

Human Act or Devil's Pact?

Human rights aspects of migration agreements between EU and third countries

NETHERLANDS
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The Netherlands Institute for Human Rights
in collaboration with the Meijers Committee

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Introduction

We all remember the images of large groups of migrants, many of them refugees, trying to cross the border in various parts of Europe, on their way to EU Member States in Western Europe in 2015. Through the media, we were regularly confronted with the deadly consequences of dangerous attempts by migrants to cross the Mediterranean Sea on overcrowded, often unseaworthy, boats. In fact, according to the International Organisation for Migration, 2015 was the deadliest year for migrants and refugees risking this crossing: 3,771 lives were lost. A year before: 3,279.¹

Since then, the European Council has convened various meetings discussing the necessity to reduce the number of migrants and refugees coming to Europe. These discussions tend to focus more on saving human lives at sea and preventing people smuggling, and less on safeguarding human rights, such as the right to asylum and the prohibition of refoulement. Part of the solution at the time was sought in collaboration with Turkey. Thus on 18 March 2016 the EU Member States and Turkey concluded a far-reaching agreement to manage the migration between Turkey and Greece.² The European Commission considers this agreement a success and uses it as an example for developing future agreements with other third countries.³ In June 2016, the European Commission issued a proposal for a framework for new migration partnerships with third countries. It proposed tail made 'compacts', based on individual country assessments to decide which measures would be necessary and attainable to manage migration in a specific country context. Sixteen countries have been identified as a priority by the European Commission.⁴ These are mainly countries of origin and countries of transit of refugees and migrants. The Dutch government agrees with the proposal of the European Commission,⁵

and considers it the implementation of its own vision put forward during the Dutch Presidency of the European Council in the first half of 2016.

While the European Union considers the agreement with Turkey a successful example for further migration compacts, its measures are being criticised by various academics⁶ and non-governmental organisations on the basis of human rights and democratic concerns.⁷ Consequently, shortly after the publication of the European Commission's plan for new migration partnerships with third countries in June 2016, over 100 human rights organisations called upon the European Council to reject this proposal and instead to develop a sustainable long-term and evidence-based strategy in consultation with civil society organisations and experts.⁸ It is not unlikely for the number of people leaving their country to flee from hunger and drought, violence or poverty to increase in the coming years. We should therefore not downplay the need for migration management nor the urgency for addressing the root causes of migration.

The Netherlands Institute for Human Rights and Meijers Committee are aware that managing migration is a

external dimension of migration, <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2016/06/24/mededeling-externe-dimensie-migratie/mededeling-externe-dimensie-migratie.pdf>.

1 IOM, Press Release, IOM Counts 3,771 Migrant Fatalities in Mediterranean in 2015, 1 May 2016, <https://www.iom.int/news/iom-counts-3771-migrant-fatalities-mediterranean-2015>.

2 European Council, Council of the European Union, Press releases and statements, EU-Turkey Statement, 18 March 2016, <http://www.consilium.europa.eu/nl/press/press-releases/2016/03/18-eu-turkey-statement/>.

3 European Commission, Press release, Commission announces New Migration Partnership Framework: reinforced cooperation with third countries to better manage migration, 7 June 2016, http://europa.eu/rapid/press-release_IP-16-2072_nl.htm.

4 COM(2016) 385 final, 7 June 2016, p 8.

5 The Dutch government, Documents, Rapports, Communication

6 'Three legal requirements for the EU-Turkey deal: An interview with James Hathaway', Maximilian Steinbeis, 9 March 2016, www.verfassungsblog.de. 'Legal requirements for the EU-Turkey Refugee Agreement: A reply to J. Hathaway', Kay Hailbronner, 11 March 2016, www.verfassungsblog.de, Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System, *Common Market Law Review* 53(2016), p. 607-642, 5 April 2016 Last revised: 27 May 2016, Available at SSRN: <https://ssrn.com/abstract=2756709>.

7 See for example: 'Turkey: No safe refuge. Asylum-seekers and refugees denied effective protection in Turkey' 3 June 2016, <https://www.amnesty.org/en/documents/eur44/3825/2016/en/>, 'UNHCR redefines role in Greece as EU-Turkey deal comes into effect', 22 March 2016, <http://www.unhcr.org/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>, and UNHCR, Representation in Greece, GREAT/HCR/973, 'Subject: Response to query related to UNHCR's observations of Syrians readmitted to Turkey', 23 December 2016 <http://www.statewatch.org/news/2017/jan/unhcr-letter-access-syrians-returned-turkey-to-greece-23-12-16>.

8 'Joint NGO statement ahead of the European Council of 28-29 June 2016. NGOs strongly condemn new EU policies to contain migration', 27 June 2016, <https://www.hrw.org/news/2016/06/27/joint-ngo-statement-ahead-european-council-28-29-june-2016-ngos-strongly-condemn-new>.

source of great concern to citizens and governments in the EU. However, managing migration should not compromise the fundamental human rights to which the EU and the individual Member States have committed themselves. In the paper that follows, the Institute and Meijers Committee will list the human rights that may be jeopardised by the scheduled agreements. Member States and EU repeatedly emphasise that the agreements must be implemented in conformity with human rights obligations under international and European law.⁹ This paper offers a yardstick for establishing whether the proposals and agreements about migration comply with these human rights obligations. This yardstick is intended for civil servants and government officials developing the agreements with third countries, for leaders of government and national and European parliamentarians approving the agreements and/or monitoring their implementation process, for journalists and non-governmental organisations acting as watchdogs and for citizens concerned about the respect for human rights of their own government and EU.

