The European refugee crisis and the EU-Turkey deal on migrants and refugees

Guido Savasta

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The uneven balance between security and human rights within the framework of the European external policy on migration and asylum

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1. Introduction

1.1. Subject of the study

The establishment of a common area without internal borders with the guaranteed free movement of persons represents one of the most important achievements and a unique symbol of the European integration. Nonetheless, the very existence of this area relies on the effectiveness of controls at the common external borders. In effect, since the creation of the Schengen area, Member States have tried to work together to manage their common border and guarantee their internal security. To this end, the EU Member States have prevented migrants from illegally crossing their external borders and entering the Union's territory. Thus, since the very beginning, immigration issues together with the questions related to asylum occupied a central place in the political Agenda of the European Union and its Member States. The subjects of immigration and asylum were considered as matters of common interest that needed to be tackled through common policies. In this context, along with the need to secure Europe's external borders, EU cooperation with third countries in the areas of migration and asylum soon became a priority. In effect, the persistent migration flow towards Europe has increased the EU's awareness that relations with countries of transit and origin had to be significantly improved in order to induce or persuade them to cooperate more in the field of migration and border management.

In this context, while the external dimension of EU migration policy has been prevalently built around the objective of better managing migratory flows with a view to reduce migratory pressures on the Union, since 1999 the EU has developed an area of freedom, security and justice. To this end, the European Council held in Tampere set up the guidelines and the priorities for the next five years in order to guarantee safety and security at EU level. In fact, the Heads of State and Government gathered in Tampere explicitly called for the establishment of partnership with countries of origin and transit of migrants. Since then, EU Member States have tried to strengthen their external action and conclude agreements with non-UE States to better manage migration flows. In this regard, the return and readmission procedures of any illegal migrant became a predominant element in the framework of the political dialogue between Member States and their neighbouring countries. In the sphere of border control and migration management, the Hague Programme further stressed the need for closer cooperation in external border check with third countries.

Within this framework, since the security of the Union's external border was an essential issue for European citizens, Member States were forced to undertake important measure to face the new challenges. Consequently, the EU began to focus on external aspects of migration and to include their immigration policies into the Union's relations with third countries. EU border management policy has established clear mechanism to strengthen cooperation with those countries, helping them to enhance their ability to cope with illegal immigration and border control. Moreover, the Union has used all its diplomatic tools to achieve its objectives, offering the countries of origin and transit visa facilitation and development aid in exchange for their engagement in managing mixed migration flows. Mobility partnerships, regional processes and readmission agreements were aimed to obtain various forms of cooperation with third countries, especially in the Mediterranean area. The Global Approach on Migration and Mobility offered the wider framework in which this cooperation has been developed while the creation of Frontex, the European border agency, took a step further in the operational partnership with non-EU States through the so-called working arrangements.

The EU response to the current refugee crisis and the engagement of Turkey is a clear example of the enhanced partnership developed over the years between the EU and its neighbouring countries in the field of migration

and asylum. Soon after the onset of the civil war in Syria, many Syrians started to flee their country in response to the growing danger. Since the first months of the revolt against Bashar al-Assad, Turkey has hosted the vast majority of the Syrian refugees. At present, Turkey is the largest receiver with more than 2.5 million refugees on its soil, followed by Lebanon and Jordan. Even if the new Law on Foreigners and International Protection, which came into force in April 2014, provides temporary protection and assistance for asylum-seekers and refugees, regardless of their country of origin, Turkey still maintains a geographical limitation to the 1951 Refugee Convention. In this context, the recent EU-Turkey agreement could result in an increased risk of *refoulement* and human rights violations.

Many NGOs, like Human Rights Watch, Amnesty International and ECRE fear that the current deal will not only result in boats being turned back and increased detention, but also more refugees stranded at the Turkish-Syrian border. According to them, the EU has externalized its border control procedures, securing its external borders rather than pretending the respect of migrants and asylum seekers' fundamental rights and liberties. As part of the EU-Turkey migration Joint Action Plan signed in November 2015, the EU pledged to improve the humanitarian situation for refugees and asylum seeker in the country, while Turkey committed to undertake all possible measures to seal its border and thus restrict the flow of migrants and refugees towards the EU. In this context, the EU-Turkey deal and in particular the "one in, one out" mechanism to tackle the Syrian refugee crisis may undermine the basic rights of refugees and migrants and constitutes one of the most controversial measure of such a complex plan.

1.2. Statement of purpose and Methodology

In light of the serious crisis currently affecting the European Union, this work reviews the approach adopted by the Members States to cope with the management of the mixed migration flows, including in particular the EU's relations with third countries. I am interested in exploring the evolution of the EU's external policies in the field of migration and asylum. In particular, the main purpose of my thesis is to analyze whether Member States have shaped their relations with non-EU countries in order to manage the mixed migration flows on the road to Europe. Therefore, within the wider framework of the EU's external actions on migration and asylum, I will try to answer to the following research question: Have Member States prioritized security to the detriment of human rights?

Within this framework my work will be based on two main hypotheses. My first hypothesis is that, for the purpose of protecting EU's external borders and guarantee the safeguard of the Schengen area, Member States have adopted a security-based approach with poor regard to the needs of vulnerable migrants and asylum seekers. I suggest that within this approach the EU has supported third countries of origins and transit of migrants in managing the influx of illegal immigrants into Europe, leading to the 'externalization' of control measures beyond EU's borders. Secondly, I assume that by engaging the Republic of Turkey in the management of the mixed migration flows, the EU Member States may be in danger of being complicit in serious human rights violations against those fleeing war, widespread violence and persecution. In addition to this, I suggest that within the framework of the recent refugee crisis, the EU has given priority to a security-based approach at the expense of the human rights of migrants and refugees. My hypothesis is that the Joint Action Plan with Turkey is part of a wider approach in the field of migration and asylum that in the last decades has been mainly driven by security concerns.

In order to answer to the above mentioned question and develop the two main hypothesis, I will provide a critical analysis of the evolution of the EU's external policy on migration and asylum as well as of its

cooperation with third countries, mainly consulting the official documents redacted by the European Commission and the European Council. EU law, with particular attention to binding and non-binding legal instruments, will be taken into account together with the official statements and agreements that paved the way to the cooperation on migration issues between Member States and third countries of transit and origins of migrants. The opinion and the reports from international experts, such as the UN Special Rapporteur on the human rights of migrants or the Commissioner for Human Rights of the Council of Europe, will be an essential part of the work when analysing the balance between security and basic freedoms of migrants, including asylum seekers. In parallel with this, I have consulted the works published by several European Research Institutes, as the Migration Policy Institute, and relevant NGOs, as PRO ASYL and the European Council on Refugee and Exiles, which will represent an important source of information and data over the state of play and the respect of human rights within the territory of the EU and its neighbouring countries. Moreover, to carry out my research I have participated in International Conferences and academic debates on the refugee crisis in the EU, collecting relevant information that have increased my awareness of the current humanitarian emergency on the doorstep of the Union.

1.3. Outline of the study

The thesis is divided into 3 chapters. First, the work presents the facts: after a short description of the unprecedented Europe's refugee crisis, the work analyses the main characteristic of the massive waves of migrants towards Europe in the period comprised between January 2015 and February 2016. In this first part I will also provide, in accordance with the UNHCR's viewpoint, a clear distinction between a refugee and an economic migrant. Moreover, using the data published by the European Border Agency Frontex and the International Organization for Migration, I will present an overview of the most important migratory routes and the amounts of unauthorized border-crossing at EU's external borders.

The second chapter reviews the increasing cooperation with third countries in the field of border control management as part of a comprehensive agenda based on shared responsibility and mutual commitments. To this end, this chapter will focus on the main measures and policies carried out by the EU and its Member States to reinforce cooperation with third countries since the origin of the Schengen area in 1985 to the launch of the European Agenda on migration in May 2015. The thesis will also offer an analysis of the European external policy and will examine the partnerships and the agreements concluded with non-EU States in the area of migration and asylum. The analysis will take into consideration States' responsibilities and obligations under the International and European Human Rights Treaties relating to refugees and migrants, such as: The Universal Declaration of Human Rights, the European Convention on Human Rights, the Convention relating to the Status of Refugees and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

In the third chapter, I will provide a critical description of the main points of the recent Joint Action Plan on migration concluded between the European Union and the Republic of Turkey on 29 November 2015, together with a review of the main operational actions agreed on 18 March 2016. I will also shift the focus on the situation of human rights in Turkey in order to verify if such a country can be considered a "safe place" for migrants and refugees. In the last part I will sum up the thesis conclusions.

2. Humanitarian emergency on the doorstep of the European Union: the massive influx of migrants crossing into Europe

2.1. The 2015 refugee crisis in the European Union

In 2015 Europe experienced a large increase in refugee arrivals and EU countries faced a serious crisis along their western and southern borders dealing with an unprecedented number of migrants crossing the common external border to seek international protection in the European Union.

Since the beginning of the refugee crisis the most affected countries were Greece and Italy that, due to their geographical position, represented the main door to the European Union and a gateway for refugees who wanted to reach northern Europe. According to the data collected by the International Organization for Migration (hereinafter IOM) in 2015 tens of thousands of people, including asylum seekers, arrived to Europe passing through the Eastern Mediterranean route, mainly by sea[1]. In this regard, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereinafter Frontex), stated that the number of illegal border-crossing along the external borders amounts to 1,820,000[2]. The vast majority of those detections along the borders was reported mostly on the route between Turkey and the Greek islands in the Eastern Aegean Sea. In this context, as reported by the Frontex Risk Analysis Unit 'Syrians accounted for the largest proportion of arrivals, although towards the end of the year, the share of Afghan nationals has risen significantly'[3].

Due to the increasing political instability and the widespread violence that Libya has experienced during the last two years, many migrants have decided to cross the European border seeking safer paths to Europe through Greece and the Western Balkans. The Greek islands of Lesvos, Chios, Samos and Kos, became the main points of entry for those migrants departing from the Turkish coasts. In particular, the vast majority of migrants have reached the island of Lesvos that in 2015 has registered an average of 3,300 arrivals per day[4]. The inadequate reception facilities and the inability of the Greek authorities to face effectively the flows of migrants crossing the Aegean Sea, together with the relentless arrivals of asylum seekers putting pressure on its border, represented some of the main factors that had contributed to deteriorate the humanitarian emergency in Greece. Moreover, the record number of migrants arriving from Turkey caused an intense growth in secondary movements across the Western Balkans, having a direct domino effect on this route.

Indeed, the largest number of refugees did not apply for asylum in Greece but moved along the Balkan route. Consequently, the former Yugoslav Republic of Macedonia, Serbia, Hungary and Croatia became the main transit route for those refugees who wanted to continue their journey in order to reach other European countries like Austria and Germany, where many applied for asylum. In 2015, as estimated by Frontex, the

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[1]   International Organization for Migration, *Mixed Migration Flows in the Mediterranean and Beyond. Compilation of Available Data and Information, 2015.* Source: http://doe.iom.int/docs/Flows%20Compilation%202015%20Overview.pdf.

[2]   Frontex, Risk Analysis for 2016, March 2016, p.6.

[3]   Ibidem, p. 16.

[4]   UNHCR, *Some 3,300 people a day still arriving on Lesvos*, News Stories, 13 November 2015, Source: http://www.unhcr.org/5645eb7f9.html.

illegal border-crossing on the Western Balkans region amounted to 764,038 detections, 'a 16-fold rise from 2014'[5] and besides, most of the irregular migrants intercepted were Iraqis, Afghans and above all Syrians.

The situation soon escalated into a humanitarian crisis in which the EU Member States have been incapable of managing the crisis with unity, following the principle of solidarity and fair sharing of responsibility, as stated in article 80 of the Treaty on the Functioning of the European Union[6]. In the EU, tensions have been particularly high because of the disproportionate burden faced by the so called countries of first arrival where the majority of migrants have been hosted.

In May and September 2015, triggering for the first time article 78(3) of the TFUE[7], EU leaders approved two emergency proposals to relocate 160,000 persons in need of international protection among Member States in order to alleviate the pressure from the frontline countries, especially Italy and Greece[8]. As of 3 March 2016, only 660 asylum seekers out of 160,000 have been relocated since the approval of the so called 'quotas system'[9], demonstrating how little has been done to put solidarity into practise and share responsibility EU-wide.

In this context, European Member States, far from reaching a common solution, blamed each other on doing less and less to tackle the refugee crisis and thus, since the EU response was very disappointing, national authorities tried to manage the emergency through individual actions, without warning or coordination with the European Institutions. Furthermore, the uneven pressure generated a new political dispute between the countries situated at the external border of the EU and those states, like Germany and Sweden, that represented the final destination of the journey for the vast majority of the asylum seekers.

In effect, the dispute between Member States led to a serious political crisis in which the countries of entry, where the migratory waves put more pressure, blamed the European institution as well as the national political authorities of continental Europe for having left them alone to deal with one of the most difficult humanitarian emergency since the Second World War. In this context, while some Member States tried to put in place an open door policy, others, by contrast, tightened their legislation and rose fences to stop the massive refugee waves. This dual approach has been underlined by Angeliki Dimitriadi who, in her article, has strongly criticized the European ambiguity affirming that:

> 'As the EU has struggled to respond to the crisis, the Janus face of Europe's migration policy has resurfaced. On the one hand, Germany stood alone in declaring that refugees would be welcomed, and although it was a move to be applauded morally, it was one that few in Europe actively supported'[10].

As a matter of fact, while Germany adopted a humanitarian policy opening its borders to 800,000 Syrian refugees stranded in Hungary[11], Balkan countries put in place restrictive policies and sealed their external borders to impede migrants from accessing their territories.

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[5]   Frontex, Western Balkan Route. Source: http://frontex.europa.eu/trends-and-routes/western-balkan-route/.

[6]   Treaty on the Functioning of the European Union, Title V, Chapter 2, art. 80, OJ C326, 26.10.2012.

[7]   "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament".

[8]   European Commission, *European Solidarity: A Refugee Relocation System*. Source: http://ec.europa.eu/dgs/homeaffairs/what-we-do/policies/european-agenda-migration/backgroundinformation/docs/2_eu_solidarity_a_refugee_relocation_system_en.pdf. See also: European Commission (IP/1561/34) *State of Play: Measures to Address the Refugee Crisis*, Brussels, 29 January 2016, Source: http://europa.eu/rapid/press-release_IP-15-6134_en.htm.

[9]   European Commission, *Relocation and resettlement- State of play*. Source: http://ec.europa.eu/dgs/homeaffairs/whatwe-do/policies/european-agenda-migration/backgroundinformation/docs/relocation_resettlement_20160304_en.pdf.

[10]   A. DIMITRIADI, *The Janus face of Europe's migration policy*, European Council on Foreign Relations, 1 February, 2016, Source: http://www.ecfr.eu/article/commentary_the_janus_face_of_europes_migration_policy_5082.

[11]   C. HOFFMANN, *Opinion: Merkel's Human Refugee Policies have failed*, Spiegel Online, February 26, 2016. Source: http://www.spiegel.de/international/europe/thelimitsofhumanitymerkelrefugeepolicieshavefaileda1079455.html.

In order to tackle the massive refugee waves, the German chancellor Angela Merkel tried to convince her European counterparts and lead the European response to the crisis proposing a humanitarian approach. In fact, Merkel responded to the crisis with the slogan '*Wir schaffen das*', meaning 'We can do it', and besides, committed her country to be a welcoming host country for refugees providing shelter for people, especially Syrians, fleeing war or persecution. Furthermore, the German chancellor, waiving the European procedure established under the Dublin Regulation, affirmed that 'all Syrian refugees would be eligible to claim asylum in Germany'[12]. According to the data of the German interior ministry, between January and October 2015, Germany registered the arrival of 758,473 asylum seekers, of whom 243,721 came from Syria[13].

By contrast, most Member States were at odds with Merkel's stance on refugees. In this regard, the restrictive approach of some countries, like Austria, Hungary, Slovenia, Serbia, Croatia and the former Yugoslav Republic of Macedonia, demonstrated how EU Member States, due to their lack of political will and the excessive focus on their own national interests, were unable to tackle the refugee crisis through a common and coordinated strategy.

One of the most controversial and contested measure adopted unilaterally by the Balkan countries in 2015 was the build-up of razor-wire fences to limit the movement of migrants across the border. As the total number of refugees in the Balkans increased, Hungary closed its border with Serbia on 15 September, while the wall at the Hungarian-Croatian border was completed on 15 October. Moreover, the Prime Minister Orban declared the state of emergency and resorted to the Hungarian army in order to stem the flow of migrants, provoking a high level of political tension between the neighbouring States and causing a domino effect that led to the fortification of borders by other Balkan countries. At every border along the refugee trail, controls have been enhanced, police forces or even the army have been deployed to stem the flow of migrants, reducing the legal ways to enter the EU. These measures led many people, including persons in need of international protection, to resort to smuggling networks to reach their final destination[14].

It is worth mentioning that on 25 February 2016, the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein expressed his serious concern over the police agreement reached by five European countries[15] and in this sense he stated:

> 'These measures are exacerbating the chaos and misery all down the line, and especially in Greece, which is already overwhelmed. The upstream border closures, are putting massive pressure on the country that is most in need of help. This could have unforeseen and devastating consequences on Greece and on the large number of people currently on its territory. I urge the five countries who signed last week's agreement to carefully recalibrate the approach of their police forces and bring it fully in line with international law'[16].

The lack of consensus under which all states must reciprocally accept refugees worsened the difficult situation along the borders. Since the crisis could not be solved through national actions alone, collective response inspired by the principle of solidarity and mutual responsibility was urgent and on 25 October 2015 President Junker said:

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[12]   *The Guardian view on Europe's refugee crisis: a little leadership, at last,* The Guardian, 1 September 2015, Source: http://www.theguardian.com/commentisfree/2015/sep/01/guardian-view-on-europe-refugee-crisis-leadership-at-lastangela-merkel.

[13]   Bundesministerium de Innern, Anhaltend hoher Asyl Zugang im Oktober 2015, Pressemitteilung 05.11.2015, Source: http://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2015/11/asylantraege-oktober-2015.html.

[14]   European Union Agency For Fundamental Rights, *Legal entry channels to EU for persons in need of international protection: a toolbox.* FRA Focus 02/2015, p. 2.

[15]   Austria, Croatia, The Former Yugoslav Republic of Macedonia, Serbia and Slovenia.

[16]   United Nations Human Rights- Office of the High Commissioner – Display News, *Europe/migration: Five-country police agreement exacerbates crisis and puts vulnerable migrants at risk*—Zeid, Geneva, 25 February 2016. Source: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17091&LangID=E.

'Countries affected should not only talk about each other, but also with each other. Neighbours should work together not against each other. Refugees need to be treated in a humane manner along the length of the Western Balkans route to avoid a humanitarian tragedy in Europe'[17].

