

## Chapter 3

# Europe and the migration crisis: migrants' rights sacrificed on the altar of security?

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### Introduction

According to the International Organization for Migration (IOM), 387,789 people reached the territory of the European Union (EU) in 2016, mainly by crossing the Mediterranean. Although this figure is high, it is considerably lower than in 2015 when more than a million migrants arrived on European soil (IOM 2016 and 2017). The crisis, however, is still far from over. For almost three years, Europe has been confronted with an influx of migrants, and, comparing 2016 to the years prior to 2014, there is an upwards trend. While the number of refugees fell steeply in 2016, the number of people dying or disappearing in the course of migration increased compared to 2015. With a total of 5,143 deaths in 2016<sup>1</sup> (compared to 3,784 in 2015<sup>2</sup>), the Mediterranean Sea has become the world's most dangerous migration route (Cogolati 2016).

This influx of migrants, unprecedented since the Second World War, has forced the European Union to adopt a series of measures following on from the European Agenda on Migration (2015) (Hassel and Wagner 2016). These are intended to crack down on the trafficking of migrants and to ensure that people are returned to whence they came (Council of the European Union 2015; European Commission 2015), but also to tighten controls on external borders and to transfer responsibility for dealing with arrivals to neighbouring countries. The recurring tragedies along the coasts of Greece and Italy, and the suffering endured by those seeking refuge in the EU by crossing the Mediterranean, raise the question of whether European migration policy respects human rights, particularly the principle of non-refoulement (Cogolati 2016), the cornerstone of the international legal regime to protect refugees.

This chapter examines, from a human rights viewpoint, some of the measures adopted in 2016 by the EU and the Member States to manage the influx of refugees and asylum-seekers (cf. Box 1). We begin by considering the lack of legal entry routes into the EU, highlighting Europe's responsibility for the human tragedies witnessed in recent years, the implications for the right to life, and the efforts undertaken by the EU to protect this right (Section 1). In Section 2, we look at the relocation programme set up in 2015 and continued in 2016 without much success. This programme revealed serious divisions between the Member States, and raised many human rights concerns, particularly

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1. <http://migration.iom.int/europe/>

2. <https://missingmigrants.iom.int/mediterranean>

as to practices in the so-called ‘hotspots’<sup>3</sup>. 2016 was also the year when management of the refugee crisis was outsourced, with the EU-Turkey agreement – a significant turning-point in EU asylum policy – being signed on 18 March. In Section 3, we analyse this disputable and disputed agreement. The EU also continued to focus on security, taking new measures to control its external borders. The mandate for the Frontex agency shows a wish to give absolute priority to enhancing security, to the detriment of migrants’ rights (Section 4). Finally, we close this chapter by reviewing the various reform proposals from the European Commission, intended to create a lasting and fair common European asylum system (Section 5). The chapter concludes that the priority given to security too often goes hand in hand with violations of migrants’ fundamental rights, and that the path to an asylum regime which respects these rights will be long and fraught with possible pitfalls.

#### Box 1 Terminology

A **refugee** is a 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 (1951 Geneva Convention on the Status of Refugees).

There is no legally-recognised definition of the term ‘**migrant**’. Nevertheless, according to the United Nations, this term refers to ‘anyone who changes his or her country of usual residence for more than a year, irrespective of the, voluntary or involuntary, reason for migration, and of his or her legal status’. The term therefore applies to people who move to another country or region in order to improve their material and social circumstances, their future prospects, or those of their family.

An **asylum seeker** is a person who requests entry to the territory of another country as a refugee, and is waiting for the competent authorities to decide on his or her application. If the application is rejected, the person must leave the territory of that State: he may be deported, in the same way as any foreigner illegally in the country, unless he is granted a residence permit for humanitarian or other reasons.

Source: United Nations, <https://refugeesmigrants.un.org/fr/definitions>

## 1. The absence of legal channels for entry into Europe

Within the EU, asylum is not dealt with as a separate issue, but as part of a more general objective to manage migration. This objective is based on the clear, unquestionable determination of the EU and its Member States to hold up and deter the mass arrival of migrants (Tissier-Raffin 2015).

In recent years, there has been a significant increase in the use of dangerous routes to reach Europe, crossing the central Mediterranean or via the Balkans. This has

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3. A *hotspot* is one way chosen by the EU to improve procedures for identifying, registering and taking digital fingerprints of migrants on their arrival. There are ‘hotspots’ in Italy and Greece, among other places. [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_hotspots\\_fr.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_fr.pdf)

come with large-scale violations of the right to life (Cogolati *et al.* 2015). According to the International Organization for Migration (IOM), in 2016 5,143 people died or disappeared at sea<sup>4</sup> (compared with 3,784 in 2015<sup>5</sup>) while trying to reach Europe on overloaded boats provided by unscrupulous smugglers. This is often, sadly, the only option left to refugees seeking security, who thus put themselves at greater risk of abuse, violence and exploitation (FRA 2016). Yet the right to life is a fundamental human right guaranteed by, *inter alia*, Article 2 of the ECHR and the Charter of Fundamental Rights. As this is an inherent human right, States must take positive preventive measures, within their powers, to protect it in cases where life may foreseeably be lost and where they can prevent such loss. The efforts made to protect migrants' right to life, through the *Mare Nostrum* and *Triton* operations<sup>6</sup>, were certainly laudable, but still insufficient (Crépeau and Purkey 2016).