This paper focuses exclusively on the external dimension of the agreements with third countries. The cooperation between Member States within the EU and the situation of refugees and other migrants within the Member States themselves are not discussed, unless these are directly affected by the agreements. Nor shall it address the human rights obligations which the European Member States have entered into under various human rights treaties with regard to international cooperation, for example to deal with the root causes of migration. The focus is on preventing human rights violations as a consequence of migration compacts with third countries. The yardstick can be used in each phase of the policy cycle: from the development and approval phase, throughout implementation up to the review, monitoring and evaluation phases.

9 See both the EU-Turkey Statement (“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.”) as well as the Commission Communication (“The ultimate aim of the Partnership Framework is a coherent and tailored engagement where the Union and its Member States act in a coordinated manner putting together instruments, tools and leverage to reach comprehensive partnerships (compacts) with third countries to better manage migration in full respect of our humanitarian and human rights obligations.”)

1 EU Migration Partnerships with third countries

Migrants travelling to Europe come from various countries and for various reasons. Many migrants enter Europe in a legal manner, with a visa, a work permit or as part of family formation or reunification. This paper is not about them. This paper is about the large number of migrants for whom it is not possible to come to Europe in a legal manner and who thus travel to Europe in an ‘irregular’ or ‘illegal’ manner. Sometimes on their own, often with the help of people smugglers. Some of these migrants are asylum seekers, people who do not feel safe in their own country and who look for safety in Europe. This group includes war refugees, for example from Syria or Eritrea. Many of these migrants are not fleeing war, oppression or prosecution, but are trying to escape poverty and hunger or are seeking a better life than in their country of origin. These ‘irregular’ migrants include migrants from Northern and Sub-Saharan Africa, but also from Pakistan, Iran and Bangladesh for example. Since a ‘legal’ route, such as by plane or via regular border crossings, is often not possible for these migrants, they resort to crossing the Mediterranean Sea, to Greece, Italy, Malta or Spain, often on board unseaworthy boats. The number of persons who drowned, went missing at sea or were rescued by various coast guards has increased in recent years. Moreover, since the beginning of the civil war in Syria, the number of migrants travelling via Turkey also increased, increasing the call for action from EU Member States and from European institutions.

In May 2015, the European Commission presented a new European migration agenda¹⁰ which combined internal and external EU policy. The agenda was built upon four pillars

- 1 addressing the root causes behind irregular migration and forced displacement (fleeing)
- 2 saving lives and securing the external borders
- 3 strengthening the common asylum policy, and
- 4 developing a new policy on legal migration.

Against this background, the EU and Turkey agreed to a joint action plan in October 2015 with respect to migration management, for which 3 billion euro were made available to Turkey in November of that same year. The main objectives of that action plan consisted of: addressing the root causes of the crisis in Syria, improving the conditions of Syrian refugees in Turkey, and strengthening cooperation to prevent irregular migration to the EU¹¹.

¹⁰ COM(2015) 240 final, 13 May 2015.

¹¹ European Commission, Fact Sheet EU-Turkey joint action plan Brussels, 15 October 2015, http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm.

In November of that same year, a migration summit of the European Council took place in Valletta with heads of state and government of African countries, resulting in an action plan with five key elements:

- 1 address the root causes of irregular migration and forced displacement
- 2 enhance cooperation on legal migration and mobility
- 3 reinforce the protection of migrants and asylum seekers
- 4 prevent and fight irregular migration, migrant smuggling and trafficking in human beings, and
- 5 work more closely on return, readmission and reintegration.¹²

Then, on 18 March 2016, further agreements about migration between EU Member States and Turkey entered into force. Agreements better known as the ‘EU-Turkey deal’. These agreements include among others:

- All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. Migrants arriving in the Greek islands will, however, be able to apply for asylum. Migrants not applying for asylum or whose application has been rejected will be returned to Turkey
- For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU
- Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU
- 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
- The EU will financially support Turkey to improve humanitarian conditions for Syrian refugees in Turkey.¹³

¹² European Council, Council of the European Union, Press releases and statements, Valletta summit on migration, 11-12 November 2015. Action plan and political declaration, 12 November 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/11/12-valletta-final-docs/>.

¹³ European Council, Council of the European Union, Press releases and statements, EU-Turkey Statement, 18 March 2016, <http://www.consilium.europa.eu/nl/press/press-releases/2016/03/18-eu-turkey-statement/>.

As set out in the introduction, the European Commission, as well as many Member States, consider the EU-Turkey deal to be great success because of the reduction in the number of deaths at sea and improved regulation of migration.¹⁴ Building on the European migration agenda of 2015 and referring to these successes, the European Commission, in June 2016, announced new migration partnerships with third countries aimed at better migration management. These so-called tailored “compacts” with key third countries would be developed according to the situation and needs of each partner country, depending on whether they are a country of origin, country of transit or a country hosting many displaced persons (read: refugees)¹⁵. In this context, the EU wants to use all policies and instruments at the EU’s disposal, such as development policies, trade policies and financial assistance. Without concrete results from the partner countries in managing migration better, the EU should review its engagement and financial aid.