In addition to the speech made by the President Junker, the Commissioner for Human Rights Niels Muiznieks expressed serious concern for the 'militarization' of the EU's external border carried out by some Member States, considering that measure as the wrong answer to the crisis. In his statement, the Commissioner also affirmed that *'European countries handling of the arrival of an unprecedented number of migrants and asylum-seekers has been simply disastrous'*[18], and criticized the European response that has been, according to his opinion, *'by and large unsatisfactory from a human rights perspective'*[19].

Unfortunately, the situation got worse after the terrorist attacks in Paris on November 13, discouraging EU Member States from working together and transforming a humanitarian challenge into a security crisis in which national authorities adopted new restrictive practises and enhanced border controls. In fact, the suspect that one of the terrorist could have been a Syrian refugee registered and transited through the Greek border, spread the fear of Islamist infiltration among refugees within Europe. Consequently, the German approach to the refugee crisis failed and the chancellor Angela Merkel found herself even more isolated at home and abroad. After an enthusiastic start, the German chancellor, facing a rising far-right and a strong dissent within her party, silently changed her political strategy and decided that the flow of refugees needed to be regulated[20]. In order to save the Schengen area and the system of border- free travel within the EU, Member States sealed their common external borders reinforcing at the same time border controls along the migratory routes. As we will see in the third chapter, the Turkish cooperation constitutes a crucial element of this new EU strategy to cope with the refugee crisis and stem the mixed migratory waves.

On the other hand, the restrictions by Austria and other countries along the Balkan route, have left tens of thousands of migrants stranded in Greece after crossing the Aegean Sea from Turkey. As some journalists have affirmed after visiting Greece:

'Idomeni is a case study of what would happen were Europe to seal its borders and shut down the Balkan Route, the path most migrants take on their way to Germany and the rest of Europe. The result would be a massive backup of hundreds of thousands of refugees in Greece'[21].

In this context, anti-immigrant rhetoric, push-backs, police violence and the disproportionate use of force and fire-arms against asylum seekers at the border of the European Union, showed the limits of humanity and contributed to exacerbate the refugee emergency. Moreover, systematic violations of European and International law became more frequent and thousands of people in need of international protection have been deprived of their basic human rights. In this regard, François Crépeau, UN Special Rapporteur on the human rights of migrants, affirmed:

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[17]   European Commission, *Leaders meet on refugee flows along the Western Balkan route*. News, 25/10/2015. Source: http://ec.europa.eu/news/2015/10/20151025_en.htm.

[18]   Council of Europe - Commissioner for Human Rights, *European countries' migration and asylum policies have been disastrous*, Strasbourg, 10/12/2015.

[19]   Ibidem.

[20]   M. AMANN, H. KNAUP, R. NEUKIRCH AND R. PFISTE, *Quiet Capitulation: Merkel Slowly Changes Tune on Refugee Issue*, Spiegel Online – International, November 20, 2015, Source: http://www.spiegel.de/international/germany/angela-merkel-changes-her-stance-on-refugee-limits-a-1063773.html.

[21]   G. CHRISTIDES, J. VON MITTELSTAEDT, P. MÜLLER AND M. POPP, *Closing the Balkan Route: Will Greece Become a Refugee Bottleneck?*, SpiegelOnline-International, 9 February 2016, Source: http://www.spiegel.de/international/europe/closing-balkan-route-means-migrant-crisis-for-greece-a-1076232.html.

'The continued ineffectiveness and paradoxes of European Union border management policies and the lack of a coherent, human rights-based approach to migration have been vividly and visibly demonstrated by the deaths of migrants in the Mediterranean Sea'[22].

2.2. Main trends and features of the refugee crisis in Europe

The dramatic events that took place along the EU's external borders, such as the death of the three-year-old Syrian boy Aylan Kurdi, contributed to convert the refugee crisis into a humanitarian emergency in which the number of civilians fleeing armed conflicts, persecution and widespread violence continued to rise together with the amount of people dying in their attempt to cross the sea and reach the "old continent".

In effect, once again the Mediterranean confirmed to be the world's deadliest route. According to the International Organization for Migration, the total amount of people who have lost their live drowning in the Mediterranean Sea in 2015 is 3.770, 491 more deaths if compared with the previous year, while in 2016[23] the number of migrants drowned was 425, 321 only in the Western Mediterranean route[24]. Even though many people have lost their lives in their attempt to cross the maritime borders and despite dangerous sea conditions, the number of arrivals during the whole 2015 continued to be high. In effect, the rising death toll didn't discourage migrants from starting their desperate journey towards Europe.

In this context, the European Union has experienced mixed migration flows. Thus, since not all migrants are refugees, it's crucial to make a clear distinction between those who left their country because of economic reasons, like unemployment or poverty, and the people that were forced to abandon their houses due to a civil war or persecution. In the last three years, among the overwhelming amount of people entering illegally into Europe, the majority was likely to qualify for refugee status that, according to the article 1,a(2) of the Convention relating to the Status of Refugees, adopted on 28 July 1951, must be recognized to someone who:

> "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country"[25].

Furthermore, we should highlight the fundamental distinction existing between a refugee and a migrant. By doing so, it is worth mentioning the UNHCR viewpoint:

> '[…] it is becoming increasingly common to see the terms 'refugee' and 'migrant' being used interchangeably in media and public discourse. The two terms have distinct and different meanings, and confusing them leads to problems for both populations. […] We say 'refugees' when we mean people fleeing war or persecution across an international border. And we say 'migrants' when we mean people moving for reasons not included in the legal definition of a refugee'.

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[22]   UN Doc. A/HRC/29/36, Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants*, 8 May 2015, para. 9.

[23]   Until February 25th.

[24]   International Organization for Migration, *Missing Migrants Project-Mediterranean*, (Last updated February 25, 2016) Source: http://missingmigrants.iom.int/mediterranean.

[25]   UN General Assembly, *Convention relating to the Status of Refugees*, 28 July 1951, art. 1. A (2). United Nations, Treaties Series, vol. 189, p. 137, Source: http://www.refworld.org/docid/3be01b964.html.

Therefore, the main difference between the current crisis and the huge flow of migrants that arrived in Italy after the onset of the Arab spring in 2011 is represented by the structure of the migratory waves; in fact, those who crossed the Central Mediterranean route were mainly young Tunisian men trying to reach France in order to look for a better life and a job[26]. They could be considered as economic migrants and thus, they were neither fleeing war or persecution nor seeking international protection in Europe.

By contrast, since the autumn of 2015 the unprecedented increase in the number of people entering the EU, mainly at the Greek-Turkish border, had much to do with the widespread violence and the armed conflict affecting the Sub-Saharan Africa and above all the Middle-East. As a consequence, the flow of migrants that has faced Europe was principally composed of asylum seekers and individuals in need of international protection. The vast majority of those who crossed the sea in unseaworthy boats in 2015 were people in need of international protection, including asylum seekers fleeing the civil war in Syria.

In fact, the exodus of refugees has its roots in the Syrian conflict that has generated one of the most serious humanitarian crisis since the Second World War. The absence of political solutions to the Syrian conflict led to a dramatic situation, that continues to deteriorate, in which the estimated number of people in need of humanitarian assistance within the country amount to 13.5 million, of whom 4.6 million in hard to reach area, while 6.5 are internally displaced persons. Moreover, the disregard for the obligation to protect the civil population caused several casualties among civilian, with over 250,000 people killed and over one million injured. As stated by the UNHCR, 'war, conflict or persecution at home, as well as deteriorating conditions in many refugee-hosting countries'[27] constituted the main push-factors which forced Syrian nationals to leave their country in order to seek international protection in other countries.

Thus, in response to the growing danger, the number of Syrians trying to reach Europe has sharply increased since the beginning of the civil war in April 2011 and, as a direct consequence of the conflict, Syria represents the main country of origins of refugees with over 4.6 registered people under international protection. If we look at the country of origins of the 857,363 migrants arrived by land and sea to Greece in the period from the 1st January to the 31st December 2015, the 56,1 % of individuals were Syrian nationals[28].

However, the distribution of asylum seekers is clearly uneven and most of them, once crossed the Syrian border, sought refuge in the nearest safe countries. Actually only a small part of the population fleeing Syria sought safety in Europe and since the beginning of the conflict until December 2015, the EU-28 Member States plus Norway and Switzerland have recognized the refugee status to 579,184 Syrian nationals[29]. Even though the European governments affirmed that they have been overwhelmed by the mass influx of refugees and migrants, the vast majority of them has been hosted by neighbouring countries.

Turkey, Lebanon and Jordan gave shelter to more than four million Syrian refugees, facing the biggest humanitarian emergency of our time. It is worth mentioning in this regard that while Turkey has ratified 1951 Refugee Convention, even if with a geographical limitation, neither Lebanon nor Jordan are party to that Convention. Nonetheless, those countries dealt with the Syrian diaspora and made an enormous effort, demonstrating an incredible generosity and offering immediate protection and assistance to the refugee population. With 83% of the refugees living in urban settings, the Jordanian authorities provided assistance to 639,704 refugees[30], the vast majority coming from Syria and Iraq, granting them access to basic services,

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[26]   Frontex, Annual Risk Analysis 2012, Warsaw, April 2012, p. 16.

[27]   UNHCR, *The sea route to Europe: The Mediterranean passage in the age of refugees*, 1 July 2015, p.2.

[28]   Ibidem.

[29]   UNHCR, *Syria Regional Refugee Response*. Europe: Syrian Asylum Applications, Source: http://data.unhcr.org/syrianrefugees/asylum.php.

[30]   UNHCR, *Syria Regional Refugee Response-Jordan*, Last updated 03 March, 2016, Source: http://data.unhcr.org/syrianrefugees/country.php?id=107.

such as health and education, in host communities. Furthermore, Jordan has also hosted Syrian nationals in the two refugee camps of Azraq and Zaatari. In Lebanon, by contrast, there were no official camps, so that many refugees lived 'in sub-standard shelter'. Nonetheless, refugees have access to most basic services through public institution where the authorities play an active role in facilitating response.

2.3. Syrian refugee waves and the humanitarian emergency in Turkey

The Syrian refugee crisis had a dramatic impact on its neighbouring countries and as the civil war entered into its sixth year, the situation in the entire regions is highly instable. As long as the parties to the conflict won't reach an agreement, the number of internally displaced persons and asylum seekers will continue to grow, affecting Turkey and putting pressure on its external borders.

Since the very beginning the Turkish government of the President Erdogan has maintained an open-border policy with Syrian refugees who began entering into Turkey in April 2011, contemporarily with the onset of the civil unrest and violence that blew up in Syria. In May 2011 the Turkish authorities established the first refugee camp and jointly with the UN refugee agency provided support and helped those who were fleeing the civil war in their country of origin, receiving in several occasion the appreciation of the entire international community. It should be noted that, even if the Turkish authorities considered the Syrian crisis as a temporal situation, the civil war between al-Assad and the rebel forces was far from being solved. Moreover, the inroads of *Daesh*, that captured the cities of Fallujah and Mosul[31], and the growing humanitarian emergency in Syria generated an exodus of people towards Turkey.

The research realized by the Migration Policy Institute in April 2015[32] has estimated that about 55.000 people crossed into Turkey in order to seek asylum by the end of 2014. Thus, in a short period of time, due to the drastic deterioration of life conditions and clash escalation, millions of Syrian nationals sought shelter in Turkey that, according to the UNHCR[33], became the world's largest Syrian refugee-hosting country with more than 2.6 million people found to be in need of international protection under the 1951 Convention. The Disaster and Emergency Management Presidency (AFAD) managed the 25 official camp in which 270,000 refugees have been hosted[34], mainly in the southern provinces of Hatay, Kilis, Gaziantep and Sanliurfa, close to the Syrian border. However, most of the Syrian refugees, about 90%, remained outside of camps and lived in urban or rural areas often in poor conditions with limited access to basic services.

In 2015, such as in the first months of 2016, Turkey became the main departure and transition country towards the EU. In fact, an unprecedented flow of migrants and refugees entered Greece crossing its land and sea borders with Turkey. Despite the dangerous sea conditions, in 2015 those who arrived in Greece from the Turkish coast were more than 850,000, while in January and February 2016 over 100,000 crossed the maritime border that divides Europe from Turkey[35].

In response to the Syrian crisis in Turkey the EU has supported Turkish authorities to deal with the humanitarian emergency providing financial assistance aimed at addressing the immediate humanitarian

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[31]   The Iraqi city of Fallujah fell under control of *Daesh* in January 2014 while Mosul was captured in June 2014.

[32]   A. IÇDUYGU, *Syrian Refugees in Turkey: The Long Road Ahead*. Migration Policy Institute, April 2015, p. 7.

[33]   UNHCR, *2015 UNHCR country operations profile- Turkey*. Source: http://www.unhcr.org/pages/49e48e0fa7f.html.

[34]   European Commission, *Turkey: Refugee crisis*, ECHO Factsheet, March 2016, p.2.

[35]   Ibidem.

needs of refugees across the country, in particular those living outside of camps. The European Commission's financial support provided since the onset of the crisis amounts to €365 million[36]. In addition to this, in November 2015 the EU Member States reaffirmed their commitment to deliver efficient and complementary support to refugees hosted in Turkey and adopted a new plan of action in order to tackle the humanitarian crisis as well as to fight against illegal immigration jointly with the Turkish government.

3. EU's external policy in the field of migration and asylum: The balance between security and human rights

3.1. Creation of the Schengen area and the establishment of a common external border

On 14 June 1985, in the town of Schengen, the governments of the States of the Benelux economic union, the Federal Republic of Germany and the French Republic reached an important agreement on the gradual abolition of checks at their common internal borders. This agreement led to the creation of the Schengen area where citizens had the right to free movement when travelling within such common territory[37]. On 19 June 1990, the five original signatories drafted and signed a Convention in order to implement the previous agreement and fulfil the decision to abolish checks at their common borders. As stated in article 2.1 of the Convention implementing the Schengen agreement 'Internal borders may be crossed at any point without any checks on persons being carried out'[38]. By doing so, the contracting Parties transferred checks to their external borders, adopting complementary measures to safeguard internal security and prevent illegal immigration by third country nationals. Actually, since the Schengen States started sharing a common external border, national border guards enhanced their cooperation and adopted common procedure in order to ease border checks as well as to ensure security within the entire area.

In fact, being part of the area without internal border controls means that the border guard of those countries do not carry out border controls at their internal borders and carry out harmonised controls, based on common criteria, at their external borders[39]. Thus, in order to guarantee the free movement of people and preserve the very existence of Schengen area, Governments have taken measures to reinforce their common borders resorting to a wide range of control and deterrence measures. These measures should strike the right balance between the need for security and the EU citizens' rights, including the right to free movement. In this regard, while article 5 of the Schengen Convention established the conditions and the requirements under which an alien (third country national) could be admitted to enter the territory of the Contracting Party, article 6 clearly stated that 'Cross-border movement at external borders shall be

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[36] Ibidem.

[37] At present, the Schengen area consists of 26 European countries of which 22 are EU states: Belgium, Czech Republic, Denmark, Germany, Estonia, Greece, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Slovenia, Slovakia, Finland and Sweden, along with Iceland, Liechtenstein, Norway and Switzerland.

[38] General Secretariat of the Council, *The Schengen acquis integrated into the European Union*, 1 May 1999, p. 33.

[39] As defined in the Schengen border code, border control means "the activity carried out at a border, [...], regardless of any other consideration, consisting of border checks and border surveillance", Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 *establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, art. 2.9, OJ EU L 105, 13.4.2006.

subject to checks by the competent authorities' and besides, 'Checks shall be made in accordance with uniform principles [...]'[40].

In August 1991, the arrivals into ports of southern Italy of thousands of migrants escaping the disastrous economic and political conditions in Albania had a strong effect on the European public opinion and forced the whole Europe to take the necessary measures to tackle the migratory issue. As stated in a report released by the Parliamentary Assembly of the Council of Europe (hereinafter PACE), in January 1992, soon after the mass exodus of Albanians, those events 'proved the need for stronger European co-operation in solving the problems caused by the mass exodus of asylum-seekers'[41]. In its report the PACE also invited the Committee of Ministers to 'consider ways and means of helping the Albanian authorities in initiating a process of economic and social development that will encourage Albanians to remain in their country'[42].

Thus, since the very beginning, immigration issues together with the questions related to asylum occupied a central place in the political agenda of the European Union and its Member States. The subjects of immigration and asylum were considered as matters of common interest that needed to be tackled through common policies. In accordance with these considerations, in 1994 the European Commission proposed a series of 'key components' as fundamental factors to develop an effective immigration policy. These components were: action on migration pressure, action on controlling immigration and action to strengthen policies for legal immigration. This included in particular a strong focus on 'cooperation with the main countries of would-be emigration to Europe" as well as the "integration into the Union's external policies' of those issues related to asylum and immigration[43].

In this context the need for more cooperation in the field of asylum and migration became straightforward. At the same time, EU Member States understood the urgency of coordinating and improving the external border control management in order to guarantee the security of their citizens. Cooperation regarding the crossing of external borders moved forward with the Treaty of Amsterdam, signed on 2 October 1997. When it entered into force on 1 May 1999, the Schengen acquis was integrated into the European Union framework and became a core part of the European law. Indeed, under the above mentioned Treaty, all issues related to free movements of persons, controls on external borders, asylum, immigration and judicial cooperation were 'communitized'. While police and judicial cooperation in criminal matters remained under the intergovernmental pillar, questions relating to controls on the external borders, asylum, immigration and judicial cooperation on civil matters have been grafted onto the first pillar, governed by the Community method. In addition to this, amending the Treaty on Maastricht, it clearly affirmed the commitment of the European Union 'to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice'[44]. To create such an area, the Treaty of Amsterdam introduced a new title[45] headed 'Visas, asylum, immigration and other policies related to free movement of persons' into the Treaty establishing the European Community.

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[40] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, art. 5-6, OJ L 239, 22/09/2000, P. 0019 – 0062.

[41] Report on the exodus of Albanian nationals (Doc. 6555) of the 27 January 1992, Parliamentary Assembly of the Council of Europe, Draft Recommendations, point 5.

[42] Ibidem, point 6.ii .

[43] Communication COM(94) 23 final from the Commission to the Council and the European Parliament of the 23.2.1994 on *Immigration and Asylum Policies*, Foreword.

[44] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, art. 1, European Communities, Luxembourg: Office for Official Publications of the European Communities, 1997, Source: http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf.

[45] The new Title IV encompasses the following areas: Free movement of persons, Checks at external borders, Asylum, immigration and protection for the rights of nationals of non-member countries, Judicial cooperation in criminal matters.

