

Note

Upholding international migration law in difficult political circumstances: the case of Syrian refugees under the EU-Turkey agreement

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Abstract

Since the beginning of the conflict in Syria in March 2011, a huge number of refugees have risked and actually lost their lives in unseaworthy boats often operated by smugglers crossing the Aegean Sea in a desperate bid to reach Greece (Europe) via Turkey. This note provides insights into the main points of the March 2016 agreement between the EU and Turkey on this issue and discusses some key legal issues at stake in the context of the political situation within which the agreement has to function. The agreement is found to be a balancing act between ‘international and European law in full’, on the one hand, and ‘pragmatics’ on the other. This is so because reality requires us to accept that sometimes situations change so dramatically that the relevant legal systems are inadequate to deal with them, despite the good will of the regulators and the desire to live up to certain civilised standards. While in the eyes of some this is unforgivable, in our eyes it is partly forgivable subject to the conditions we propose here.

INTRODUCTION

Migration and refugee flows have always existed and will always exist. They are the result of various factors and often of a combination of factors such as wars between and within states, terrorist acts, climate change, poverty, or frustration at the lack of accountability of governments. Some migrants or refugees seek asylum in foreign countries, and once they do this they acquire

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specific rights under international law – both procedural and substantive. They have the right to be heard individually as to their reasons for leaving their homes and these hearings must result in carefully-considered decisions on a case-by-case basis. A positive decision must be followed by the award to the migrant or refugee, of a legal status commensurate with that of the citizens of the state to which he or she has travelled. Sometimes, however, the number of asylum seekers is so great that these rights come under pressure, to speak euphemistically. That is the case with the huge number of people leaving Syria and other such states in search of a new life in any one of the 28 member states of the European Union (the EU or Europe).¹ Many of them attempt to flee from Libya to Italy (an EU member state) across the Mediterranean Sea, while others until recently followed the route from Turkey to Greece (also an EU member state), crossing the Aegean Sea or following the longer overland route. This note focuses on the latter group and on the March 2016 agreement between the EU and Turkey in this regard. It does so by presenting some facts and figures in paragraph 2, explaining the agreement between the EU and Turkey in paragraph 3, and discussing two salient legal questions in paragraph 4. We then venture some concluding remarks in paragraph 5. The note aims primarily to provide the reader with insight into the main aspects of the agreement and some of the key legal issues² at stake in the context of the political situation within which the agreement must function.

It is important to note that this note was finalised towards the end of July 2016, a moment in time relevant in three ways: first, the topic of the note is ‘a moving target’, in that there are changes virtually every day or week as regards of the numbers of asylum seekers arriving and applications finalised. On reviewing the note before publication we feel that these changes do not necessitate adapt our narrative of the note. Second, on 23 June 2016 there was a referendum in the United Kingdom (UK), then a leading member of the EU – to establish whether or not the UK should leave the EU. One of the reasons for the British people’s voting in favour of the ‘Brexit’ related to the

¹ The term ‘Europe’ is often used, as is the case in this note, as being equal to the EU. Apart from the EU, we also know the Council of Europe, being a regional organisation in the sense of Chapter VIII of the *Charter of the United Nations* (1945), with forty-seven member states, and the Organisation for Security and Co-operation in Europe, with its fifty-seven participating states, including among others a number of so-called ‘Euro-Asian’ states such as Kazakhstan.

² This note avoids some minor legal details that might make the reader lose sight of the underlying narrative.

migration and asylum issue, the dominant feeling being that the UK, due to EU rulings, had to accept an excessive number of fugitives. The Brexit will change all this, but it is too early to say in what way. The new UK leadership will first have to invoke article 50 of the 2007 Lisbon Treaty (the ‘exit clause’) but it will only do so in 2017, at the earliest, and only then will a period of two years of negotiation start. The new Prime Minister, Theresa May, who will administer the Brexit although she herself voted against it, has not yet made indicated where exactly she stands as to the migration/asylum issue. And even if the UK could free itself from EU regulation in this regard, it would still be bound by, for example, the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees, to which it entered no reservations relevant to the present situation. Third, on 16 July there was an attempted military coup in Turkey, which although unsuccessful, would appear to have led to far-reaching consequences, *inter alia*, as regards the rule of law and respect for human rights. However, it is again too early to say what the consequences will be for asylum seekers, and more specifically for those central to this note: asylum seekers from Syria.