The compacts serve the following purpose in the short term: save lives in the Mediterranean Sea, increase rates of return to countries of origin and transit, and enable migrants and refugees to stay close to home to avoid people taking dangerous journeys. The compacts should then set specific and measurable objectives in the following fields: work with key partners to improve legislative and institutional framework for migration; concrete assistance for capacity building on border and migration management, including providing protection for refugees; increasing rates of return and readmission and focus on reintegration; and stemming the irregular flows while offering legal migration channels, including increased resettlement efforts.¹⁶

Today, this new European Partnership Framework is recognised as the EU approach to address the challenges of irregular migration and its root causes as part of a wider cooperation with third countries.¹⁷ The European Commission therefore frequently issues progress reports on the implementation of this framework.¹⁸ At the time of writing the EU is negotiating with a number of countries, including Niger, Nigeria, Senegal, Mali, Ethiopia, Jordan, Lebanon, Afghanistan, Pakistan, Bangladesh, Iran, Egypt, Libya, Morocco and Algeria. Some of these countries are predominantly countries of origin, whilst others are both country of origin and country of transit. Some others are also countries of destination of migrants. In the case of human rights obligations with respect to migration management, it matters whether the agreements apply to refugees, asylum seekers or (irregular) migrants. This will be explained in more detail below.

The European Commission’s documents about the Partnership Framework provide many examples of possible forms of cooperation, such as stricter border management in Libya and possibly in Egypt and Tunisia, the organisation of asylum procedures for the EU in Libya or other third countries, improved border management in countries such as Niger to avoid irregular migration to Libya or Algeria, readmission agreements with Nigeria for its own nationals, projects in Mali to strengthen voluntary return of migrants in transit, collaboration with Ethiopia to speed up the return process of its own nationals and arrangements regarding accelerated return and reintegration of Afghani nationals with Afghanistan.¹⁹

The following part will highlight the human rights obligations that need to be taken into account when developing, implementing and monitoring these agreements.

14 European Commission, Press release, Commission announces New Migration Partnership Framework: reinforced cooperation with third countries to better manage migration, 7 June 2016, http://europa.eu/rapid/press-release_IP-16-2072_nl.htm, p.2.

15 See footnote 14.

16 COM(2016) 385 final, 7 June 2016.

17 COM(2017) 205 final, 2 March 2017.

18 COM(2017) 205 final, 2 March 2017.

19 COM(2017) 205 final, 2 March 2017; COM(2016) 960 final, 14 December 2016.

2 Relevant human rights

The agreement between the EU and Turkey has been criticised by academics²⁰, UNHCR²¹ and various non-governmental organisations²² on grounds of human rights and democratic concerns. Criticism extended, for example, to the agreement's legal status, the rights of people in the so-called *hotspots*, the increased impossibility for refugees to find protection, and the question of whether Turkey can be designated a safe third country. UNHCR indicated that the Turkish authorities did not always enable them to monitor persons returned to Turkey from Greece, and that it consequently could not adequately assess their situation in Turkey.²³ In a letter to the European Council, over 100 human rights organisations called for the European Commission's new proposal for migration partnerships to be rejected, and instead to develop a sustainable, long-term and evidence-based strategy in consultation with civil society organisations and experts.²⁴

Below we address the most relevant human rights that could be compromised as a result of the EU's agreements with third countries. For each human right we formulate a number of key questions. Thus we will create a human rights yardstick which can be used to assess these agreements.

2.1 The right to seek and obtain asylum

Article 14 of the Universal Declaration of Human Rights (UDHR), adopted shortly after the Second World War, mentions the right of everyone 'to seek and to enjoy in other countries asylum from persecution'. The 1951 Refugee Convention determines who can be designated a refugee and the criteria for enjoying refugee protection. A refugee is defined as a person who has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion (Article 1A(2) Refugee Convention). The original Refugee Convention referred to refugees from Europe, but the Convention's scope was extended to non-Europeans with the Additional Protocol of 1967. Influenced in part by the jurisprudence of the European Court of Human Rights, in European law persons fleeing a war are equally considered to have the right to asylum, if the war poses a serious risk to the person's life.²⁵ A person seeking protection as a refugee is called an asylum seeker. Article 18 of the EU Charter guarantees the right to asylum 'with due respect for the rules' of the Refugee Convention.

This does, however, not guarantee the right to asylum in a specific state, such as an EU Member State. States may therefore refer refugees to a safe alternative elsewhere. The international system of refugee protection however aims to ensure that a refugee can enjoy asylum in at least one state effectively, i.e. in accordance with the Refugee Convention. The right to flee the country of persecution to seek asylum elsewhere goes hand in hand with the equally ensured human right of everyone to leave any country (Article 13 UDHR, Article 12, paragraph 2, International Convention on Civil and Political Rights (ICCPR), and Article 2 Fourth Protocol European Convention on Human Rights (ECHR)).

²⁰ See footnote 6.

²¹ 'UNHCR redefines role in Greece as EU-Turkey deal comes into effect', 22 March 2016, <http://www.unhcr.org/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>.

²² See for example: 'EU: Turkey Mass-Return Deal Threatens Rights Would Harm Refugees, Undermine EU's Principles' 15 March 2016, <https://www.hrw.org/news/2016/03/15/eu-turkey-mass-return-deal-threatens-rights>.

²³ UNHCR, Representation in Greece, GREAT/HCR/973, 'Subject: Response to query related to UNHCR's observations of Syrians readmitted to Turkey', 23 December 2016, <http://www.statewatch.org/news/2017/jan/unhcr-letter-access-syrians-returned-turkey-to-greece-23-12-16.pdf>.

²⁴ See footnote 8.

²⁵ European Court of Human Rights, 17 July 2008, NA. v UK, 25904/07; Article 15(c) of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), O.J. 2011, L 337/9, 20 December 2011.

