



EU Actions Regarding *the Principle of Non-Refoulement* of Asylum Seekers in Light of EU-Turkey Agreement

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Abstract:

Non-Refoulement is one of the most basic rights known for asylum seekers, which means that no asylum seeker should be returned to the country where there is a reasonable fear that the person would be harassed. This principle, which is non-violable and a *jus cogent* rule, is mentioned in many international instruments, and many countries respect this right; the European Union, both due to the accession of all its members to the international instruments accepting non-refoulement and because of its own instruments, is obliged to adhere to such a principle. However, in practice and when confronted with the flood of Syrian asylum seekers, the EU has entered into an agreement with Turkey and, based on the first paragraph of the treaty, EU returns all Syrian asylum seekers to Turkey, assuming *Article 38 of the instruction on admission conditions* as the legal basis for its action. However, since Turkey is not considered a safe place for asylum seekers, Article 38 of the instruction does not apply to it; consequently, the right to non-Refoulement of asylum seekers is violated by this agreement.

Keywords: EU-Turkey Agreement, Non-Refoulement Principle, European Union, Asylum Seekers Rights

Introduction

The European Union is an organization composed of European governments seeking to establish unity around the institution. Since in organizations whose aim is to create union and unity among members we see the actual

transfer of governmental authorities and competencies to them, so, some of the traditional governmental competencies is transferred to these organizations (Beigzadeh, 1391: 92). One of the most important competencies that EU member states have granted

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to this organization is legislation on common foreign and security policy, i.e. the European Union takes decisions on this area through its pillars. Such decisions which are categorized as the secondary regulations in the EU are based on Article 288 of the Treaty of Rome. According to this article, in order to exercise their competencies, the EU pillars can issue provisions under such titles as the *regulations, directives, decisions, and opinions*. The first two categories (regulations and directives) are indispensable for all the member states of the European Union (Firan.com, 2015).

On the other hand, because of the high importance of EU foreign policy and common security, the Maastricht treaty dealt with the issue to align the related policies in the European Union (Beindi, 1393:92). Accordingly, the EU developed policies on refugees and asylum-seeking issues that fall under the "Common European Asylum System". This system is comprised of the European Union regulations on the rights of asylum seekers, including the instructions for admission, the instructions for accreditation, the Dublin Regulation and other related instruments. (Azarpendar, 1396: 2)

The Syrian civil war has left more than seven and a half million people displaced as of March 2015, with more than three million people leaving for Turkey, Lebanon and Jordan (İçduygu, A., 2015: 2). This growing trend of asylum-seeking led to more than three million Syrian asylum seekers being imposed on Turkey (UNHCR, 2017); many asylum seekers entering Turkey had the dream of joining the European Union. Accordingly, asylum seekers rarely went through land ways (Euronews, 2015) and mostly went through seas, such as the Aegean Sea or the

Mediterranean (Deutsche Welle, 2016), to arrive in Greece (Park, 2015: 313) so as to make their way to other advanced countries of the EU through Greece (Orchard and Miller, 2014: 16); But the EU, which saw the arrival of asylum seekers as an obstacle for its economic growth and security (Sheker and others, 2016: 4), considered the readmission mechanism as the best solution to tackle the phenomenon of illegal entry of asylum seekers (Parvizi, 1394: 59). This mechanism, however, was not always responsive to the flood of asylum seekers, and since the deportation or extradition of asylum seekers to countries posing threats against them was in breach of the imperative principle of "non-Refoulement" (Lauterpacht & Bethlehem, 2003: 141), the EU signed an agreement with the Turkish government on March 18, 2016 in order to transfer its burden of responsibility onto the Turkish government, not only preventing the illegal entry of asylum seekers, but also returning many of the asylum seekers who had entered the EU to Turkey.

The purpose of this agreement is essentially to replace the illegal, irregular, chaotic and dangerous flows of immigration with organized, safe and legalized ways to Europe for people who are internationally under protection in accordance with EU and international law (European Commission, 2016). The first clause of the agreement states that all illegal immigrants or asylum seekers who have arrived from Turkey in Greek islands as of March 20, 2016 will be returned to Turkey (Council of the European Union, 2016). Nevertheless, it should be considered whether the content of this agreement is consistent with the obligations of the EU member states regarding the non-Refoulement of asylum seekers?

