

THE EUROPEAN UNION'S REFUGEE DEAL WITH TURKEY: A RISKY ALLIANCE CONTRARY TO EUROPEAN LAWS AND VALUES

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“We’ve got to be judged by how we do in times of crisis.”¹

I. INTRODUCTION

These words, famously proclaimed by the American lawyer Johnnie Cochran, accurately portray contemporary concerns about the approach taken by European political leaders in an effort to maneuver the refugee crisis of the European Union (“EU” or “Union”). The refugee crisis is arguably one of the most critical challenges the EU has been confronted with in its young history, and, therefore, requires special attention and altered decision-making authority. In the wake of such a historical challenge, we must nonetheless never forget that EU laws on immigration, refugees, and asylum are proclaimed in accordance with widely accepted humanitarian and fairness standards set forth by the international community. I urge that, when addressing the refugee crisis, these standards must always be at the heart of the Union’s coordinated endeavor to ease the burden on its member states. Thus, in this comment, I address the landmark agreement concerning the refugee crisis, which seems to not only bypass EU laws in order to provide a relief valve for political pressure, but also to contradict the European understanding of democratic and humanitarian values: the EU-Turkey Refugee Deal of 2016 (“Refugee Deal”).

In Section II, I provide a general overlook about the organization and purpose of the European Union, the history and political system of the Republic of Turkey, Turkey’s long-standing pursuit of joining the European Union as a fully recognized

1. BOOK OF AFRICAN-AMERICAN QUOTATIONS 35 (Joslyn Pine ed., 2011).

member state, and the European refugee crisis.

First, I am concerned with the structure of the European Union as an economic and political union of twenty-eight European countries adhering to agreed-upon treaties.² Of special importance is the notion that all member countries must adhere to the Union's shared core values of human dignity, freedom, democracy, equality, rule of law, and respect for human rights.³

The Republic of Turkey, the other party to the Refugee Deal, was founded on a democratic, secular, and parliamentary system.⁴ Turkey has often been referenced as Europe's gateway to Asia.⁵ Turkey's geography is of particular significance in relation to the Refugee Deal because the Eastern Mediterranean route from Turkey into Greece is the main source of maritime arrivals of refugees coming from Syria.⁶ Today, Turkey is a major force in international trade, transportation, and logistics.⁷ Even though Turkey is still not a member to the Union, the EU has always considered Turkey a European country.⁸ Given Turkey's long path to potential EU membership, it is important to evaluate continued, yet unconsummated, promises of accession extended by the European community to Turkey as an indicator of adverse bargaining positions and unequal bargaining power during the negotiation process of the Refugee Deal.

Turkey joined the Council of Europe in 1949 and, when

2. *The EU in Brief*, EUR. UNION, http://europa.eu/european-union/about-eu/eu-in-brief_en (last updated Mar. 8, 2018) [hereinafter *The EU in Brief*].

3. *Id.*

4. See *The World Fact Book—Turkey*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html>? (last updated Feb. 28, 2018) [hereinafter *The World Fact Book—Turkey*].

5. See generally CLARISSE FRÄSS-EHRFELD, *TURKEY—EUROPE'S GATEWAY TO ASIA* 13, 13–80 (2006) (detailing Turkey's economic development and relations with the European Union).

6. UNHCR Staff, *The Sea Route to Europe*, U.N. HIGH COMM'R FOR REFUGEES [UNHCR] TRACKS (July 1, 2015), <http://tracks.unhcr.org/2015/07/the-sea-route-to-europe/>.

7. See, e.g., World Eye Reports, *Turkey*, JAPAN TIMES, Oct. 29, 2012, at 8 (describing Japan's business links to Turkey) [hereinafter *World Eye Reports—Turkey*]; see also WTO, *WORLD TRADE STATISTICAL REVIEW 2016* 94 (2016) [hereinafter *WORLD TRADE STATISTICAL REVIEW 2016*] (ranking Turkey 31st among the leading exporters and 21st among the leading importers in world merchandise trade in 2015).

8. Thomas Diez, *Expanding Europe: The Ethics of EU-Turkey Relations*, 21 *CARNEGIE COUNCIL* 415, 418–19 (2007).

Turkey officially applied for full membership to the European Union in 1987, a strenuous process of potential accession began to unfold.⁹ The 1990s, in particular, were challenging times for Turkey.¹⁰ Even though officials initiated change, the process of transforming and democratizing the country did not come effortlessly due to unstable coalition governments and a constant inability to commit to democracy.¹¹ EU officials especially criticized the state of freedom of speech, which is why it was not until the Helsinki European Council in 1999 that the EU finally declared Turkey a candidate for accession.¹² The EU launched actual membership talks in 2005, but no critical development has been made since.¹³ To be more precise, a report on Turkey published by the European Commission in 2015—highlighting numerous issues regarding human rights, constitutional issues about freedom of expression, and the state of public administration in Turkey—essentially ended membership negotiations for the time being.¹⁴ The tiring and unfortunate development of EU membership negotiations potentially fueled Turkey's desire to hold the upper hand in negotiating the Refugee Deal. The EU, for once, desperately needed Turkey's help, while the constellation was opposite with regards to EU membership

9. Fernanda G. Nicola, *Promises of Accession: Reassessing the Trade Relationship Between Turkey and the European Union*, 24 AM. U. INT'L L. REV. 739, 742–44 (2009) (outlining the three-step process required of Turkey by the Ankara Association Agreement for membership in the European Economic Community).