In addition to this, to find the right balance between security and freedom, Member States tried, among other things, to respond to the migration challenge and develop policies of migration control in the broader framework of the external action. In this context, a close cooperation with third countries constituted a crucial element for the European Union and its asylum and migration policy as well as for its border management. In parallel to its internal dimension and the enjoyment of rights and freedom, the EU enhanced border management and other measure of migration, setting up a system of control and enhanced cooperation between Member States and the country of origin and transit of illegal migrants.

3.2. A new comprehensive approach to migration: The integration of immigration policy into the Union's relations with third countries

Following the entry into force of the Amsterdam Treaty, in October 1999 the Tampere European Council gave a kick-start to the EU's justice and home affairs policies, adopting, *inter alia*, 'short, truly political oriented, forward looking and inspiring conclusions in the area of freedom, security and justice'[46]. In this regard, the Tampere summit paved the way to the creation of a Union of freedom, security and justice and such goal has been clearly reaffirmed in the Presidency Conclusions of the European Council. Effectively, the enjoyment of freedom such as the right to circulate freely within the Union 'requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes'[47].

Moreover, the EU Tampere summit stressed the importance of a 'comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit'[48] and in addition called for a 'more efficient management of migration flows at all their stages'[49]. In its Conclusion the Presidency of the European Council also invited the Council to 'conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries'[50].

Thus, the EU committed itself to strengthen cooperation with third countries and sustain an effective system of information exchange through the promotion of dialogue with regional organizations or institutional actors. The Cotonou Partnership Agreement signed on 23 June 2000 put the political dimension at the centre of the relations between the ACP[51] and the European Communities. Political dialogue was considered as a strategic and continuous tool in the partnership between the ACP countries and the EC.

The idea was to launch a new form of cooperation and open dialogue, not only when major problems in the partnership arise, but also to cope with a wide range of issues, including asylum and migration. In fact, article 13 1. stated that 'the issue of migration shall be the subject of in-depth dialogue in the framework of the ACP-EU Partnership', while article 5(a) established that 'in the framework of the political dialogue the Council of Ministers shall examine issues arising from illegal immigration with a view to establish, where appropriate, the means for a prevention policy'. Furthermore, the Parties agreed on the procedure to return illegal

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[46]   Y. PASCOUAU, *The future of the area of freedom, security and justice Addressing mobility, protection and effectiveness in the long run*, EPC, Discussion Paper, 23 January 2014, p.8.

[47]   Tampere European Council, Presidency Conclusions, Towards A Union of Freedom, *Security and Justice: The Tampere Milestones*, point 3, 15-16 October 1999.

[48]   Ibidem, point 11.

[49]   Ibidem, point 22.

[50]   Ibidem, point 27.

[51]   African, Caribbean and Pacific States.

immigrants to their country of origin. In this regard, they established that each Member State of the EU or of the ACP group of States 'shall accept the return of and readmission of any of its nationals who are illegally present on the territory' of a Member State of the counterpart.

Integration of immigration policy into the Union's relations with third countries became even more evident with the European Summit which took place in Sevilla in 2002. The European Council came after the dramatic terrorist attacks that hit the United States on 9/11, so at that time the security issues were a priority question for the European Union. As a matter of fact, in an area without internal border checks, the external borders were still seen as weak and constituted a serious source of worrying for the citizens of the Member States[52].

Thus, in accordance with the previous EU meeting[53], the external dimension of migration was reaffirmed as well as the crucial process of cooperation with countries of origin and transit to manage the migration flows and combat illegal immigration. In this respect, even if readmission clauses have been included in trade and cooperation agreements with many third countries[54] since 1996, the Seville Summit represented a turning point for the implementation of such agreements. In fact, for the purpose of controlling their common borders, Member States decided to use all appropriate instruments in the context of the EU's external relations. In this regard, the Presidency established that:

> 'any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration'[55].

Readmission Agreements establish unambiguous and reciprocal obligations and stipulate the obligation to readmit nationals of the country with which the EU has signed the agreement. These agreements contain the commitment to readmit stateless persons or persons of another jurisdiction who entered the EU illegally from the country in question[56].

Actually, what was agreed in Seville represented one of the firmest expressions of the EU's desire for a general inclusion of readmission in its external policy, for the purpose of managing illegal immigration. Even if all these clauses do not constitute final readmission agreements, they facilitated and, in a certain sense, paved the way to future negotiations in this direction. Since then, Member States have also tried to incorporate questions related to asylum and immigration into their foreign policies.

In this respect, a comprehensive neighbourhood policy constituted an essential component to achieve the Union's objectives in the area of Justice and Home Affairs, including issues related to migration. The importance of a neighbourhood policy was also highlighted in the European Security Strategy, endorsed at the European Council of December 2003, which stated that the EU's task is to 'make a particular contribution to stability and good governance in our immediate neighbourhood [and] to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can

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[52] Communication COM(2002) 233 final *From The Commission To The Council And The European Parliament Towards Integrated Management of the External Borders of the Member States of the European Union*, Brussels, 7.5.2002, point 1.

[53] The Heads of States joined in Laeken focused their attention on the management of the Union's external border controls, the fight against terrorism, illegal immigration and the traffic in human beings. In order to address the challenges to internal security and meet the expectations of Europe's citizens, in the conclusions of the European Council of Laeken of 14 and 15 December 2001 were reaffirmed the importance of a more effective control of external border.

[54] Algeria, the Andean Community, Armenia, Azerbaijan, Chile, the Community of Central American States, Croatia, Egypt, Georgia, Lebanon, FYROM, Syria and Uzbekistan, among others.

[55] Seville European Council, Presidency Conclusions, 21-22 June 2002, point 33.

[56] European Commission (MEMO/05/351), *Readmission Agreements*, Press Release Database, Brussels, 5 October 2005.

enjoy close and cooperative relations'[57]. The European Neighbourhood Policy (hereafter ENP) was launched to reinforce existing forms of regional and sub-regional cooperation and provide a framework for their further development.

The ENP aimed at reinforcing stability and security and contribute to efforts at conflict resolution. In the field of Justice and Home Affairs, including issues such as migration pressure and trafficking in human beings, it is only by working together that the EU and its neighbours can manage common borders more efficiently in order to facilitate legitimate movements[58]. Moreover, as outlined in the Strategy Paper of the Commission, the EU intended to reinforce regional cooperation on border management, migration and asylum with its partner countries on the eastern and southern borders.

In this respect, in February 2003, the British government led by Tony Blair drafted a controversial proposal entitled 'A new vision for refugees' whose aim was a 'better management of the asylum globally'[59]. The UK proposal contained provision for regional protection areas in refugee-producing regions, and included the idea of establishing transit processing centres along the main routes used by asylum seekers to reach the EU countries. Thus, according to the British plan the asylum procedures should have been conducted outside the territory of the EU and the management of migratory flows in the regions of origin should have been improved in order to strengthen protection in the source region. The UK proposal on the one side was hardly criticized, in particular by France and Sweden, but on the other side received the support of some Member States such as Denmark and the Netherlands and revived by Italy and Germany, one year later. At the same time many NGOs expressed their concern over the proposal and in this respect Amnesty International launched a study in which it identified a series of legal deficiencies focusing on the European 'overwhelming emphasis on control and repression in regard to asylum seekers'[60]. In its analytical study, Amnesty International also stated that:

> 'The real goal behind the UK proposal appears to be to reduce the number of spontaneous arrivals in the UK and EU states by denying access to territory and shifting the asylum-seekers to processing zones outside the EU, where responsibility, enforceability and accountability for refugee protection would be weak and unclear'[61].

3.3. Strengthening cooperation with third countries of origin and transit of migrants: From the Hague Programme to the European Pact on Immigration and Asylum

The political guidelines set up in the previous European Councils were included into the 2004 Hague Programme that contained a specific paragraph on the external dimension of asylum and migration[62]. The program, *inter alia*, aimed at improving the ability of the EU to tackle migration flows and enhance external border control establishing new partnership with third countries. In this regard, the EU should provide

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[57]   European Security Strategy, *A Secure Europe in a Better World*, Brussels, 12 December 2003.

[58]   Communication COM(2004) 373 final from the Commission, *European Neighbourhood Policy-Strategy Paper*, Brussels, 12.5.2004.

[59]   Amnesty International, *UK/EU/UNHCR Unlawful and Unworkable - Amnesty International's views on proposals for extra-territorial processing of asylum claims*, 18 June 2003, p. 6.

[60]   Amnesty International, *Amnesty International launches major study on Asylum Transit Camps/Regional Protection Centres*, Source: http://www.amnesty.eu/en/news/press-releases/eu/asylum-and-migration/amnesty-internationallaunches-major-study-on-asylum-transit-camps-regional-protection-centres-0125/#.V0WmsriLS00.

[61]   Ibidem, p.1.

[62]   Council of the European Union, *The Hague Programme: strengthening freedom, security and justice in the European Union*, Doc.16054/04, Brussels, 13 December 2004, para. 1.6. See also J. VAN SELM, *The Hague Program reflects New European Realities*, Migration Policy Institute, January 1, 2005, Source: http://www.migrationpolicy.org/article/hague-program-reflects-new-european-realities.

assistance to these countries and support them in managing migration and protecting refugees. More specifically, Member States should aim at improving third countries' capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return.

In respect with countries of origin the European Council called on the need to develop refugee protection programs in partnership with the third countries concerned, and in close cooperation with UNHCR[63]. With regard to regions of transit the Hague Programme stressed the importance of enhancing cooperation on migration issues and providing support for capacity building in national asylum systems and border control to countries, especially those on the southern and the eastern borders of the EU, 'that demonstrate a genuine commitment to fulfil their obligations under the Geneva Convention on Refugees'[64]. It further called on the Council and the Commission to ensure 'the firm establishment of immigration liaison networks in relevant third countries'[65].

In this context, EU Member States were the destination of a great number of people and due to the rise in the number of mixed migration flows, immigration control became a high priority on the European Union's agenda. Consequently, due to Morocco's increasing role as transit country for migrants coming from sub-Saran Africa, the EU tried to reach a crucial agreement with Moroccan authorities over the issue of readmitting illegal migrants. In effect, a high level of bilateral cooperation with some EU Member States, in particular with Spain, has been established. Since 2004[66], Morocco has collaborated with Spain in joint naval patrols and readmission operations of Moroccan and sub-Saharan immigrants, in return for $390 million in aid[67]. In this context, the new restrictive Moroccan law regulating the entry and residence of foreigners adopted in 2003, has been perceived by some critics as the outcome of the growing pressure coming from the EU, which actually "wishes Morocco to play the role of Europe's 'policeman' in North Africa"[68].

One year later, in September 2005 when hundreds of sub-Saharan migrants had tried to climb over the fences erected around the Spanish enclaves of Ceuta and Melilla in Morocco, became evident that priority actions were needed to respond to the challenges of migration. The 2005 events along the Spanish border with Morocco soon became, to some extent, a European Union issue and the massive assaults on the fences required a common strategy. In effect, the incidents brought the Union face to face with the challenge of migration along its external borders and the need to work together with third countries. This new strategy responded to the increasing awareness that relations with countries of transit and origin had to be significantly improved in order to induce or persuade them to cooperate more in the field of migration and border management[69]. Actually, since Africa and the Mediterranean were considered as the main regions of origin of migrants in Europe, the principal actions were widely focused on those geographical areas.

In December 2005 a Global Approach to Migration (hereafter GAM) was adopted by the European Council held in Brussels. Since then, the GAM became the 'overarching framework of the EU external migration and

[63]   Council of the European Union, *The Hague Programme: strengthening freedom, security and justice in the European Union*, para. 1.6.2.

[64]   Ibidem, para.1.6.3.

[65]   Ibidem, para.1.7.1.

[66]   After the tragic terrorist attack occurred in Madrid in March 2004, immigration was linked to security issues.

[67]   H. DE HAAS, Morocco: From Emigration Country to Africa's Migration Passage to Europe, Migration Policy Institute, October 1, 2005, Source: http://www.migrationpolicy.org/article/morocco-emigration-country-africas-migration-passage-europe.

[68]   Ibidem.

[69]   J.P CASSARINO, *EU Mobility Partnerships: Expression of a New Compromise*, Migration Policy Institute, September 15, 2009, Source: http://www.migrationpolicy.org/article/eu-mobility-partnerships-expression-new-compromise/.

asylum policy'[70] and constituted an example of the European policy dialogue and cooperation with non EU-countries within the framework of the EU's external action. It aimed to present a comprehensive strategy to address irregular migration and human trafficking on the one hand, and to manage migration and asylum through cooperation with third countries of origin and transit on the other. In this respect, the Heads of government reaffirmed the need for immediate actions focusing on Africa and the Mediterranean and agreed that, while fully respecting human rights and the individual's right to seek asylum, specific measures must be taken to:

- reduce illegal migration flows and the loss of lives,

- ensure safe return of illegal migrants,

- strengthen durable solutions for refugees,

- build capacity to better manage migration, including through maximising the benefits to all partners of legal migration[71].

It called on the recently created European Agency Frontex in order to implement border management measures in the Mediterranean, such as joint operations and pilot projects, as well as to establish regional network of Immigration Liaison Officers with the assistance of priority countries and key regions. Moreover, the GAM stressed the importance of promoting an effective dialogue and a better cooperation with Africa, in particular the African Union, with the purpose of making migration 'a shared priority'[72]. In accordance with the above mentioned article 13.1 of the Cotonou Agreement, this dialogue should be focused on a broad range of issues ranging from institution and capacity building and effective integration of legal migrants to return and the effective implementation of readmission obligations. Along with these measures, the GAM aimed at establishing a pilot Regional Protection Programme, analysing the root causes of migration and launching an information campaign to raise awareness over the risks associated with illegal immigration. It also highlighted the need of engaging in close cooperation in migration management with Morocco, Algeria and Libya. Indeed, work with neighbouring countries represented a priority and in this respect the GAM recommended to:

> 'Use all available frameworks for cooperation with Mediterranean partners, including those mentioned below, to prevent and combat illegal migration and trafficking in human beings, build capacity to better manage migration, and explore how best to share information on legal migration and labour market opportunities'[73].

The proposal also developed the concept of 'mobility packages', a new form of circular migration for high-skilled migrants, and further anchored the notion of a 'more for more' approach: the more third countries cooperate, the more advanced visa facilitation will be for their nationals. Mobility were thus officially conditioned upon cooperation on border control and the conclusion of a readmission agreement with the EU[74]. They addressed those third countries once certain conditions were met, as cooperation on illegal

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[70] European Commission, Migration and Home Affairs, *Global Approach to Migration and Mobility*, Source: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/global-approach-tomigration/index_en.htm.

[71] M. DEN HEIJER, Extraterritorial asylum under European Union law, Doctoral thesis, Institute of Immigration Law, Faculty of Law, Leiden University, 2011, p.179.

[72] European Council Brussels, *Presidency Conclusions*, 15-16 December 2005, Annex I.

[73] Ibidem.

[74] M. MARTIN, *The Global Approach to Migration and Mobility*, Statewatch journal volume 22 no 2/3, October 2012, pp.1-7, p. 2.

migration and the existence of 'effective mechanisms for readmission'[75]. Second, they were limited to specific categories of migrant workers. In this respect, the European Union's attempt to link mobility partnerships with cooperation on readmission reflects how this issue became a crucial factor of its immigration policy.

Thus, the Global Approach to migration can be defined as the external dimension of the European Union's migration policy. It was based on genuine partnership with third countries, was fully integrated into the EU's other external policies, and addressed all migration and asylum issues in a comprehensive and balanced manner. As the Commission stated:

> 'The Global Approach reflects a major change in the external dimension of the European migration policy over recent years, namely the shift from a primarily security-centred approach focused on reducing migratory pressures, to a more transparent and balanced approach guided by a better understanding of all aspects relevant to migration, improving the accompanying measures to manage migratory flows, making migration and mobility positive forces for development, and giving greater consideration to decent work aspects in policies to better manage economic migration'[76].

This major change was based on reciprocal commitments and concrete steps to strengthen the synergy between migration and development. Then, cooperation with third countries became a fundamental part and even a prerequisite for an efficient integrated management of the external borders of the European Union. In order to secure their external borders and guarantee a proper management of the movement of persons, Member States established new partnership with countries of origin and transit of illegal migration. In this regard, cooperation with partner countries in terms of identification of their nationals, readmission of own nationals and readmission of third country nationals, coupled with financial and development aid, was a priority. At the same time, it was in the common interest of the European Member States to support and contribute to improve border management capacity on both sides of the border, promoting bilateral permanent contact and information exchange between the respective national authorities. In this context we should highlight that behind the negotiations of new partnership with third countries the security issue has often been the main goal for the EU. In fact, the very existence of the Schengen area relied on the efficient controls of its external borders and on Member States' ability to prevent illegal entries. As a matter of fact, within the EU's security-oriented approach, Member States launched a series of important initiatives and project to cooperate with Africa on migration issues.

The Rabat Process, for example, represented the main framework for regional dialogue within the Global Approach to Migration with regard to migration from West and Central Africa. It was established in July 2006 at the first EuroAfrican Ministerial Conference on Migration and Development and aimed at enhancing the dialogue between the EU and the Africa countries in order to cooperate on:

• legal migration and mobility

• prevention of irregular migration and measures to counteract it

• migration and development

• international protection[77].

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[75]   J.P CASSARINO, *EU Mobility Partnerships: Expression of a New Compromise*, Migration Policy Institute, September 15, 2009.

[76]   Communication COM(2008)611 final From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, *Strengthening The Global Approach To Migration: Increasing Coordination, Coherence And Synergies*, Brussels, 8.10.2008, para. 2.

[77]   European Commission-Fact Sheet (MEMO/15/4832), *The European Union's cooperation with Africa on Migration*, Brussels, 22 April 2015, Source: http://europa.eu/rapid/pressrelease_MEMO154832_en.htm.

Thus, providing pathways for legal migration to Europe was explicitly included as a goal in the Rabat Process, which has brought together more than fifty countries of origin, transit and destination, which have a shared vision of a rational, balanced and efficient management of migration flows. In parallel with cooperation at regional level, the EU-Africa Partnership on Migration, Mobility and Employment[78] provided a new framework for dialogue on migration between EU and Africa at continental level, including the countries of the Southern Mediterranean and with the African Union Commission as the main interlocutor.

In this institutional framework, cooperation with third countries on migration issues became even more prominent after the launch of the Frontex coordinated operation Hera in the Canary Islands. The aim was to prevent migrants from leaving the African coasts as well as to intercept them in the territorial waters of the third country and hand them over to the authorities of the respective African coastal state[79]. During the course of the joint sea operation, which started on 17 July 2006, seven Member States and Schengen Associated Countries[80] participated with the deployment of groups of experts that were involved in screening and debriefing procedures. Their work contributed to the return of illegal migrants and to the detention of several smugglers, in particular in Senegal. The second part of the Frontex operation was aimed at detecting vessels directed towards the Spanish islands and patrolling, joined with the national authorities, the coastal areas of Senegal, Mauritania, Capo Verde and the Canary Islands.