The protection of a refugee consists of protection against being returned (the prohibition of *refoulement*; Article 33 of the Refugee Convention), as well as the protection and realisation of political and socio-economic rights. The Refugee Convention mentions the right to employment, education, housing and social security, to name a few.²⁶ UNHCR, for instance, emphasises that the protection of refugees may not be reduced to physical protection only²⁷. This would not be consistent with the idea codified in the Refugee Convention that refugees must be enabled to build a new socio-economic existence in the country of asylum and thus, in principle, must benefit from rights equal to those enjoyed by nationals of that country.

For the assessment of the migration compacts, relevant human rights questions that arise:

- 1 **Is the third country concerned party to the Refugee Convention, including its Additional Protocol?**
- 2 **Does the third country concerned offer protection in accordance with the Refugee Convention, in the sense that the country:**
 - a Has established an asylum procedure in legislation that is accessible in practice to asylum seekers?
 - b Grants refugee status to those in need of protection?
 - c Provides refugees, in legislation and in practice, with access to housing, education, medical care, employment and social security?
 - d Has an effective remedy system for human rights violations, in legislation and in practice?
- 3 **If the answer to question 1 and / or 2 is 'no', are compensation measures provided, such as resettlement, which enable refugees to seek protection in the EU or in another safe country?**
- 4 **Can nationals and migrants leave the third country concerned unimpeded?**

26 See Articles 17, 21, 22, 23, 24 of the 1951 Refugee Convention.

27 UNHCR 'Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept', 23 March 2016, <http://www.refworld.org/docid/56f3ee3f4.html>.

2.2 The prohibition of *refoulement* and the principles of a safe third country, first country of asylum and safe country of origin

The prohibition of *refoulement*

The prohibition of *refoulement*, set out in Article 33 of the Refugee Convention, establishes that a refugee may not be returned to a country in which his or her life or freedom would be threatened. Persons that can be defined as refugees are entitled to this protection. Under Article 3 of the ECHR²⁸, Article 19 of the EU Charter and EU Qualification Directive 2011/95/EU, this protection is extended to other persons who – upon return – run a real risk of torture or inhuman or degrading treatment, or a threat to life as a result of armed conflict. This risk may arise from individual or group-related circumstances, such as belonging to a certain minority group or the existence of a (civil) war. In 2015, the European Court of Human Rights (ECtHR) established that the situation in Syria was so unsafe that no Syrian could be expelled to it.²⁹

For the prohibition of *refoulement* to apply it does not matter whether or not the person has already been granted refugee status, or whether the person as applied for asylum. Moreover non-*refoulement* also applies during interceptions at sea. In *Hirsi Jamaa v Italy*, the ECtHR established that Italy had violated Article 3 by the immediate return of intercepted boat migrants to Libya, because 1) the migrants were not given the opportunity to apply for asylum, 2) Libya did not offer refugees any special protection, 3) irregular migrants in Libya were systematically detained in inhuman conditions and 4) migrants risked being transferred to unsafe countries of origin, namely Somalia and Eritrea.³⁰ From the fourth observation we may deduct a prohibition of 'indirect' *refoulement*, i.e. returning persons to a third country that in turn, transfers them to an unsafe country.

28 European Court of Human Rights, 30 October 1991, *Vilvarajah e.a. v UK*, 13163/87.

29 European Court of Human Rights, 15 October 2015, *L.M. e.a. v Russia*, 40081/14.

30 European Court of Human Rights, 23 February 2012, *Hirsi Jamaa v Italy*, 27765/09.

Safe third country and first country of asylum

Non-refoulement is considered the lowest threshold of protection under refugee law. European law formulates further conditions for the removal of asylum seekers (persons who have not yet been granted refugee status) from the EU to an alleged safe third country. According to the EU Asylum Procedures Directive, asylum applications can be declared inadmissible if a 'safe third country' or a 'safe first country of asylum' is available. This means that not the EU Member State, but the 'safe third country' or the 'safe first country of asylum' will handle or has handled the application for asylum. This is related to the fact that the right to asylum does not equal the right to asylum in a country of choice. A possible consequence of increased cooperation with third countries is that these concepts will play a more central role in asylum procedures.

The conditions for applying the concept of **first country of asylum** (Article 35 of the EU Asylum Procedures Directive), are:

- a the asylum seeker has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection, or
- b the asylum seeker otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement.

And only provided the asylum seeker will be readmitted to that country.

Although 'sufficient protection' mentioned under b has not been elaborated further, UNHCR assumes that this not only refers to prohibition of direct refoulement, but also against indirect refoulement, and to protection and treatment in accordance with general human rights standards, such as adequate standard of living, access to the labour market, healthcare and education, as well as the right to legal residence, care for vulnerable persons and the availability of a sustainable solution such as permanent residence.³¹ UNHCR further emphasises that protection must not only be guaranteed in law but also in practice. And any appeal against the validity of the application of first country of asylum inherently requires an individual examination.

31 UNHCR 'Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept', 23 March 2016, <http://www.refworld.org/docid/56f3ee3f4.html>.

The conditions for applying the concept of **safe third country** (Article 38 of the EU Asylum Procedures Directive), are:

- 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 to life, or other cruel, inhuman or degrading treatment or of loss of life as a result of armed conflict
- c the principle of non-refoulement in accordance with the Refugee 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 apply for refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention.