10. Zeynep Alemdar, "Modelling" for Democracy? Turkey's Historical Issues with Freedom of Speech, 50 MIDDLE E. STUD. 568, 574 (2014) (stating "[c]hanges were fast, transformations were difficult and democratization did not come easily").

11. *Id.*

12. *Id.* at 575; Nicola, *supra* note 9, at 746 (citing Christos Kassimeris & Lina Tsoumpanou, *The Impact of the European Convention on the Protection of Human Rights and Fundamental Freedoms on Turkey's EU Candidacy*, 12 INT'L J. HUM. RTS. 329, 335 (2008)).

13. Nicola, *supra* note 9, at 747–50 (noting that, since 2006, Turkey has made little to no progress on aligning itself with European standards—especially in areas concerning human rights, the protection of minorities, and women's rights).

14. Bernd Riegert, Opinion, *Opinion: Why Turkey Does Not Belong in the EU*, DEUTSCHE WELLE (Aug. 4, 2016), <http://www.dw.com/en/opinion-why-turkey-does-not-belong-in-the-eu/a-19449830>; see also *Commission Staff Working Document—Turkey 2015 Report*, at 21–26, SWD (2015) 216 final (Nov. 10, 2015) (criticizing the state of human rights and the protection of minorities in Turkey).

negotiations.¹⁵ Consequently, a description of the European refugee crisis rounds out Section II.

Per Amnesty International, the world is currently experiencing the worst refugee crisis since World War II.¹⁶ In fact, more than one million refugees came to Europe in 2015.¹⁷ Turkey, with a refugee population of more than three million, is the largest refugee-hosting country in the world.¹⁸ In a desperate attempt to address the refugee crisis and deter migrants from further coming to Europe via the dangerous sea route between Turkey and Greece, the EU and Turkey signed an agreement now known as the *EU-Turkey Refugee Deal*.¹⁹ In general terms, migrants arriving in Greece under the Refugee Deal must be sent back to Turkey if they do not apply for asylum or their claims are rejected by Greek decision-making authorities.²⁰

In Section III, I first address European law with regards to human rights, the status of refugees, and migration before I consider the EU-Turkey Refugee Deal and its incompatibility with EU law and values. It is crucial to understand that migration into and within Europe is regulated by a combination of national law, EU law, the European Convention on Human Rights (ECHR), the European Social Charter (ESC), and other international obligations agreed to by European countries.²¹

15. Amnesty Int'l, *No Safe Refuge—Asylum-Seekers and Refugees Denied Effective Protection in Turkey*, at 4, EUR 44/3825/2016, June 3, 2016 [hereinafter *No Safe Refuge*].

16. *Id.*

17. Jonathan Clayton & Hereward Holland, *Over One Million Sea Arrivals Reach Europe in 2015*, UNHCR (Dec. 30, 2015), <http://www.unhcr.org/en-us/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>.

18. *No Safe Refuge*, *supra* note 15, at 8.

19. Riham Alkousaa et al., “Disaster in the Making”—*The Many Failures of the EU-Turkey Refugee Deal*, SPIEGEL ONLINE (May 26, 2016), <http://www.spiegel.de/international/europe/the-refugee-deal-between-the-eu-and-turkey-is-failing-a-1094339.html> (translated by Christopher Sultan); European Commission Press Release 144/16, EU-Turkey Statement (Mar. 18, 2016) [hereinafter *EU-Turkey Statement*].

20. *EU-Turkey Statement*, *supra* note 19.

21. *Communication 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*, COM (2015) 240 final (May 13, 2015) [hereinafter *A European Agenda on Migration*]; see *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the*

Asylum and refugee status legislation was first considered in Europe in the wake of the 1951 Geneva Convention and its subsequent Protocol, and since then the EU established a Common European Asylum System (CEAS).²² The principle of *non-refoulement* is at the heart of the Geneva Convention, its Protocol, and EU refugee law.²³ *Non-refoulement* forbids the return of refugees to a country where they have a reason to fear persecution.²⁴ It plays a major role in the legal analysis of the Refugee Deal because Turkey, even though it signed the 1951 Geneva Convention, never fully adopted its regulations.²⁵ Turkey, in fact, applies the *non-refoulement* principle only with regards to refugees *from* Europe.²⁶

Next, I take a closer look at the actual wording of the Refugee Deal and analyze key sections. The Refugee Deal, at its core, allows Greece to return “all new irregular migrants” to Turkey.²⁷

Committee of the Regions—A Common Immigration Policy for Europe: Principles, Actions and Tools, at 4, COM (2008) 359 final (June 17, 2008); *see also* EU Immigration Portal, *Explaining the rules*, EUR. COMM’N, http://ec.europa.eu/immigration/who-does-what/more-information/explaining-the-rules-why-are-there-eu-rules-and-national-rules_en#EUImmRules (last updated Dec. 6, 2016) (describing the combination of various laws guiding migration into the EU).