Consequently, the Operation Hera led to a drastic decrease in the flow of irregular migration. In this respect, as highlighted by the same European Agency, 'one of the important factors enabling continuous enhanced patrolling during as well as after the operation was the strong involvement of Senegal and Mauritania with which Frontex seeks to enter into permanent partnership'[81].

In this context, the UN Refugee Agency (hereinafter UNHCR) made some specific suggestions for future measures related to the external dimension of asylum and in this respect called on the EU to make an explicit commitment to 'protection-sensitive border management', affirming:

> 'In the context of these 'mixed flows', international protection can only be provided if individuals seeking protection have access to the territory of States where their claims can be assessed properly. The best quality asylum system will be of little use if it is not accessible. Surveillance of the EU's external borders, coupled with interception and migration control measures taken outside the EU and at its borders, including under the aegis of Frontex, may impede access to the Common European Asylum System'[82].

Furthermore, in accordance with UNHCR's viewpoint, the external dimension, including capacity-building activities and refugee resettlement, should be a complement to, and not a substitute for, the provision of protection within the EU[83]. In addition to this, EU measures adopted to coordinate the effective control of its 15,000 km of external borders and effectively manage the migration flows have been criticized by Irene Khan, the Secretary General of Amnesty International. In her statement over the EU's asylum policy she expressed her concern about the negative impact that security issues had on immigration and asylum questions, highlighting the risks, especially for refugees, of a security-driven approach. She also argued that:

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[78]   Launched in December 2007 in Lisbon.

[79]   M. FINK, *Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding 'Technical Relationships'*, Merkourios 2012 – Volume 28/Issue 75, Article, pp. 20-35, p.22.

[80]   France, Germany, Italy, Portugal, the Netherlands, Norway and the United Kingdom. During the second part of the Operation, Finland joined the mission with the deployment of 1 aircraft. See: S. CARRERA, *The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*, (2007) CEPS Working Document No. 261, p. 20.

[81]   Frontex, *Longest Frontex Coordinated Operation – Hera, The Canary Islands*, 19-12-2006, Source: http://frontex.europa.eu/news/longest-frontex-coordinated-operation-hera-the-canary-islands-WpQlsc.

[82]   UNHCR, *Response to the European Commission's Green Paper on the Future Common European Asylum System*, September 2007, p.46.

[83]   Ibidem, p.1.

'The EU and its Member States are pushing control beyond the physical borders of the EU, further south and further east. It is patrolling the territorial waters of Senegal, carrying out rescue operations in the Mediterranean and Aegean seas and increasing cooperation with transit countries in the field of migration'[84].

In September 2008, following a pragmatic approach, Member States began to consider international migration as a reality that will persist as long as there were differentials of wealth and development between various regions of the world. In this respect, the European Pact on Immigration and Asylum reaffirmed the idea, previously conceived by the same European Council, that 'migration issues are an integral part of the EU's external relations' and that 'the Global Approach to Migration can only make sense within a close partnership between the countries of origin, transit and destination'[85]. In this context, the EU committed itself to pursue policies of cooperation with its partners 'to deter or prevent illegal immigration, in particular by capacity-building in those countries'[86].

3.4. Evolution of the European external action under the Lisbon Treaty and the reinforcement of the EU's borders security after the Stockholm Programme

On 1 December 2009, after having been ratified by all EU Member States, the Treaty of Lisbon came into force reforming the structure of the Union and the way it functions. The Treaty of Lisbon amended the two funding Treaties[87] and, among other things, strengthens the external policies of the EU. In effect, the Treaty has constituted a crucial element in the evolution process of the EU's foreign policy. First of all, it reaffirmed the importance to establish an area of freedom, security and justice in which the free movement of people is guaranteed together with appropriate measure related to external border controls, asylum, immigration and the prevention and combating of crime[88].

In the second place the Treaty clearly stated that the Union, 'guided by the principle which have inspired its own creation, development and enlargement'[89], should promote relations and establish partnerships with non-EU countries in order to defend its value and fundamental interest, such as its own security. In addition to this, the Union has to respect the above mentioned principles[90] when developing and implementing its external action. In this framework, the Treaty focused on the promotion of EU's values and interest in the world, as stated in article 3.5 of the TUE:

'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'[91].

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[84]   Amnesty Internation, The EU's policy in a securitized world by Irene Khan, Brussels, 15 April 2008.

[85]   Council of the European Union, *European Pact on Immigration and Asylum*, (DOC. 13189/08), Brussels, 24 September 2008.

[86]   Ibidem, V.(c).

[87]   The Treaty on European Union and the Treaty establishing the European Community, that since then is renamed the Treaty on European Union (hereinafter TFUE and TUE).

[88]   Consolidated Version of the Treaty on European Union as amended by the Treaty of Lisbon, art. 3.2.

[89]   Ibidem, art. 21.1.

[90]   Democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

[91]   TUE, art. 3.5.

Moreover, it is worth mentioning that with the Lisbon Treaty the EU progressed towards an increasing international influence. In effect, after Lisbon, Member States were able to increase their role in the international arena and, since the Treaty has provided the Union with legal status, the new EU's legal personality can further facilitate the negotiation and conclusion of cooperation agreements with third-countries[92]. As part of the new institutional architecture adopted under the Lisbon Treaty, migration and asylum issues were also brought into the domain of foreign and security policy with the creation of the charge of EU High Representative for Foreign Affairs and Security Policy.

On 2 December 2009, Member States of the European Union agreed to the Stockholm Programme. It made a clear reference to the Treaty of Lisbon stating that 'the new basis under the Treaty for concluding international agreements will ensure that the Union can negotiate more effectively with key partners'[93]. It also relaunched the development of an area of freedom, security and justice and, at the same time, promoting the creation of 'an open and secure Europe serving and protecting the citizens'[94]. It recalled the basic commitments set out in the European Pact on Immigration and Asylum as well as the Global Approach to Migration. Moreover, the European Council called for the further development of integrated border management and, 'to respond more effectively to changing migration flows'[95], underlined the need to clarify the mandate and enhance the role of Frontex. The consolidation and implementation of the GAM, recognized to be a relevant element in the promotion of a comprehensive migration policy, needed to be accelerated maintaining the focus on cooperation with countries in Africa and Eastern and South-Eastern Europe.

When the Arab Spring broke out in the North Africa, especially in Tunisia, Egypt and Libya, the EU set out a series of measures to address the new situation and tackle the migratory pressure. In effect, the eruption of protests and unrests in the Southern Mediterranean since December 2010, led to significant population movements, from the Maghreb countries towards the EU. The situation in the Mediterranean region got worse when the long-standing dictators in Egypt and Tunisia were ousted, spreading chaos and confusion all over the country. The political vacuum did not cause the massive migratory waves towards Europe but certainly facilitated, together with high levels of unemployment rate among a very young population, the increase in the number of migration flows. As affirmed the Commission in its Communication (2011) 292 final:

> 'The eruption of the conflict in Libya as of mid-February, provoked the displacement of around 800,000 persons of many different nationalities towards the neighbouring countries, in particular Tunisia and Egypt. A number of them have fled towards Italy and Malta across the Mediterranean Sea on vessels of fortune, sometimes losing their lives at sea as a result. As of mid-January some 35,000 migrants from Tunisia and Libya have arrived at the shores of the Italian island of Lampedusa and Malta'[96].

Within this framework, in May 2011 the EU drafted 'a dialogue for migration, mobility and security with the southern Mediterranean countries' in order to strengthen its external migration policy and ensure a better management of the flow of persons between the EU and its partner countries. Therefore, among its measures, the Commission proposed to establish and develop mobility partnerships, giving priority to the EU's neighbouring countries. By setting up those relations with their non-EU counterparts, Member States

[92] J. MONAR, *The External Dimension of the EU´s Area of Freedom, Security and Justice Progress, potential and limitations after the Treaty of Lisbon*, Swedish Institute for European Policy Studies (SIEPS), Report No. 1 May 2012, p. 58.

[93] *The Stockholm Programme -An open and secure Europe serving and protecting the citizen*, Doc. 17024/09, Council of the European Union, Brussels, 2 December, 2009.

[94] *The Stockholm Programme -An open and secure Europe serving and protecting the citizen*, Doc. 17024/09, Council of the European Union, Brussels, 2 December, 2009, para. 1.

[95] Ibidem, para. 6.1.1.

[96] Communication COM(2011) 292 final From The Commission To The European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions of the 24.5.2011, *A dialogue for migration, mobility and security with the southern Mediterranean countries*, Introduction.

requested to their Partners to 'take every possible measure to prevent irregular migration and to this end, agree to conclude a readmission agreement allowing for the return of citizens who do not have the right to stay in Europe'[97].

In this regard, the Communication also proposed to establish a special joint EU-Tunisia operational project as part of a wider set of measures to address the overall situation of irregular migration in the Mediterranean region. This project was aimed at strengthening the capacity of the Tunisian authorities to control their borders, to fight against the smuggling of migrants and trafficking in human beings, to facilitate the return and social and professional reintegration of returnees, to support access to legal migration channels and to treat migrants entering their territory in accordance with international standards, including by offering asylum to those in need of international protection[98]. Thus, the Dialogue on migration, mobility and security paved the way to the negotiation of mobility partnership and in 2013 Morocco was the first country from the Mediterranean region to sign a mobility partnership with the European Union[99].

Within this wide institutional framework, embedded in the EU's overall external action, the GAM has been implemented through the addiction of a new component: mobility[100]. The new Global Approach to Migration and Mobility has been adopted in November 2011 and was conceived to address four main priorities:

- organising and facilitating legal migration and mobility;

- preventing and reducing irregular migration and trafficking in human beings;

- promoting international protection and enhancing the external dimension of asylum policy;

- maximising the development impact of migration and mobility.

The explicit aim was to ensure that 'before visa obligations are facilitated or lifted, a number of specific benchmarks are fulfilled by the partner countries, including in areas such as asylum, border management and irregular migration'. In this respect, the burden third countries are required to carry, such as readmission and border management is heavy and often uneven. Moreover, since visa liberalization between the EU and its partner countries is conditional on the signing of an agreement on the readmission of illegal immigrants, the GAMM has been criticized and defined by some critics as 'a mean for the EU to restrict access to its territory and for allowing Member States to use migrants as disposable workers'[101].

In this regard, some NGOs expressed their concern about the new approach and underlined that the signing of readmission agreements results in some countries being incorrectly deemed 'safe' and that refugees could face human rights violations upon return[102]. In effect, the European Council on Refugees and Exiles (hereinafter ECRE) affirmed, in its analysis paper on the GAMM published in its Weekly Bulletin, that 'the EU

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[97] European Commission-Migration and Home Affairs, *Southern Mediterranean Policies*, Source: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/southern-mediterranean/index_en.htm.

[98] Ibidem, para 4 (5).

[99] *Joint declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States*, Council of the European Union, Doc. 6139/13 ADD 1 REV 3, Brussels, 3 June 2013.

[100] Communication COM(2011) 743 final From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions of the 18.11.2011, *The Global Approach to Migration and Mobility*.

[101] T. MAROUKIS AND A. TRIANDAFYLLIDOU, *Mobility Partnerships: A Convincing Tool for the Eu's Global Approach to Migration?*, Policy Paper No. 76, Notre Europe – Jacques Delors Institute, February 2013.

[102] M. MARTIN, The Global Approach to Migration and Mobility: the state of play, Statewatch Analysis 2012.

and Member States should first and foremost consider the human rights situation and the availability of a well-functioning asylum system in the third country before entering into negotiations and implementing readmission agreements with that country'[103].

In parallel with this new approach and in line with the Stockholm program, Regulation 2004/2007 of 26 October 2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States, was amended in order to reinforce the powers and clarify the mandate of Frontex[104]. The amendments intended to widen the engagement of the Agency in technical cooperation projects with competent authorities outside the EU in order to secure EU external borders. As stated in 2010 by the same Agency, in its analysis on its first five years of activity:

> 'Cooperation between Frontex and Third Countries is carried out in the context of the overall EU security strategy. This clearly establishes that border control-related activities begin in the countries of origin or transit and continue with cooperation on both sides of the external border'[105].

With the new amended Regulation, cooperation with non-UE countries became an integral part of Frontex's mandate. Within the existing framework of the external relations policy of the Union, aimed at reinforcing bilateral cooperation with EU's neighbouring countries, as well as with countries of origin and transit to cope with irregular migration. The establishment of operational and technical cooperation with non-EU partners and with competent authorities of third countries, especially with those bordering the Mediterranean[106], remained a high priority.

As established in article 14, among its tasks, Frontex shall promote 'operational cooperation between Member States and third countries'[107]. Within the framework of working arrangements[108] signed with the competent authorities of those countries, the EU had a strong interest in tackling illegal immigration and supporting its partners' ability to manage their borders. Frontex may launch and finance technical assistance projects in non-EU countries, also benefiting from EU funding. It may also deploy liaison officers to non-EU countries and, on a reciprocal basis, may receive liaison officers posted by those non-EU countries, for a limited period of time[109]. It's worth mentioning that, according to the new amended Regulation 'liaison officers shall only be deployed to third countries in which border management practices comply with minimum human rights standards'[110].

In the framework of the Joint Operation coordinated by Frontex, it should be noted that, according to the Fundamental Right Strategy endorsed by its Management Board on 31 March 2011, Operational Plan has to be elaborated guaranteeing the respect for fundamental rights and 'with a view to preventing breaches or other negative effects'[111]. In this respect, working arrangements should respect the fundamental rights clause included in every action plan, as established since the recast of Frontex's mandate in 2011. By contrast,

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[103] ECRE, *ECRE Comments to the Commission Communication on the Global Approach to Migration and Mobility COM (2011) 743 final*, ECRE Weekly Bulletin, 27 April 2012, Source: file:///E:/Dati%20Utente/Downloads/ECRE%20Weekly%20Bulletin%2027%20April%202012.pdf.

[104] Regulation (EU) No 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004 *establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.*

[105] Frontex, *Beyond the Frontiers-Frontex: The First Five Years*, Warsaw 2010, p.69.

[106] The Agency Frontex is negotiating bilateral agreement with Lybia, Morocco, Egypt and Tunisia. See Frontex, *Third Countries*, Source: http://frontex.europa.eu/partners/third-countries/.

[107] Regulation (EU) No 1168/2011, art. 14.

[108] Regulation (EU) No 1168/2011, art. 14.2.

[109] Frontex, *Third Countries.*

[110] Regulation (EU) No 1168/2011, art. 14.3.

[111] Frontex Fundamental Rights Strategy, point 15.

cooperation with third countries with poor human rights records may lead and constitutes a risk of human rights violations[112].

Along with the reinforcement of Frontex[113], in December 2013 the European Parliament and the Council of the EU approved a Regulation establishing a system to enable a better cooperation and exchange of information between Member States and the Agency. With the purpose of improving the situational awareness and reaction capability at the external border of the Union, the new European Border Surveillance System (hereafter EUROSUR) aimed at 'detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants'[114]. The system, which became operational in December 2013, reinforced surveillance at the external borders using sophisticated technology, such as drones and satellites, whose use was strictly conditioned to the respect of fundamental rights and in particular the principle of non-*refoulement*[115]. However, even if one of the main goals of this cooperation mechanism is to save migrants' lives and reduce the number of deaths at the sea, it was not sufficient to serve this purpose. In effect, as affirmed by Gil Aria Fernandez, Frontex's own deputy director, Eurosur 'does not fulfil this service'[116] and thus, won't be useful for search and rescue operations at the sea.

Under the Eurosur Regulation[117], cooperation with third countries constituted a major priority and in accordance with article 20.1 it should be pursued through the conclusion of bilateral or multilateral agreements as well as with the establishment of regional network. Since the exchange of information and cooperation with non-EU partners was considered as a crucial element contributing to the success of EUROSUR, Member States supported the competent authorities of the North African countries[118] in order to reinforce their border surveillance system. A clear example of that approach is represented by the Southern Mediterranean Border Surveillance Network aimed to curb irregular immigration "by reinforcing the capacity of the authorities of the North African countries to prevent irregular departures of migrants from their territories"[119].

In this context, even if the EUROSUR Regulation explicitly recognized the importance to carry out those cooperation agreements in full compliance with fundamental rights, in particular with the principle of non-*refoulement*, EU Member States concluded important agreement with non-EU countries, such as Libya or Morocco, where refugees and migrants may face serious human rights violations[120]. Thus, shaped by security concerns, EU policies with third countries in the field of migration and asylum may not be fully in line with international and European law.

Since 2013, within the framework of the GAMM, the European Union has also signed Mobility Partnerships with Morocco and Tunisia as well as a common agenda on migration and mobility with Nigeria. In this regard, Member States, for the purpose of reaching a better migration management and a more efficient border control in return for development aid and visa facilitation, adopted a number of security-focused policies. As affirmed

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[112] The right to leave any country including one's own: Art. 13 Universal Declaration of Human Rights – UDHR, Art. 2 European Convention on Human Rights – ECHR; Right to seek asylum: Art. 14 UDHR, Art. 18 EU Charter of Fundamental Rights; *Non-refoulement* principle -Prohibition of collective expulsions: Art. 19.1-2 EU Charter, Protocol 4 art. 4 ECHR; Right to effective remedy: Art. 8 UDHR, Art. 47 EU Charter, Art. 13 ECHR, Art. 13 Schengen Border Code.

[113] Hereinafter we will also use the expression "the Agency" to make reference to Frontex.

[114] Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 *establishing the European Border Surveillance System (Eurosur)*, para.1, OJ EU L 295, 6.11.2013.

[115] Regulation (EU) No 1052/2013, para. 11.

[116] N. NIELSEN, *EU border surveillance system not helping to save lives*, EUobserver, 14 May 2014, Source: https://euobserver.com/justice/124136.

[117] Regulation (EU) No 1052/2013, art.20.

[118] Algeria, Tunisia, Libya and Egypt.

[119] Annex 2 to the AAP 2012 part 3 of the Thematic Programme for Cooperation with Third Countries in the Areas of Migration and Asylum, para 2.1.

[120] Amnesty International, *The Human Cost of Fortress Europe*, July 2014, p. 25.

by Francois Crepeau, the UN Special Rapporteur on the human rights of migrants, 'oncerning trends in the use of externalization techniques have continued'[121] and despite the fact that the GAMM posed serious concerns due to its 'lacks of transparency and clarity on the substantive contents of its multiple and complex elements, […] the European Union has continued to use the Approach to promote greater 'security''[122].