SOME FACTS AND FIGURES

Before presenting some facts and figures, a few definitions of the persons to whom these facts and figures apply are given for the sake of clarity. A migrant can be broadly defined as a person who leaves his or her own country for another country (with or without legal permission) either voluntarily or due to economic hardship or other problems. A refugee, on the other hand, is someone who has left the country of his or her nationality for fear of being persecuted.³ Refugees remaining in their countries of origin are termed ‘internally displaced persons’, while asylum seekers are people who claim to be refugees and want to make a new start in another country, but whose claim has not yet been definitively evaluated.

Writing about facts and figures is to some extent risky, as what is true at the time of writing is unlikely still to be true at the time of publication.⁴ Focusing on Syria, it is clear that since the onset of the conflict in March

³ A more detailed definition of a ‘refugee’ is given under par 4.2.

⁴ The accuracy of these figures even at the time of writing is dependant on various factors such as the source, time frames and methodology. This section of the note is intended to give the reader an idea of the extent of the problem as at 2 May 2016, without claiming that the figures used are precise.

2011, a flood of migrants and refugees has risked, and some actually lost, their lives in a desperate bid to reach Europe. This said, it should also be noted that many Syrians fleeing the war have remained in Syria. The total number of people who have left Syria since the outbreak of the war reportedly reached 4 835 909 on 2 May 2016.⁵ This figure includes 2,1 million Syrians registered by the United Nations High Commissioner for Refugees (UNHCR) in Egypt, Iraq, Jordan and Lebanon; 2,7 million Syrians registered by the government of Turkey; and more than 29 000 Syrian refugees registered in North Africa. Of this number roughly 49,2 per cent are male and 50,8 per cent female, and adults make up only roughly half of these figures. This indicates that distressing numbers of infants and children (male 26,2 per cent/49,2 per cent, female 25,2 per cent/50,8 per cent) are at risk.

The number of Syrians seeking protection in Europe is only slightly over ten per cent of those who have fled the conflict. Between April 2012 and February 2016, the total number of Syrian applications for asylum in Europe amounted to 972 012.⁶ Of this number approximately 61 per cent applied to Serbia and Germany; 27 per cent to Sweden, Hungary, Austria, the Netherlands and Denmark; and the remaining twelve per cent to other European countries. According to the report of the International Organisation for Migration entitled ‘Mixed Migration Flows in the Mediterranean and Beyond’,⁷ the cumulative arrivals in Greece over land and sea for 2016, stood at 156 255 as at 3 May, of which 72 924 were Syrians. The number of Syrians arriving in Europe via Greece and seeking international protection peaked in 2015. At the end of the first quarter of 2016 it seems that the agreement between the EU and Turkey – which is the focus of this note – is actually functioning and appears to have resulted in a decrease in the influx. What does the agreement look like, and what are its legal characteristics?

THE MIGRATION AGREEMENT BETWEEN THE EUROPEAN UNION AND TURKEY

⁵ The statistical data in this part of the note rely on the following source, unless otherwise indicated. Available at: <http://tinyurl.com/7hgo7zy> (last accessed 3 June 2016).

⁶ Based on the data of 37 European countries which provide monthly information to the UNHCR. To the extent possible, the figures reflect first-time asylum applications, but some of the statistics are likely to include repeated applications (to the same or a different country).

⁷ See <http://tinyurl.com/h2slyu8> (last accessed 3 June 2015).

In the autumn of 2015 the EU and Turkey drafted a ‘joint action plan’ to address Syrian refugees, leading, among other things, to: the opening of Turkey’s labour market to Syrians under temporary protection; the introduction of new visa requirements for Syrians and other nationalities; the stepping up of security efforts by the Turkish coastguard and police; and enhanced information sharing. In turn, the EU began, *inter alia*, to disburse three billion Euro of the so-called ‘Facility for Refugees in Turkey’ for concrete projects.⁸ Meanwhile the number of refugees wishing to enter Europe continued to grow.

In fact, during the period October 2015 to March 2016, hundreds of people who had risked their lives by accepting smugglers’ offers of transport in badly maintained, unseaworthy boats, died in the Aegean Sea, which lies between EU member state Greece and non-EU member state Turkey. This was all the more reason for both contracting parties to take further measures against the smugglers, and they even requested the North Atlantic Treaty Organisation, of which both states are members, to conduct patrol activities. However, both parties recognised that this would not be enough and that ‘further, swift and determined efforts [were] needed’.⁹

In order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, and to try to end the irregular migration from Turkey to the EU, they formulated the following agreement:¹⁰

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

⁸ European Council 2016 available at: <http://tinyurl.com/zsybkfg> = <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> (last accessed 9 June 2016)..