The lack of a formal migration channel meeting humanitarian needs and protecting individuals fleeing crisis situations is a key factor in explaining why migrants embark on such dangerous journeys. The UN Special Rapporteur on the human rights of migrants (Crépeau 2015) rightly emphasised that 'the European Union's collective response to the Syrian crisis exposes a remarkably intransigent refusal to offer Syrians any significant migration opportunities. Most European Union Member States have preferred to look the other way, unsurprisingly pushing migrants to turn to smugglers'.

If more legal channels were available to reach the EU, refugees not effectively protected in their countries of origin could reach safety without having to risk their lives or use the services of traffickers. The potential legal channels include resettlement and family reunification.

## 1.1 The resettlement of refugees: promises difficult to keep

The resettlement of displaced persons in non-European countries is a standard way of helping recognised refugees to rebuild their lives without having to risk dangerous journeys. It is also an expression of solidarity with countries of first arrival that are bearing a disproportionate responsibility in hosting refugees and asylum seekers (HRW 2016a). In July 2015, the EU adopted a programme intended to resettle 22,504 refugees<sup>7</sup> designated by the UN High Commissioner for Refugees (HCR) in 27 Member States<sup>8</sup> over a two-year period (Justice and Home Affairs Council 2015). Despite the efforts made, the EU has a poor record in this area, given its capacities and the needs to be met. By late December 2016, 13,887 refugees had been resettled<sup>9</sup>, most of them Syrians from

4. <http://migration.iom.int/europe/>

5. <https://missingmigrants.iom.int/mediterranean>

6. Operation *Mare Nostrum* was a military and humanitarian operation conducted by the Italian navy as of 15 October 2013, following the Lampedusa tragedy. Operation *Triton* is an operation conducted by the European agency Frontex since November 2014, and is supposed to help Italy to cope with the influx of migrants via the sea.

7. This figure seems tiny, given that, according to the HCR, 1.15 million people across the world needed resettlement in 2016, and 1.19 million will need it in 2017 (UNHCR 2015 and 2016a).

8. Hungary refused to take part in the programme. However, Iceland, Liechtenstein, Norway and Switzerland are participating.

9. 13,998 people by 7 April 2017 (European Commission 2017a).

the Lebanon, Jordan and Turkey<sup>10</sup> (European Commission 2016a). This was below the original commitment, but what was particularly striking were the disparities between states: non-EU EEA states (CH, NO, LI, IS) took in large numbers, as did Austria, Sweden and the United Kingdom. However, ten Member States, principally Central and Eastern European countries (SK, SL, RO, BG, HU, CY, HR, MT, PL) had still not taken in a single refugee (Forum Réfugiés-Cosi 2016a) ten months after the launch of the programme.

On 13 July 2016, the European Commission published a proposal for a regulation establishing a common EU resettlement framework, to ‘ensure orderly and safe pathways to Europe for persons in need of international protection’ (European Commission 2016b). This procedure would be based on the adoption of an annual resettlement plan, setting out the maximum number of people to be resettled during the following year in the whole of the EU, as well as details concerning Member State participation and geographical priorities. The decision on how many people to resettle in each Member State would, however, be taken by the States themselves. 10,000 Euros in financial assistance, to help finance reception and support for the migrants, would be paid to them for each person resettled (*ibid.*).

This proposal for a regulation contains some worrying provisions. For example, the decision as to the third countries from which resettlement would take place will be based, *inter alia*, on the effective cooperation of these governments with the EU in the area of asylum and migration. This corresponds to one of the objectives listed in the resettlement framework: to help achieve the Union’s foreign policy objectives by increasing the Union’s leverage *vis-à-vis* third countries. Making the resettlement options for refugees dependent on the degree to which their host country cooperates with EU interests is a distortion of the principle of sharing responsibility and of providing durable solutions to the most vulnerable refugees (HRW 2016a).

The proposal also excludes from possible resettlement anyone who has irregularly entered, irregularly stayed or attempted to irregularly enter the territory of the Member States during the five years prior to resettlement. The idea is to deter people needing protection from trying to enter Europe irregularly. This seems unrealistic, given the low number of resettlement places available compared to the number of displaced persons and refugees (Forum réfugiés-Cosi 2016a). The proposal also contains a clause excluding persons for whom there are reasonable grounds for considering that they are a danger to the community, public policy, security, public health or the international relations of the Member State examining the resettlement file, and authorising a Member State to effectively block the resettlement of an individual by another Member State.

While it is encouraging to see the EU creating a common legal framework for resettlement, Member States may well lack the necessary political resolve to implement it (Forum réfugiés-Cosi 2016a). The EU, which would like resettlement to be the only legal pathway to protection on its territory, will probably, therefore, establish a common

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10. This figure includes the Syrians resettled from Turkey under the 2016 EU-Turkey agreement (see Section 4).

implementation framework, but without setting reception objectives<sup>11</sup> reflecting real protection requirements and the need for an international distribution of refugees (HRW 2016a).

## 1.2 Family reunification: a legal entry channel which suffers in times of crisis

Family reunification is another important legal pathway for entry into the EU for family members of people with an established need for international protection in the EU. This right developed in the light of international and European provisions which require States to promote, alongside family unity, family reunification, insofar as this is possible<sup>12</sup>.

Restrictions on family reunification imposed on refugees and beneficiaries of subsidiary protection were increased in 2016 in some destination Member States such as Germany, Belgium, Finland, Denmark and Sweden. The inclusive family reunification policies of these countries were considered, wrongly according to the Council of Europe's Commissioner for Human Rights, to be pull-factors which should be subject to new restrictions and waiting periods to enhance integration capacity. As well as potentially offsetting the slight progress made in terms of resettlement, the question arises as to whether these restrictions comply with international and European law.