In this context, in consideration of the fact the massive flows of migrants using precarious routes to reach the EU, particularly through the central Mediterranean Sea, has increased dramatically since 2013, the European Commission set up the Task Force for the Mediterranean (hereinafter TFM). The TFM was established following the Justice and Home Affairs Council of 7-8 October 2013, soon after the tragic incident occurred on 3 October 2013 when 366 people drowned off the coast of Lampedusa.

In order to prevent such human tragedies from happening again the Task Force has identified five areas of action. Among the main lines of action developed by the TFM, the cooperation with third countries was on the top of the list. In effect, those countries were considered by the EU as 'crucial partners' to achieve sustainable or durable solution to manage the mixed migration flows as well as the irregular migration waves in the Mediterranean Sea. The other four measures contained in the Communication of the European Commission were related to:

- Regional protection, resettlement and reinforced legal avenues to Europe,

- Fight against trafficking, smuggling and organised crime,

- Reinforced border surveillance contributing to enhancing maritime situational picture and to the protection of saving of lives of migrants in the Mediterranean,

- Assistance and solidarity with Member States dealing with high migration pressure[123].

Once again, the European response to the increasing number of mixed migration flow relied on the establishment of Mobility Partnership within framework of the GAMM, the conclusion of readmission agreement with non-EU countries and the launch of new regional dialogue process[124]. Even if the tragic loss of human lives off the Italian coasts triggered a strong call for action from the EU and its citizens, Member States proposed to reinforce the existing partnerships in the context of operational control, confirming the existence of a predominant security-driven approach. As stated by Marie Martin in her Policy Brief in June 2014:

> 'it is evident from both the Task Force's recommendations as well as its first working document on their imple-
> mentation that these do little more than offer more of the same, repackaging already existing policies and placing
> a disproportionate focus on cooperation with third countries, reinforced border control, and voluntary returns. the
> main concern of the EU and its member states remains that of preventing migrants and refugees from departing
> from Southern Mediterranean countries and from reaching EU territory'[125].

[121]   UN Doc. A/HRC/29/36, Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants*, 8 May 2015, para 36.

[122]   UN Doc. A/HRC/29/36, para. 38.

[123]   Communication COM(2013) 869 final from the Commission to the European Parliament and the Council *on the work of the Task Force Mediterranean*, Brussels, 4.12.2013.

[124]   European Commission, Commission Staff Working Document SWD(2014) 173 final, *Implementation of the Communication on the Work of the Task Force Mediterranean Part Ù*, Brussels, 22.5.2014.

[125]   M.MARTIN, *Prioritising Border Control over Human Lives: Violations of the rights of migrants and refugees at sea*, Euro-Mediterranean Human Rights Network (EMHRN), Policy Brief-June 2014, p. 1.

In June 2014, the European Council stressed the importance of fully implementing the actions identified by the TFM, reaffirming that migration policies should apply the 'more for more' principle and be a crucial factor of the EU's external and development policy. It also called on Member States to ensure strong protection at common external borders, reinforce Frontex's operational assistance and guarantee a 'genuine area of security' for European citizens. To this end and in order to promote the development of an area of freedom, security and justice, one of the main priorities set out by the European Council for the next five years was to better manage migration in all its aspect, 'also through better cooperation with third countries, including on readmission'[126].

As part of this long-standing dialogue on migration and mobility, the EU-Horn of Africa Migration Route Initiative (hereafter Khartoum Process), launched at a Ministerial Conference on 28 November 2014 in Rome, aimed at enhancing the current cooperation, included through the identification and implementation of concrete projects. On that occasion, the Ministers of the participant European and African countries agreed on a series of activities which aimed to tackle trafficking in human beings as well as smuggling of migrants between the Horn of Africa and Europe.

In their political declaration the EU and the African Union expressed their concern about the serious social and human impact that mixed migration flows may produce, as well as about the perilous journeys across desert and sea. In this regard, the European and the African Union committed themselves to undertake initiatives to try to avoid new tragedies, in particular in the Mediterranean, 'in the full respect of human rights and in accordance with relevant international conventions, […] in particular the 1951 UN Geneva Convention'[127]. Capacity building, technical assistance and the exchange of best practises in the field of migration management were some of the most relevant measures proposed at the Ministerial Conference held in Rome.

In addition to these concrete actions, the governments also agreed to undertake specific measures to assist the participating countries in: establishing and managing reception centres, improving camp services and security, coping with mixed migration flows and supporting victims of trafficking[128]. In this regard, the EU's migration Commissioner Avramopoulos affirmed that the EU Member States 'will finance the first projects that will support migrants and refugees stranded along the migration routes from Eastern Africa'. To this end, in the framework of the Khartoum Process, EU has fund specific measures to strengthen the cooperation and the ability of its African partners to cope with the above mentioned migrant issues. Among the project financed by the EU we should highlight the training of Sudanese officials in migration management, the improvement of border management capacity in South Sudan, and establishment of a training centre at the Police Academy in Cairo[129].

3.5. European Agenda on Migration

On 13 May 2015, the European Commission launched a European Agenda on Migration setting up a series of immediate measures in order to respond to the crisis situation in the Mediterranean. The Agenda has represented the European response to increase migratory pressure at the external borders of the EU and sets out a new strategic approach to manage migration in the medium to long term four levels of action:

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[126]   Europen Council 79/14, *Conclusions*, Annex I, point 4, Brussels, 27 June 2014.

[127]   Declaration of the Ministerial Conference of the Khartoum Process (EU-Horn of Africa Migration Route Initiative), Rome, 28 November 2014.

[128]   ECRE, *Khartoum Process: EU and African Union launch initiative against smuggling of migrants*, ECRE Weekly Bulletin, 5 December 2014.

[129]   Council of the European Union, *Steering Committee meating of the EU-Horn of Africa Migration'Route Initiative (Khartoum Process) (Sharm El Sheikh 23-24 April 2015)- Sharm El Sheikh Plan of Action*, DOC. DS 1250115 LIMITE, Annex (2), Brussels, 27 April 2015.

- reducing the incentives for irregular migration,

- saving lives and securing the external borders,

- a strong common asylum policy,

- a new policy on legal migration[130].

When implemented, they will provide the EU with a migration policy which respects the right to seek asylum, responds to the humanitarian challenge, provides a clear European framework for a common migration policy. As stated by the High Representative Federica Mogherini: 'with this agenda we confirm and broaden our cooperation with the countries of origin and transit in order to save lives, clamp down on smuggling networks and protect those in need'[131]. In effect, the Agenda reaffirmed the importance of Partnership with countries of origin and transit as well as the existing bilateral and regional cooperation frameworks on migration. Within this framework, since the role of EU Delegations in key countries is crucial, their engagement in migration issues should be increased in order to reduce the incentives for irregular migration. In particular, Delegations will report on major migratory related developments in the host countries, contribute to mainstream migration issues into development cooperation and reach out to host countries to ensure coordinated action. At the same time, alongside those Delegations, European migration liaison officers will support their activities in key third countries.

In its Communication (2015) 240 final the European Commission made a clear reference to the benefits deriving from the partnership with Turkey, defined as 'a good example of where there is much to be gained from stepping up cooperation'[132]. In effect, since 2014, the Turkish government has received EUR 79 million to contribute to its efforts to deal with the pressure on its refugee management system and to help prevent hazardous journeys along the Eastern Mediterranean route.

EU's external cooperation assistance, and in particular development cooperation, should play an important role in tackling global issues like poverty, insecurity, inequality and unemployment which are among the main causes of irregular migration. The EU will help third countries to meet their obligations by offering support such as capacity building for the management of returns, information campaigns and support for reintegration measures. The Commission will also revise its approach to readmission agreements, prioritising the main countries of origin of irregular migrants. Among the key action the European Commission proposed to strengthen the capacity of third countries to manage their borders. The goal should be to encourage more secure borders, but also to strengthen the capacity of countries in North Africa to intervene and save lives of migrants in distress[133].

On the face of what have been planned, it should be noted that, setting apart political rhetoric, the EU's response to the migration emergency of 2015 showed a clear preference for cooperation with non-EU countries in the areas of readmission, border controls and surveillance. In effect, in the current EU policy and media discourse has prevailed the assumption that identifies cooperation with third countries as 'the solution to Europe's refugee crisis'[134].

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[130] European Commission, *Managing migration better in all aspects: A European Agenda on Migration*, Press Release- IP/15/4956, Brussels, 13 May 2015, Source: http://europa.eu/rapid/press-release_IP-15-4956_en.htm.

[131] Ibidem.

[132] European Commission, Communication COM(2015) 240 final From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Agenda On Migration*, Brussels, 13.5.2015, p. 8.

[133] Communication COM(2015) 240 final, p.11.

[134] S. CARRERA, J. P. CASSARINO, N. EL QADIM, M. LAHLOU AND L. DEN HERTOG, *EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow*, CEPS Paper in Liberty and Security in Europe No. 87/ January 2016, p. 12.

The European Committee of the Regions has expressed its concern in its policy recommendations over the European Agenda on Migration, affirming that:

> 'the meetings of heads of state held to date barely addressed the humanitarian dimension of the situation; stresses that the strengthening of border controls and measures to tackle irregular migration is essential, including the strict registration of all migrants in accordance with the relevant EU acquis, but cannot take precedence over international obligations to save lives and respect human rights, or over the right to seek asylum in the EU, which must remain a place of refuge for people in need of international protection'[135].

In addition to this, in the future Europe may face several difficulties on a number of issues related to the conclusion of negotiations with third countries. Since the Union and its partners have different interest at stake, it will be hard to find a compromise that ensure an efficient and fair cooperation on migratory issues. In this regard, conditionality and the 'more for more' principle, related to the benefits that partner countries may receive if they engage more constructively on return and readmission, represents one of the most controversial aspect in the debate between the EU and most African countries. With the Valletta Summit on migration held on 11-12 November 2015, this issue became even more evident and, as the Presidency of the European Council highlighted:

> 'The points of departure of the partners are, however, quite different and that is also obvious in the discussions held so far. While EU Member States have mainly emphasised the need for clear progress in the area of return and readmission as part of a strategy to curb illegal migration and reduce pull-factors, African partners insist on framing the Summit deliverables as elements of a wider, long-term effort to regulate migration flows and mobility between the two continents and hence their insistence on further exploring legal channels into Europe. The issue of conditionality, or the "more-for-more" principle, namely as regards the link between visa facilitation and readmission, has also proved to be controversial'[136].

3.6. Externalization of Europe's border controls: Which consequences for the human rights of migrants and asylum-seeker?

External border controls have always been an important element of providing internal security. In this context, even if the EU Member States have the right to control their common external borders, they have to do so in fully compliance with human rights and fundamental freedoms. In 2008, the then UN High Commissioner for Refugees, Antonio Gutierrez, affirmed that 'there are more and more barriers to entry to the European territory, the consequence being that many people seeking protection have no other choice but to resort to smugglers and traffickers in order to cross borders'[137]. The EU's external policy in the field of migration and asylum have adopted several measures that had hindered or even prevent people, either refugees or migrants, from moving up their country until they reach the shores of the Mediterranean or the land border of the Union[138]. As a matter of fact, the possibilities for people in need of protection to legally enter and stay in an EU Member State are limited. The overall result of the policies approved by the EU has led to the introduction, by the competent authorities of third countries, of restrictive measures and mechanisms to prevent people fleeing persecution and torture from arriving at its borders or entering the territory of a Member State of the Union.

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[135] Communication COM (2015) 240 final of the 3 December 2015 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *A European Agenda on Migration*, para. 4, OJ EU C51, 10.2.2016.

[136] Council of the European Union, *Valletta Summit on Migration, 11-12 November 2015*, Doc. 13153/15 LIMITE, Brussels, 16 October 2015.

[137] Intervention de M. António Guterres, Haut Commissaire des Nations Unies pour les réfugiés, à la Conférence ministérielle «Bâtir une Europe de l'Asile», Paris, le 8-9 septembre 2008.

[138] T. BUNYAN, *EU-Africa: Fortress Europe's neo-colonialism project*, Statewatch Analysis, November 2015, p. 6.

The lack of legal channel obliged many people in need of international protection, the majority of these coming from 'refugee producing' countries such as Syria, to resort to smuggling networks in order to cross the dangerous Central Mediterranean route or the Aegean Sea and reach the old continent.

In this context, by strengthening cooperation with third countries of transit and origin of migrants, Member States have increasingly externalized border controls beyond their national borders. As stated by Claire Rodier, Vice-President of Migreurop, 'Externalization in the EU involves transferring responsibility and, in effect outsourcing its immigration and asylum policy by subcontracting controls'[139]. The UN Special Rapporteur also expressed his concern about the actions adopted by the EU in the field of immigration and asylum and in this regard affirmed:

> 'I regret the trend of "externalization" of border control, […] shifting the responsibility of preventing irregular migration to countries of departure or transit. […] Migration and border control are increasingly integrated into security frameworks that emphasize policing, defence and criminality over a rights-based approach'[140].

As part of this wide framework, it is worth mentioning that perimeter checks have also been privatized. In effect, since Directive 2004/82/EC11[141] requires carriers to perform identity checks on their passengers and obtain detailed information on their route, transport companies, most of which are private, have been forced to control migration flows on behalf of the EU. Thus, as carriers have to check that all their passengers have legal documentation, they play a crucial role in managing illegal immigration. In this regard, we should highlight that the vast majority of people fleeing war and persecution do not have neither the time nor the opportunity to obtain the legal traveling document required by the EU and thus by the transport companies. Moreover, as explained by T. Kritzman-Amir, 'while carriers are threatened with sanctions if they err and allow entry to undocumented migrants, they are not subject to any sanctions if they effectively deny entry and admission of asylum seekers'[142]. When persons in need of international protection reach the borders of the EU in an irregular manner, they may be refused entry to the country at which they arrive, and instead be subjected to unlawful collective expulsions or pushed back in violation of the principle of non-*refoulement*[143].

Another relevant aspect of this security-driven approach is that the EU has been tightening asylum laws and shifting responsibility for migration management beyond its borders[144]. Even if principles, such as solidarity, humanitarian values and fair procedures are reaffirmed in every EU document on migration and asylum, an 'ethical' EU asylum and immigration policy both within the Union and externally is far from being achieved. As many NGO's have argued, since the need for security is predominant among the European citizens, the EU immigration and asylum policy, including its external dimension, have prioritized border checks and migration controls rather than the protection of human rights.

Over the last two decades, externalisation measures have been usually based on bilateral agreements between individual Member States in Europe and countries of departure or transit of migrants and refugees. As stated

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[139] Red Cross EU Office, *Shifting Borders – Externalising migrant vulnerabilities and rights?*, 2013, p. 7.

[140] Statement by the UN Special Rapporteur on the human rights of migrants, François Crépeau, *Securitisation and Externalisation of the Borders Alone Will Not Stem Irregular Migration*, High-level Dialogue on international migration and development, Side event: Human Rights at International Borders, New York, 4 October 2013.

[141] Directive 2004/82/EC on *the Obligation of Carriers to Communicate Passenger Data*, adopted by the European Council on 29 April 2004, OJ EU L261/25, 6.8.2004.

[142] T. KRITZMAN-AMIR, Privatization and Delegation of State Authority in Asylum System, in Law and Ethics of Human Rights, Vol. 5,2011, Iss. 1, Art. 6, pp. 194-215, p. 203.

[143] European Union Agency For Fundamental Rights, *Legal entry channels to the EU for persons in need of international protection: a toolbox*, FRA Focus, 02/2015, p. 3.

[144] Z. STOYANOVA-YERBURGH, *Asylum in the EU: Between Ideals and Reality*, Carnegie Council for Ethics in International Affairs, 10 June 2008, Source: https://www.carnegiecouncil.org/publications/ethics_online/0022.html.

by the UN Special Rapporteur on the human rights of migrants 'readmission agreements are an area of particular concern'[145]. He also added that 'externalization is achieved, *inter alia*, through capacitation of border control in countries of origin and transit, or the signing of readmission agreements'[146].

In effect, since the very origins of the EU, Member States have signed a series of bilateral and multilateral agreements with third countries. Readmission agreements, which allow to return irregular migrants and asylum seekers whose application have been denied, are negotiated as part of a wider cooperation that usually include trade agreements. As we have already mentioned in the second chapter, visa facilitations and development aid may be conditional and thus tied to the acceptance of the readmission clauses included in those agreements. In this context, despite protections against such practices in European Union legislation, pushbacks and *refoulement* to countries of origin and third countries have been conducted as a direct consequence of the conclusion of several bilateral agreements between European and non-European States.

The bilateral cooperation agreement on migration and border control signed in August 2008 between Italy and Libya is a clear example of how such agreements between European States and third countries can lead to serious human rights violations. In fact, in February 2012, the European Court of Human Rights has condemned the Italian government for returning about 200 Somali and Eritrean migrants travelling by sea back to Libya in 2009. In effect, the sentence *Hirsi Jamaa and Others v. Italy* ruled by the Court[147] condemned the push-back operation, based on the above mentioned agreement signed between Italy and Libya, and held that Italy had violated articles 3, 4 (Protocol n.4) and 13[148] of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) by directly returning those migrants to Libya, regardless to the principle of non-*refoulement*[149] and the right to an effective remedy. In addition to this, the Italian authorities, pushing back those migrants, denied them access to the asylum procedure.

In this regard, we should highlight that the principle of non- *refoulement* is the cornerstone of International Refugee Law and has been originally established by the 1951 UN Convention on the Status of Refugee which clearly prohibits the return (*refouler*) or the expulsion of a refugee 'in any manner whatsoever' to a country where his or her life and freedom would be at risk[150]. At the same time, within the international framework, article 3.1 of the 1984 UN Convention against Torture, extending the non-*refoulement* duty to anyone who is at risk of torture or other ill-treatment, reaffirmed the absolute prohibition of expel, return or extradite a person to the territory of a State 'where there are substantial grounds for believing that he would be in danger of being subject to torture'[151]. On the other hand, the European law established a series of legal guarantees for those who flee persecution and widespread violence. In effect, while art. 4 of the Protocol n.4 to the ECHR reaffirmed the prohibition of collective expulsion, article 19.2 of the Charter of Fundamental Rights of the EU, which gained binding force since December 2009, stated that 'no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'[152].

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[145] UN Doc. A/HRC/29/36, Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants*, 8 May 2015, para 39.

[146] Ibidem.

[147] European Court of Human Rights (Grand Chamber) *Case of Hirsi Jamaa and others v. Italy*, Application no. 27765/09, Judgement of 23 February 2012.

[148] Art. 3: Prohibition of torture; art. 4 Prot. No.4: Prohibition of collective expulsion; art. 13. Right to an effective remedy.