The provision that the asylum seeker is admitted to that country equally applies here. Moreover, there must be a 'connection' between the asylum seeker and the third country concerned on the basis of which it is reasonable for that person to go to that country. Transit alone is not enough to assume a connection according UNHCR.³² Moreover, a Greek court ruled that Turkey did not satisfy the conditions to be considered a safe third country, among other things because of evidence that Turkey violated the principle of non-refoulement, and that Turkey did not adequately ensure the rights set out in the Refugee Convention.³³

Safe country of origin

As soon as migration compacts include agreements pertaining to the readmission of a country's own nationals, the concept of **safe country of origin** comes into play. The conditions for designation as such, are established in Annex I to the EU Asylum Procedures Directive. A country is considered as a safe country of origin if, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution (as defined in Article 9 of the EU Qualification Directive, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

32 See footnote 31.

33 An English translation of this ruling has been made available by the Dutch Senate (De Eerste Kamer der Staten-Generaal): APPEALS COMMITTEE PD 114/20101 Decision 05/133782, 17 May 2016, https://www.eerstekamer.nl/bijlage/20160603/griekse_uitspraak_inzake_het_niet/document3/f/vk4m914hdass.pdf.

In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

- a the relevant laws and regulations of the country and the manner in which they are applied
- b observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the United Nations Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention
- c respect for the non-refoulement principle in accordance with the Refugee Convention
- d provision for a system of effective remedies against violations of those rights and freedoms.

These conditions were discussed extensively in a recent ruling by the court of Den Bosch, which concluded that Tunisia was not a safe country of origin.³⁴ The judge argued that the assessment of whether or not a country can be considered a safe country of origin must be based on objective and up-to-date information, which in any case should include, if available, information from other Member States, from the European Asylum Support Office (EASO), UNHCR, the Council of Europe, and other relevant international organisations. The information should show that the legal and regulatory framework in that country prohibits the aforementioned persecution and treatment in line with Article 3 of the ECHR, and enables the authorities in that country to effectively offer protection against it (the legal situation). The information should further prove that the legal and regulatory framework is implemented in practice and that protection is indeed provided. For the latter an effective remedy system is crucial (the actual situation). Moreover, after it designates a country as a safe country of origin, the State must re-assess the situation on a regular basis.

In summary, a safe country of origin must not only offer legal and practical protection against persecution, but also have an effective remedy system against human rights violations. These conditions equally apply to the designation of safe third country and first country of asylum.

How to decide whether country is safe or not?

In the ruling cited above from the court in Den Bosch, the judge mentions a number of sources that could serve to decide whether or not a country can be considered safe. These sources are also cited in Article 37, paragraph 3 of the EU Asylum Procedures Directive. In the case mentioned above, the Netherlands had used the *Fragile State Index*³⁵ and *Freedom House* reports³⁶ to argue that Tunisia is a safe country of origin. Other authoritative sources that could be used include the *Universal Periodic Review (UPR)*. This is the 'human rights examination' to which the United Nations Human Rights Council subjects each State Party to UN human rights treaties every few years.³⁷ Concluding Observations from the Committees that monitor compliance with specific human rights conventions (such as the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child) could also provide useful information about the human rights situation in a particular country.³⁸

Relevant human rights questions that arise:

- 5 **Has the third country concerned established the prohibition of (indirect) refoulement in legislation, and is it enforced in practice?**
- 6 **In case of returning asylum seekers (whose application for asylum has not yet been considered):**
 - a Is the third country concerned a safe third country, a first country of asylum or a safe country of origin in line with the EU Asylum Procedures Directive?
 - b Is each asylum seeker guaranteed an examination of the individual's situation of the safety for him or her of the third country, first country of asylum or a country of origin?
 - c Is there a connection between the asylum seeker and the third country concerned?
 - d Does the third country concerned have an effective remedy system against human rights violations, both in theory and in practice?
 - e Has the general human rights situation in the third country been thoroughly assessed using objective and up-to-date information, and is this assessment renewed on a regular basis?

34 Rechtbank Den Haag (Zittingsplaats 's Hertogenbosch), 29 March 2017, ECLI:NL:RBDHA:2017:3186.

35 See footnote 34, para 12.

36 See footnote 34, para 12.

37 United Nations, Office of the High Commissioner, Universal Periodic Review <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

38 Article 17 of the Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18-12-1979 and Article 43 of the Convention of the Rights of the Child, New York, 20-11-1989.

2.3 The prohibition of collective expulsions

There is a certain risk that agreements with third countries will lead to accelerated return and readmission procedures of a collective nature. This could conflict with the prohibition of collective expulsions. The ECHR includes a prohibition of collective expulsions of aliens in Article 4 of its Protocol No. 4. The EU Charter also prohibits collective expulsions in Article 19. The prohibition of collective expulsions can be invoked by any alien, not only refugees or asylum seekers.

The prohibition of collective expulsions is increasingly invoked at the ECtHR by migrants falling under readmission agreements, such as concluded between Italy and Tunisia, Italy and Libya and the EU and Turkey. A potential risk of such agreements is that persons that do not apply for asylum – or who are not given the opportunity to do so – are subjected to very quick and non-individualised return procedures.

In *Hirsi Jamaa v Italy* the ECtHR confirmed that people may not be collectively expelled and that this prohibition also applied in a maritime environment, i.e. at sea.³⁹ In the context of bilateral agreements between Italy and Libya regarding the transfer of migrants arriving on Lampedusa to Libya, the ECtHR considered that migrants must be identified before expulsion take place and they must be able to provide individual arguments against their expulsion. If they so wished, they should also have been granted the right to appeal against their transfer.⁴⁰ The prohibition of collective expulsions obliges that any decision to expel is made based on the examination of an individual situation, and entails, for instance, that any migrant to be expelled is first identified and offered the opportunity to appeal against his or her expulsion.

