside Europe where those granted refugee status will also stay. This legislative proposal has been motivated as a humanitarian response to disrupt migrant smuggling networks. Nevertheless, as part of its March 8, 2021, observations, the UN High Commissioner for Refugees (UNHCR) expressed doubts about whether such a process is in line with international obligations, including the 1951 Convention relating to the Status of Refugees and EU law[14]. The UNHCR has strongly urged Denmark to refrain from establishing laws externalizing its asylum obligations, affirming that it would be contrary to the spirit of the international and European system for the protection of refugees. It is therefore opportune to expose the reactions to this proposal, posing the risks and the legal implications on the rights of asylum seekers and other migrants.

I) Temporary Protection in Turkey and EU-Turkey Statement

The EU-Turkey Statement (hereinafter "Statement")[15] was concluded on 18 March 2016 and took effect two days later on 20 March 2016, in other words after the adoption and entry into force of Turkey's principal domestic legislations relating to the migrants, asylum-seekers/refugees: the *Law on Foreigners and International Protection* (LFIP) (2013) and the *Temporary Protection Regulation* (TPR) (2014). Given the fact that Turkey is a country where the effects of the EU externalization policy regarding asylum, at least some of them, can be observed and the temporary protection inducing a "*legal differentiation*" between people who need protection, can be regarded as an extension of EU's externalization policy[16], it seems thus important to mention

[14] UN High Commissioner for Refugees (UNHCR), *UNHCR Observations on the Proposal for amendments to the Danish Alien Act (Introduction of the possibility to transfer asylum-seekers for adjudication of asylum claims and accommodation in third countries)*, 8 March 2021.

[15] EU-Turkey Statement, 18 March 2016, (https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/, last access: 11.21).

[16] A. Üstübici, "The impact of externalized migration governance on Turkey: technocratic migration governance and the production of differentiated legal status", *Comparative Migration Studies,* 2019, accessible on https://comparativemigrationstudies.springeropen.com/articles/10.1186/s40878-019-0159-x, (07.21).

respectively the temporary protection in Turkey (A) and the Statement (B) before the Danish law, even if the latter is considered as "*radically more far-reaching*"[17].

A) Temporary Protection in Turkey and Main Critiques

The Turkish government adopting an "*open-door*" policy in 2011 (October 2011), qualified the people coming from Syria as "*guest*" which is not a legal status[18]. This qualification is not based on rights so creates an ambiguous situation[19]. It took a few years for Turkey to adopt the *LFIP* (2013) and the *TPR* (2014). The LFIP was adopted on 4 April 2013 and entered into force one week later, literally on 11 April 2013. Adopted before the EU-Turkey Statement and inspired from the relevant EU legislations, the LFIP is the country's first law on immigration[20]. As for the TPR whose legal base is the previously outlined law (LFIP), it was adopted on 13 October 2014 and entered into force on 22 October 2014.

The TPR stipulates that the Syrian citizens, stateless persons and refugees coming from Syria "*due to the events that have taken place in Syrian Arab Republic since 28 April 2011 shall be covered under temporary protection*" by underlining that "*even if they have filed an application for international protection*"[21].

One of the critiques regarding the text of the TPR focuses on the absence of a time limit. In other words, unlike the EU legislation the TPR does not provide a time limit for the temporary protection[22]. This

[17] N. F. Tan and J. Vedsted-Hansen, "Denmark's Legislation on Extraterritorial Asylum in Light of International and EU Law", 15 November 2021, https://eumigrationlawblog.eu/denmarks-legislation-on-extraterritorial-asylum-in-light-of-international-and-eu-law/ (11/21).

[18] Üstübici, "The impact of externalized migration governance on Turkey", cit.

[19] M. Arslan, "İçeridekiler ve Dışarıdakiler: Ulus Devlet Düzeninde Göçmenliğin Siyasal Statüsü", 11.08.21, https://ayrintidergi.com.tr/icerdekiler-ve-disardakiler-ulus-devlet-duzeninde-gocmenligin-siyasal-statusu/ (07.21).

[20] N. Ö. Öztürk, "Türkiye'de Bulunan Suriyelilere İlişkin Tespit ve Öneriler. Hukuki Boyut", 2019, pp. 1-2, https://www.gocarastirmalaridernegi.org/tr/yayinlar/tespitler-ve-oneriler/82-turkiye-deki-suriyeli-multeciler-baglaminda-tespit-ve-oneriler-hukuki-boyut (06.21).

[21] Interim Provisions, Provisional article 1, (1) of the TPR.

[22] Üstübici, "The impact of externalized migration governance on Turkey", cit.; Öztürk, "Türkiye'de Bulunan Suriyelilere İlişkin Tespit ve Öneriler", cit., p. 4.

lack of termination time then takes us to the question of whether it is still possible to qualify the situation as "temporary" after 10 years of residence[23].

The TPR leads also to some questions in terms of the way of termination of the temporary protection. Pursuant to Article 11 (para. 1) of the TPR, it is the Council of Ministers that has competence to terminate the temporary protection by a decision. The Council may decide, besides the termination decision, not only "[t]*o fully suspend the temporary protection"* but also "*to return of persons benefiting from temporary protection to their countries*"[24]. This provision indicates the discretionary character of the termination decision[25]. Additionally, the conditions of total termination of the temporary protection are not specified[26], and such a decision will not depend on an individual evaluation[27].

Another fundamental critique is directed to the lack of access to permanent status in the TPR[28]. According to the TPR, "[i]*ndividual applications for international protection shall not be processed during the implementation of temporary protection*"[29]. The Regulation specifies also that persons under temporary protection "*shall not be deemed as having been directly acquired one of the international protection statuses as defined in the Law*" (art.7, para. 3). It is worth briefly mentioning here the international protection status recognized by Turkish domestic legislation.