[149] The return of those 200 migrants constituted a violation of article 3 on account of the fact that the applicants were exposed to the serious risk of being subjected to ill-treatment in Libya. Once handed over to the Libyan authorities the applicants were likely to be repatriated to Somalia and Eritrea, where they would be almost surely subject to death penalty, torture or other form of ill-treatment.

[150] Convention and Protocol relating to the Status of Refugees, art.33.1.

[151] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984 (resolution 39/46), art. 3.1.

[152] Charter of Fundamental Rights of the European Union, art. 19.2, OJEU C 364, 18.12.2000.

Over time, the phenomenon of externalization has increased, leading to the systematic engagement with third countries with the explicit goal of preventing migrants from entering the territory of the EU. As reported by the European Commissioner for Human Rights, EU countries which in 2011 registered a significant increase in asylum applications from Western Balkan citizens, put pressure and urged the competent authorities of the countries of origins of asylum seekers to 'properly manage their migration outflows'. EU officials have also addressed the governments of those countries remarking that the visa liberalisation process was linked to an efficient management of migration and asylum flows, pointing out that 'if the problem continued […] visa requirements would be reintroduced'[153].

The pressure upon the countries in the Western Balkan region became even greater when the European Commission drafted a proposal in order to establish a visa safeguard clause[154]. According to this proposal, 'in the event of sudden inflow of nationals of one or more third countries, including nationals of the Western Balkans', a rapid suspension of visa liberalization would be adopted[155].

In this context, we should highlight that the right to seek and enjoy asylum is deeply embedded and thus guaranteed in the international as well as in the European human rights legislation. Article 14.1 of the Universal Declaration of Human Right in fact clearly establishes the right to seek and enjoy in other countries asylum from persecution, while article 13.2 states that 'everyone has the right to leave any country, including his own'. Moreover, the right to asylum is reaffirmed in article 18 of the Charter of the EU. In this regard, any measure or action that prevent an individual from enjoying these basic rights, without any reasonable justification, is not fully in compliance with the international and European law.

4. Engagement of Turkey into the EU refugee crisis: the EU-Turkey Joint Action Plan

4.1. EU-Turkey Joint Action Plan: a common endeavour to manage the refugee crisis

On 15 July, 2014 the then candidate for President of the European Commission, Jean-Claude Junker, announced his political guidelines through which he outlined the main challenges the European Union had to deal with, reaffirming the urgent need for a common response to draft a new policy on migration. In his new Agenda Junker's main message in relation to migratory issue was clear:

> 'we need to deal more robustly with **irregular migration**, notably through better cooperation with third countries, including on readmission. […] Last but not least, we need to **secure Europe's borders**. Our common asylum and migration policies will only work if we can prevent an uncontrolled influx of illegal migrants'[156].

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[153]   Council of Europe Commissioner for Human Rights, *The right to leave a country*, Issue Paper, October 2013, p. 42.

[154]   European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2011) 290 final, Brussels, 24.5.2011.

[155]   Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to the "former Yugoslav Republic of Macedonia", from 26 to 29 November 2012, COMDH(2013)4, paragraph 97.

[156]   Jean-Claude Junker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission*, Strasbourg, 15 July 2014, point 8.

When the flow of migrants begun to increase dramatically and the pressure on the European external border was too high, EU heads of State or Government realized that was essential to strengthen their cooperation with Turkey, the major first reception and transit country for migrants, in order to respond to the unprecedented refugee crisis. In effect, the magnitude of that crisis paved the way for the establishment of a new form of cooperation between Turkey and the EU. As a matter of fact, the nature of their relations has evolved into a strategic and operational partnership which aimed at tackling illegal immigration and enhancing border controls, actually transforming Turkey into a buffer zone for refugees and migrants[157].

On 23 September 2015, EU leaders asked the EU institutions and their own Governments to enhance the dialogue with the Republic of Turkey. On 15 October, following those orientations, the Commission submitted to the European Council a Joint Action Plan (hereinafter JAP) which was elaborated and negotiated with Turkey to 'step up their cooperation on support of refugees and migration management in a coordinated effort to address the unprecedented refugee crisis created by the situation in Syria and Iraq'[158].

Once the Council has approved the draft document, the Action Plan was officially activated at the EU-Turkey summit that took place in Brussels on 29 November 2015, where the leaders of the European Union and their Turkish counterpart reaffirmed their commitment to address the situation of massive influx of persons in a spirit of burden sharing. As integral part of the existing EU-Turkey relations, including the Visa Liberalization Dialogue, the EU financial support to Turkey and the readmission agreement signed in December 2013, the Action Plan, defined the main actions the two contracting parties shall undertake in order to assist the Syrian refugees hosted in Turkey and reduce the influx of migrants towards Europe. Since the very beginning, as stated in the Conclusions of the European Council meeting of the 15 October 2015, the JAP with the Turkish authorities has been considered 'as part of a comprehensive cooperation agenda based on shared responsibility, mutual commitments and delivery'[159]. In this context, as stated in the first part of the Plan, the EU will support Turkey in dealing with the massive presence of Syrian under temporary protection within its territory providing financial assistance and thus mobilizing new funds 'in the most flexible and rapid way possible'[160].

Moreover, among the commitments undertaken by the EU, Member States will keep on addressing the most urgent needs, including the provision of legal or psychological support and access to education and basic services, providing immediate humanitarian assistance through humanitarian agencies working on the field in order to create better living conditions for the refugee host communities. The EU side will work hard to weaken the main factors that push the refugees to continue their journey from Turkey to the EU, as well as to uphold the Member States resettlement schemes and programmes.

Under Part I the Turkish government committed to implementing the Law on foreigners and international protection, drafted in 2013, and ensuring the registration of all migrants as well as the provision of appropriate documents 'on a compulsory basis'[161] to permit a better migration management. In addition to this, Turkey will keep on granting access for Syrian nationals under temporary protection to basic services, such as education, health and employment, as well as providing assistance to vulnerable groups, whose members has to be identified in order to cope with their needs.

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[157] B. KALE, *The EU-Turkey Action Plan Is Imperfect, But Also Pragmatic, and Maybe Even Strategic*, The German Marshall Fund of the United States, February 2016, P-112, p. 2.

[158] European Commission (MEMO/15/5860), *EU-Turkey Joint Action Plan, Brussels*, 15 October 2015, Source: http://europa.eu/rapid/press-release_MEMO-15-5860_it.htm.

[159] European Council meeting (EUCO 26/15) of the 15 October 2015, Conclusions, point 2 (a).

[160] Ibidem.

[161] Ibidem.

The second part of the EU-Turkey agreement, actually the most controversial, has been criticized by many NGOs which claimed for the inconsistency between the deal and the international obligations undertaken by the European Union, while international organizations like the UNHCR have expressed their concern about the measures provided to prevent uncontrolled migratory flows from Turkey to the EU. In fact, according to the strategy outlined by the European Commission to manage the refugee crisis, 'Turkey needs to make significant progress in preventing irregular departures of migrants and refugees from its territory'[162]. To this end, the EU will launch an information campaign to raise awareness of the risks connected to irregular departures and to prevent further losses of lives at sea.

Moreover, to improve the border control management and tackle migrant smuggling in coastal areas, the EU will provide adequate support to the Turkish authorities and in particular to the Turkish Coast Guard, while Turkey committed itself to strengthen the 'interception capacity'[162] of its Border Guard. In this sense, due to their geographical position, Greece and Bulgaria are two fundamental partners for Turkey that, to tackle irregular migration and secure their common land border, will cooperate with the authorities of those two countries, and especially with the Hellenic Coast Guard. Furthermore, as agreed by both parties, cooperation between Turkey and EU member States will be enhanced through an intense exchange and sharing of information and the deployment of Frontex as well as Europol liaison officer to Turkey.

Under part 2 of the Action Plan both parts agreed to prevent illegal departure of migrants who are not in need of international protection and to readmit, according to the established bilateral readmission provisions[164], those who have been intercepted crossing irregularly the border and have entered Europe coming from the Turkish territory. As part of the agreement Turkey also committed itself to 'ensure that the asylum procedures that have been initiated are completed, so that the status of refugee is granted without delay to those whose asylum requests are positively assessed'[165]. In addition to this, the EU border agency will play an important role by deploying liaison officers to Turkey and by implementing the working arrangement with its authority, thanks to the existing bilateral agreements between Turkey and the EU.

In regard to the humanitarian assistance, on 24 November 2015, the European Commission has adopted the decision C (2015) 9500 final through which has established the Refugee Facility for Turkey that, as stated in article 1, will help the Turkish government 'addressing the immediate humanitarian and development needs of the refugees and their host communities, national and local authorities in managing and addressing the consequences of the inflow of refugees'[166]. To this end, the EU committed to provide an initial 3 billion euro of resources under the Facility for refugees in Turkey. Then, an additional 3 billion will be paid to the end of 2018. The financial support was definitely approved after a long delay in February 2016.

In this context, the opening of new chapters in the accession negotiations was a crucial aspect of the JAP. In this regard, in order to re-energized the accession process, on 14 December 2015, the EU decided on the opening of negotiations on Chapter 17 relating to 'Economic and monetary policy', while other five will be opened 'as soon as possible'.

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[162] European Commission, *Managing the Refugee Crisis, EU-Turkey Joint Action Plan: Implementation Report*, 10 February 2016, Available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agendamigration/background-information/docs/managing_the_refugee_crisis_-_euturkey_join_action_plan_implementation_report_20160210_en.pdf.

[163] Ibidem.

[164] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ L 134, 7.5.2014, p. 3-27, art. 4.

[165] European Commission (MEMO/15/5860), *EU-Turkey joint action plan*, Brussels, 15 October 2015.

[166] Commission Decision C(2015) 9500 final of 24.11.2015 *on the coordination of the action of the Union and of the Member States through a coordination mechanism the Refugee Facility for Turkey*, art. 1.

Since the number of illegal entries was still too high, EU leaders and their Turkish counterpart decided to enhance their strategic and operational partnership to curb the number of illegal border-crossing from Turkey to Greece. In effect, on 7 March 2016, following a meeting with Turkish Prime Minister Davutoğlu, the President of the European Parliament Martin Schulz affirmed: 'Relations with Turkey were, are and remain very difficult, but for the benefit of refugees we need to cooperate'. On the same day, the EU Heads of State or Government jointly with the Turkish authorities gathered in Brussels step up their cooperation to implement the Joint Action Plan activate in November 2015. One of the most relevant and controversial aspect that came out from the International Summit held in Brussels was the Turkish commitment to accept the rapid return of 'all irregular migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants apprehended on Turkish waters'. Another crucial provision agreed on that occasion was the 'one in, one out' scheme. According to this new arrangement, for every Syrian refugee returned to Turkey from Greek islands, the EU should resettle another Syrian from Turkey to the EU Member States. As part of the plan established to put an end to the irregular migration flows from Turkey to Europe, in occasion of the summit held in Brussels on 17-18 March both parties confirmed the agreement reached on 7 March and further agreed on additional action points. In effect, the EU and Turkey decided on the return of all irregular migrants that, passing through the Turkish territory, have reached the Greek coast as of 20 March 2016. Moreover, the one for one deal will lead to the resettlement of Syrian refugees in the EU up to a cap of 72,000 and 'priority will be given to migrants who have not previously enter or tried to enter the EU irregularly'[167]. In addition to this, Turkey committed itself to undertake all the necessary measures to prevent further irregular cross-border movements along the Aegean route. In this context, a Voluntary Humanitarian Admission scheme will be put in place once the influx of illegal migrants will be definitively tackled or significantly reduced.

In this regard, since refugee resettlement remains voluntary, EU Member States may refuse to accept Syrian nationals under the 'one for one' mechanism. The quota system proposed in 2015 has already shown its operational limits and some European countries, such as Poland, have opposed this measure, affirming that they won't assume the burden of hosting Syrian refugees on their territory.

4.2. Legal Status of the EU-Turkey 'deal'

On 12 January 2015, Marietje Schaake, Member of the European Parliament, asked a written question to the European Commission about the precise legal status of the deal reached between Turkey and the EU on 29 November[168]. A few months later, on 22 March 2016, Birgit Sippel, a German politician and a Member of the European Parliament submitted a series of Parliamentary questions to the Council regarding the Legal nature and binding nature of the EU-Turkey agreement[169]. In particular, the Parliamentary questions focused on the binding nature of the deal under EU and international law and its compliance with existing EU regulation.

In the first place, to answer to those question we should underline that the 'deal' reached between the Republic of Turkey and the Heads of State and Government of the European Union cannot be considered as a treaty in the meaning of the Vienna Convention on the law of treaties since it has taken the form and has been formulated as a 'statement'. In this regard, in order to clarify the meaning and the use of specific terms, article 2 of the above mentioned Convention clearly states that the term treaty 'means an international agreement

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[167] European Council, EU-Turkey Statement, 18 March 2016, Press release 144/16, Source: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

[168] Written Question about the Appendix letter to the EU-Turkey deal, 12.01.2016, Source: http://www.marietjeschaake.eu/2016/01/written-question-about-the-appendix-letter-to-the-eu-turkey-deal/.

[169] Parliamentary questions, O-000053/2016, Subject: Legal nature and binding nature of the so-called 'EU-Turkey Agreement', 22 March 2016.

concluded between States in written form and governed by International Law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'[170]. In addition to this, the 'EU-Turkey statement' may not even be considered as a treaty according to article 216.1 of the Treaty on the Function of the EU since, on the face of how it has been formulated, it seems not legally binding.

In light of this, Professor Steve Peers affirmed: 'Since the agreement will take the form of a "statement", in my view it will not as such be legally binding. Therefore, there will be no procedure to approve it at either EU or national level, besides its endorsement by the summit meeting'[171].

In line with this analysis of the 'deal', Karolína Babická affirmed that 'the EU-Turkey statement as such is not legally binding. It is only a politically binding joint declaration'[172].

On another view, the EU-Turkey statement does constitute an agreement since both parts have committed themselves to reciprocal obligations. In fact, through an accurate analysis of the text agreed in occasion of the International Summit held in Brussels on 18 March between the Members of the European Council and their Turkish counterpart, the terms used reveals the binding nature of the statement. In effect, both parts 'reconfirmed their commitment to the implementation of the Joint Action Plan' and 'decided to end the irregular migration from Turkey to the EU'[173]. Within this framework, even if the term 'treaty' has not been mentioned during the International meeting, the statement has legal effects and resulted in reciprocal commitments and obligations.

As a consequence, we should highlight that the procedure that led to the conclusion of the agreement between Turkey and the EU is not fully in compliance with article 218 of the Treaty on the Functioning of the European Union. In fact, this article clearly establishes the procedure that the EU should follow when negotiates and concludes agreement with third countries. According to the specific provisions laid down in article 218, the Council has to consult the European Parliament which has also to be informed 'at all stages of the procedure'[174]. In addition to this, the same article establishes that for treaties 'covering fields to which either the ordinary legislative procedure applies'[175], the Council can adopt a decision only after obtaining the approval of the European Parliament. In this context, since such institutions has not even been consulted, the EU's procedure to conclude an agreement has not been observed.

4.3. Joint Action Plan implementation: operational and political limits

As highlighted in the statement released by the European Commission 'the implementation of the agreement will require huge operational effort from all involved, and most of all from Greece'[176]. In effect, the EU relied heavily on the Greek authorities for the success and the implementation of the plan.

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[170]   Vienna Convention on the law of treaties, art. 2.1(a).

[171]   S. PEERS, The draft EU/Turkey deal on migration and refugees: is it legal?, EU Law Analysis, 16 March 2016, Source: http://eulawanalysis.blogspot.com.es/2016/03/the-draft-euturkey-deal-on-migration.html.

[172]   K. BABICKÁ, EU-Turkey deal seems to be schizophrenic, migrationonline.cz, 22.3.2016, Source: http://migrationonline.cz/en/eu-turkey-deal-seems-to-be-schizophrenic.

[173]   European Council, *EU-Turkey Statement*, 18 March 2016, Press release 144/16.

[174]   TFUE, art. 218.10.

[175]   TFUE, art. 218.6.a(v).

[176]   European Commission (MEMO/16/963), *EU-Turkey Agreement: Questions and Answers*, Brussels, 19 March 2016, Source: http://europa.eu/rapid/press-release_MEMO-16-963_it.htm.

Nonetheless, since the very beginning the EU-Turkey agreement has shown its operational limits. In particular, Greece was clearly unable to cope with the procedures and timelines established in the deal. As a matter of fact, the Greek asylum system as well its competent authorities have been criticized for their ineffectiveness and dysfunctionality. As a result of the agreement concluded between Turkey and the EU the Turkish borders have been sealed, while Western Balkans States have erected walls and border fences to impede migrant from crossing into their territory.

Consequently, migrants and asylum seekers were stranded in Greece, whose structural and bureaucratic deficiencies have created an unacceptable situation in which overcrowded detention facilities, chaotic identification procedures and violence were the main elements. Moreover, the number of migrants in Greece has increased dramatically and according to Giorgos Kyritsis, the spokesman for the Government's coordinating committee for refugees, as of 12 May 2016 there were 54,542 migrants hosted in Greece, of which 10,000 were living in inhuman conditions in Idomeni[177]. In addition to this, he confirmed that 'asylum processing on the islands is a lengthy procedure, with thousands of appeals pending'. This situation has generated frustration and tension either among the people living in the camps and in the "hotspots" or among local communities on the Greek islands, such as Chios and Lesvos.

In this context, Greece was not able to send refugees back to Turkey in accordance with the timing established in Brussels. In fact, even if according to text agreed in 18 March the returns of migrants from Greece to Turkey should have been put in place as from 20 March, deportations has begun on 4 April 2016. Thus, the Greek authorities needed more time to prepare and this was also confirmed by the Government coordinator for migration policy spokesman who affirmed that 'a plan like this cannot be put in place in only 24 hours'[178].

Moreover, as a result of the deal, most of the migrants facing deportation to Turkey, had no other choice but to apply for asylum in Greece. This led to an overwhelming increase in the number of asylum application that, according to the UN Special Rapporteur 'resulted in 90% of migrants […] trying to apply for asylum in Greece, when it was only a trickle before'[179]. Within this framework, under the requirements established in the Directive 2013/32/EU any applications should be examined 'individually, objectively and impartially'[180]. In this regard, there are serious doubts that the Greek authorities could guarantee all the necessary safeguards and ensure adequate standards to those who apply for international protection. On 17 May 2016, the UN Special Rapporteur on the human rights of migrant have confirmed the serious deficiencies of the Greek system and after his official visit to Greece affirmed:

> 'The Greek Asylum Service has considerably strengthened during the past three years. The Greek Asylum Service has opened seven Regional Asylum Offices and three Asylum Units all around Greece. However, it is clear that the Asylum Service is not in a position to cope with 50'000 applications for asylum any time soon. This is because it was not conceived for a spike of this magnitude. The Asylum Service is clearly understaffed, with officials and ca-seworkers struggling to cope with the demand of asylum requests'[181].