⁹ *Ibid.*

¹⁰ *Ibid.*

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 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. On the EU side, resettlement under this mechanism will take place, in the first instance, by honouring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015, of which 18.000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54.000 persons. The Members of the European Council welcome the Commission's intention to propose an amendment to the relocation decision of 22 September 2015 to allow for any resettlement commitment undertaken in the framework of this arrangement to be offset from non-allocated places under the decision. Should these arrangements not meet the objective of ending the irregular migration and the numbers of returns come close to the numbers provided for above, this mechanism will be reviewed. Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued.
- 3 Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighbouring states as well as the EU to this effect.
- 4 Once irregular crossings between Turkey and the EU are ending or at least have been substantially and sustainably reduced, a Voluntary Humanitarian Admission Scheme will be activated. EU Member States will contribute on a voluntary basis to this scheme.
- 5 The fulfilment of the visa liberalisation roadmap will be accelerated vis-à-vis all participating Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016, provided that all benchmarks have been met. To this end Turkey will take the necessary steps to fulfil the remaining requirements to allow the Commission to make, following the required assessment of compliance with the benchmarks, an appropriate proposal by the end of April on the basis of which the European Parliament and the Council can make a final decision.

- 6 The EU, in close cooperation with Turkey, will further speed up the disbursement of the initially allocated 3 billion euros under the Facility for Refugees in Turkey and ensure funding of further projects for persons under temporary protection identified with swift input from Turkey before the end of March. A first list of concrete projects for refugees, notably in the field of health, education, infrastructure, food and other living costs, that can be swiftly financed from the Facility, will be jointly identified within a week. Once these resources are about to be used to the full, and provided the above commitments are met, the EU will mobilise additional funding for the Facility of an additional 3 billion euro up to the end of 2018.
- 7 The EU and Turkey welcomed the ongoing work on the upgrading of the Customs Union.
- 8 The EU and Turkey reconfirmed their commitment to re-energise the accession process as set out in their joint statement of 29 November 2015. They welcomed the opening of Chapter 17 on 14 December 2015 and decided, as a next step, to open Chapter 33 during the Netherlands presidency. They welcomed that the Commission will put forward a proposal to this effect in April. Preparatory work for the opening of other Chapters will continue at an accelerated pace without prejudice to Member States' positions in accordance with the existing rules.
- 9 The EU and its Member States will work with Turkey in any joint endeavour to improve humanitarian conditions inside Syria, in particular in certain areas near the Turkish border which would allow for the local population and refugees to live in areas which will be more safe.

In sum, as far as is relevant for the present note, the primary focus of the EU-Turkey agreement is on breaking the business model of the smugglers, to end irregular migration from Turkey to the EU, and to return to Turkey people who reach Greece via the Aegean Sea. The latter, however, can be done only after a careful check of the individual refugee's story in accordance with standing international legal procedures, which are based on key principles such as *non-refoulement*, as will be explained in greater detail below.

EVALUATING THE AGREEMENT UNDER INTERNATIONAL AND EUROPEAN LAW

The EU's legal aspirations re the crisis: framing the legal issues to be discussed

Confronted with the consequences of the Syrian conflict, the European Commission – represented by a high-level team comprising its President, Jean-Claude Juncker (Luxemburg), its first Vice President, Frans Timmermans (The Netherlands), High Representative Federica Mogherini (Italy), and Commissioner Dimitris Avramopoulos (Greece) – set out three ‘longer term steps to manage migration in all its aspects’:¹¹

- 1 Reducing the incentives for irregular migration, by ‘[i]nvestigating, disrupting and prosecuting smugglers’ networks and helping align EU countries’ return practices – partly by strengthening Frontex’, the Agency protecting the external borders of the EU.
- 2 Saving lives and securing external borders, by ‘[s]etting a revised proposal on smart borders, financing initiatives in North Africa to help the region become stronger in search and rescue activities, and seeing if a European border guard system should be established’.
- 3 Developing a strong common asylum policy, by ‘[e]nsuring a full and coherent implementation of the common European asylum system. This would be achieved by promoting identification and fingerprinting, seeing how a single asylum decision process would ensure equal treatment of asylum seekers in Europe, and evaluating the Dublin system [relating to the duty of the state of first arrival to take care of the asylum procedures] by mid-2016’.