Pursuant to the LFIP (2013) international protection covers three different categories (art. 3, r). One of them is the refugee status. In

[23] A. Sayın, "Türkiye'nin göçmen politikası değişiyor mu?", 14.09.21, https://www.bbc.com/turkce/58554007.amp (09.21).

[24] Art. 11, para. 2, a) of the TPR.

[25] Üstübici, "The impact of externalized migration governance on Turkey", cit.

[26] Öztürk, "Türkiye'de Bulunan Suriyelilere İlişkin Tespit ve Öneriler", cit., pp. 8, 9.

[27] A. Tsiliou, "When Greek judges decide whether Turkey is a Safe Third Country without caring too much for EU law", 29 May 2018, https://eumigrationlawblog.eu/when-greek-judges-decide-whether-turkey-is-a-safe-third-country-without-caring-too-much-for-eu-law/ (08.21).

[28] Öztürk, "Türkiye'de Bulunan Suriyelilere İlişkin Tespit ve Öneriler", cit., p. 4; Üstübici, "The impact of externalized migration governance on Turkey", cit.

[29] Interim Provisions, Provisional article 1, (1)

accordance with the Turkey's reservation to the Geneva Convention (1951), refugee status can be granted to persons coming to Turkey "*as a result of events occurring in European countries*"[30]. Second category is "*conditional refugee*". This status can be granted to persons coming to Turkey "*as a result of events occurring outside European countries*"[31]. Unlike the refugees, the conditional refugees have right "*to reside in Turkey temporarily until they are resettled to a third country*"[32]. And the last category is the "subsidiary protection"[33].

Returning to the focus of this section, as indicated previously, the access to refugee status, "*conditional refugee*" status or subsidiary protection is not allowed by the TPR, unlike the EU Directive on Temporary Protection. Ergo the temporary protection does not correspond to a real status intending an effective solution[34]. However, as the UNHCR states, "[t]*imely access to a durable solution*" is a requirement under the Geneva Convention[35].

B) EU-Turkey Statement

The aim of the Statement is, "*to break the business model of the smugglers and to offer migrants an alternative to putting their lives at*

[30] Art. 61 of the LFIP.

For Turkey's reservation see *infra* and https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en#EndDec (07.21).

[31] Art. 62 of the LFIP.

[32] *Ibidem.*

[33] Subsidiary Protection refers to « [a] *foreigner or a stateless person, who neither could be qualified as a refugee nor as a conditional refugee, shall nevertheless be granted subsidiary protection upon the status determination because if returned to the country of origin or country of [former] habitual residence would: a) be sentenced to death or face the execution of the death penalty; b) face torture or inhuman or degrading treatment or punishment; c) face serious threat to himself or herself by reason of indiscriminate violence in situations of international or nationwide armed conflict; and therefore is unable or for the reason of such threat is unwilling, to avail himself or herself of the protection of his country of origin or country of [former] habitual residence*". Art. 63, LFIP.

[34] Sayın, "Türkiye'nin göçmen politikası değişiyor mu?", cit.

[35] UNHCR, "Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept", 23 March 2016, https://www.unhcr.org/56f3ec5a9.pdf (07.21), para. 2.1.

risk"[36]. In fact, the Statement is a quick reaction to the mass migrations of 2015-2016 and serves as a continuum of the process of the EU external borders enforcement, accompanying to the suppression of internal borders[37].

The Statement encompasses, among others, the return of irregular migrants to Turkey and in turn the resettlement of Syrians in the EU in accordance with the "*one-to-one mechanism*" and financial support of the Union to Turkey. It demands that necessary measures must be taken by Turkey to prevent "*illegal migration*"[38]. The Statement assigns Turkey of "*border guard*" of the EU by transferring its border management to the former[39].

This instrument between the EU and Turkey has been criticized for several reasons. Some of them are relevant to the responsibility of the Union and its members. In other words, one of the questions is whether the attitude of the EU and its Member States can be seen as "*outsourcing* [EU's] *responsibilities to protect refugees to Turkey*"[40] or as a "*denial of responsibility*" for those taking place in third countries[41]. In connection with this matter (but certainly not limited to it), it is worth recalling the lack of a monitoring mechanism of the Statement's

[36] EU-Turkey Statement, cit.

[37] Üstübici, "The impact of externalized migration governance on Turkey", cit.

[38] EU- Turkey Statement, cit.

[39] Üstübici, "The impact of externalized migration governance on Turkey", cit.

One of the elements of the Statement is the visa liberalization, but it has not been realized. The European Commission underlines in its *Turkey 2021 Report* that Turkey must take steps to render its legislation compatible with EU visa policy, more specifically Turkey is expected to make progress, among others, in the implementation of the EU-Turkey readmission agreement. European Commission, *Turkey 2021 Report*, SWD (2021) 290 final/2, 19.10.2021, pp. 6, 50-51.

[40] ECRE, "EU-Turkey deal: trading in people and outsourcing the EU's responsibilities", 8 March 2016, https://ecre.org/eu-turkey-deal-trading-in-people-and-outsourcing-the-eus-responsibilities/ (07/21). Apropos of responsibility see also the second section of the present contribution.

[41] V. Moreno-Lax and M. Lemberg-Pedersen, "Border-induced displacement: The ethical and legal implications of distance-creation through externalization", *QIL*, 2019, p. 26.

implementation[42], as well as the decision of the CJEU concluding that the Statement is out of its jurisdiction[43].

Besides the responsibility question, another critique towards the Statement is the instrumentalization of migrants and asylum-seekers[44]. The European Council Conclusions of June 2021 clearly features the instrumentalization of migrants by third countries[45]. But migrants are instrumentalized not only by the third countries but also by the EU itself[46]. Migrant/asylum-seeker issue is in fact a political issue having deep ties with "State" and unfortunately has been used as a tool by States[47]. The political nature of the issue is certainly not an excuse allowing the instrumentalization of asylum-seekers/refugees and migrants. The instrumentalization of people by an organization, just as by States, should be utterly refused.

