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1. The EU-Turkey Migration Deal

In 2015 the European Union witnessed what has been perceived as a migration and asylum crisis. The influx of 1 million asylum claimants in the EU, with many of them crossing the Mediterranean Sea in perilous ways, arriving on the shores of Greece and Italy and then travelling on to other EU Member States, disrupted the working of the EU asylum and immigration procedures. Reception and registration of asylum claimants came under pressure. The responsibility mechanism for the treatment of asylum applications in the Dublin Regulation[1], demanding those who travel illegally into the EU to introduce their asylum claims in the country of first entry, failed as well. Some Member States reinstalled internal border controls.

In response EU Member States entered into negotiations with Turkey, a country of transit of many who ultimately sought a way into the EU, in an attempt to address the mass exodus of particularly Syrians, but also other third country nationals. A first *EU-Turkey joint action plan* of 15 October 2015 provided support to (the by 2019 nearly 4 million) Syrians enjoying temporary international protection in Turkey and strengthened the cooperation in the field of preventing illegal migration flows from Turkey towards the European Union. A month later, on 29 November 2015, the heads of State or Government decided to increase their cooperation concerning migrants who were not in need of international protection, by preventing them from travelling to Turkey and the EU, by ensuring the application of the established bilateral readmission provisions[2] and by swiftly returning migrants who were not in need of international protection to their countries of origin. After further negotiations in March 2016, the EU-Turkey Statement was released by way of Press Release No 144/16 of the European Council.[3] The arrangements were adopted "to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk". To that end, the EU[4] and Turkey decided to end the irregular migration from Turkey to the EU. As from 20 March 2016 migrants not applying for asylum in Greece or whose application has been found unfounded or inadmissible by Greece were to be returned to Turkey. For every Syrian being returned to Turkey, another Syrian was to be resettled from Turkey to the EU. In total this would include 72.000 Syrians. Turkey engaged in taking any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU. Upon ending or at least substantial and sustainable reduction of irregular crossings between Turkey and the EU, a voluntary humanitarian admission scheme

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[1] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, *OJ* L 180, 29.6.2013, p. 31.

[2] Readmission Agreement (2001) between the Hellenic Republic and the Republic of Turkey on cooperation of the Ministry of Public Order of the Hellenic Republic and the Ministry of the Interior of Turkey on combating crime, especially terrorism, organized crime, illicit drug trafficking and illegal immigration, and, as of 1 June 2016, the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, *OJ* 2014 L 134, p. 3.

[3] www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement.

[4] Legally, the deal was not made with the EU but with the Member States. See Order of the General Court, 28 February 2017, *NF* v. *European Council*, T-192/16, ECLI:EU:T:2017:128.

would be activated. The EU would further speed up the disbursement of the initially allocated 3 billion euros under the Facility for Refugees in Turkey scheme and ensure funding of further projects for persons under temporary protection, notably in the field of health, education, infrastructure, food and other living costs, with an additional 3 billion euro up to the end of 2018. The EU and its Member States were to 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 more safe areas. In return, a number or broader engagements in the EU-Turkey relationship were included. The fulfilment of the visa liberalisation roadmap was to be accelerated with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016. The EU and Turkey welcomed the ongoing work on the upgrading of the Customs Union and reconfirmed their commitment to re-energise the accession process.

The Deal was interrupted upon the decision of the Turkish government on 28 February 2020 that it would no longer stop immigrants from moving into the EU. The war situation in northern Syria, with a new possible influx of Syrian refugees into Turkey, together with disputes about the extent to which the EU had lived by its obligations under the Deal, were factors leading to that decision.

2. Externalising migration and asylum policy: chasing the Australian model?

With this deal, the EU Member States engaged in a partial externalisation of their asylum and migration policy, shifting the burden of their duty of offering asylum to those seeking protection from individual prosecution or war in their home countries, to a third country, namely Turkey. Several EU policymakers are in favour of such externalisation,[5] often by referring to the 'Australian Asylum Model'. Under this model any person arriving in Australia by sea without a valid visa has been subject to offshore processing in a third country, even if they applied for asylum immediately upon arrival in Australia. All asylum seekers arriving in this way are detained in Australia and then taken 'as soon as reasonably practicable' to offshore processing facilities in either the Republic of Nauru or in Papua New Guinea. They will never be given an opportunity to settle in Australia, not even when they are recognised refugees.