### Box 2 Restrictions on family reunification in some Member States

In Austria, since 1 June 2016, refugees benefiting from subsidiary protection will have to wait three years before applying for family reunification, and must have suitable housing, health insurance and a sufficient income.

In Germany, in March 2016, facilitated family reunification was suspended for two years for people who were granted subsidiary protection after 17 March 2016.

Sweden has adopted a temporary law to suspend access to family reunification for asylum seekers with provisional protection until 2019.

Source: EMN 2017.

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11. At the high-level Summit on Refugees held on 20 September 2016 by President Barack Obama, the President of the European Council, Donald Tusk, said merely that 'the final goal we are aiming at is that the refugees will get asylum in EU Member States through resettlement', without giving a quantified objective (Forum réfugiés-Cosi 2016a).

12. The family is recognised as the fundamental building-block of society, and family unity seen as an essential right of any person. The right to respect for family life is, in particular, guaranteed by the UN Convention on the rights of the child (Art. 9 & 10), the European Convention on Human Rights (Art.8), the European Social Charter (Art. 16 (general) and 19 (family of migrant (workers))) and the EU Charter of Fundamental Rights (Art.7).

Some provisions of the Dublin III regulation<sup>13</sup> (European Parliament and Council of the European Union 2013a) can also help to maintain family unity by allowing family reunification for asylum seekers living in different EU Member States<sup>14</sup>. In January 2016, a British court, with reference to the regulation, authorised four minors, asylum seekers living in the ‘jungle’ in Calais, to join their family members in the United Kingdom, despite having lodged a request for asylum with the French authorities<sup>15</sup> (EMN 2017).

However, if the amendment proposed by the European Commission (Article 3(3)) to the Dublin regulation is adopted, it will be more difficult for family members to join beneficiaries of protection living in another Member State, as this amendment will oblige the Member State where the application for asylum is first lodged to return the applicant to the first country of asylum, a safe third country or the safe country of origin, as appropriate (European Commission 2016c).

## 2. Relocation and the ‘hotspots’: an unsuitable response by the EU

In 2015, in order to manage the migratory pressures, the EU adopted emergency relocation measures. Relocation is a mechanism for dividing up between the Member States people who need international protection and are already in Europe. The negotiations leading to the adoption of these measures revealed worrying divisions between Member States: some were clearly against any sharing of the responsibility for hosting asylum seekers (Tissier-Raffin 2015). As was said by the President of the European Commission, Jean-Claude Juncker (2015) himself, ‘Where Europe has clearly under-delivered is on common solidarity with regard to the refugees who have arrived on our territory’.

The political agreement reached in July 2015 on the relocation of 40,000 people was formally approved in September. It was agreed that this would be a voluntary mechanism: Member States were free to join up to it or not (Council of the European Union 2015a). Only Austria and Hungary decided not to offer any places at all via this system. The second decision – on the relocation of 120,000 persons – was adopted in September 2015. This was a mandatory allocation. As no unanimous decision could be reached, the decision was adopted by qualified majority, with Hungary, the Czech Republic, Slovakia<sup>16</sup> and Romania voting against it (Council of the European Union 2015b). These relocations are to take place within two years of the decision.

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13. This system sets out a series of criteria for attributing responsibility for the processing of applications for asylum and protection to one sole Member State. In practice, responsibility has very often been attributed to the country where the first irregular entry took place. The aim of these criteria was to prevent ‘asylum-shopping’ (multiple applications for asylum in various Member States in order to obtain the best conditions) and the emergence of ‘refugees in orbit’ (a chain of transfers of refugees from one Member State to another in the absence of clear responsibility).

14. Articles 4, 6 - 11, 16, 17 and 20, and Recital 15 of Regulation 604/2013 of 26 June 2013, OJ L 2013, 180/31.

15. This decision was overturned by the Court of Appeal in August 2016 following an appeal from the public prosecutor. The four young people, however, will be permitted to stay in the United Kingdom. <https://www.goodplanet.info/actualite/2016/08/02/migrants-cour-dappel-contre-transfert-de-refugies-de-calais-royaume-uni/#sthash.j1Ykj6dk.dpuf>

16. Slovakia, followed by Hungary, has brought an application for annulment of the measure before the CJEU, arguing that it violates the EU’s procedural rules, the division of powers within the EU, and the principle of proportionality, CJEU, *Slovakia v. Council*, C-643/15 and *Hungary v. Council*, C-647/15, brought on 2 December 2015, pending.

The aim of these two measures adopted by the EU in 2015 is to distribute refugees more effectively between the Member States and to relieve pressure on the so-called 'frontline countries', Greece and Italy, through which most migrants and refugees enter the EU. In principle, according to the Dublin III regulation (European Parliament and Council of the European Union 2013a), these two countries should be responsible for processing all their applications for asylum. The agreements concluded are limited and temporary derogations to this regulation. By 2 March 2017, 13,546 relocations had taken place in total, including 3,936 from Italy and 9,610 from Greece. Out of the Member States, only Malta and Finland are on course to meet their obligations, while some countries (Hungary, Austria and Poland) are still refusing to take part in the programme, and others (the Czech Republic, Bulgaria, Slovakia) are participating only to a very limited extent (European Commission 2017b).