The resettlement issue and Turkey's capacity are among the targets of critiques. According to the Statement, "[f]*or every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU* [...]"[48] ("*one-to-one*" mechanism)**.** This condition is considered as a breach of the EU Member States' obligation in regards the right to asylum[49]. Even if the right to asylum does not suppose "*open borders*" and not impose on States an obligation to grant

[42] M. Gatti, "The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)", 18 April 2016, https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/ (07/21).

[43] See CJEU, *Order of the General Court,* Case T-192/16, 28 February 2017.

[44] Üstübici, "The impact of externalized migration governance on Turkey", cit.

[45] European Council, European Council Conclusions (24-25 June 2021), Brussels, 25 June 2021, EUCO 7/21, CO EUR 4, CONCL 4, para. 13.

[46] ECRE, "EU-Turkey deal: trading in people and outsourcing the EU's responsibilities", cit.

[47] Arslan, "İçeridekiler ve Dışarıdakiler", cit.

[48] EU-Turkey Statement, cit.

[49] ECRE, "EU-Turkey deal: trading in people and outsourcing the EU's responsibilities", cit.; M. Kamto (rapporteur), "Migrations de masse", https://www.idi-iil.org/app/uploads/2017/06/16eme_com.pdf (06/21), pp. 198-199, 203; B. S. Chimni, "The Global Refugee Crisis: Towards a just response", *Global Trends. Analysis*, July 2018, https://www.sef-bonn.org/en/publications/global-trends-analysis/032018.html (06.21).

asylum[50], it should be recalled that this right consists of substantive and procedural fundamental human rights such as respect for human dignity and due process guarantees[51].

Another issue concerning the resettlement is relevant to the "numbers". According to the Turkish Directorate General of Migration Management (DGMM), as of 2 December 2021, about thirty-one thousand Syrians left Turkey in the scope of "*one-to-one mechanism*" and more than eighteen thousand Syrians were resettled in the third countries within 2014-2021[52]. The implementation of the Statement has thereby confirmed the conviction of the Parliamentary Assembly of the Council of Europe (CoE): the conditional nature of the resettlement of Syrian refugees would engender "*unacceptable low levels of resettlement*"[53]. In this vein, it is worth pointing out with N. Ö. Öztürk the relationship between the lack of capacity and violations of migrants' human rights even if the host State has a system based on the protection of human rights[54]. But, besides the question of the migrants' protection in Turkey, question that will be tackled in the following pages, needless to say, the world's largest refugee population is hosted by this country since 2014[55].

Aside from the aforementioned issues, it would not be exaggerated to say that the critiques concentrate on the question of whether Turkey can be qualified as a "*safe third country*"[56]. In the words of Pro-

[50] Chimni, "The Global Refugee Crisis", cit., p. 12.

[51] C. (K.) Wouters, "International refugee and human rights law: partners in ensuring international protection and asylum", *in* S. Sheeran and Sir N. Rodley (eds.), *Routledge Handbook of International Human Rights Law*, Routledge, Oxon/ New York, 2013, pp. 241-242.

[52] https://en.goc.gov.tr/temporary-protection27 (last access: 07.12.2021)

[53] Parliamentary Assembly of the Council of Europe, *The situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016*, Resolution 2109 (2016), 20 April 2016, para. 2. 7. See H. Labayle, "The EU-Turkey Agreement in migration and asylum: False pretences or a fool's bargain?", 1 April 2016, https://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-and-asylum-false-pretences-or-a-fools-bargain/ (07.21).

[54] Öztürk, "Türkiye'de Bulunan Suriyelilere İlişkin Tespit ve Öneriler", cit., p. 3.

[55] Refugee Data Finder https://www.unhcr.org/refugee-statistics/ (l09. 21)

[56] Labayle, "The EU-Turkey Agreement in migration and asylum", cit.; Tsiliou, "When Greek judges decide whether Turkey is a Safe Third Country", cit.

fessor Kamto, the 1951 Convention and the concept of "*safe country*" are not irreconcilable and the latter is "*well-established*" in practice and also in the European Union law[57]. Indeed, "*safe third country*", defined in Directive 2013/32/EU, requires, among others, the existence of the possibility to apply for refugee status and providing protection in conformity with the 1951 Convention to the persons having refugee status[58]. Turkey has been party to the Geneva Convention since 1962 and to the Protocol since 1968**,** but as indicated previously, it has a geographical reservation which does not admit recognizing refugee status to persons coming to Turkey "*as a result of events occurring outside of Europe*"[59], *in case* to Syrians, stateless persons coming from Syria. To put it differently, Turkey is one of the two States that have preserved the geographical reservation[60], consequently, accepting only the possibility to recognize the refugee status to asylum-seekers coming from European countries[61], whereas most of the asylum-seekers in Turkey come from the non-European countries[62]. The Parliamentary Assembly of the CoE underlines the absence of protection in accordance with the 1951 Convention and of "*effective access to the asylum procedure*"

[57] Kamto (rapporteur), "Migrations de masse", cit., p. 199.

[58] 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 (recast) , *Official Journal of EU*, L 180/60, art. 38, 1(e).

[59] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en#EndDec (07.21).

[60] Besides Turkey, three States (Congo, Madagascar, and Monaco) made similar reservations. At present, only Madagascar (not Party to the Protocol) and Turkey have maintained their reservations. Congo and Monaco have been Party to the Protocol and did not maintain their reservations. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en#EndDec (07.21)

[61] "*European countries*" are defined by the Law on Foreigners and International Protection (2013) as "*Member States of the Council of Europe as well as other countries to be determined by the Council of Ministers*". Law on Foreigners and International Protection (LFIP) (2013), Article 3, b), https://www.unhcr.org/tr/wp-content/uploads/sites/14/2017/04/LoFIP_ENG_DGMM_revised-2017.pdf (unofficial translation) (07.21).