With the massive increase of irregular entry of immigrants by boats across the Mediterranean Sea in 2015, the Australian model has been defended by some as a solution to externalise the asylum process outside the EU and thus have a deterrent effect on those wanting to cross by boat. Processing of asylum claims would occur in reception or disembarkation centres located on the Southern and Eastern borders of the Mediterranean. Asylum claimants should apply there and, if caught trying to cross illegally into the EU, be returned to those centres.

The EU-Turkey Deal can be seen as a variation on the Australian model. The burden of protecting asylum applicants was shifted from the EU to Turkey. Turkey committed itself to

[5] See on this subject S. Carrera et al., "Offshoring asylum and migration in Australia, Spain, Tunisia and the US", (2018) European Policy Institute, http://aei.pitt.edu/94398/1/OSI_009-18_Offshoring_asylum_and_migration.pdf; D. Davitti, M. Fries & M. Walter-Franke, "Gradations of externalisation: Is the EU sailing towards offshoring asylum protection", (2018) Human Rights Law Centre, University of Nottingham, https://portal.research.lu.se/portal/files/55021547/Gradations_of_externalisation.pdf; G. Lagana, "Does offshoring asylum and migration actually work?", (2018) European Policy Institute, www.opensocietyfoundations.org/uploads/3c397d87-5348-41de-9e92-d1a2108dabb1/does-offshoring-asylum-and-migration-actually-work-20180921.pdf

stop these persons and any other immigrant (not necessarily being in need of protection) from travelling further into the EU illegally. Turkey also takes back applicants who are declared inadmissible by the Greek authorities, under the presumption that they have a safe alternative for protection in Turkey. Only those who have stayed in Turkey will have a perspective of resettlement, at a later stage, in the EU. This externalisation process raises moral, practical, financial and legal concerns.

3. Concerns

3.1. Moral concerns

The moral concern relates to the taking on of responsibility. Contemporary asylum law is based on the moral obligation for the international community to offer protection to those who do not longer have protection in their country of origin for reasons of persecution or indiscriminate war-related violence. As Boldizsar Nagy has argued,[6] there is no moral principle according to which geographic proximity entails a higher duty and responsibility: why would Lebanon, Libya or Turkey be more responsible for Syrian or Eritrean refugees than Italy, Hungary or Sweden? Yet off-shoring rests on the presumption that at least in the initial phase of access to the asylum procedure and reception, the burden can be shifted to countries that are geographically closer to the countries of origin.

3.2. Practical concerns

This lack of taking up responsibility in the initial phase may be compensated by taking up responsibility in a later phase by resettlement of recognised refugees in the EU. Yet in practice such solidarity is not easily achieved: the numbers of resettlement from Turkey to the EU have remained low. Even between Member States relocation of asylum seekers from one State to another to lighten the burden on Italy and Greece has been problematic, with some Member States refusing to participate.[7] Even if such solidarity is in place, with a solid resettlement scheme for recognised refugees, the fact remains that the countries where the off shore processing takes place, will remain responsible for rejected applicants.

3.3. Financial concerns

Taking on responsibility for those requiring international protection and not to be returned to their countries of origin has financial repercussions as well. A registration or status determination procedure will have to be set up, combined with reception and, in the longer term, integration measures that guarantee living conditions that meet the standards of human dignity. This financial support has also been one of the elements in the EU-Turkey agreement. While a substantial amount of 6 billion euro was pledged to Turkey, the question remains if these means are sufficient to support the Syrian refugee population in Turkey and how they should be distributed: to the Turkish authorities or directly to actors in the field working in matters of education, health care, employment, housing etc.

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[6] B. Nagy, "The moral irrelevance of geographic proximity in the protection of refugees" (2019) www.nagyboldizsar.hu/uploads/2/6/7/7/26778773/the_moral_irrelevance_of_geographic_proximity_20191206.pptx.

[7] See the recent ECJ Judgment, 2 April 2020, *Commission* v *Poland, Czech Republic and Hungary*, C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257.

3.4. Legal Concerns

A full implementation of the Australian model of off-shoring of asylum applications would require a number of substantial changes in the existing Common European Asylum System.