This relocation mechanism raises several fundamental rights issues. For example, only asylum seekers who have arrived in Italy or Greece and are of the 'right' nationality are eligible<sup>17</sup>. To be eligible, asylum seekers must be of a nationality whose average first instance international recognition rate for protection at the EU level is at least 75%, according to the most recent quarterly Eurostat figures. At the time when the Council decisions were adopted (August and September 2015), nationals of the following countries were eligible: Syria, Iraq, the Central African Republic, Eritrea, Yemen, Bahrain, Swaziland and Trinidad and Tobago. The tenth report from the European Commission, however, states that to be eligible, asylum seekers must now be nationals of Syria, Burundi, Eritrea, the Maldives, Qatar or Yemen. Iraqis, therefore, are now excluded (European Commission 2017b). This criterion is discriminatory and arbitrary, and can result in the automatic exclusion of certain asylum seekers who have a proven need of international protection (HRW 2017; Guild *et al.* 2017). Moreover, a decision to transfer an asylum seeker from Greece or Italy to another Member State does not imply automatic recognition of protection status for the seeker.

The host State will furthermore decide whether the individual is eligible for refugee status or can benefit from subsidiary protection. Member States, however, still differ in their interpretation and recognition of these two statuses. Depending on where they are sent, relocated individuals may not enjoy the same rights. This unequal treatment is not only unjustifiable in principle, but is even more damaging since those who have been relocated can only benefit from the rights linked to international protection in the State which has accepted them in via relocation. They will not therefore benefit from free movement within the Schengen Member States (Myria 2016; Tissier-Raffin 2015).

Finally, the asylum seekers eligible for relocation cannot, in this system, express a preference as to the country to which they are to be sent. This partly explains the lack of enthusiasm to participate in the programme: some would rather turn down the offer of relocation rather than be obliged to move to a country and maybe end up far from their loved ones (De La Baume 2016; Forum Réfugiés-Cosi 2015). Despite the right to

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17. Moreover, to be eligible for relocation, asylum seekers must have arrived in Italy or Greece after 15 August 2015 (first relocation decision) and after 24 March 2015 (second decision). They must have lodged an application for asylum in Greece or in Italy (requiring identification, registration, digital finger-printing).

an effective (non-suspensive) remedy against the relocation decision, and the taking into account of various (family, language or cultural) criteria to ease integration in the host country, the fact that States can indicate preferences is bound to lead to questions or scepticism about fundamental rights (Tissier-Raffin 2015).

Practical implementation of the relocation plan is, moreover, based on the establishment of crisis centres, ‘hotspots’, at the EU’s external borders. These are designed to help the countries involved to meet their obligations in terms of controlling, identifying, registering and fingerprinting new arrivals. Their purpose is to sort asylum seekers into those eligible for relocation, those whose application will be examined by the local authorities and those whose application for asylum is manifestly unfounded and who should be sent back<sup>18</sup>. The nature of these ‘hotspots’ quickly raised certain questions: were they reception centres, or holding centres for irregular migrants waiting to be returned to their countries? Following the entry into force of the EU-Turkey agreement in March 2016 (see Section 3), the centres established on the Greek islands became de facto holding centres. In the days following the agreement, the refugees and migrants on the islands were taken to the mainland, so that the reception centres could be converted into closed centres for the new arrivals. On 22 March 2016, the HCR, which is against mandatory detention, suspended some of its activities in the closed centres on the islands, including the transporting of new arrivals to and from the centres. They limited their work to ensuring that human rights standards were respected and providing information on procedures to apply for asylum<sup>19</sup>. Oxfam and Médecins sans frontières (MSF) followed suit, announcing two days later that they would no longer help to transport new arrivals to the ‘hotspots’ on the Greek islands (RTBF-Info 2016). Human rights organisations denounced the appalling conditions in these centres (Amnesty International 2017a; MSF 2017).

A recent study (2017), commissioned by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs, criticises the ‘hotspot’ approach in terms of fundamental rights. Far from relieving the pressure on Greece and Italy, the hotspots have made the situation worse and have led to the adoption of repressive measures contrary to human rights. They have mainly functioned as a ‘filtering’ mechanism, with few, if any, procedural guarantees and have failed to identify the vulnerabilities/special needs of the asylum seekers. The study lists various forms of malpractice: no information on the relocation procedure, use of coercion to take digital fingerprints and systematic detention to prevent secondary movements. The insufficient reception infrastructure and resources have resulted in long waiting periods in the processing of migrants, inhuman living conditions, and feelings of injustice, discrimination and despair among the migrants themselves (Guild *et al.* 2017).

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18. Several EU agencies provide assistance to national authorities in the hotspots: in particular the European Asylum Support Office (EASO), providing practical help for asylum seekers (registration, identification, digital fingerprints, interviews), and Frontex, the Agency for cooperation at the EU’s external borders, for the return of ‘irregular migrants’. Europol and Eurojust provide support in dismantling people-smuggling and trafficking networks.

19. Melissa Fleming, spokesperson for the HCR (2016), ‘UNHCR redefines its role in Greece as EU-Turkey deal comes into effect’, 22 March 2016. <http://www.unhcr.org/fr/news/briefing/2016/3/56f14c5cc/hcr-redefinit-role-grece-apres-lentree-vigueur-laccord-ue-turquie.html>

### **3. The EU-Turkey agreement: outsourcing to dispense with the right to asylum?**

One important aspect of EU asylum and migration policy which has an impact on the rights of migrants is the Union's external cooperation with third countries, principally transit countries.