[62] See UNHCR, "Turkey Fact Sheet", September 2021, https://www.unhcr.org/tr/wp-content/uploads/sites/14/2021/09/Bi-annual-fact-sheet-2021-09-Turkey-ENG.pdf (09.21).

in Turkey[63]. The withdrawal of geographical reservation is therefore necessary in order to provide access to refugee status[64].

Another question is onward refoulement of Syrians from Turkey to Syria[65]. The Statement refers to the principle of non-refoulement, one of the fundamental components of the "safe third country" concept[66]. The respect of the principle is an obligation incumbent upon Turkey under the 1951 Convention. It has also been integrated into the domestic law of Turkey[67]. But some conducts contrary to this obligation have already been communicated[68]. Moreover, a pilot decision was delivered by the Turkish Constitutional Court in *Y.T. case* with regard to the derogation from non-refoulement inserted by the *Emergency Decree* of 29 October 2016 to the *LFIP*[69]. Even before the adoption of this decree, the Parliamentary Assembly of the CoE was recommending to Turkey do not return asylum-seekers[70].

Likewise, regarding Greece, the Statement provides that "[m]*igrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR*"[71]. But the time has revealed a discrepancy between the text and its implementation: In fact, the forced returns of migrants from

[63] Parliamentary Assembly of the CoE, Resolution 2109 (2016), cit., para. 2. 5.

[64] UNHCR, "Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey", cit., para. 2.2.1. See Parliamentary Assembly of the CoE, Resolution 2109 (2016), cit., para. 6.1.

[65] Parliamentary Assembly of the CoE, Resolution 2109 (2016), cit., para. 2. 5.

[66] Directive 2013/32/EU, cit., art. 38, 1 (c).

[67] See article 4 of the LFIP and article 6 of the Temporary Protection Regulation (TPR) (2014) (English version of the Regulation is accessible on https://www.goc.gov.tr/kurumlar/goc.gov.tr/Gecici-Koruma-Yonetmeligi-Ingilizce.pdf)

[68] Amnesty International, "Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey deal", 1 April 2016, https://www.amnesty.org/en/latest/press-release/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/ (last access: 26.11.2021)

[69] ECRE, "Turkey: Constitutional Pilot Judgement on Protection from Refoulement", 26 October 2018, https://ecre.org/turkey-constitutional-court-pilot-judgement-on-protection-from-refoulement/ (last access: 24.11.2021).

[70] Parliamentary Assembly of the CoE, Resolution 2109 (2016), cit., para. 6.2.

[71] EU- Turkey Statement, cit.

Greece to Turkey is considered "*as the most problematic aspect*" of the Statement[72]. Some cases relating to the forced returns have been brought before the CJEU[73]. A few domestic tribunals also questioned returns to Turkey within the framework of fundamental rights[74].

Generally speaking, at the very beginning of the Statement, the Parliamentary Assembly of the CoE has underlined that the Statement "*raises several serious human rights issues*" relevant to not only "*its substance*" but also "*its implementation now and in the future*"[75].

Here the question is what has happened for migrants/ asylum-seekers/refugees during the implementation of the Statement, a period corresponding to the implementation of the TPR after 2016?

First of all, despite the fact that some of the Syrians have acquired Turkish citizenship[76], the great majority of people coming from Syria has been under the temporary protection whose objective is not the integration of people[77].

One of the crucial questions concerns the right to work of persons under temporary protection. The *Regulation on Work Permit of Foreigners under Temporary Protection* (2016/8375)[78] provides that all persons under the temporary protection need a work permit to work in Turkey (art. 4). But there is an exemption for those who will work in seasonal

[72] Üstübici, "The impact of externalized migration governance on Turkey", cit. See also Parliamentary Assembly of the CoE, Resolution 2109 (2016), cit., para. 2. 5, 4; Labayle, "The EU-Turkey Agreement in migration and asylum", cit.

[73] B. Bathke, "Syrian asylum seeker sues Frontex over illegal removal from Greece", 22.10.21, https://www.infomigrants.net/en/post/35937/syrian-asylum-seeker-sues-frontex-over-illegal-removal-from-greece (10.21).

[74] L'intervention de L. Bianku *in Dialogue entre juges. « Le non-refoulement comme principe du droit international et le rôle des tribunaux dans sa mise en œuvre »,* Cour européenne des droits de l'homme, Conseil de l'Europe, 2017*,* https://www.echr.coe.int/Documents/Dialogue_2017_FRA.pdf (06.21), p. 21.

[75] Parliamentary Assembly of the CoE, Resolution 2109 (2016), cit., para. 2.

[76] The number of Syrians acquiring Turkish citizenship was announced more than 100.000, but the official number is not known. M. Hamsici, "Türkiye'deki Suriyeliler hakkında güncel bilgiler neler?", 26.08.21, https://www.bbc.com/turkce/haberler-turkiye-58329307 (10.21).

[77] Tsiliou, "When Greek judges decide whether Turkey is a Safe Third Country", cit.; Öztürk, "Türkiye'de Bulunan Suriyelilere İlişkin Tespit ve Öneriler", cit., p. 5.

[78] *Official Gazette, No. 29594*, 15 January 2016.

agriculture and animal husbandry (art. 5, para. 4). Article 8 of the Regulation imposes a quota on the employment of persons under the temporary protection. As a consequence, most people are employed in the informal sectors[79]. Additionally, migrant child labor on which there is not an official data is another acute problem[80]. This situation is reinforced by the fact that the access of persons under the temporary protection to a permanent status is prevented by the TPR[81] and by the restrictions on the freedom of movement[82]. This latter issue should be mentioned, albeit very shortly. Freedom of movement is recognized by Turkey's Constitution and can be restricted by law for some specific purposes such as prevention of crimes[83]. Article 13 of the Constitution accentuates that the restriction of fundamental rights and freedoms ought to be done only by way of law. Moreover article 16 concerning the restriction of non-citizens' fundamental rights and freedoms stipulates that this restriction may be done "*by law compatible with international law*". Nonetheless, the freedom of movement of the people under temporary protection is not restricted by law, but by a regulation[84].