At present, the Procedures Directive 2013/32/EU requires that persons who introduce an asylum application on the territory of the EU have the right to an examination of their claim, even if this is only a fast track procedure in case of ineligibility or manifestly unfounded applications. Access to a procedure is crucial to benefit from the right to asylum as guaranteed by Article 18 of the EU Charter of Fundamental Rights and Freedoms. Abolishing the right of access to a procedure on the territory of EU Member States, requires guarantees of access to similar forms of protection in the third country.

Secondly, the Qualification Directive defines those in need of protection and their rights upon recognition of protection status. Will these criteria also apply in the off shore determination country? How can one guarantee that the off-shoring country will give similar protection? This concern is also embedded in the Procedures Directive.[8] Asylum claims can be declared inadmissible if the claimant has passed or resided in a first country of asylum (Article 35) or in a safe third country (Article 38). A first country of asylum is a country where the applicant has been recognised as a refugee and can still avail him/herself of that protection, or where he or she otherwise enjoys sufficient protection, including benefiting from the principle of non-refoulement, provided that he or she will be readmitted to that country. A safe third country is a country where the applicant will benefit from guarantees that he/she will not risk persecution or serious harm, and where the principle of non-refoulement under the Geneva Convention and 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. In addition, the possibility must exist to request refugee status and to receive protection in accordance with the Refugee Convention. Critique has been raised that the existing legal framework in Turkey does not sufficiently meet these criteria.

Of course, EU directives and regulations may be amended so as to make off-shore processing of asylum claims possible. Nevertheless, this will not liberate the Member States from other international human rights obligations, like the principle of non-refoulement in the Geneva Refugee Convention: refugees cannot be returned or indirectly to their country or origin. As Turkey still applies the 1951 regional limitations of the Refugee Convention, the formal legal guarantee against refoulement for Syrians is lacking in Turkey. From this follows that for off-shore processing not to entail the risk of violating the Geneva Convention, access to the procedure and effective examination of the risk under the Geneva Convention is required, with a guarantee of non-refoulement.

A similar argument can be developed as regards the risk to life, the risk of torture, inhuman or degrading treatment of punishment, all prohibited by Articles 2 and 3 of the European Convention of Human Rights. The European Court of Human Rights has held in *Hirsi v. Italy* (2012)[9] that the enforced return of irregular migrants to the point of departure of their attempted Mediterranean crossing, without any individual processing, let alone examination of asylum claims, constituted a violation of Article 3 ECHR prohibiting inhuman and degrading treatment (for risk of ill-treatment in Libya and risk of repatriation from Libya to countries where ill-

[8] 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, *OJ* L 180, 29.6.2013, p. 60.
[9] ECtHR, 23 February 2012, *Hirsi Jamaa and Others* v *Italy* [GC], Application No. 27765/09.

treatment is risked), a violation of Article 4 of Protocol no. 4 prohibiting collective expulsion and a violation of Article 13 ECHR guaranteeing a domestic remedy for any arguable complaint of a violation of the Convention. Also the living conditions in the country of off-shoring must be taken into consideration to determine if there is a risk of ill-treatment under Article 3 ECHR there.[10]

4. Conclusion

The adoption and implementation of offshoring may give rise to serious legal concerns, in addition to moral, practical and financial concerns. Concrete examples of these have also emerged in the context of the EU-Turkey Deal. This is not to say that the treatment of asylum applications outside the EU with a further possibility of legal entry and/or resettlement in the EU at a later stage, is not a possible manner to approach current asylum streams. When inspired by the idea of taking on the joint responsibility of the international community to support those who are unprotected, the creation of so-called legal pathways for migration may prevent many from having to undertake often horrendous odysseys from their war-torn countries. It would also externalise the solidarity of the EU beyond its borders.
The adoption of the Australian off-shoring solution would require a fundamental paradigm shift in the area of EU asylum protection and even in the area of human rights protection in Europe. Australia is not bound by any constitutional human rights framework or regional human rights convention, making it hard to blindly transpose the Pacific Solution to Europe. The EU Member States and Turkey are subject to the provisions of the European Convention of Human Rights, requiring of them a higher legal respect for the principle of individual dignity. Replying to both this need for protection of the individual, while managing the impact of high influx of irregular migrants is, as the EU-Turkey Deal demonstrated, a delicate exercise.

[10] ECtHR, 21 January 2011, *M.S.S.* v *Belgium and Greece* [GC], Application No. 30696/09.