The Principle of Non-Refoulement

Non-Refoulement is one of the customary international rights that all states, regardless of their membership in the Convention on the Rights of Refugees, are obliged to observe at all times. Although compliance with this requirement does not seem difficult with individual applications for asylum-seeking, its fulfillment at times of armed conflicts – which expose neighboring countries to the massive onslaught of asylum seekers – can lead to many serious problems (especially in terms of safety) for host governments.

The term ‘non-Refoulement’ in asylum seekers’ rights implies the prohibition of returning an asylum seeker to a country or territory in which his/her life or freedom may be threatened due to race, religion, nationality, membership in a political group or belonging to a social group.(UNHCR, 2016)

The first instrument, in which the non-Refoulement of asylum seekers was stated, was the Convention relating to the International Status of Refugees, which was enacted in 1933 by eight governments. It was in the third article of this convention that the notion of non-Refoulement appeared, and it was argued that the member states would not return any asylum seeker unless when required by security or public order. Of course, this principle did not get the agreement of all states at the time, and three of the eight countries included in the treaty made reservations concerning this article.

In subsequent years, the principle was repeated frequently in instruments related to refugees and asylum seekers. Similarly, in the 1936 and 1938 agreements on German asylum seekers, we have witnessed the writing of this principle, according to which the states parties had pledged that they will refuse to return asylum seekers to their home

countries, except in cases where public order or national security is endangered.

With the end of the World War, the adoption of United Nations General Assembly Resolution 8(1) on February 12, 1946, reaffirmed the prohibition of returning asylum seekers to their country – where they would be harassed – and stated: "No refugees or displaced persons ... who have valid objections to returning to their countries of origin ... shall be compelled to return to their country of origin".

After this resolution, another international instrument on refugee law dealt with this issue: the Ad hoc Committee on ‘Statelessness and Related Problems’ was established in 1951, which resulted in the provision of a instrument with 46 articles; it is the basis for United Nations Convention Relating to the Status of Refugees.

The principle of ‘non-Refoulement’ is recognized as the main rule for protecting asylum seekers and refugees, each year the United Nations General Assembly, while discussing the activities of the United Nations High Commissioner for Refugees, strongly emphasizes in its resolutions the importance of full respect for the principle of non-Refoulement. Besides, many international human rights scholars regard the principle of ‘non-Refoulement’ as the most fundamental subject (and the core) of the asylum-seeking and refugee law which stems from the 1951 Convention.

It is well understood that the large number of States Parties to the 1951 Convention adds to the importance of this key principle and, on the other hand, the provisions of the same Convention confirm this and impose a practical obligation on governments, in a way that Article 42 of the Convention does not permit the right to reservations to Article 33 on the prohibition of non-Refoulement.

In addition to the 1951 United Nations Convention on the Status of Refugees, the principle of non-Refoulement has been addressed in various ways in some other international and regional treaties. Although not all of these instruments explicitly refer to refugees, they imply a general commitment to the prohibition of returning people to a country where the lives or liberties of individuals may be threatened upon return. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) are among such instruments. In addition to the mentioned global instruments, non-Refoulement could be observed in some regional instruments, including the American Convention on Human Rights aka the San José Treaty (1969), the OAU Convention Governing the Specifics Aspects of Refugee problems in Africa (1969), and the African Charter on Human and People's Rights (1981), which also contain similar provisions in this regard. Reference to prohibition of non-Refoulement can be similarly observed in the declarations and resolutions issued by the General Assembly of the United Nations and other international and regional bodies.

In addition to the Declaration on Territorial Asylum (1967) which prohibits governments from extraditing, expulsion or compulsory return of asylum seekers to a country that may prosecute the person (General Assembly, 1967), through separate resolutions and declarations, The United Nations General Assembly also generalizes the obligation to refrain from returning people to a country where they may be subject to arbitrary executions or forced disappearances. The resolu-

tion regarding Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989) and the Declaration on the Protection of All Persons from Enforced Disappearance are two examples of these cases.(Keihanloo, 1382: 133-153)

In its 2004 report No. 31, The United Nations Human Rights Committee states that "States Parties are required by article 2, paragraph 1 [*of International covenant on civil and political rights*] to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction."