Besides the legal problems, compounded with the economic conditions, the pandemic has aggravated the conditions for migrants, asylum-seekers, and refugees, including by affecting the loss of their jobs in the informal sectors[85]. It can be reminded here the obligations of the host countries and also EU Member States with regard to the economic and social rights of migrants/asylum-seekers and refugees under the International Covenant on Economic, Social and Cultural Rights (1966)[86]. It is also worth noting that some of the legal instru-

[79] Üstübici, "The impact of externalized migration governance on Turkey", cit.

[80] ECRE, "EU-Turkey deal: trading in people and outsourcing the EU's responsibilities", cit.; European Commission, *Turkey 2021 Report*, cit., p. 91.

[81] Arslan, "İçeridekiler ve Dışarıdakiler", cit.

[82] European Commission, *Turkey 2021 Report*, cit., p. 17.

[83] Constitution of the Republic of Turkey, art. 23. English version is accessible on https://global.tbmm.gov.tr/docs/constitution_en.pdf (11.21)

[84] Öztürk, "Türkiye'de Bulunan Suriyelilere İlişkin Tespit ve Öneriler", cit., p. 5.

[85] European Commission, *Turkey 2021 Report,* cit., p. 17.

[86] See A. Pijnenburg, "Socio-economic Rights and Migration deals: Obligations and Responsibility of EU Member States", 16 July 2021, https://eumigrationlawblog.eu/socio-economic-rights-and-migration-deals-obligations-and-responsibility-of-eu-member-states/ (10.21).

ments[87] are extremely important particularly in view of the situation of migrant women and children in Turkey[88]. The effective implementation of those instruments must also be discussed in relation to the protection of asylum-seekers, refugees and all migrants. As to the EU, under the Union's law it has some international obligations in the field of human rights[89].

Another problem is the attitudes and discourse towards migrants, asylum-seekers in Turkey. It is thought that there is change in the political discourse[90]. In fact, since the very beginning of the mass migrations, the employment of the word "*guest*" points out the presumption of the Turkish government towards the return of Syrians to Syria[91]. Recently, on 12 September 2021, Minister of Foreign Affairs told that the government has been studying for returning the refugees to their countries[92]. And the Ministry of Interior announced the numbers of Syrians returned voluntarily to Syria: 469.179[93]. But it must be reminded that

[87] For instance, Convention on the Rights of the Child (1989) (Turkey has been party since 1995); Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (2000) (Turkey has been party since 2003); Convention on the Elimination of All Forms of Discrimination against Women (1979) (Turkey has been party since 1985); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999) (Turkey has been party since 2002). But it must be recalled that Turkey withdrew from the Istanbul Convention. See https://www.unhcr.org/tr/en/refugees-and-asylum-seekers-in-turkey (08.21).

[88] For actual numbers (as of 2 December 2021) see https://en.goc.gov.tr/temporary-protection27 (last access: 12.21).

[89] J. Apap, A. Radjenovic and A. Dobreva, *Briefing. EU policies- Delivering for Citizens. The Migration issue,* 2009, http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635542/EPRS_BRI(2019)635542_EN.pdf (06.21), s. 5.

[90] H. Köylü, "Türkiye'nin 'açık kapı politikası' sona mı erdi?", 17.09.21, https://www.dw.com/tr/türkiyenin-açık-kapı-politikası-sona-mı-erdi/a-59215310 (10.21); Sayın, "Türkiye'nin göçmen politikası değişiyor mu?", cit.

[91] Üstübici, "The impact of externalized migration governance on Turkey", cit.

[92] BBC News Türkçe, "Dışişleri Bakanı Çavuşoğlu: Mültecilerin ülkelerine gönderilmesi için çalışmalarımız var", 12.09.21, "https://www.bbc.com/turkce/haberler-turkiye-58535728 (09.21); Sayın, "Türkiye'nin göçmen politikası değişiyor mu?", cit.; See also https://apnews.com/article/europe-middle-east-health-turkey-migration-c087f4aa2412ffc1904cc7bd7d4f7cf8 (08.21).

[93] O. O. Gemici, "İçişleri Bakanlığı Sözcüsü Çataklı: Ekimde 98 terörist etkisiz hale getirildi", 03.11.21, https://www.aa.com.tr/tr/gundem/icisleri-bakanligi-sozcusu-catakli-ekimde-98-terorist-etkisiz-hale-getirildi/2410449, (11.21).

the forced return of people constitutes a violation of established international obligations and also domestic rules[94].

The question of the security of migrants, asylum-seekers and refugees has arisen in a vital way. One of the examples is those that have happened at the Turkish-Greek border following the Turkey's decision (on February 2020) not to prevent the people to cross the border towards Greece[95]. Another one is the mass attacks committed on 11 August 2021 in the capital Ankara (Altındağ)[96]. After those attacks, on 1 September 2021 the Turkish DGMM issued a statement[97]. This statement was a message to the Turkish citizens concerning the measures which would be applied against migrants (unlicensed business, no new refugee registration in Ankara etc.)[98].

II) The Danish case: towards a "radical" externalization of the asylum process?

In recent years, the externalization of migration controls to third countries has become one of the central pillars of the European Union's migration policy[99]. The recent bill, an amendment to Denmark's Aliens Act, seems to embrace this approach by introducing the possibility of transferring asylum-seekers for adjudication of asylum claims and accommodation in third countries. According to this bill, if a foreigner is

[94] See Öztürk, "Türkiye'de Bulunan Suriyelilere İlişkin Tespit ve Öneriler", cit., p. 6.

[95] European Commission, *Turkey 2021 Report*, cit., p. 17.

[96] Euronews, "Altındağ'da Suriyelilere ait iş yerlerine saldırı: Valilik olayların sona erdiğini duyurdu", 11.08.21, https://tr.euronews.com/2021/08/11/ankara-alt-ndag-da-suriyelilere-ait-ev-ve-is-yerlerine-sald-r (08.21).