39 See footnote 30.

40 European Court of Human Rights, 15 December 2016, *Khlaifia v Italy*, 16483/12.

A relevant human rights question that arises:

- 7 In the case of readmission by a third country, do the agreements provide guarantees against collective expulsions, i.e. guarantees that any expulsion is based on the examination of an individual's situation?**

2.4 Access to justice

If a migrant is of the opinion that expulsion from an EU Member State is not consistent with the law, he or she has the right to lodge an appeal before the court in accordance with Article 13 of the ECHR and Article 47 of the EU Charter. As a rule an appeal against a negative decision to an asylum application has a suspensive effect. This means that a person may not yet be returned while the procedure is pending. This comes down to the right to wait for the final decision in the country of application.⁴¹ However, the European Commission has proposed not allocating a suspensive effect to the appeal if the application has been declared inadmissible.⁴² This could lead to people being returned without effectively offering them the opportunity to challenge the alleged safety of the country of return. This could result in violation of the non-refoulement principle.

As discussed above, the right to access to justice in the third country concerned must also be part of the assessment of whether or not third countries are safe. In general the requirement applies whereby the refoulement prohibition and the rights in the Refugee Convention can only be deemed effective if the third country concerned provides an effective remedy system against violations of human rights.

Relevant human rights questions that arise:

- 8 If aliens are returned to a third country, is the right to access to the courts guaranteed, including the suspensive effect of the appeal?**

41 European Court of Human Rights, 21 January 2011, *MSS v. Belgium & Greece*, 30696/09 and Council of Europe: *Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures*, 1 July 2009, available at: <http://www.refworld.org/docid/4a857e692.html> [accessed 10 May 2017].

42 COM(2016) 467 final, 13 July 2016, Articles 34-36.

2.5 Prohibition of discrimination

Besides the general human rights prohibition of discrimination, as established, for example, in Article 14 of the ECHR, Article 1 of Protocol No. 12 to the ECHR, Articles 3 and 26 of the ICCPR and Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 3 of the Refugee Convention determines that: 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.'

The prohibition of discrimination prohibits unequal treatment, unless it is objectively justified. This is the case if the difference in treatment pursues a legitimate aim and the means of achieving that aim are appropriate and necessary. With regard to discrimination on the grounds of race the ECHR imposes strict requirements that will not easily be satisfied: 'Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.'⁴³ The requirements are also extraordinarily strict with regard to discrimination based on nationality: only 'very weighty reasons' may form justification.⁴⁴ The prohibition of discrimination based on nationality appears to be increasingly relevant in migration cooperation with third countries.

The agreements with Turkey provide for difference in treatment with regard to Syrian refugees and refugees of other nationalities. Syrian refugees are eligible for resettlement in the EU. Refugees of a different nationality are not covered by this agreement. And the safe country of origin concept means that people are subject to different procedural rules based on nationality. The same applies to people that fall under the scope of a readmission agreement with a certain third country. One must always consider the degree to which this difference in treatment can be objectively justified.

One relevant human rights question that arises:

- 9 Do the agreements with the third country make a difference in treatment between aliens or refugees as to race, religion, nationality or on other grounds? If so, is it objectively justified?**

43 European Court of Human Rights, 13 December 2005, *Timishev v. Russia*, 55762 and 55974/00.

44 European Court of Human Rights, 16 September 1996, *Gaygusuz v. Austria*, 17371/90.

2.6 The right to life

The right to life is established, for example, in Article 2 of the ECHR, Article 6 of the ICCPR and Article 2 of the EU Charter. It includes the obligation of Member States to take measures to guarantee the right to life of those that fall under their jurisdiction. This positive obligation, applies, for example, if the authorities know, or should have known, that there is a real and immediate risk that someone may be dying or may become the victim of a crime. And, moreover, that they failed to take measures within the scope of their powers which, may reasonably have been expected to avoid that risk.⁴⁵

The agreements with Turkey were welcomed by the EU and the Dutch Government because they made a significant contribution to reducing the number of deaths from drowning in the Aegean Sea. Agreements with third countries regarding improved border management, for example, with Tunisia and Libya, should reduce the number of crossings and thus also the risk of the loss of life. Cooperation with countries in West Africa aim, for example, to combat human smuggling and human trafficking, such as by increasing the investigative capacity of third countries, or the targeted education of migrants. Such measures could reduce the risk of the exploitation of migrants as well as the number of options of dangerous journeys through the desert or by sea.

The other side of the coin is that stricter border controls generally promote human smuggling. The view is widely shared that the increase in the number of border deaths and the exploitation of migrants is directly related to ending options for migrants, including refugees, to enter the EU.⁴⁶ This requires keeping options to legally enter the EU open, and creating (new) possibilities to do so. Furthermore pressure from the EU to prevent exits from a third country could lead to other violations of human rights, including the detention of migrants. The Special UN Rapporteur on the Human Rights of Migrants reported that the pressure exerted by the EU on neighbouring countries has resulted in the increased use of detention measures on migrants and refugees.⁴⁷ Therefore the human rights consequences of migration agreements with third countries must be viewed in the broader dynamics of migration. It concerns the effects

45 European Court of Human Rights, 10 April 2012, *Kemaloğlu v. Turkey*, 19986/06 and 28 October 1998, *Osman v. UK*, 23452/94.