Having said that, the European Commission also underlined the importance of keeping Europe ‘an attractive destination for migrants in a time of demographic decline’.¹² In other words, migration flows are not solely a ‘problem’, even if many Europeans actually see the issue that way. It is typical of the European Commission’s approach that it should underline the existence of long-term benefits of migration, knowing that the EU member states will need migrants in order to keep their economies going in a range

¹¹ See European Commission 2016. <http://tinyurl.com/h6vbabd> = http://ec.europa.eu/priorities/migration_en (last accessed 10 June 2016).

¹² *Ibid.*

of areas, from service delivery to cleaning, and from production plants to agriculture.

The approach of the European Commission is strongly supported and ‘co-authored’ by the European Council, which is composed of Heads of States and Government from the EU members, and which was presided over by the Dutch Prime Minister, Mark Rutte, in the first half of 2016. The Commission wishes ‘to end the irregular migration from Turkey to the EU and replace it instead with legal channels of resettlement of refugees to the European Union’, the aim being ‘to replace disorganised, chaotic, irregular and dangerous migratory flows by organised, safe and legal pathways to Europe for those entitled to international protection in line with EU and international law’.¹³ Having underlined these ambitions and while for the purposes of this note glossing over the problems currently confronting many European states from populist movements and political parties such as ‘*Alternative für Deutschland*’ (Germany), the ‘*Freiheitlichen Partei Österreichs*’ (Austria), the ‘*Partij voor de Vrijheid*’ (The Netherlands), and ‘*Le Front National*’ (France) with claims like ‘our own people first’ and ‘enough is enough’, we now deal with two important questions: is Turkey a ‘safe third country’ to which asylum seekers can safely be returned (para 4.2); and is Greece able to deal with the (numerous) asylum requests in a way that meets the standards required by international law (para 4.3)?

Is Turkey a ‘safe third country’?

Contemporary refugee law has its origins in the aftermath of World War II as well as in the refugee crises of the inter-war years that preceded it. The Universal Declaration of Human Rights (Universal Declaration),¹⁴ adopted in 1948, for instance, guarantees the right to seek and enjoy asylum in other countries.¹⁵ The controlling international convention on refugee law is the 1951 Convention Relating to the Status of Refugees¹⁶ and its 1967 Protocol Relating to the Status of Refugees. The 1951 Convention defines a refugee as a person who¹⁷

¹³ See European Commission 2016 available at: <http://tinyurl.com/jhzpv7e> = http://europa.eu/rapid/press-release_IP-16-1246_en.htm (last accessed 10 June 2016).

¹⁴ *Universal Declaration of Human Rights* (1948).

¹⁵ Article 14(1) of the *Universal Declaration*.

¹⁶ *Convention Relating to the Status of Refugees* (1951).

¹⁷ Article 1 of the *Convention Relating to the Status of Refugees* (1951).

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 to, or owing to such fear, is unwilling to avail himself of the protection of that country.

A key element in the 1951 Convention is the principle of *non-refoulement*, which obliges states to refrain from forcibly returning a refugee to a state where he or she is likely to suffer persecution or danger to life or freedom. The principle has crystallised into a rule of customary international law and even gained the character of a peremptory standard of international law (*jus cogens*).¹⁸ Another international convention relevant to the present case is the European Convention on Human Rights (European Convention). All EU member states are bound by and/or are party to these legal instruments. The same goes for Turkey, which, however, made one important reservation upon its ratification of the 1951 Convention, and also upon its accession to the 1967 Protocol:¹⁹

The instrument of accession stipulates that the Government of Turkey maintains the provisions of the declaration made under section B of article 1 of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, according to which it applies the Convention only to persons who have become refugees as a result of events occurring in Europe, and also the reservation clause made upon ratification of the Convention to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey.