[97] Göç İdaresi Başkanlığı, "Ankara İli Özelinde Alınan Kararlar Hakkında Duyuru", 01.09.21, https://www.goc.gov.tr/ankara-ili-ozelinde-alinan-kararlar-hakkinda-duyuru (09.21).

[98] B. Yavçan, "One if by Land, Two if by Sea: ın the end, Turkish academics and refugee activists are surrounded by all sides", 18.09.21, https://igamder.org/EN/one-if-by-land-two-if-by-sea:-in-the-end-turkish-academics-and-refugee-activists-are-surrounded-by-all-sides-le-soir (09.21).

[99] Directorate-General for Neighbourhood and Enlargement Negotiations, "Improving Migration Management in the North of Africa Region", 6 July 2018, https://ec.europa.eu/neighbourhood-enlargement/news/improving-migration-management-north-africa-region-2018-07-06_en.

granted asylum after the processing of the application in a third country, the third country will be responsible for providing protection. If the application is refused, the third country will also take responsibility for the deportation of the person, including unaccompanied minors. Although the proposal has been approved, several issues remain outstanding since external processing of asylum claims raises fundamental questions about both access to asylum procedures and effective access to protection[100]. For these reasons, it will be opportune to first analyze the reactions raised by the Danish proposal (A), and then to hypothesize the "possible" legal implications (B) once it becomes effective.

A) The reactions raised by the Danish proposal

On one hand, it is necessary to consider the written answer given by Ms. Johansson on behalf of the European Commission regarding the question posed by some members of Parliament on 31st March 2021. The Parliamentary questions concerned the Commission's assessment of the proposed bill in relation to EU law, the right to asylum and the principle of non-refoulement. Ms. Johansson premised that Denmark - by virtue of Protocol 22[101] – "*does not take part in the EU's migration and asylum* acquis*, with the exception of the Dublin[102] and Eurodac[103] Regulations which Denmark applies on the basis of an international*

[100] M. Lemberg-Pedersen, "Danish Desires for Externalization and Non-Integration", *Danish desires to export asylum responsibility to camps outside Europe.* Centre for Advanced Migration Studies, Copenhagen, s. 7-23.

[101] Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 22) on the position of Denmark, OJ C 326, 26.10.2012, p. 299-303.

[102] Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

[103] Regulation No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation No 1077/2011 establishing a European Agency for

agreement that it concluded with the European Community". In other words, as Denmark has opted out of much of the EU law asylum system, it is not bound by the same provisions as other Member States. In fact, the Commission specifies that "*for Member States participating in the EU's asylum* acquis*, such arrangements are not possible under existing EU rules or proposals under the New Pact on Migration and Asylum*[104] *which upholds the right to asylum as a fundamental right guaranteed by the EU Charter of Fundamental Rights*". Subsequently, the Commission notes that the legal basis for making transfers to a third country – as contained in the amended Act - is conditioned by the conclusion of an agreement with a third country. Since no such agreement has yet been concluded, the Commission noted that in order "*to assess whether the amended Act complies with Denmark's international obligations, the content of any agreement must also be examined.*"

On the other hand, even though the proposal has yet to name a host country considering the previous policy propositions, it seems that the North African area could be potentially chosen as a site for the extra-territorial facilities outside Europe. In this context, even if no agreement seems to have been concluded with third countries so far, the position of the African Union is worthy of note. As a matter of fact, the African Union has firmly condemned Denmark's recently passed Aliens Act regarding the externalization of the asylum procedures to third countries. With great concern in a press release, the African Union notes attempts and proposals to establish similar arrangements in Africa through bilateral arrangements. After mentioning Denmark's responsibility, as a State party, to guarantee international protection for persons in need as provided in the 1951 UN Convention on refugees, the African Union pointed out how Africa "*continues to generously shoulder the burden of 85% of the world's refugees, often in protracted situations, whereas only 15% are hosted by developed countries"*[105]. Ac-

the operational management of large-scale IT systems in the area of freedom, security and justice.

[104] COM (2020)609.

[105] *Press Statement On Denmark's Alien Act provision to Externalize Asylum procedures to third countries*, AU Headquarters, Addis Ababa, Ethiopia, 2nd August 2021, https://au.int/en/pressreleases/20210802/press-statement-denmarks-alien-act-provision-externalize-asylum-procedures.

cording to this reasoning, these attempts are perceived "*as an extension of the borders of such countries and an extension of their control to the African shores*", a practice that would not only be unsustainable, but *"would not support the principle of equitable burden and responsibility sharing as envisioned in the Global Compact on Refugees"*.

B) "Possible" legal implications on the rights of asylum seekers and other migrants

Although the amendment to the Aliens Act will go into effect only if Denmark reaches an agreement with a third country, this does not exclude that there are enough elements and precedents to assume its "possible" legal implications. Consequently, it is opportune to bear in mind that between «the primary destination countries that have externa*lized their border controls to prevent irregular migrants - including asylum seekers - from reaching their territories, the EU, the USA and Australia are on top of the list*»[106]. In this regard, the approach of the EU since the late 1990s to outsource "migration management" to third countries[107] is particularly relevant, and the Danish bill seems to fit perfectly into this context.

In practice, these border externalization policies and practices jeopardize the access to asylum procedures by weakening support and reception capacities for asylum seekers. In fact, the countries of first arrival or transit, where they are transferred, show less capacity to ensure the same protection of rights and to handle claims according to the international standards[108]. In the majority of cases, the outcome entails a direct/indirect violation of the human rights of asylum seekers and migrants. As a result, the diversion of migratory flows towards third countries through externalization has a huge influence on the

[106] B. Frelick, I. M. Kysel, & J. Podkul, "The impact of externalization of migrations controls on the rights of asylum seekers and other migrants", *Journal on Migration and Human Security*, 4(4), 2016, pp. 190–220.