46 Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants', 24 April 2013, UN Doc. A/HRC/23/46.

47 See footnote 46.

on migration routes and the behaviour of human smugglers and migrants, as well as the effects of the policy choices by third countries related to the treatment of migrants and refugees.

Relevant human rights questions that arise:

- 10 Do the agreements contribute to a reduction in the number of deaths by drowning?
- 11 Do the agreements contribute to the establishment of legal options for refugees to seek protection in a safe third country?

2.7 Reception and detention of migrants

Reception

Standards related to the reception and detention of asylum seekers within the EU are established in the EU Reception Directive 2013/33/EU.

The Refugee Convention provides safeguards for the reception of refugees outside the EU, including the right to housing and assistance. However, most of the rights included in the Refugee Convention (with the exception of, for example, the prohibition of refoulement) depend on having legal residence. The Refugee Convention has no special provisions related to the treatment of asylum seekers, who often do not (yet) have legal residence. Nonetheless, since asylum seekers could be refugees, it is assumed that they can rely on those rights in the Refugee Convention, which assumes no legal residence, including the prohibition of refoulement, safeguards against arbitrary punishment and detention, and the right to education.

The ICESCR provides safeguards for reception outside the EU for asylum seekers and other migrants. The rights laid down by the ICESCR, including the right to an adequate standard of living (Article 11), also apply to persons without legal residence. This was explicitly determined by the Committee that monitors compliance with this Convention.⁴⁸

48 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment* 20, punt 30, 2 July 2009, E/C.12/GC/20.

The way in which a third country receives irregular migrants, as well as asylum seekers, is also relevant in the assessment of whether their return is possible to that country. The ECtHR ruled that the return of boat migrants to Libya was contrary to Article 3 of the ECHR, also because of the risk of them being subjected to appalling living conditions, a marginalised existence and arbitrary detention in inhuman conditions.⁴⁹

Detention

Although within the EU the detention of migrants and asylum seekers is subject to detailed provisions, safeguards against arbitrary detention and against inhuman detention also apply in third countries (Article 9 of the ICCPR). These safeguards are as follows.⁵⁰

- 1 There must be legitimate grounds for detention. Although crossing a border irregularly could constitute grounds for detention, Article 31 of the Refugee Convention states that asylum seekers may only be detained in exceptional circumstances and on the condition that less severe alternatives are not available. The fact that a person uses the services of a human smuggler in itself does not constitute sufficient grounds for proceeding with detention⁵¹
- 2 National legislation must provide for the possibility of detention and offer safeguards against arbitrary detention. Legislation must, for example, prescribe a maximum duration for detention
- 3 A decision to detain someone must be based on an investigation into his or her individual circumstances, as well as into the proportionality and the necessity of detention
- 4 It must be possible to appeal to a judge against detention
- 5 The detention conditions must be humane. This means, for example, that basic needs are satisfied such as clothing, food, safety and toilet facilities. Medical care must be available as well as contact with the outside world
- 6 For asylum seekers it is also assumed that their detention conditions must be adapted to the fact that they are not suspected of any criminal offence.

49 See footnote 30.

50 See UNHCR, *Detention Guidelines, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Geneva, 2012, <http://www.unhcr.org/505b10ee9.html>

51 Article 5 of the Protocol Against the Smuggling of Migrants by Land, Sea and Air prohibits the criminalisation of migrants who are the subject of human smuggling.

Relevant human rights questions that arise:

- 12 Are the reception conditions of (non-detained) asylum seekers and other migrants in the third country concerned satisfactory, in the sense that they provide adequate living conditions and access to care and education for minors? (for refugees see question 2);**
- 13 Does the detention of refugees, asylum seekers or other migrants by the third country concerned satisfy the following conditions?**
- a** legislation accurately describes the conditions for detention as well as a maximum duration
 - b** there are legitimate grounds for detention, and detention is not applied simply because a migrant has applied for asylum
 - c** a decision regarding detention is only taken with due consideration of individual circumstances and the principles of proportionality and necessity. This means that in each case an attempt has been made to ascertain whether any less severe alternatives could suffice
 - d** there is the possibility, in legislation and in practice, to appeal against detention
 - e** living conditions in detention are satisfactory and, in any case, provide for medical care and basic needs such as clothing, food, safety and toilet facilities.

2.8 Democracy and transparency

The EU-Turkey agreements took the form of a press release. Neither the European Parliament, or national parliaments were involved in their establishment. This led to critical questions from the European Parliament, since the EU Treaty requires the agreement of the European Parliament in the case of such agreements with third countries.⁵² The EU adopted the stance that the press release is not a treaty in the sense of the Vienna Convention on the Law of Treaties, or an international agreement in the sense of the EU Treaty. Moreover the General Court of the European Union ruled that the EU cannot be held liable for the content of the press release, because the European heads of government had apparently spoken with Turkey in their capacity as heads of state and heads of government

⁵² European Parliament, Parliamentary questions, 22 March 2016, Question for oral answer to the Council, Rule 128, Birgit Sippel, on behalf of the S&D Group, O-000053/2016.

and not as members of the European Council.⁵³ One danger is that neither the EU, nor individual Member States could be held liable for the content of the agreements. This impedes democratic control with regard to the latter's establishment. Moreover it makes judicial review more difficult in retrospect, as revealed by the Court's decision. From the viewpoint of democratic control and judicial supervision it is desirable for such agreements to have an unambiguous legal status that guarantees control and supervision. If the agreements are not made by the EU, but by individual Member States (including the Netherlands) and should be regarded as a treaty in accordance with international law, they are subject to a national parliamentary right of consent. Consequently the Netherlands could be held liable for the contents.