Formally speaking, therefore, the 1951 Convention and the 1967 Protocol do not apply to the situation of Syrians in Turkey. However, the *non-refoulement* principle is still applicable, leading to the (difficult) question (which is a key element of the EU-Turkey agreement) of whether or not the asylum seekers who arrive in Greece via Turkey can be returned to Turkey on the ground that the latter is a 'safe third country'. For this purpose article 38(1) of the EU Asylum Procedures Directive of 2013 (2013 EU Directive) is particularly relevant.²⁰ Article 38 sets out in great detail what requirements

¹⁸ Goodwin-Gill 'The international law of refugee protection' in Fiddian-Qasmiyeh *et al* (eds) *The Oxford Handbook of Refugee and Forced Migration Studies* (2014) at 40.

¹⁹ Chapter 5 of the *Protocol Relating to the Status of Refugees* (1967).

²⁰ 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, L 180/60, *Official Journal of the European Union*, 29 June 2013.

must be met before one can speak of a 'safe third country'. Given its importance as a 'compass' for the present issue, we quote the article in full:

- 1 Member States [of the EU] may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:
 - (a) life and liberty 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 (...);
 - (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.
- 2 The application of the safe third country concept shall be subject to rules laid down in national law, including:
 - (a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;
 - (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;
 - (c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).

In sum, when returning persons to Turkey (in this particular case), the EU member state, Greece, supported by other EU member states and the EU itself, should guarantee that their lives and liberty are not in danger. They cannot otherwise be sent back. In addition, asylum seekers have the right to

be heard individually, on a case-by-case basis, taking into consideration their particular circumstances. The latter provision will be discussed in greater detail in paragraph 4.3 below. For the present, it is important to underline that the 2013 EU Directive applies in and to all 28 EU member states so far, and most likely in the years to come, including the United Kingdom. It relates to the way in which these states should act once people enter European territory, and when a particular EU member state decides to send them to any state outside the EU. As a non-EU member state, Turkey is not bound by the Directive.

The need to apply the substantive criteria of the 2013 EU Directive (article 38, para 1) to the return of people to Turkey by Greece, raises the very difficult question of whether or not Turkey can in practice be considered a 'safe third country'. This question cannot yet be answered definitively. As stated above 2,7 million Syrians actually live in Turkey. For them Turkey is often not the country of their destination, either because they want to travel further, or because they want to return to Syria once the war has ended. This does not, however, mean that Turkey is 'unsafe' for them in terms of the criteria listed above. For a country to qualify as 'unsafe' there should be real fear for life and limb, and that seems to be the case only for certain segments of the refugees currently in Turkey. We cannot define these segments authoritatively as empirical research is to date inadequate. Examples that could be indicative include Syrian Kurds who sympathise with the Kurdistan Workers' Party (PKK), which is listed as a terrorist organisation by the EU; people who use their freedom of expression to criticise the approach of Turkey's President Erdogan to the Syrian conflict; and people who do not behave in accordance with the principles and laws of religious tolerance (Christians versus Muslims, and vice versa). Evidence of the risks to which members of these segments are exposed exists, but overall reliable figures are not available.

From a legal point of view, it must again be emphasised that as a non-EU member state, Turkey is not bound by the 2013 EU Directive, and that its reservation to the 1951 Convention claiming a geographical limitation for non-EU asylum-seekers is again relevant here, but also that it remains subject to the *non-refoulement* principle. This relates not only to Turkey as the 'receiving nation' and Greece as the 'transporting nation', but also to Turkey as a 'sending nation'. According to Human Rights Watch and Amnesty International, among others, Turkey has disregarded the *non-*

refoulement principle by returning Syrian refugees to Syria²¹ (an issue that will not be considered further as it falls outside the scope of the present note). What is relevant to the note, however, is the question of whether EU member state Greece can return asylum seekers to Turkey, assuming that it is safe to do so. Interestingly, in a recent case a Greek appeals committee upheld the appeal of a Syrian asylum seeker listed for return to Turkey under the terms of the EU-Turkey agreement. In the absence of a translation of the decision in English, we quote *The Guardian*, which states that:²²

In a document seen by the Guardian, a three-person appeals tribunal in Lesbos said Turkey would not give Syrian refugees the rights they were owed under international treaties and therefore overturned the applicant's deportation order by a verdict of two to one. The case will now be re-assessed from scratch.

Although it is too early to tell, this might well be a landmark decision in the making.

Is Greece able to meet the required procedural standards and guarantees?

As shown above, article 38(2) of the 2013 EU Directive establishes several procedural guarantees, including the requirement of a case-by-case evaluation and the consideration of the particular circumstances of the individual. The EU-Turkey agreement itself states, partly in the same words, 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'. It also states that – and this is important from a practical point of view – '[a] mechanism will be established, with the assistance of the [European] 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'.