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[177] *Europol to send experts to Greek islands as refugee influx grows*, ekathimerini.com, 12.05.2016, Source: http://www.ekathimerini.com/208591/article/eka-thimerini/news/europol-to-send-experts-to-greek-islands-asrefugee-influx-grows.

[178] Greece delays sending refugees back to Turkey under EU deal, The Guardian, Agence France-Presse, Sunday 20 March, Source: http://www.theguar-dian.com/world/2016/mar/20/greece-delays-sending-refugees-back-to-turkeyunder-eu-deal.

[179] United Nations Human Rights-Office of the High Commissioner, UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece, 16 May 2016, Source: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19972&LangID=E.

[180] 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 (recast)*, art. 10.3(a), OJEU L180, 29.6.2013

[181] United Nations Human Rights-Office of the High Commissioner, UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece, 16 May 2016.

As consequence of the EU-Turkey deal, the Greek authorities has also made an excessive use of detention in order to deal with migrant crisis and the Reception and Identification centres better known as 'hotspots' have become closed centres, inaccessible to human rights campaigners and journalists[182]. In this context, those asylum seekers waiting for the examinations of their application, are kept in state of detention against their will and beyond the twenty-five day time-limit laid down by law. In this context, article 31 of the 1951 Geneva Convention clearly establishes the non-penalization of refugees and asylum seekers for their illegal entry or stay while the UNHCR stated that 'the right to seeks asylum, the non-penalization for irregular entry or stay and the rights to liberty and security of person and freedom of movement, mean that the detention of asylum seekers should be a measure of last resort, with liberty being the default position'[183].

As a direct consequence, the UNHCR expressed its concerns over the use of mandatory detention and suspended some of its services in detention centres on the Greek islands. Furthermore, on 22 March 2016, four days after the conclusion of the EU-Turkey agreement, the UN refugee agency communicated its refusal to assist in the transfer of migrants and refugees arriving in Greece to the so called hotspots, also adding that 'the deal was being prematurely implemented without the required safeguards in place'[184].

In this context, in order to implement the deal and support the Greek authorities to cope with the humanitarian emergency on its soil, many Member States pledged to send extra personnel, mainly security and legal experts. Under the estimation of the Commission, Greece will need 4,000 staff, including border guards, asylum and interpreters from the Hellenic country as well from other Member States, the European Asylum Support Office (EASO) and Frontex[185].

In addition to this, on the face of what have been established by the EU leaders, the allocation of resettled refugees will be decided by Member States on a voluntary basis. This exchange of refugees between the EU and Turkey will rapidly show its political and operational limits. By contrast, according to the UN Special Rapporteur on the human rights of migrants, François Crépeau, the EU has abandoned Greece to deal with the refugee crisis. Two months after the conclusion of the EU-Turkey deal, the UN Special Rapporteur actually visited the detentions centres in Lesbos and Samos as well as the refugee camp in Idomeni. After his visit, he expressed his concern about the dramatic situation in the camp, also affirming that 'unlike before, Greece is no longer a transit country and is struggling to 'catch up' and develop a mechanism to deal with immediate needs, in the absence of a clear commitment from the EU to support the country'.

On the other hand, as affirmed by Angela Dimitriadi, 'it is unrealistic to expect that Turkey will be able to sustain the growing number of refugees in its country indefinitely'[186].

The Joint Action Plan with Turkey is part of a wider approach in the field of migration and asylum that in the last decades has been mainly driven by security concerns. In effect, in the current deal the EU has acted prioritizing its own internal security rather than its founding values. In addition to this, the measures adopted by the EU Heads of State or Government in order to address the refugee crisis, exemplified the policy of

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[182] E. Cossé and W. Michalski, Dispatches: Start of Dodgy EU-Turkey Migrant Deal, Human Rights Watch, 5 April 2016, Source: https://www.hrw.org/news/2016/04/05/dispatches-start-dodgy-eu-turkey-migrant-deal.

[183] UNHCR, *Detention Guidelines- Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 14.

[184] S. NEBEHAY AND K.A TAGARIS, *UNHCR says won't work in Greek 'detention centers' in swipe at EU-Turkey deal*, ekatimerini.com, Source: http://www.ekathimerini.com/207228/article/ekathimerini/news/unhcr-says-wont-work-ingreek-detention-centers-in-swipe-at-eu-turkey-deal.

[185] EU has largely 'abandoned' Greece to deal with migrant crisis on its own, UN expert warns, UN News Centre, 17 May 2016, Source: http://www.un.org/apps/news/story.asp?NewsID=53958#.V1Sv1dWLS00.

[186] A. DIMITRIADI, *The Janus face of Europe's migration policy*, European Council on Foreign Relations, 1 February, 2016, Source: http://www.ecfr.eu/article/commentary_the_janus_face_of_europes_migration_policy_5082.

containment carried out by the EU since the establishment of the Schengen zone and the development of an area of freedom, security and justice. In fact, within the EU's foreign policy as well as its external action in the field of immigration and asylum, the security issues have often been largely predominant, leaving behind the respect of human rights.

The JAP between Turkey and the EU contains a series of provisions regarding the visa liberalization and the readmission of irregular migrants crossing from the Turkish coasts into the Greek islands. Within this framework, the 'more for more' approach is evident. In accordance with this approach, the more Turkey does, the more it will receive. More specifically, if the Turkish government accepts to take back all irregular migrants and prevent further secondary movements of migrants towards Europe, strengthening its border control capacity, the EU will accelerate the visa liberalization process 'with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016'[187].

We should highlight that the visa liberalization roadmap will be as fast as the implementation of the JAP. In this regard, Turkey has to fulfil all benchmarks and requirements relating to migration management and border surveillance. In effect, as reaffirmed by the European Commission in its report, in order to lift the visa requirements for Turkish citizens, Turkey needs to *'carry out adequate border checks and border surveillance […] in such a manner that it will cause a significant and sustained reduction of the number of persons managing to illegally cross the Turkish borders either for entering or for exiting Turkey'*[188].

As a matter of fact, this approach is not new and during the last decade the EU has used all its diplomatic tools in order to convince third countries to share in the responsibility and cooperate in the field of migration and border management. In this context, thousands of refugees have been used as tradeable commodity in exchange of financial assistance and visa facilitation. As affirmed by Professor Başak Kale 'Turkey has utilized a critical bargaining chip of "managing irregular migration" for leverage over the EU, gaining visa liberalization for its citizens, guaranteeing financial support or technical assistance for refugees, and opening accession to negotiation chapters'[189].

Nonetheless, since the Gezi Park protests, Turkey has been passing through a period of internal unrest that led to a serious crisis within the country, paving the way to the growing authoritarianism of President Recep Tayyip Erdoǧan. In this regard, the political and institutional situation in Turkey has posed serious doubt over the effective ability of the Turkish authorities to deal with the massive influx of migrants and to prevent them from leaving the country. As a matter of fact, even if the flows have been substantially reduced during several weeks, migrants and refugees have continued to arrive on the European shores.

In fact, as long as Turkey will be unable to offer sufficient guarantees and protection to those who flee war and persecution, mixed migration flows will persist and refugees will continue to leave the country in order to reach the EU. In this regard, in its working document the European Commission has declared that 'the fact that so many thousands of persons are left without a clear indication about their fate hampers their capacity to normally settle down in Turkey, and contributes to pushing them to searching alternative countries of asylum'[190].

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[187]   European Council, Statement of the EU Heads of State or Government, 07/03/2016, Press office- General Secretariat of the Council, 08/03/2016, Source: http://www.consilium.europa.eu/en/meetings/international-summit/2016/03/07/.

[188]   European Commission, COM(2016) 140 final, Report From the Commission to the European Parliament and the Council, *Second Report on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap*, Brussels, 4.3.2016, para. 2 block 1.

[189]   B. KALE, *The EU-Turkey Action Plan Is Imperfect, But Also Pragmatic, and Maybe Even Strategic*, The German Marshall Fund of the United States, February 2016, P-112, pp.2-3.

[190]   Commission Staff Working Document (SWD/2016/097) final Accompanying the document *Second Report on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap*, European Commission, Brussels, 4.3.2016, p. 21.

4.4. Systematic deficiencies in the Greek asylum system and the implementation of the EU-Turkey agreement

The EU-Turkey deal relies on Greek authorities' ability to cope with the thousands of individual asylum applications and procedures for the determination of refugee status as well as with the identification procedure of other migrants. In effect, on the face of what have been agreed on 18 March, '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'[191].

In the past, the Parliamentary Assembly of the Council of Europe as well as the UN Special Rapporteur have already expressed their concern over the restrictive measures adopted by the Greek Government and the serious impact that these measures could have on human rights[192]. Actually, due to the deficiencies of its asylum system and the persistent human rights violations, Greece could not be considered as a safe country for refugees and migrants. In effect, the lack of access to an effective and fair asylum procedure[193] as well as the lack of guarantees during the expulsion procedure, deny the right to an effective remedy.

In this framework, it is worth reminding that the Asylum Procedure Directive 2013/32/EU has laid down a series of basic provisions in order to guarantee the access to international protection. In particular, article 6.2 of the Directive 2013/32/EU clearly established that 'Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible'[194]. At the same time, Member States should also provide all the necessary information, in detention facilities as well as at external border, to those who want to apply for international protection and in this regards 'shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure'[195]. According to the European Union Agency for Fundamental Rights, a fair and effective asylum procedure 'is one where applicants know their rights and duties, and where they understand its different stages'[196]. In addition to this, article 47 of the Charter of Fundamental Rights of the European Union established to the right to an effective remedy, while article 46 of the recast Asylum Procedures Directive gives the applicant the right to appeal the decision taken by a Member State on his or her applications before an independent and impartial court or a tribunal[197].

In light of the legal provisions and procedure that we have just mentioned, we should highlight that the reception condition of asylum seekers in Greece has often been described as inhuman and inappropriate, and thus not in compliance with the European and International law. The judges of the European Court of Human Rights have repeatedly called on the Greek authorities to bring their reception facilities in line with the European and International standards. In this regard, it is worth mentioning that from 2004 to 2011, the Court has condemned Greece 11 times in cases concerning violations of article 3 of the ECHR, most of the times perpetrated by law enforcement officers, and the absence of effective investigations[198].

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[191]   European Council, *EU-Turkey Statement*, 18 March 2016, Press release 144/16.

[192]   Resolution 1918(2013) of the Parliamentary Assembly adopted on 24 January 2013, *Migration and asylum: mounting tensions in the eastern Mediterranean*, paragraph 3; See also U.N. Doc. A/HRC/23/46/Add. 4, *Report of the Special Rapporteur on the human rights of migrants, Mr Francois Crepeau, following his visit to Greece - Addendum - Mission to Greece*, 17 April 2013, paragraphs 66,68, p. 14.

[193]   UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, at paras. 4–5.

[194]   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 (recast)*, art. 6.2, OJEU L 180, 29.6.2013.

[195]   Directive 2013/32/EU, art. 8.1.

[196]   European Union Agency for Fundamental Rights, *The duty to inform applicants about asylum procedures: The asylum-seeker perspective*, September 2010, Source: http://fra.europa.eu/en/publication/2010/duty-informapplicants-about-asylum-procedures-asylum-seeker-perspective.

[197]   Directive 2013/32/EU, art. 46.1.

[198]   Council of Europe: Commissioner for Human Rights, *Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to Greece from 28 January to 1 February*, 16 April 2013, CommDH(2013)6, paragraph 109, available at: www.refwold.org/docid/516e76bb4.html.

In this framework, the chronic deficiencies in the country's asylum system together with the obstacles faced by the asylum seekers to apply for international protection coupled with the longstanding inadequacy of the Greek legislation in the field of human rights. In this regard, the Court, in the cases *S.D. v. Greece* (11/06/2009), *Tabesh v. Greece* (26/11/2009) and *A.A. v. Greece* (22/07/2010), assessed the Greek authorities responsible for the violations of article 3 and 5.1 and 4 of the ECHR, for the unlawful detention of asylum seekers and the inhuman condition in which those persons have been forced to live that, according to the judges of Strasbourg, amounted to degrading treatment[199]. In addition to this, the systematic apprehension of asylum seekers and other migrants irregularly entering Greece as well as the deplorable detention conditions have been well documented.

Over the years, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) have carried out periodic visits to Greece in order to assess, among other things, the conditions of detentions and the treatment of illegal migrants apprehended by the Greek authorities in different centres all over the country. In 2007 the CPT had expressed its concerns over the serious structural deficiencies and the ill-treatments faced by asylum seekers and migrants in special centres for irregular migrants and police holding facilities[200]. The same year a delegation of the European Parliament in light of the findings during its visit to the detention centre on the Greek island of Samos described the general conditions of the facility as 'squalid, deplorable and inhuman'[201].

Furthermore, in 2011 the Committee reiterated its recommendations and brought to the attention of the competent authorities the persisting deficiencies highlighted in the previous visits, affirming that: 'Not only were hardly any positive developments observed since the September 2009 visit but, in the CPT's view, the conditions of detention at Amfissa Prison in particular could still be described as amounting to inhuman and degrading treatment'[202].

In this context, we should highlight the *case of M.S.S. v. Belgium and Greece*[203] regarding the return of an asylum seeker from Belgium to Greece. The sentence issued by the Court on 21 January 2011 condemned the Belgium authorities for having deported the applicant back to Greece under the Dublin II Regulation, stating that 'the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would seriously examined by the Greek authorities'[204]. In effect, the Court held unanimously that Belgium violated article 3 ECHR having exposed the applicant 'to risks linked to the deficiencies both in the asylum procedure and in the detention and living conditions in Greece'[205].

Again, as reported by Olivier De Schutter in 2014, 'the Court stated that by sending the applicant back to Greece under the Dublin Regulation when they were aware of the deficiencies in the asylum procedure in Greece, the Belgian authorities has failed in their obligations under article 3 of the Convention'[206].

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[199] Cour Européenne des Droits de l'Homme (Première Section), *Affaire S.D. c. Grèce*, Requête n°53541/07, Arrêt 11 juin 2009; Cour Européenne des Droits de l'Homme (Première Section), *Affaire Tabesh c. Grèce Requête* n°8256/07, Arrêt 26 novembre 2009; Cour Européenne des Droits de l'Homme (Première Section), Affaire A.A. c. Grèce, Requête n°12186/08, Arrêt 22 juillet 2010.

[200] Council of Europe, *Report to the Government of Greece on the visit to Greece carried out by the European Committe for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 27 February 2007*, CPT/Inf (2008) 3, paragraph 3(b) point 28, p. 17, Strasbourg, 8 february 2008, available at: www.cpt.coe.int/documents/grc/2008-03-inf-eng.pdf.

[201] European Parliament - Committee on Civil Liberties, Justice and Home Affairs, *Report from the LIBE Committee Delegation on the Visit to Greece (Samos and Athens) Rapporteur: Jeanine HENNIS-PLASSCHAERT*, Brussels, 2 July 2007, paragraph 4, p. 4.

[202] Council of Europe, *Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 to 27 January 2011*, CPT/Inf(2012) 1, point 56, p. 29, Strasbourg, 10 January 2012, available at: http://www.cpt.coe.int/documents/grc/2012-01-inf-eng.pdf.

[203] European Court of Human Rights (Grand Chamber), *Case of M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011.

[204] Case of M.S.S. v. *Belgium and Greece*, Application no. 30696/09, paragraph 358.

[205] C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford, Oxford University Press, 2016, p. 262.

[206] O. DE SCHUTTER, *International Human Rights Law*, Cambridge, Cambridge University Press, 2014, p.238.

In addition to this, the *case of M.S.S. v. Belgium and Greece* has underlined the importance of a fair and effective access to the asylum procedure and for this reason the Grand Chamber held unanimously that Greece violated article 13 ECHR taken in conjunction with Article 3 ECHR 'because of the deficiencies in the asylum procedure followed in the applicant's case and the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application and without any access to an effective remedy'[207].

In May 2016, the UN Special Rapporteur after his recent visit to Greece has highlighted once again the bureaucratic obstacles faced by asylum seekers as well as the existing flagrant flaws of the Greek asylum system, affirming in this regard that:

> 'The law limits administrative detention upon arrival to twenty-five days. However, in practice detention at times lasts longer. I deeply regret the Greek government's policy of increasing the use of detention of persons irregularly entering the Greek territory, including unaccompanied children and families'[208].

4.5. Returns to Turkey and the requirements of EU and International law

As part of the European response to the refugee crisis, the EU-Turkey agreement has been criticized by several NGOs and International organizations which have claimed for the inconsistency between the deal and the international obligation undertaken by the EU Member States. In fact, they have expressed their concern about the measures adopted to prevent uncontrolled migratory flows from Turkey to the European Union. In this regard, even if the agreement reached on 18 March 2016 explicitly reaffirmed its commitment 'to end the irregular migration […], targets the people smugglers' business model and removes the incentive to seek irregular routes to the EU, in full accordance with EU and International law', the deal is contradictory in terms and poses serious doubt on the respect of migrants' human rights..

In effect, on the basis of what has been agreed 'all new irregular migrants crossing from Turkey to the Greek islands as of 20 March will be returned to Turkey' and 'this will take place in full accordance with EU and International law, thus excluding any kind of collective expulsion'. However, the first sentence clearly contradicts the second since the return of all immigrants would constitute a flagrant breach of International and EU law, violating the existing regulations that explicitly prohibit collective expulsions. In fact, while art. 4 of the Protocol n.4 to the ECHR reaffirmed the prohibition of collective expulsion, article 19.2 of the Charter of Fundamental Rights of the EU, which gained binding force since December 2009, stated that 'no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'[209]. In this context, UNHCR's reaction to the EU Heads of State and Government of Turkey, following the International Summit in Brussels, was clearly expressed by Filippo Grandi, the UN High Commissioner for Refugees, who stated: 'I am deeply concerned about any arrangement that would involve the blanket return of anyone from one country to another without spelling out the refugee protection safeguards under International law'[10].

In this context, the deal on migrants relies on Turkey's ability to guarantee safety and protection for Syrian refugees. Thus Turkey has to prove that it is a safe country for vulnerable people.

[207] *Case of M.S.S. v. Belgium and Greece*, Application no. 30696/09, point 7.

[208] United Nations Human Rights-Office of the High Commissioner, UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece, 16 May 2016, Source: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19972&LangID=E.

[209] Charter of Fundamental Rights of the European Union, art. 19.2, OJEU C 364, 18.12.2000.

[210] UNHCR, *UNHCR expresses concern over EU-Turkey plan*, 8 March 2016, Source: http://www.unhcr.org/56dee1546.html.