Given the nature of the agreements, which provide for implementation and supervision by Member States as well as EU institutions, it appears even more appropriate that they were concluded by the EU and not by Member States. Moreover, the division of competences between the EU and Member States to conclude treaties must be taken into account. The EU bears sole competence for treaties with third countries that could alter the scope of EU legislation, and such a treaty may not be concluded separately by Member States.⁵⁴ Since one of the agreements with Turkey now means that all asylum seekers that arrive in Greece from Turkey are readmitted by Turkey, which interferes with internal European agreements related to the distribution of asylum seekers as set out in the Dublin Regulation, it could be argued that the EU is solely competent.

One relevant human rights question that arises:

- 14 Do the agreements with the third country concerned have a clear legal status that guarantees democratic supervision as well as judicial control of compliance with human rights?**

⁵³ Court of Justice, Order of the General Court (First Chamber, Extended Composition), 28 February 2017, *N.M. v the European Council*, T-257/16.

⁵⁴ Article 3(2) Treaty on the Functioning of the European Union.

Conclusion

The European migration agenda, the European Partnership Framework based on this agenda and the subsequent migration compacts being negotiated, all emphasise that the agreements must be implemented in conformity with human rights obligations under international and European law. It is therefore of utmost importance that those involved in developing, preparing, approving and monitoring these agreements are fully aware of these human rights obligations. These include European and national civil servants, parliamentarians and judges, but also journalists and others who follow migration policies.

It goes without saying that saving human lives is of primary importance. This cannot be achieved without combating the root causes of migration, such as war, violence, persecution, but also poverty and inequality in countries of origin. The Netherlands Institute for Human Rights and the Meijers Committee are fully aware of the concerns of citizens and governments alike regarding the challenges of immigration into Europe, such as reception and integration of refugees. They fully understand that managing migration is a top priority.

This paper lays out the international and European human rights obligations which these migration compacts must respect. These obligations have been summarised in a yardstick, which can be used to assess to which extent the agreements between the EU and third countries, safeguard the human rights of refugees, asylum seekers and other migrants.

Human Rights Yardstick

Human Rights Yardstick

- 1 Is the third country concerned party to the Refugee Convention, including its Additional Protocol?
- 2 Does the third country concerned offer protection in accordance with the Refugee Convention, in the sense that the country:
 - a Has established an asylum procedure in legislation that is accessible in practice to asylum seekers?
 - b Grants refugee status to those in need of protection?
 - c Provides refugees, in legislation and in practice, with access to housing, education, medical care, employment and social security?
 - d Has an effective remedy system for human rights violations, in legislation and in practice?
- 3 If the answer to question 1 and / or 2 is 'no', are compensation measures provided, such as resettlement, which enable refugees to seek protection in the EU or in another safe country?
- 4 Can nationals and migrants leave the third country concerned unimpeded?
- 5 Has the third country concerned established the prohibition of (indirect) refoulement in legislation, and is it enforced in practice?
- 6 In case of returning asylum seekers (whose application for asylum has not yet been considered):
 - a Is the third country concerned a safe third country, a first country of asylum or a safe country of origin in line with the EU Asylum Procedures Directive?
 - b Is each asylum seeker guaranteed an examination of the individual's situation of the safety for him or her of the third country, first country of asylum or a country of origin?
 - c Is there a connection between the asylum seeker and the third country concerned?
 - d Does the third country concerned have an effective remedy system against human rights violations, both in theory and in practice?
 - e Has the general human rights situation in the third country been thoroughly assessed using objective and up-to-date information, and is this assessment renewed on a regular basis?
- 7 In the case of readmission by a third country, do the agreements provide guarantees against collective expulsions, i.e. guarantees that any expulsion is based on the examination of an individual's situation?
- 8 If aliens are returned to a third country, is the right to access to the courts guaranteed, including the suspensive effect of the appeal?
- 9 Do the agreements with the third country make a difference in treatment between aliens or refugees as to race, religion, nationality or on other grounds? If so, is it objectively justified?
- 10 Do the agreements contribute to a reduction in the number of deaths by drowning?
- 11 Do the agreements contribute to the establishment of legal options for refugees to seek protection in a safe third country?
- 12 Are the reception conditions of (non-detained) asylum seekers and other migrants in the third country concerned satisfactory, in the sense that they provide adequate living conditions and access to care and education for minors? (for refugees see question 2);
- 13 Does the detention of refugees, asylum seekers or other migrants by the third country concerned satisfy the following conditions?
 - a legislation accurately describes the conditions for detention as well as a maximum duration
 - b there are legitimate grounds for detention, and detention is not applied simply because a migrant has applied for asylum
 - c a decision regarding detention is only taken with due consideration of individual circumstances and the principles of proportionality and necessity. This means that in each case an attempt has been made to ascertain whether any less severe alternatives could suffice
 - d there is the possibility, in legislation and in practice, to appeal against detention
 - e living conditions in detention are satisfactory and, in any case, provide for medical care and basic needs such as clothing, food, safety and toilet facilities.
- 14 Do the agreements with the third country concerned have a clear legal status that guarantees democratic supervision as well as judicial control of compliance with human rights?

Colophon

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