On 18 March 2016, cooperation between the EU and Turkey, which had already begun under the EU-Turkey action plan (2015), moved up a gear with a new, highly controversial, political agreement. The so-called 'EU-Turkey Statement' declares that from 20 March 2016 onwards, all 'new irregular migrants' arriving in Greece will be returned to Turkey. The agreement also sets out a 'one for one' mechanism: for every Syrian sent back to Turkey, another Syrian in a refugee camp in Turkey will be resettled in Europe using a humanitarian corridor, the purpose being to counter illegal crossings between Greece and Turkey. Turkey agreed to take 'any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU'. In exchange, it received an overall sum of 6 billion euros to finance refugee-related projects in Turkey, as well as visa liberalisation and the re-energising of the accession process (Council of the European Union 2016).

This agreement has been discussed at length within civil society and academic circles. From an institutional viewpoint, many lawyers doubt whether this agreement, signed by the Council of the EU with a third country without the prior consent of the European Parliament, is valid (Collett 2016; Corten and Dony, 2016). This question was decided through an action for annulment lodged with the General Court of the EU in April 2016 by three asylum seekers<sup>20</sup>. In their view, the said statement, which took the form of a press release, was an act which could be attributed to the European Council, setting down on paper an international agreement concluded on 18 March 2016 between the EU and Turkey. The appeal was dismissed, with the reasoning that the decision to conclude an agreement with the Turkish government had been taken by the Member States and not by the European Council. The EU-Turkey Statement could not therefore be considered as the act of an EU institution which could be annulled<sup>21</sup>.

The agreement with Turkey also raises serious fundamental rights issues (Carlier and Leboeuf 2017). The UN High Commissioner for Refugees (UNHCR 2016b), the UN Special Rapporteur on the human rights of migrants (Crépeau 2016), the Council of Europe's Commissioner for Human Rights (Muiznieks 2016), Human Rights Watch (2016b) and Amnesty International (2016a) all questioned its legality with regard to the principle of non-refoulement enshrined in the Geneva Convention, and the ban on collective expulsions guaranteed by the European Convention on Human Rights and the EU's Charter of Fundamental Rights.

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20. The applicants entered Greek territory and lodged an application for asylum there because of pressure from the national authorities, and in order to avoid being returned to Turkey with, possibly, the risk that they would be held there or be deported to their respective countries of origin. They claimed that this pressure was the result of implementation of the Statement.

21. EU General Court, Order of 28 February 2017 *NF, NG and NM v. European Council*, T-192/16, T-193/16 and T-257/16.

According to the terms of the agreement, all migrants, asylum seekers and refugees who have entered Greece irregularly via Turkey are to be sent back to Turkey, considered to be a safe third country. Asylum applications lodged in Greece will be examined quickly for admissibility, without an in-depth analysis of their substance. If the individual already benefits from effective protection in Turkey (first country of asylum), or could have requested asylum there (safe third country<sup>22</sup>), his application will be declared inadmissible and he will be returned to Turkey. This is by application of the rules in the so-called ‘procedure’ directive, which sets out two cases when the national authorities may declare an application for asylum to be inadmissible (European Parliament and Council of the European Union 2013b). Greece made haste to transpose the directive, the day after the agreement, into a law which allowed for the use of the concepts of ‘safe third country’ and ‘safe first country of asylum’<sup>23</sup>. However, it is questionable whether these terms can be applied to Turkey, for two main reasons:

(1) Turkish legislation and practice on access to asylum procedures and to international protection are still extremely restrictive. The Geneva Convention on the status of refugees only applies fully to member states of the Council of Europe. Syrians have been, in principle, authorised to apply for temporary protection there since 2011, but with no real guarantee of access to or receipt of such protection. Protection granted is also limited to access to healthcare, education and the labour market. Non-Syrians have been able to benefit from temporary protection, subject to certain conditions, since 2014, which in theory gives them access to healthcare and education, but not to employment (Myria 2016).

(2) On 6 April 2016, Turkey adopted a law intended to make it clear that Syrians returned under the new system may apply for and receive temporary protection. This covers both those who were previously registered in Turkey and those who were not<sup>24</sup>. In any case, the level of this protection is far below that afforded by the right to asylum in most Member States, and is difficult to implement. Moreover, human rights organisations have repeatedly denounced practices such as illegal detention of migrants and violations of the principle of non-refoulement. Human Rights Watch (HRW) (2016a) and Amnesty International (2017a) have denounced Turkish border guards who regularly return Syrian refugees trying to cross the border. Cases of arbitrary arrests and illegal detention of migrants of all nationalities, for several weeks, sometimes with ill-treatment, have also been reported (Amnesty International 2017b).

It is also ironic to see that Turkey is being considered by the EU as a safe country, to which asylum seekers may be returned from Greece, while Greece, condemned in 2011 by the European Court of Human Rights, could not itself be considered as a safe country<sup>25</sup>.

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**22.** A safe third country is a non-EU country through which an asylum seeker transited during his journey. ‘Safe’ in this context means that the person could have had access there to an asylum procedure, and, if their application had been accepted, could have obtained international protection status there. In this way, the application for asylum may be declared inadmissible without any examination of the substance taking place (Myria 2016).

**23.** Law 4375 3 April 2016.

**24.** Regulation No.2014/6883 on temporary protection and Regulation 2016/8722 amending the former regulation.

**25.** ECtHR, *M.S.S v. Belgium and Greece*, 21 January 2011, Application No.30696/09.

There is another cause for concern: the readmission agreements signed by Turkey with other third states. Not wishing to see migrants who have been readmitted by European countries remaining indefinitely in Europe, the EU has itself embarked on signing a number of bilateral readmission agreements with states which are 'sources of immigration', such as Pakistan, Russia, Nigeria and Syria, and is looking to do so with 14 other countries including Iraq, Iran, Sudan and Egypt. These agreements, by allowing so-called 'chain refoulement' of people fleeing war and persecution, deny the existence of the fundamental right to leave one's country to claim asylum. The ban on returning a person to a country, including one considered as safe, if there is a risk that this country might send him on to another country where he is at risk, i.e. that of his nationality or residence, is, moreover, contrary to Article 3 of the ECHR. Afghan nationals, for example, were expelled from Turkey without their individual situation having been properly examined (Toubon 2016).