[107] V. Badalič, "Tunisia's Role in the EU External Migration Policy: Crimmigration Law, Illegal Practices, and Their Impact on Human Rights", *Journal of International Migration and Integration*, Springer, vol. 20(1), 2019, pp. 85-100, February.

[108] B. Frelick, I. M. Kysel & J. Podkul, "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants", *Journal on Migration and Human Security*, Volume 4 Number 4 (2016), pp.190-220.

core and the term of State legal obligations, raising important issues about which States, according to international law, have to guarantee the protection of the rights of asylum seekers and migrants. As a matter of fact, border externalization may attempt not only the right to seek asylum and access to asylum procedure but may also trigger violations of certain categories of fundamental rights. These include rights - that independently of the status and location of the migrant – are granted during transit, in case of detention, as well as during the expulsion or deportation process. For instance, to prevent collective expulsions, the right to actual recourse and the need to examine cases individually, is fundamental to prohibit inhuman and degrading treatment and the obligation of *non-refoulement*. Additionally, to some categories, such as child migrants, refugees, asylum seekers or Stateless people, a special status under international law that involves a higher standard of protection is also guaranteed. Not to mention that «*at times, migrants also encounter situations during transit that increase their vulnerability, or trigger the attachment of additional rights, such as the rights of victims of trafficking or other crimes*»[109]. Consequently, it is still unclear if the third country must maintain the same standards of the asylum processing as those provided by Denmark.

Besides, even in the absence of an agreement with a third State, fundamental questions about the responsibility of Denmark concerning the access to asylum procedures and effective access to protection must still be raised. For instance, once the extra-territorial facilities are located, it remains to be clarified which State will have responsibility over them, and with which authorities Denmark will have to cooperate and to what extent the latter will exercise control over the acts of third countries. Further to this point, if the rights of asylum seekers and migrants are violated in the third countries, will Denmark bear or share the responsibility? The main issue that remains to be solved, considering the previous experience of pursuing border externalization policies and practices, is whether or not destination States, such as Denmark, may be held responsible under international law for the violations of human rights that occurred outside their territory.

[109] *Ibid*., p. 198.

2. Conclusion

During the implementation of the Statement and also of the TPR, Turkey has constructed a wall along the Turkey-Syria border and launched the construction of a wall along the Turkey-Iran border[110]. It must be reminded here that Iran is among the first three countries of origin of asylum-seekers in Turkey[111]. It is far beyond the scope of this contribution to weigh in on this issue but suffice it to say that these walls are thought as "*the contagious impact of border externalization*"[112].

According to the Statement, it would be "*a temporary and extraordinary measure*". The above-mentioned developments lead to ask whether this is true and confirm that it is really questionable whether the Statement has been a positive step for migrants/asylum-seekers/refugees[113].

On side of the EU aiming to prevent the arrival of irregular migrants in the Union, the Statement has reached its objective[114] due to the important fall in the number of irregular migrants and asylum-seekers[115]. The question here is if the ultimate objective of the EU is, whatever it takes, the prevention of the arrival of migrants in the Union's borders. Unfortunately, the decision of the Supreme Administrative Court of Greece and the change in the position of some Greece authorities with respect to the question whether Turkey is a "safe third country" can be considered as reflection of a pragmatic approach seen across the EU[116]. In a similar vein, it is worth recalling the differences between the levels

[110] See "2016'dan Bugüne Doğu ve Güney Sınırlarımızdan 2 Milyon 327 Bin Kaçak Göçmenin Geçişi Engellendi", 15.09.21, https://www.goc.gov.tr/2016dan-bugune-dogu-ve-guney-sinirlarimizdan-2-milyon-327-bin-kacak-gocmenin-girisi-engellendi-merkezicerik (09.21).

[111] UNHCR, *Turkey Fact Sheet,* September 2021, cit.

[112] Üstübici, "The impact of externalized migration governance on Turkey", cit.

[113] Gatti, "The EU-Turkey Statement", cit.; Labayle, "The EU-Turkey Agreement in migration and asylum", cit.; See also Tsiliou, "When Greek judges decide whether Turkey is a Safe Third Country", cit.

[114] ESI, "EU-Turkey Statement 2.0.", cit.

[115] European Commission, *Turkey 2021 Report*, cit., p. 120.

[116] See Tsiliou, "When Greek judges decide whether Turkey is a Safe Third Country", cit.

of critiques among the European Council Conclusions of June 2021[117] and the resolution of the European Parliament which was deeply critical in the field of human rights and rule of law in Turkey[118] or even the European Commission's *Turkey 2021 Report*[119].

In drawing this section to a close, it should be underlined that the non-entrée regime is not a solution, "*keeping legal channels open and meeting commitments under international refugee and human rights law*" is necessary[120] and given the actual situation, to draw attention to the following question: When the borders are closed to migrants/asylum-seekers, what is/are the option(s) proposed to the persons who need international protection?

The outsourcing of asylum claims poses a number of difficulties. Questions can be raised regarding the compatibility of these practices with the concepts of international law as well as EU's secondary law, mainly the concepts of: "safe third country" and "first country of asylum".

The principle of externalization of border control is not an issue as such. The most important question relates to the actual safety of the country of first arrival or transit. The answer to this interrogation requires a factual assessment. Effective protection needs to be evaluated. The following criteria may be used in order to assess the safety and the degree of protection in the country of first arrival[121]:

- "*No risk of persecution within the meaning of the 1951 Convention or serious harm in the previous State.*
- *no risk of onward refoulement from the previous State.*

[117] European Council, European Council Conclusions (24-25 June 2021), cit., para. 20.

[118] European Parliament, European Parliament resolution of 19 May 2020 on the 2019-2020 Commission Reports on Turkey (2019/2176(INI)).

[119] European Commission, *Turkey 2021 Report*, p. 2.

See also the recent interim resolution of the Committee of Ministers (Council of Europe). Committee of Ministers, Interim Resolution CM/ResDH(2021)432, 2 December 2021.