In the European Union, we are witnessing progressive laws regarding the principle of non-Refoulement. Article 3 of the European Convention on Human Rights deals with the prohibition of torture, inhuman treatment, and refusing to return refugees to a country where there is the possibility of prosecution and torture. The European Convention on Human Rights has also created serious and significant barriers to the removal and expulsion of foreigners from the territory of member states. Article 3 of the Convention very clearly raises the question of the appropriateness and balance of the danger that an asylum seeker might have for a host country with the risk of his expulsion. If there is strong evidence that the expulsion of a person puts him/her in danger or is contrary to article 3 of the Convention, then the committed European state that expels the refugee should also assume responsibility for his/her security and ensure it in the deportation process.(Parvizi, 1394:148-149) The European Court of Human Rights has also argued that Articles 2, 5 and 6 of the European Convention on Human Rights contain the principle of non-

Refoulement.(Hemme, 2006:32) On the other hand, Article 4 of the EU Charter of Fundamental Rights, which derives from Article 3 of the European Convention on Human Rights regarding the prohibition of torture and inhuman treatment, indirectly stipulates the principle of non-Refoulement of asylum seekers and refugees.(Hemme,2006:29) Also, Article 19 of the Charter, entitled "Protection in the event of removal, expulsion or extradition", prohibits collective and massive returns, and states that no one should be returned a country where there is the risk of torture, inhuman treatment and death penalty. It should be kept in mind that liberal construction interpretations in this regard have expanded to such an extent that grave, gross or widespread violations of human rights would also result in the asylum seeker not returning to the land that such events would happen to him/her.

Finally, it is important to note that there are exceptions to the principle of non-Refoulement of asylum seekers, i.e. when there are strong reasons that the asylum seeker has taken refuge because of being accused of a serious criminal offense and facing a definite judgment by a competent court of law. It is also not much reasonable to support the principle of non-Refoulement when it comes to war criminals and crimes against humanity; since their actions are contrary to the principles and objectives of the United Nations Charter.

Review of the Contents of the Agreement

On March 18, 2016, member states of the European Union signed an agreement with Turkey. Essentially, the agreement aims to prevent the excessive flow of migrants and asylum seekers being smuggled and entering Greece from Turkey through the Aegean Sea. According to the agreement, since March 20,

any asylum seeker who arrives from Turkey in the Greek Islands will be returned to Turkey, and this action will be considered as "a necessary, temporary and extraordinary measure to end humanitarian problems and to restore public order."

According to this deal:

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

- resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly. On the EU side, resettlement under this mechanism will take place, in the first instance, by honoring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015, of which 18.000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54.000 persons. The Members of the European Council welcome the Commission's intention to propose an amendment to the relocation decision of 22 September 2015 to allow for any resettlement commitment undertaken in the framework of this arrangement to be offset from non-allocated places under the decision. Should these arrangements not meet the objective of ending the irregular migration and the number of returns comes close to the numbers provided for above, this mechanism will be reviewed. Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued.
- 3) Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighboring states as well as the EU to this effect.
 - 4) Once irregular crossings between Turkey and the EU are ending or at least have been substantially and sustainably reduced, a Voluntary Humanitarian Admission Scheme will be activated. EU Member States will contribute on a voluntary basis to this scheme.
 - 5) The fulfillment of the visa liberalization roadmap will be accelerated vis-à-vis all participating Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016, provided that all benchmarks have been met. To this end Turkey will take the necessary steps to fulfill the remaining requirements to allow the Commission to make, following the required assessment of compliance with the benchmarks, an appropriate proposal by the end of April on the basis of which the European Parliament and the Council can make a final decision.
 - 6) The EU, in close cooperation with Turkey, will further speed up the disbursement of the initially allocated 3 billion Euros under the Facility for Refugees in Turkey and ensure funding of further projects for persons under temporary protection identified with swift input from Turkey before the end of March. A first list of concrete projects for refugees, notably in the field of health, education, infrastructure, food and other living costs that can be swiftly financed from the Facility will be jointly identified within a week. Once these resources are about to be used to the full, and provided the above commitments are met, the EU will mobilize additional funding for the Facility of an additional 3 billion euro up to the end of 2018.

- 7) The EU and Turkey welcomed the ongoing work on the upgrading of the Customs Union.
- 8) The EU and Turkey reconfirmed their commitment to re-energise the accession process as set out in their joint statement of 29 November 2015. They welcomed the opening of Chapter 17 on 14 December 2015 and decided, as a next step, to open Chapter 33 during the Netherlands presidency. They welcomed that the Commission will put forward a proposal to this effect in April. Preparatory work for the opening of other Chapters will continue at an accelerated pace without prejudice to Member States' positions in accordance with the existing rules.
- 9) The EU and its Member States will work with Turkey in any joint Endeavour to improve humanitarian conditions inside Syria, in particular in certain areas near the Turkish border which would allow for the local population and refugees to live in areas which will be safer.