Finally, the resettlement mechanism developed by the EU and Turkey organises bartering in (Syrian) human beings, and totally ignores refugees of other nationalities who are registered in Turkey, thus violating the non-discrimination principle enshrined in Article 3 of the Geneva Convention (Carrera and Guild 2016; Cogolati 2016).

Despite the negative humanitarian impact of this agreement (MSF 2017; HRW 2017), the European Commission and the European Council are still, one year later, putting pressure on Greece to speed up returns to Turkey. Following the EU-Turkey agreement, attempts to return Syrians to Turkey were made particularly difficult by the appeal committees, which considered the returns to be dangerous for the Syrians. In June 2016, apparently under pressure from the EU, the Greek government changed the composition of these appeal committees, dismissing independent human rights experts and thus removing the members who, for legal reasons, were against returning Syrians to Turkey<sup>26</sup> (Crépeau 2017). Two Syrian asylum seekers brought their case to the Greek Council of State, which has still not reached a decision. As of 31 January 2017, nobody had been forcibly returned to Turkey with the argument that Turkey was a safe third country. Nevertheless, if the Greek Council of State rejects the appeal, this could pave the way for mass returns of asylum seekers to Turkey (Amnesty International 2017a).

In the view of the European Commission, the agreement with Turkey is a success: nearly a year after its adoption, 'daily crossings from Turkey to the Greek islands have gone down from 10,000 persons in a single day in October 2015 to 43 a day now. Overall, arrivals have dropped by 98 %. The number of lives lost in the Aegean Sea since the Statement took effect has also substantially fallen, from 1,100 (during the same period in 2015-2016) to 70' (European Commission 2017c). However, in the view of Amnesty International, the International Federation for Human Rights (FIDH), HRW, MSF, Solidarity Now, the Greek Council for Refugees and the Greek Union for Human Rights, the EU-Turkey agreement is a failure. It violates international asylum law, results in

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26. By 31 December, these new committees had already decided, in 20 cases, that Turkey was a safe country, although it excludes non-Europeans from its refugee protection. This is in stark contrast with the previous committees, which had only confirmed the decisions of inadmissibility of asylum applications taken by the Greek Asylum Department in 3 cases out of 393 (MSF 2017).

degrading conditions for the migrants trapped on the Greek islands, and disregards the European values of human rights and dignity (Raffenberg 2017; ETUC 2016).

#### **4. Frontex's new mandate: control the external borders to the detriment of migrants' rights**

Claiming that this would help in the fight against human trafficking and smuggling, the EU has developed an increasingly full set of legal and military instruments to combat clandestine arrivals. In 2004, it set up the Frontex agency, responsible for the management and operational coordination of its external borders. While Frontex explains and justifies its border control work by the need to provide help to migrants and to combat terrorism, the Agency has often been accused of violating the fundamental rights of migrants and refugees, and of undermining the principle of non-refoulement (Tissier-Raffin 2015; Cogolati 2016). In 2012, for instance, the Court of Justice of the European Union (CJEU) annulled a European Council decision granting the agency new powers, which mean that 'the fundamental rights of the persons concerned may be interfered with'<sup>27</sup>. In 2014, the European Ombudsman examined the return operations carried out by Frontex. In her conclusions, she suggests changes to ensure proper protection of migrants' fundamental rights during forced returns. These changes involve transparency of the operations, the application of common rules concerning the use of means of restraint, and improving appeal processes (European Ombudsman 2015).

In October 2016, Frontex was renamed the 'European Border and Coast Guard Agency', and its powers were increased (European Parliament and Council of the European Union 2016). Under its new name, the Agency takes a similar approach to the old Frontex: as well as the task of managing migratory flows, it now has a new aim - to maintain security within the EU. This new mandate needs to be considered from the angle of migrants' rights.

The Agency's powers have increased. Member States which refuse to make staff available to it in an exceptional situation must now justify such a refusal and must, in any case, be ready to provide half the staff numbers requested. The Agency is now able to carry out a vulnerability assessment of Member States' external borders. This power of initiative and action is new. If the border is not sufficiently 'well-guarded', the Agency may intervene and deploy its agents on the territory of Member States. If a Member State refuses to cooperate, the Council may reintroduce controls at the internal borders and temporarily exclude that State from the Schengen area. These new powers are worrying, because their purpose is to oblige Member States to pursue a policy of strict control at the borders, to prevent people from crossing them (CIRE 2016). Its enhanced powers in the area of data collection and processing also give cause for concern. It will centralise the personal data not only of individuals suspected of 'involvement in cross-border crimes such as migrant smuggling, terrorism or trafficking in human beings', but also of people who 'cross the external borders without authorisation'. In the eyes of European decision-makers, migrants are thus assigned risk profiles equating them

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27. CJEU, 5 September 2012, *European Parliament v. Council*, C-355/10.

with criminals who must be watched closely and identified rapidly to counter the risk or potential threat which they represent. This helps to strengthen the confusion between migrants and criminals, or even migrants and terrorists (*ibid.*).