[120] Chimni, "The Global Refugee Crisis", cit., p. 15. See also ECRE, "EU-Turkey deal: trading in people and outsourcing the EU's responsibilities", cit.

[121] For the origin of this list of elements, see Frelick, et al. "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants" *in Journal on Migration and Human Security*, Vol. 4, n° 4, 2016, pp. 193-196.

- *compliance, in law and practice, of the previous State with relevant international refugee and human rights standards, including adequate standards of living, work rights, health care, and education.*
- *access to a right of legal stay.*
- *assistance of persons with specific needs; and*
- *timely access to a durable solution (UNHCR 2002)*"[122].

Border externalization has an important impact on the rights of migrants that needs to be assessed in order to ensure the compliance of these procedures and fundamental human rights[123]. Externalization itself has an influence on the migrant flow as it directs it to third countries. It is also necessary to consider the consequences of these practices regarding on the one hand, the nature and on the other hand, the duration of State legal obligations. It also modifies which States bear the obligation under international law to protect the rights of migrants.

Another difficulty resides in the fact that externalization strategies can result in placing important and unequal burdens on countries of arrival. The latter are often countries with lesser resources, and their legal obligations may include the protection of rights in the context of asylum. This can be a real challenge for these countries in case of insufficient financial support.

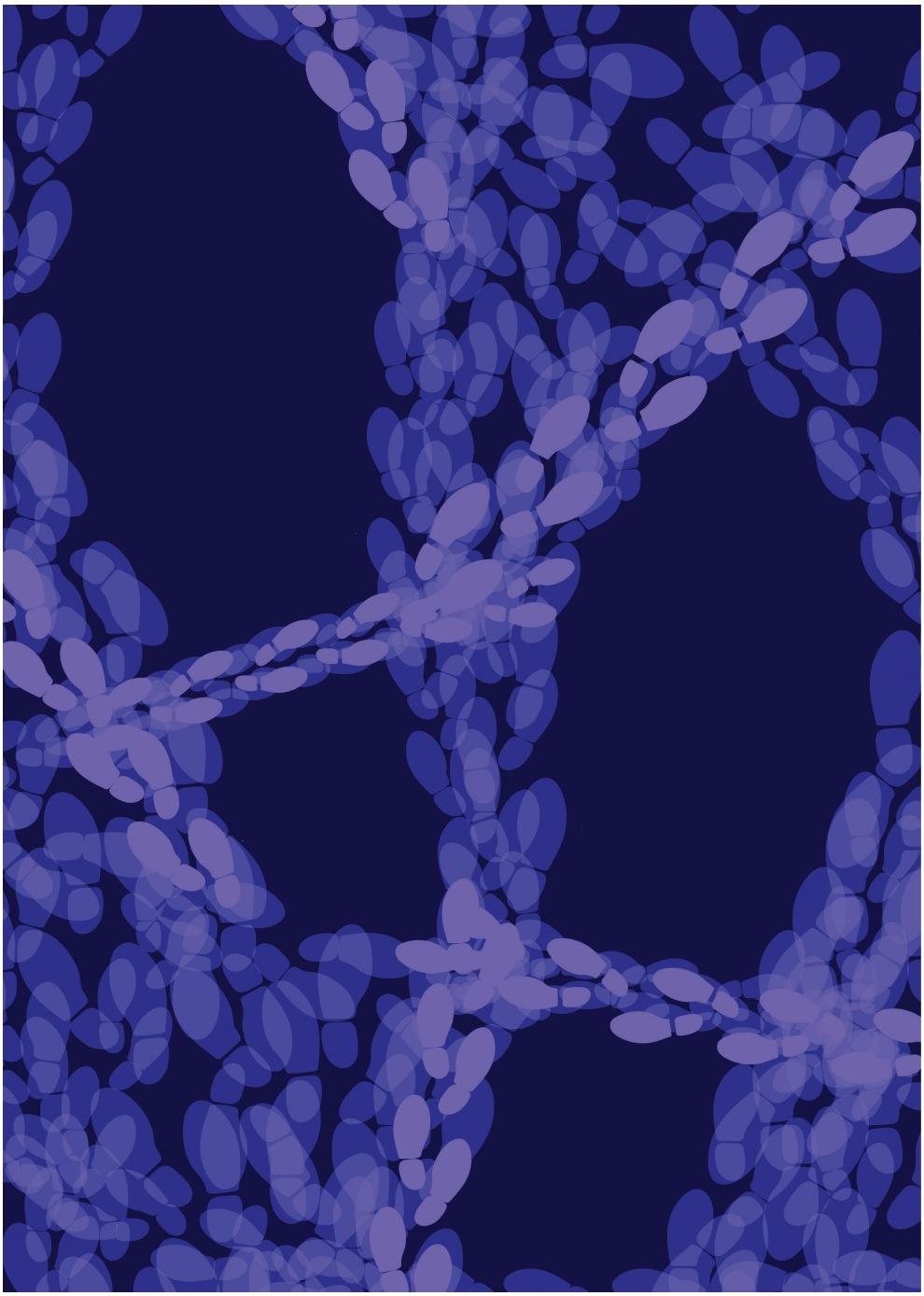
In cases where asylum seekers face situations of violation of their rights as a consequence of a destination State's externalization strategy, concerns of State responsibility may arise for both destination States and third countries. When a State directly supports wrongful acts of another State, it is a matter of violation of international law. This can lead to the international responsibility of States pursuing border externalization strategies in case of rights violations across their borders. They can be held liable if they exercise control over the actions of third countries.

Finally, the externalization may also actually trigger one or more categories of rights violations. Migration-control externalization practices can implicate many different rights including specific rights aim-

[122] *Ibidem.*

[123] *Ibid*, pp. 196-199.

ing to protect the asylum seekers during the processing of their request. These rights can also be those implicated during transit or if detained and during the expulsion or deportation process.



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