In a statement provided by the European Union in the interpretation of the agreement, it is declared that the agreement seeks to replace the illegal, irregular, chaotic, and dangerous immigration flows with organized, secure and legal ways to Europe for people internationally protected in accordance with EU and international law (European Commission-Fact Sheet, 2016).

According to EU rules about examining the status of the asylum seeker in the first government, the Greek government authorities are obliged to review all asylum applications for any asylum seeker who arrives in Greece. Those who did not apply for asylum or whose requests were baseless and rejected will be returned to Turkey. In order to implement the plan, Turkish government offi-

cial are present on the territory of Greece and vice versa; and all the expenses of this transfer are covered by the EU. For each Syrian refugee being returned from the Greek Islands to Turkey, another Syrian refugee will be sent from Turkey to the European Union which is known as the "*one in, one out*" rule. However, the number of refugees sent from Turkey to the Union shall not exceed 72,000 people. If the number is not reached, the condition will be re-evaluated and if it reaches more than 72,000 people, the system will stop its activity. (European Council, 2016)

The process of using the €3 billion previously allocated to Turkey by the European Refugee Fund (ERF) will be accelerated, and education, health, infrastructure, nutrition and daily life projects to which the fund is to be allocated will be determined within a week. With regards to the second package, it was announced that "after spending the previous amount to achieve the outcome desired by the European Union, the Union could allocate another €3 billion by the end of 2018 for the aforementioned issues." (Anatoly Press, 2016)

The Legal Status of the Agreement

An important question which needs to be considered here is whether Turkey is a safe place for asylum seekers who are being returned. The answer to this question can, to some extent, assess the legality or illegality of the agreement between Turkey and the European Union. Whether Turkey is a safe place for refugees and asylum seekers, is still full of uncertainty. During the months following the agreement, the Greek Asylum Appeal Committees ruled in many cases that Turkey did not provide effective protection for refugees. (Collett, 2016) This uncertainty has not only been examined in the Appeal Committees, but

the German foreign minister, Sigmar Gabriel, also stated on July 20, 2017, that Turkey was not a safe place to travel because of the possibility that any person could get arrested in the country (DW, 2016).

Recent investigations conducted by Amnesty International in the border provinces of southern Turkey suggest that Turkish authorities have transferred groups of about 100 Syrian men, women and children to Syria on a daily basis since mid-January. Researchers at Amnesty International have some evidence on returning large groups of Syrian refugees from Hatay province to Syria. Among the reports delivered by Amnesty International, there was a case in which three children had to return to Syria without their parents; another case of forced returns included a pregnant woman being returned.

In Turkey, in order for Syrian asylum seekers to access basic services (such as medical necessities, provision of food, medication, and housing), it is essential for them to register with specific institutions. In Amnesty International's investigations, it has been pointed out that the number of these institutions has significantly dwindled in southern border provinces, and it seems almost impossible to enroll in these institutions. Of course, lack of registration of the asylum seekers in these institutions is not the only problem; in the interviews carried out by Amnesty International with the families of Syrian refugees who did not register with Hatay province, they have said that they prefer to stay in their place of residence instead of registering, because they are afraid of being returned to Syria. According to humanitarian assistance groups and camp residents, conditions in the border camps are tragic; such as the lack of clean water and health necessities.

In the same report, there is an interview with someone who says five members of his family were returned to Syria in late February 2016. He states that his 20-year-old brother and his four nephews who aged less than 11 years were forced to leave Turkey and go back to Syria. He said that his brother and his nephews were arrested by the police while playing in a park; and after they had no identification instruments to present, they sent them to a police station. He has told Amnesty International that, a few hours after the arrest, the five asylum seekers were transferred to a bus and returned to Syria along with six other buses carrying about 210 passengers (Amnesty International, 2016).

On the other hand, and from a legal standpoint, Turkey is the only country of the Council of Europe which has merely acceded to paragraph (A), clause (B) of Article I of the 1951 Convention relating to the Status of Refugees. This means that Turkey is committed to European asylum seekers only, based on the convention; while Turkey hosts asylum seekers more than any other country in the world, and many non-European citizens still face barriers to access medical services, education, housing, etc.; and Syrian asylum seekers can only benefit from a temporary protection system in Turkey, that is to say, they can only live there, but they will not enjoy all the protections stipulated in the 1951 Convention. They still face multiple barriers, including registration, access to education, employment, and healthcare. This is while nationals from other countries, such as Iraq and Afghanistan, do not even benefit from the same minimums as Syrian citizens (Human Rights Watch, 2016). A recent report by the Refugees International (RI) has instrumented and recorded the problems of non-

Syrian refugees and the lack of long-term solutions for them. In its report, the group asked the European Union and its member states to prevent the return of asylum seekers to Turkey, whether they are Syrian, Afghan or Iraqi (Izza Leghtas, 2016).