The question, then, is whether the Greek asylum system meets the safeguards promised in both documents when dealing with applications by

²¹ In particular, in November and December 2015 Human Rights Watch and Amnesty International denounced an increase in deportations, push-backs, arbitrary detentions and physical violence against asylum-seekers trying to cross the Turkish southern border coming from Syria or Iraq, or trying to enter Greece from Turkey, either by land or sea.

²² See Fotiadis, Smith & Kingsley 2016 available at: <http://tinyurl.com/hqdhjjk>.

Syrian asylum seekers. If not, the system may constitute a violation of the 2013 EU Directive and the EU-Turkey agreement and, for instance, of the prohibition on collective expulsions in article 4 of Protocol 4 of the European Convention, to which Greece is a party – as is Turkey – and which covers practices condemned by the European Court of Human Rights.²³

The decision of the Greek government to move from open reception centres to (relatively) closed camps in which to hold those who cross the Aegean Sea from Turkey, has resulted in thousands of people being detained, often for lengthy periods, while they await the results of their asylum applications and so their future.²⁴ This poses an immediate problem at macro-level, and also has consequences for the individual asylum seeker, such as imposing severe limitations on his or her freedom of movement. The overcrowded detention camps also pose serious problems for vulnerable groups such as women, children, and gays, while key issues arise for all detainees, such as the lack of food or its poor quality, the lack of blankets and privacy, and inadequate access to appropriate medical care. Under pressure from the agreement between the EU and Turkey, Greece is doing its very best to deal with the worst aspects of the current situation, for instance by moving hundreds of refugees out of the disreputable camp near the village of Idomeni, which housed some 20 000 migrants at its peak in March 2016, and some 8 000 by the time it was closed down, most of them Syrians.²⁵

Due to the extraordinary number of people applying for asylum, the Greek system was already under great pressure and the measures undertaken can be seen as an attempt to contain the problem, to regain control, and in the end to live up to the agreement with Turkey. But the actual manpower provided to deal with the number of asylum seekers has been far from adequate. This is true of each part of the process, from the number of officers conducting the ‘intake talks’, the availability of interpreters at every stage of the procedure, the support that should be provided by experienced lawyers, to transportation for those granted asylum and those who are not. Given this lack of manpower and infrastructure, it is practically impossible

²³ *Hirsi Jamaa v Italy*, Application No 27765/09 ECHR 23 February 2012.

²⁴ Amnesty International 2016 available at: <https://www.amnesty.org/en/latest/news/2016/04/greece-refugees-detained-in-dire-conditions-amid-rush-to-implement-eu-turkey-deal/> (last accessed 10 June 2016).

²⁵ See Kitsantonismay 2016 available at: [ERLINK"http://www.nytimes.com/2016/05/25/world/europe/greece-idomeni-refugee-camp.html?_r=1"](http://www.nytimes.com/2016/05/25/world/europe/greece-idomeni-refugee-camp.html?_r=1) [blank"http://www.nytimes.com/2016/05/25/world/europe/greece-idomeni-refugee-camp.html?_r=1"](http://www.nytimes.com/2016/05/25/world/europe/greece-idomeni-refugee-camp.html?_r=1) (last accessed 10 June 2016).

to deal timeously with persons on a case-by-case basis, and the number of applications dealt with effectively is extremely low, indicating that applicants have an extremely long wait for a decision on their cases. To illustrate, on 6 April 2016 Amnesty International established that in the VIAL detention centre on Chios Island, only ten of the 833 applications submitted had been processed.²⁶ These numbers indicate the extent of the staffing shortfalls at the time, and since then things have not really improved.

In the meantime, the agreement between the European Asylum Support Office (EASO, an Agency of the EU) and Greece, signed in May 2015, still applies.²⁷ In this agreement, EASO promised to deliver tailor-made support to Greece in ‘a number of prioritised areas, such as ... training Greek personnel in the framework of the EASO Training Curriculum, Dublin III procedures, Country of Origin Information (COI), setting up an effective guardianship system and transcription of interviews’, while ‘in the field of reception, support will be offered in monitoring the provision of services and enhancing the quality of the reception procedure’.²⁸ This again relates to the whole chain of activities needed to conduct the asylum intake procedures and to follow up on them in line with established international and European legal standards. In practice, one can observe a striking similarity between the Greek and EASO practices: the intentions are good but the actual efforts made are insignificant in the face of the number of people waiting for either positive or negative decisions, which will have so great an impact on their lives.