With its new mandate, the Agency will receive more resources to carry out its activities, thus becoming the most generously-funded EU agency. This leaves no doubt as to the priorities of the EU and its Member States with regard to migration and asylum policy<sup>28</sup>. No mention, however, is made of guarantees that fundamental rights will be protected. There has been no response to the concerns raised by the European Ombudsman and certain NGOs (Frontex 2014), while the Agency's role in the establishment of a forced return policy at European level has been significantly increased (Cogolati 2016). There is a whole chapter in the Regulation on expulsions, showing the priority given to this aspect of migration policy. The mass expulsion of irregular migrants considered as 'undesirable' thus appears as one of the main goals of the EU<sup>29</sup>, at the expense of the principle of non-refoulement, set out in the Geneva Convention, and the principle that each situation should be examined individually (Lievens 2016). At the request of one or more participating Member States, or on its own initiative, the Agency may organise return operations, the material and human resources for which are provided by that Member State and/or a third state. If human rights, however, are violated, who will be held responsible: the Agency, the Member State which decided to expel the individuals or the third country which provided the staff (CIRE 2016)?

The fact that the Agency can now require operations to take place on the territory of Member States makes it even more difficult to identify who is responsible in cases involving human rights violations. If a violation takes place during an operation imposed by the Agency, Member States will tend to blame the latter (since the operation took place at its initiative), while the Agency could also point the finger at the state concerned (since it was its staff who were involved). The Agency may step up its cooperation with non-EU states which do not respect European standards on fundamental rights, without being able to hold them responsible for any violations of such rights (CIRE 2016).

Another worrying factor is the lack of supervision of the Agency's activities. There is only very limited democratic control, although the new mandate introduces an article making the Agency accountable to the European Parliament and the Council. As underlined by Lievens (2016), this is 'a democratic varnish which is already displaying large cracks'. Frontex was criticised in late August 2016 for excessive and quasi-systematic use of force during its interventions in the Aegean Sea<sup>30</sup>. The Agency denied the allegations and blamed the Greek authorities. The Greek coastguards, however,

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28. On top of its annual budget of 143.3 million euros (2015), the European Commission is planning to add 31.5 million euros from 2017 onwards, and to create 602 extra posts, with the corresponding financial resources, by 2020. By way of comparison, the European Asylum Support Office had a budget of around 19 million euros in 2016. <https://www.easo.europa.eu/sites/default/files/public/EASO-Budget-2016-adopted-by-MB.pdf>
29. [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication\\_from\\_the\\_ec\\_to\\_ep\\_and\\_council\\_-\\_eu\\_action\\_plan\\_on\\_return\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_from_the_ec_to_ep_and_council_-_eu_action_plan_on_return_en.pdf)
30. *The Intercept*, 'Shoot First: coast guard fired at migrant boats, European border agency documents show', 22 August 2016; *Le Point*, 'Frontex a-t-elle tiré sur des migrants?', 1 September 2016. <http://www.rfi.fr/europe/20160902-poseidon-frontex-mediterranee-tirs-bateaux-migrants-questions>

were never convicted<sup>31</sup>. Legally speaking, Frontex has never been charged and convicted in a court of law, although violations of fundamental rights have been alleged and even duly documented by NGOs (Tissier-Raffin 2015).

## **5. Towards a less protective, less welcoming European asylum system?**

The inflow of migrants has revealed the weaknesses which exist in the Common European Asylum System (CEAS)<sup>32</sup> and in one of its pillars, the Dublin III regime<sup>33</sup>. Despite some common European standards, recognition rates for refugee status vary between Member States, encouraging asylum seekers to carry out irregular secondary movements. Given these weaknesses, in spring 2016, the EU launched a large-scale reform, with a view to creating a common, sustainable and fair European asylum system, reducing the discretionary clauses on key aspects of the asylum procedure (European Commission 2016h).

On 4 May 2016, the European Commission launched the first stage of the revision of the Common European Asylum System (CEAS). In its recast of the Dublin III Regulation (European Commission 2016i), it foresees sanctions for asylum seekers who proceed to secondary movements, withdrawing the material advantages linked to reception, as well as submitting them to an accelerated asylum procedure. In parallel, Member States would be obliged to take back a beneficiary of international protection if he or she was irregularly present on the territory of another Member State.

The imposition of sanctions is an issue for discussion: this type of measure emphasises that asylum seekers have not only rights, but also duties vis-à-vis the Member States which take them in. However, migrants are not always fully responsible for secondary movements: some Member States (Italy, Greece), which did not always have the capacity and/or wish to register them and keep them in the country, did let them transit to other States (Balleix 2016).

The proposed recast of the Dublin regulation also stipulates a mandatory examination of admissibility for all asylum applications, in the light of the concepts of first country of asylum and safe third country (Art. 3.3). In such cases, the person still has his application for asylum examined individually, and has the right to appeal, but this examination only concerns the protection he could be given by the safe third country or country of first asylum, rather than considering the substance of his application. Until now these concepts were optional, and some Member States had not even transposed them into their legislation. Making them a mandatory common criterion for admissibility of asylum applications would drastically reduce the scope of international protection in

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31. <https://www.fidh.org/fr/themes/droits-des-migrants/renforcement-de-l-agence-frontex-l-ue-reste-sourde-aux-cris-d-alarme>

32. The CEAS is based on five pillars: the directive on reception conditions, the directive on asylum procedures, the directive on the conditions required, the Eurodac regulation and the Dublin regulation.

33. See note 13.

the EU, so that, ultimately, the only applications to be examined would be applications from persons who, in the view of the Union, could not be sufficiently protected in other third countries. This would be an across-the-board extension of the logic behind the EU-Turkey Statement of 18 March 2016, although even the classification of Turkey as a first country of asylum or safe third country is debatable (Balleix 2016; Forum Réfugiés-Cosi 2016b)<sup>34</sup>.