On the other hand, the UN is also against the return of asylum seekers to Turkey's territory, and thus considers the agreement illegitimate. In this regard, Peter Sutherland, the Special Representative of the Secretary-General for International Migration, considered the deportation of asylum seekers and refugees without attending to their asylum applications as a violation of international law, holding the agreement between the EU and Turkey to be completely illegal. To prove his claim, he states two main reasons: "First of all, collective deportations without considering the individual rights of those claiming to be refugees are illegal. Secondly, their rights should be fully protected, over which there are serious doubts. In this regard, the Turkish government has to give enough assurance that the asylum seekers who are sent back to Turkey, will not be returned to Syria, Afghanistan, or wherever else they have escaped from." (The Guardian, 2016)

This procedure is also evident in the case law of national courts of the European Union member states; in several cases, Greek courts have acknowledged that Turkey is not a safe place for asylum seekers, and some of them even say that Syrian refugees are deprived of the most fundamental human rights in Turkey (Collett, 2016); in a way that many of these asylum seekers do not even have a minimum shelter for sleeping and sleep in the streets, parks or mosques at night. (DW, 2016)

In February 2016, more than 57,000 immigrants arrived at Greece, with 52% of them having Syrian citizenship, and more than

41% of them are Afghan and Iraqi nationals (25% and 16%, respectively). All the three groups have significant needs regarding health and life support and other rights and will have to enter Turkey in a while, but it is still unclear whether Turkey has sufficient facilities (legally and practically) to meet these needs. Ensuring all these legal facilities, in accordance with EU law and the 1951 Refugee Convention, is likely to result in the return of very few asylum seekers.

The main problem is that the framework needed for protecting asylum seekers in Turkey may be available on paper, but in practice, there is no such possibility. By the end of February 2016, the number of asylum applications in Turkey was more than 200,000, of which only 38,595 were supported by the Turkish government. Thus, the Turkish government system is not adequate to support asylum seekers and there are many shortcomings that need to be addressed. EU leaders have willfully ignored the simplest of facts: Turkey is not a safe country for Syrian refugees and is getting less safe by the day", said John Dalhousie, Amnesty International's Director for Europe and Central Asia (Reuters, 2016).

Furthermore, Amnesty International believes that tens of thousands of asylum-seeking children cannot access formal education since Turkey is unable to provide proper infrastructures for asylum seekers (Amnesty International, 2016).

Conclusion

One of the main problems of asylum seekers is being returned to the country in which there is a real danger for them and they are reasonably afraid of returning there. The principle of non-Refoulement of asylum seekers should be considered as the main law protecting asylum seekers and refugees, as

well as the main point of the 1951 Convention. In addition to Article 33 of the 1951 Convention, which has now become a *jus cogent* rule (Lauterpacht and Bethlehem, 2003:141), many other instruments also attest to the fundamental nature of this principle. In the European Union, Article 3 of the European Convention on Human Rights has also addressed the principle of non-Refoulement and has forbidden the deportation of any individual that would lead to putting them in danger. Article 4 of the Charter of Fundamental Rights stipulates the principle of non-Refoulement as well. In addition, Article 19 of the Charter deals with the collective return of asylum seekers and prohibits it.

In sending asylum seekers back to Turkey, the EU believes it has acted on the basis of Article 38 of the EU Asylum Procedures Directive. Article 38 of the Asylum Procedures Directive refers to a third safe state—a coun-

try that can guarantee effective access to security and protection. However, Turkey is not a safe place for asylum seekers by virtue of returning these people to Syria, failure to provide basic living requirements for asylum seekers sent back from the European Union, and breaching its other obligations.

Therefore, it can be said that by returning asylum seekers from the European Union to Turkey, and subsequently from Turkey to Syria, a double-layered crime is being committed. In this situation, the Turkish government has not only broken the *jus cogent* rule of non-Refoulement, but also violates other human rights of asylum seekers. The European Union, on the other hand, ignores the human rights of asylum seekers, and in particular Article 33 of the Convention Relating to the Status of Refugees, through the transfer of these people to Turkey.

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