CONCLUDING REMARKS

In certain periods in history the number of asylum seekers in the world overall grows exponentially in a relatively short space of time. This has been and still is the case with the hordes of people leaving Syria because of the ongoing civil war in that country. Quite a number of them wish to start a new life in one of the EU countries and reach EU member state Greece via non-EU member state Turkey. In 2015 the influx of asylum seekers to Europe reached its limits, especially, and perhaps even primarily, because

²⁶ Amnesty International 2016 available at: <http://tinyurl.com/gwn7339> (last accessed 10 June 2016).

²⁷ <http://tinyurl.com/gux3c9t>=<https://www.easo.europa.eu/news-events/easo-and-greece-sign-agreement-continue-easo-support-greece-until-may-2016> (last accessed 10 June 2016).

²⁸ *Ibid.*

of the rise of populist resistance movements using slogans such as ‘our people first’ and ‘enough is enough’. And while several leading European politicians, prominent among them the German *Bundeskanzler*, Angela Merkel, attempted to accord them the human dignity prescribed by international and European law, they had eventually to accept that providing ‘too much hospitality’ to the migrants could easily generate an untenable situation within their own countries. In addition, they and others observed that the business model of the migrant smugglers remained extremely successful, despite its resulting in to the death of thousands of people. That combination of factors led to forging of the agreement between the EU and Turkey discussed in this note.

It is too soon to tell what the legal cost of the agreement has so far been. We have shown that a range of key principles in the agreement are actually being violated – the limitation of freedom of movement, the lack of special protection for vulnerable groups, the poor quality of food, the lack of blankets and privacy, and inadequate access to appropriate medical care – but to date these are seen as ‘collective problems’ calling for ‘collective responses’, while legal arguments play only a minor role in that context. Most of the asylum seekers have not yet reached the stage of being evaluated as individuals, although that is what should happen according to the legal instruments above. Their needs should be addressed on a case-by-case basis, demand urgent and major attention, and importantly, effective judicial and extra-judicial procedures and remedies. That ideal, however, is still far from being realised.

In the end the agreement between the EU and Turkey, with EU member Greece as a key player in the middle, can be seen as a balancing act between international and European law on the one hand, and pragmatics on the other hand, with legal arguments being used only if watchdogs such as the UNHCR, Human Rights Watch, and Amnesty International intervene. Ideally, practice in this situation, as in all others, should be in full conformity with the applicable laws. Sometimes, however, situations change so dramatically that the legal system falls short, despite the good intentions of all involved and their desire to act in accordance with the highest standards.

This is unforgivable in the eyes of some analysts, but partly forgivable in our eyes, provided that three things take place. First, and as a matter of urgency, the powers that be must invest in the capacity to deal with the asylum

seekers on a case-by-case-basis and in accordance with all legal requirements, and must refrain from returning people to Turkey if it has been established that their return would place them in real danger. This is primarily a task for the Greek government, assisted by EASO and whatever person, government, or international organisation is willing and able to help. Secondly, the overall situation in (and outside) the camps also demands urgent attention. It must be ensured that the ambient conditions meet at least the standards of basic human dignity provided for in human rights instruments such as the European Convention and replicated in the EU-Turkey agreement. It is unacceptable that such inhumane living conditions should exist on European soil. Thirdly, there must be planning for the future. Although the Syrian crisis is sometimes described as an ‘incident’, suggesting that it is in some way isolated, no exercise of the imagination is needed to see that there will always be such ‘incidents’ driven by wars or numerous other factors which drive people from their home countries, and that Europe will remain attractive in the eyes of asylum seekers. Europe was not ready to deal with the number of asylum seekers fleeing Syria and found a solution for aspects of that problem by concluding an agreement with Turkey. The agreement is a novelty, and to some extent an ‘experiment’, but it relates intimately and vitally to the lives of many human beings. While it is too soon to tell whether this novel agreement will succeed in the present circumstances, it should be clear that similar situations will occur in the future and that Europe needs to be better prepared to face them. In doing so it needs to benchmark established international legal standards, and recognise that migration could be beneficial in a time of demographic decline. Migration flows are not exclusively a problem, even if many Europeans actually see them as such.