According to the European Commission Turkey could be considered as first country of asylum and a safe third country for refugees and thus they will be returned from the Greek islands to Turkey in line with the EU and international law. In this regard, the EU asylum law would allow Member States to declare 'inadmissible' an application submitted by an asylum seeker, that is to say, without examining the substance, under certain circumstances. In effect, according to the recast Asylum Procedure Directive, an application could be declared inadmissible if a non-EU country is considered a 'first country of asylum' or a 'safe third country'. These are the legal basis on which refugees will be return to Turkey. On the one hand, under the concept of first country of asylum the applicant, that is to say the asylum seeker, has been already recognized in that country as a refugee or enjoy 'sufficient protection' in such a country[211]. On the other hand, according to what established in article 38 of the Directive 2013/32/EU, Member States can return a person to a third country, considered as 'safe', if such a country will guarantee effective access to international protection to 'the applicant', that is to say, the readmitted asylum seeker[212].

In this context, even if the EU Heads of State or Government considered Turkey as a safe third country, it does not fulfill most of the requirements established by International and EU law, including the Asylum Procedures Directive. Firstly, Turkey maintains a geographical limitation to the 1951 Refugee Convention and thus denies the refugee status to non-European citizens. In light of the conclusion of the 17-18 March EU Summit, the Parliamentary Assembly of the Council of Europe has underlined that restraint to the UN Refugee Convention affirming that:

> 'Turkey only extends refugee status under the 1951 Convention to persons fleeing from persecution in Council of Europe member States. In practice, therefore, none of those potentially subject to return under the EU-Turkey Agreement will have already been recognised as a refugee by Turkey. Applications from non-Europeans can thus only be considered inadmissible if it is found that they enjoy "sufficient protection" in Turkey'[213].

Within this framework, article 38 of the Directive 2013/32/EU clearly establishes that, to be considered as such, a safe third country should guarantee 'protection in accordance with the Geneva Convention'[214]. In addition to this, on 22 October 2014 Turkey has adopted a Temporary Protection Regulation for 'Syrian nationals, stateless people and refugees originating from Syria'[215], while in January 2016 the Turkish government has released a new regulation that will allow Syrian refugees to apply for work permits[216]. Despite the positive effects that these measures will generate and the remarkable efforts made by Turkey to provide a temporary protection regime, this approach distinguishes Syrian refugees from other persons in need of international protection on the basis of their nationality and thus in contrast with article 3 of the UN Refugee Convention according to which 'the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'[217].

In the second place, according to the provisions contained in the above mentioned Directive, the country has to offer sufficient protection[218] and respect 'the prohibition of removal, in violation of the right to freedom

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[211] Directive 2013/32/EU, art. 35.

[212] Directive 2013/32/EU, art. 38.

[213] Council of Europe, Report by the Committee on Migration, Refugees and Displaced Persons Rapporteur: Ms Tineke STRIK, Netherlands, Socialist Group, The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016, Doc. 14028, 19 April 2016, point 14.

[214] Directive 2013/32/EU, art. 38.1(e). See also: V. CHETAIL, *Will the EU-Turkey migrant deal work in practice?*, The Graduate Institute Geneva, 29 March 2016, Source: http://graduateinstitute.ch/home/research/researchnews.html/_/news/research/2016/will-the-eu-turkey-migrant-deal.

[215] Refugee Rights Turkey, The Temporary Protection Regulation of 22 October 2014, published on Asylum Information Database (AIDA), Source: http://www.asylumineurope.org/reports/country/turkey/temporary-protection-regulation-22october-2014.

[216] D. MURRAY, High Commissioner welcomes Turkish work permits for Syrian refugees, UNHCR,18 January 2016, Source: http://www.unhcr.org/news/latest/2016/1/569ca19c6/high-commissioner-welcomes-turkish-work-permitssyrian-refugees.html.

[217] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, art. 3.

[218] Directive 2013/32/EU, art. 35(a).

from torture and cruel, inhuman or degrading treatment as laid down in international law'[219]. In addition to this, in accordance with UNHCR's view, the protection provided by the third state to an asylum seeker should go 'beyond protection from *refoulement*' and also be 'effective and available in law and practise'[220].

In this regard, Turkey is a member State of the Council of Europe and it is also a party to ECHR, while its 1982 Constitution made a clear reference to the respect of human rights as a 'characteristic of the Republic of Turkey'[221]. Moreover, article 17 of the Turkish Constitution states that 'no one should be subjected to torture or ill-treatment' and 'no one shall be subjected to penalty or treatment incompatible with human dignity'[222]. We should also highlight that Turkey has achieved substantial progress in the field of asylum through the adoption of a new law on Foreigners and International Protection in April 2013.

In effect, the new law, among other things, contained a clear reference to the principle of non-*refoulement* and provided a series of exemptions from removal decision issued in respect of foreign nationals, including 'when there are serious indications to believe that they shall be subjected to the death penalty, torture, inhuman or degrading treatment or punishment in the country to which they shall be returned to'[223].

Despite these significant progresses, in 2012 the European Commission affirmed that Turkish asylum system 'continues to be far from the EU standards'[224], while in different occasions the Court of Strasbourg has condemned Turkey for violating articles 3, 5 and 13 of the European Convention of Human Rights for the deportation of migrants towards 'unsafe countries'[225].

In addition to this in June 2012, the UN Special Rapporteur on the human rights of migrants, Francois Crepeau, after his official visits to Turkey expressed its deeply concern over the widespread and systematic detention in the so called 'removal centres' of migrants in an irregular situation 'including families and children'[226]. In his report, the UN Special Rapporteur, recognising the 'commendable progress' that has been achieved by Turkey, with a clear reference to the approval of the Law on Foreigners and International Protection, has highlighted that apply for asylum in detention centres remains 'difficult'[227].

In this context, in 2014 the ONG PRO ASYL reported several cases of migrants ill-treated and detained by the Turkish authorities. These treatments, that could amount to torture, coupled with the deportations of refugees back to their countries of origins and the lack of an effective refugee protection system, led to serious human rights violations[228].

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[219]   Directive 2013/32/EU, art. 38.1(d).

[220]   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, para. 2.2.1 (b).

[221]   Constitution of the Republic of Turkey [Turkey], 7 November 1982, art.2, available at: http://www.unhcr.org/refworld/docid/3ae6b5be0.html [accessed 15 January 2010].

[222]   Constitution of the Republic of Turkey, art. 17.

[223]   *Turkey: Law No. 6458 on 2013 of Foreigners and International Protection*, 4 April 2013, art. 55.1(a), Unofficial translation, Available at: http://www.refworld.org/docid/5167fbb20.html [accessed 6 June 2016].

[224]   Commission Staff Working Document SWD(2012) 336 final del 10.10.2012, *Turkey 2012 Progress Report*, p.79.

[225]   European Court of Human Rights(Second Section), *Case of Abdolkhani and Karimnia v. Turkey*, Application 30471/08, Judgment of 22 September 2009; European Court of Human Rights (Second Section), *Case of Tehrani and others v. Turkey*, Applications 32940/08, 41626/08, 43616/08, Judgment of 13 April 2010; European Court of Human Rights (Second Section), *A.D. And Others v. Turkey (no. 22681/09)*, 22 July 2014.

[226]   UN Doc. A/HRC/23/46/Add.2, Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Mission to Turkey (25-29 2012)*, 17 April 2013, para. 40.

[227]   UN Doc. A/HRC/23/46/Add.2, para. 59.

[228]   PRO ASYL, *Pushed Back - systematic human rights violations against refugees in the Aegean Sea and at the Greek-Turkish land border*, 2014, Summary, 2.1.

The situation worsened after the conclusion of the agreement between the EU and Turkey. In effect, in accordance with the report of different human right campaigners, after the 17-18 March 2015 Summit held in Brussels, the Turkish authorities have pushed hundreds of Syrian refugees back to their country of origin. Amnesty International has denounced the illegal mass return of Syrian and Afghan refugees, showing as the implementation of the 'deal' may exposes refugees' lives at risk and could lead to the violation of the principle of non-*refoulement*[229]. In addition to this, Günter Burkhardt, PRO ASYL's managing director, has underlined the immediate consequences of the EU-Turkey action plan affirming that, after the conclusion of the 'negotiation' on 29 November 2015, 'arbitrary arrests of refugees, mistreatment in detention centres and illegal deportations and refoulement to Syria and Iraq have been documented in Turkey'[230].

In the third place, in accordance to the Asylum Procedures Directive, the risk of serious harm is one of the requirements to be considered as a safe third country. As explained by Vincent Chetail, Professor of International Law, this means that 'there must be no risk of execution, torture, inhuman or degrading treatment in Turkey' in order to return asylum seekers from Greece. In this regard, Turkey has been recently hit by recurrent terrorist attacks on its territory and the armed conflict against the Kurdish minority in the south-east of the country has brought to an escalation of violence.

Conclusions

1) In the light of the analysis carried out in my thesis, the first hypothesis has been confirmed. In fact, in light of the measures and policies actually adopted over the years, EU Member States have developed a security-based approach with poor regard to the needs of vulnerable migrants and asylum seekers. Within the framework of the EU's external policy, the Governments and the Institutions of the Union have prioritized security to the detriment of human rights of migrants and people in need of international protection. In this regard, since the EU has been frequently concerned with securing its external perimeter and protecting itself against massive migratory waves, Member States have reached agreements and implemented partnerships with third countries of origin and transit of migrants to better control their external borders and intercept illegal immigrants. The actions taken and the measures put in place by the EU have clearly shown an excessive focus on security. In addition to this, the vast array of arrangements adopted by the EU Heads of State or Government in order to address the migration issue has exemplified the policy of containment carried out by the EU since the establishment of the Schengen zone and the development of an area of freedom, security and justice.

In effect, this approach has resulted in the joint management of migration flows *en route* to Europe, preventing people without necessary travel documents and authorization, including asylum seekers, from reaching the 'old continent'. Furthermore, in exchange for substantial technical and financial assistance, third countries have been 'persuaded' to cooperate in tightening their border management capacity and enhancing their controls on migrants leaving their own territory. By doing so, Member States have externalized, or out-sourced, the procedures regarding the control and surveillance of EU borders. Moreover, these policies of border externalization were largely based on the financing of capacity building projects aimed at strengthening non-

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[229]   Amnesty International, Turkey 'safe country' sham revealed as dozens of Afghans forcibly returned hours after EU refugee deal, 23 March 2016, Source: https://www.amnesty.org/en/press-releases/2016/03/turkey-safe-countrysham-revealed-dozens-of-afghans-returned/. See also: Amnesty International, Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey deal, 1 April 2016, Source: https://www.amnesty.org/en/latest/news/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flawsin-eu-turkey-deal/ ; P. KINGSLEY, *Refugee crisis: What does the EU's deal with Turkey mean?* The Guardian, 18 March 2016, Source: http://www.theguardian.com/world/2016/mar/18/eu-dealturkey-migrants-refugees-q-and-a.

[2230]   PRO ASYL, PRO ASYL opposes the refoulement of asylum seekers from Greece to Turkey, Press Release, 30. 01.2016, Source: https://www.proasyl.de/en/pressrelease/pro-asyl-opposes-the-refoulement-of-asylum-seekersfromgreece-to-turkey/.

EU States' ability to prevent and curb unauthorized border-crossing movements, once again prioritizing security to the detriment of human rights. In this context, cooperation with non-UE countries became an integral part of Frontex's mandate. Within the framework of working arrangements signed with the competent authorities of those countries, the EU had a strong interest in tackling illegal immigration and supporting its partners' ability to manage their border. The establishment of operational and technical cooperation with non-EU partners and with competent authorities of third countries, especially with those bordering the Mediterranean, has remained a high priority. In light of what has been agreed in Cotonou, Rabat and Khartoum, capacity building, technical assistance and the exchange of best practise in the field of migration management were some of the most relevant measures proposed within the framework of the Africa-EU partnership.

The EU's external policy in the field of immigration and asylum went hand in hand with the establishment of readmission agreements with third countries which allow to return irregular migrants and asylum seekers whose application have been denied. These agreements have also been concluded with dictatorial regimes or authoritarian States with poor human right records. The partnership between Italy and Libya, the agreement between Spain and Morocco as well as the deal on readmission signed between Greece and Turkey constitutes the most remarkable examples of this bilateral cooperation on migration issues.

As part of this security-driven approach, trade or commercial partnerships have often included incentives for non-EU States cooperating in combating illegal border-crossing at the EU's external borders. In this context, development aid and visa facilitation were the main diplomatic tools that the EU has used in order to ensure the collaboration of third countries of transit and origin of migrants in the implementation of restrictive migration policies. Consequently, visa facilitations and development aid became conditional and thus tied to the acceptance of the readmission clauses. These policies have effectively posed serious obstacles to people in need of international protection, hindering their chances to have appropriate access to asylum procedure in the Union and limiting their freedom of movement as well as their right to seek and enjoy asylum. In this context, despite protections against such practices in European Union legislation, pushbacks and *refoulement* to countries of origin and transit of third countries have been conducted as a direct consequence of the conclusion of several bilateral readmission agreements between European and non-European States.

In effect, the analysis of the actions taken and the solutions adopted by Member States to guarantee its own safety and tackle mixed migration flows towards Europe has highlighted the systematic recourse to policies aimed at preventing migrants and refugees from reaching their territories, and this with poor considerations of the needs of vulnerable groups as well as in open breach of international and EU law. As we have already mentioned, the right to seek and enjoy asylum is deeply embedded and thus guaranteed in the international as well as in the European human rights legislation. In this regard, any measure or action that prevent an individual from enjoying these basic rights, without any reasonable justification, is not fully in compliance with the principle established at EU as well as international level.

2) Also my second hypothesis has been confirmed. The agreement concluded between the leaders of the EU Member States and the Republic of Turkey violates the fundamental human rights of migrants and refugees. Moreover, the Joint Action Plan with Turkey is effectively part of a wider approach in the field of migration and asylum that in the last decades has been mainly driven by security concerns, leaving behind the respect of human rights.

In effect, to tackle the current refugee crisis, the EU has acted prioritizing its own internal security rather than its founding values. First of all, the EU has tried to persuade Turkey to cooperate in tackling the current

refugee crisis, using economic and humanitarian support to induce Turkish authorities to prevent irregular migrants, including those in need of international protection, from leaving its coast and enter Greece. As part of the deal, if the Turkish government accepts to take back all irregular migrants and prevent further secondary movements of migrants towards Europe, strengthening its border control capacity, the EU will accelerate the visa liberalization process. In this regard, following a well-established model of bilateral cooperation, the EU has made these incentives conditional on curbing the influx of irregular migrants on their road to Europe.

Secondly, the EU-Turkey deal is not fully in compliance with international and EU law. Since it provides for the return of 'all irregular migrants' arriving in Greece after 20 March 2016, the agreement violates the prohibition of collective expulsion of aliens and thus blatantly infringes article 19.1 of the Charter of Fundamental Rights of the European Union as well as article 4 of Protocol n°4 to the European Convention of Human Rights.

Thirdly, by returning migrants and refugees to Turkey, the EU exposes them at risk of being ill-treated or expelled to unsafe countries. Since the deal on migrants relies on Turkey's ability to guarantee safety and protection for Syrian refugees, it should be noted that, as reported by Amnesty International, after the conclusion of the agreement with the EU, the Turkish authorities has carried out collective expulsion of refugees to Syria, a country where refugees' lives would have been seriously threatened. In this regard, Turkish officials have violated the principle of non-*refoulement* that clearly prohibits states from returning or expelling a person to a country where his or her life would be at risk of torture, cruel, inhuman or degrading treatment. In this context, it is worth noting that in cases of indirect or chain-*refoulement* both countries may be held liable and thus directly or indirectly responsible for the unlawful return of an asylum seekers to an unsafe country. Within the framework of the recent EU-Turkey deal, the Union and its Member States, due to their collaboration with the Turkish authorities, may be in danger of being complicit in serious human rights violations against those fleeing war, widespread violence and persecution.

In addition to this, Turkey can in no way be qualified as a safe third country or a first country of asylum since it does not provide sufficient protection to refugees and does not fulfil the requirements envisaged by the recast Asylum Procedure Directive. Moreover, Turkey maintains a geographical limitation to the 1951 Refugee Convention which means that the refugee status can be given only to European citizens. Even if the Turkish government has adopted a temporary protection regime for Syrian nationals, refugees from other countries, mainly Iraq and Afghanistan, have been left behind and then forced to continue their journey towards Europe. In this regard, the regime adopted by Turkey amount to unlawful discrimination carried out on the basis of nationality and in this respect it clearly violates article 3 of the 1951 Refugee Convention.

In conclusion, the situation of legal uncertainty coupled with the precarious and instable situation within the country, has pushed migrants and refugees, including Syrians, to leave Turkey and seek better alternatives in Europe. In this context, the absence of legal channels for migration, obliges people in need of international protection to resort to illegal immigration or human traffickers.

To summarize, the present work has remarked that the prevalence of security policies aimed at preventing third country nationals from entering the EU have negatively affected the human rights of migrants, including those in need of international protection. Within the framework of the EU's external policy in the field of asylum and immigration, the excessive focus on surveillance has resulted in the externalization of border control procedures to third countries of origins and transit of migrants and the establishment of 'controversial' partnership with non-EU countries. In this context, the EU-Turkey deal is illegal and has paved the way to

serious human rights violations in contrast with the principles established in international and EU law. Moreover, in light of the above, Turkey cannot be considered neither a first country of asylum nor a safe third country.

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Resumen: En el otoño de 2015, los Estados miembros han experimentado un gran aumento en la llegada de refugiados. En este contexto, la respuesta de la UE a la crisis migratoria y la consecuente implicación de Turquía constituyen un claro ejemplo de la cooperación desarrollada a lo largo de los años entre la UE y sus países vecinos en el ámbito de la migración y el asilo. Con el fin de hacer frente a la crisis de refugiados, la UE ha actuado dando prioridad a su propia seguridad interior en lugar de a los derechos fundamentales de los refugiados. En efecto, el enfoque excesivo en la seguridad ha llevado a la externalización de los procedimientos de control en las fronteras exteriores y al establecimiento de un acuerdo muy controvertido con Turquía, un país inestable e inseguro para los refugiados.

Abstract: In the autumn of 2015, when the flow of migrants begun to increase dramatically and the pressure on the European external border was too high, EU heads of State or Government realized that was essential to strengthen their cooperation with Turkey in order to respond to the unprecedented refugee crisis. In this regard, by engaging the Republic of Turkey in the management of the mixed migration flows, the EU has given priority to a security-based approach at the expense of the human rights of migrants and refugees. The present work remarks that the prevalence of security policies aimed at preventing third country nationals from entering the EU have negatively affected the human rights of migrants, including those in need of international protection.