In a second 'package' of proposals published on 13 July 2016, the European Commission proposes, firstly, to transform the 'procedures' (European Parliament and Council of the European Union 2013b) and 'qualifications' (European Parliament and Council of the European Union 2011) directives into regulations, in order to harmonise asylum procedures and the conditions for granting international protection (European Commission 2016c and 2016e), and secondly to revise the 'reception' directive (European Parliament and Council of the European Union 2013c) (European Commission 2016d). While these proposals do make some improvements to the common asylum system, they also raise fundamental rights issues. Among the improvements, there is a strengthening of Member States' obligation to assess specific needs ('procedures' and 'reception' proposals); the appointment, within five days, of a legal representative for unaccompanied foreign minors (UFM) ('reception' proposal); the restating of the right of all asylum seekers to legal assistance, free of charge, from the first instance, including the right to be accompanied during the interview when their application is examined ('procedures' proposal).

However, some provisions may result in a weakening of the guarantees offered to asylum seekers. In the 'procedures' proposal, the following provisions are particularly worrying: the non-suspensive nature of the appeal against a negative decision handed down by an accelerated procedure, and the period to lodge this appeal, which has been shortened by two weeks; the use of an accelerated procedure for asylum seekers from safe countries of origin, the mandatory application of the concepts of 'safe third country' and 'country of first asylum', without any mechanism planned to monitor application of the 'safe third country' principle. The proposal for the 'qualifications' regulation also foresees the introduction of a system to review the status of beneficiaries of international protection. This means that someone who has obtained refugee status would only be protected for an initial period of three years, after which his status would be reviewed to see if the risks on return still exist. Such a provision would be bound to make protection statuses far more precarious (Forum Réfugiés-Cosi 2016b).

In order to stamp out secondary movements, the proposal for a revised 'reception' directive states that when an asylum seeker is identified in a Member State other than the country where he is authorised to be in the light of the Dublin criteria, he will be sent back to the original country, where he will lose all the material benefits of reception (except for medical help). His application for asylum will automatically be dealt with by accelerated procedure. This limited access to social rights, however, does not comply

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34. The other proposals from the European Commission include the conversion of the European Asylum Support Office (EASO) into a European Union Agency for Asylum (EAA), and the addition of a corrective mechanism to the Dublin system (European Commission 2016j and 2016k).

with the human rights standards set out in the Geneva Convention, the ECHR, the European Social Charter and the Charter of Fundamental Rights (Hruschka 2016).

These proposals for a more binding harmonisation of standards should be approached with care. The Commission has emphasised that they should make it possible to reduce ‘undue pull-factors to come to the EU’. The risk is that these aims will result in a levelling downwards of reception conditions and of migrants’ rights. This would run counter to the stated objective: to create a more humane European asylum policy (HRW 2016c; AEDH 2016). What is more, a downwards convergence of standards would not eliminate the real pull-factors, such as pre-existing family or social networks, or, simply, a Member State’s general economic prosperity (Enderlein and Koenig 2016).

## Conclusion

The analysis, from a human rights viewpoint, of the measures adopted in 2016 to address the challenge of the migratory crisis results in mixed conclusions. The EU Member States reacted in ways which set aside fundamental values and the protection of rights, rather than working to ensure that these would be upheld. EU policies essentially focused on preventing the arrival of refugees and outsourcing the management of asylum seekers and refugees (HRW 2017).

The option for refugees to legally enter EU territory and benefit from international protection there is presented as an alternative to dangerous journeys over the Mediterranean and smugglers’ networks. Nevertheless, the various categories of legal entrance routes give rise to legal and political questions which come up against opposing interests. The refugee resettlement programme is no real success, given the scanty progress made in the Member States. As for family reunification, another legal entry channel par excellence, the restrictions imposed on refugees and beneficiaries of subsidiary protection were tightened in 2016 in some Member States of destination. In such circumstances, increasing numbers will embark on dangerous journeys, thus lining the pockets of smuggler networks.

Similar conclusions can be drawn on relocation. Member States have shown little inclination to share out responsibility for asylum seekers more fairly within the EU. The programme also raises many fundamental rights issues: the discriminatory and arbitrary criterion of nationality, the disregard for the preferences of eligible asylum seekers; the unequal treatment of beneficiaries depending on the host State, etc. The ‘hotspots’, a key element of the programme, have, far from relieving the pressure on Greece and Italy, made things worse. They have led to the adoption of repressive measures contrary to human rights, to inhuman living conditions, and have left asylum seekers with a sense of injustice, discrimination and despair.

The EU-Turkey agreement of March 2016 confirmed the outsourcing approach to asylum policy. This agreement sparked strong reactions from many human rights organisations and still raises questions as to the respect of fundamental rights: illegal detentions, violations of the non-refoulement principle, arbitrary arrests, ill-treatment.

Due to this agreement, the image of the EU is increasingly one of a fortress closed to economic migrants and refugees (Nahavandi 2016), a fortress which has acquired a controversial weapon, the Frontex agency, the non-avowed aim of which is to 'send back large numbers of migrants arriving at the external borders of the European Union' (Ottavy and Clochard 2014).

As recommended by the Council of Europe's Commissioner for Human Rights, Member States, in order to meet migratory challenges effectively and while respecting human rights, should meet their human rights obligations and work together to develop common solutions based on country-to-country solidarity. They should guard against adopting asylum provisions which are increasingly restrictive, and which weaken human rights standards (Muižnieks 2016).

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