22. *See generally* Migration and Home Affairs, *Common European Asylum System*, EUR. COMM’N, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm (last updated Mar. 9, 2018) (noting that “the EU has been working to create a [CEA]” and that new rules “setting out common high standards and stronger co-operation to ensure that asylum seekers are treated equally in an open and fair system” have now been agreed upon).

23. *See generally* Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267 (addressing applicable standards relating to the status of refugees as defined by the Refugee Convention) [hereinafter 1967 Protocol]; Consolidated Version of the Treaty on the Functioning of the European Union arts. 67(2), 78, Oct. 26, 2012, 2012 O.J. (C 326); Charter of Fundamental Rights of the European Union art. 18, Oct. 26, 2012, 2012 O.J. (C 326/02), at 399.

24. *See, e.g.*, Seline Trevisanut, *The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea*, 27 LEIDEN J. INT’L L. 661, 661–75 (2014).

25. *See, e.g.*, Mehmet Atakan Foça, *Turkey Sticks to “Limited” Application of the Geneva Convention*, BIANET (Aug. 1, 2011), <http://bianet.org/english/world/131856-turkey-sticks-to-limited-application-of-the-geneva-convention> (emphasizing that Turkey has only applied a “limited” version of the Geneva Convention since 1968).

26. *See id.* (emphasis added); *see also* Dilek Latif, *Refugee Policy of the Turkish Republic*, 33 TURKISH Y.B. INT’L REL. 1, 8 (2002) (describing Turkey’s limitation of the application of the Geneva Convention to refugees from Europe).

27. Elizabeth Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POL’Y

In exchange, EU Member States agree to “increase resettlement of Syrian refugees residing in Turkey, accelerate visa liberalization for Turkish nationals, and boost existing financial support for Turkey’s refugee population.”²⁸ The text of the Refugee Deal is of major concern because, if taken literally, it is illegal under EU and international law.²⁹ In addition, I address legal and human rights concerns associated with the Refugee Deal below.

The first sentence of the Refugee Deal calls for collective expulsion, which is illegal under EU and international law.³⁰ I further argue that the *EU Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals* requires a case-by-case analysis regarding immigration of illegal migrants that goes beyond the mere fact of an illegal stay, which not only contradicts the Refugee Deal, but provides for additional proof of its illegality under EU law. The language of the Refugee Deal encourages refugee bartering contrary to European values and I urge European officials to accept that Turkey cannot be considered a “safe” country for migration and asylum purposes. For instance, I provide evidence that Turkey ignores *non-refoulement* requirements and address anti-democratic movements in Turkey as the result of a failed coup attempt in July 2016. In the aftermath of the attempted coup, the Turkish Government instituted a three-month state of emergency, and consecutively extended it in October 2016, January 2017, April 2017, and July 2017.³¹ Under the state of emergency, Turkey can suspend parts

INST. (Mar. 2016), <http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>; *EU-Turkey Statement*, *supra* note 19.

28. Collet, *supra* note 27.

29. *Id.*

30. *Id.*

31. Emre Peker, *Turkey Extends State of Emergency in Wake of Attack Claimed by Islamic State*, WALL ST. J. (Jan. 4, 2017), <http://www.wsj.com/articles/turkey-seeks-to-extend-state-of-emergency-1483475370>; *Turkey Extends State of Emergency by Three Months, Deputy PM Says*, REUTERS (Apr. 17, 2017), <http://www.reuters.com/article/us-turkey-security-emergency-pm/turkey-extends-state-of-emergency-by-three-months-deputy-pm-says-idUSKBN17J1MU>; *Turkish Government Extends State of Emergency Rule for Another 3 Months*, REUTERS (July 17, 2017), <https://www.reuters.com/article/us-turkey-security-emergency/turkish-government-extends-state-of-emergency-rule-for-another-3-months-idUSKBN1A212S>.

of the European Convention on Human Rights, which directly impacts the refugees the EU returns to Turkey.³² Considering this development, I explain that Turkey is no longer on its way to becoming an “E.U.-style liberal democracy.”³³ In fact, I argue that Turkey has taken the path toward dictatorship.³⁴ Thus, I consequently have to question how the EU could enter into such a far-reaching agreement with Turkey in good conscience in the first place.

Before I conclude, I investigate the Refugee Deal’s applicability to real life situations and point out that, unless EU officials are willing to violate well-settled EU law on the right to appeal asylum decisions, there will be no significant increase in the number of refugees returned to Turkey.³⁵ As a matter of fact, shortly after the Refugee Deal came into effect, Greek Appeals Committees ruled that Turkey is not safe enough for Syrian refugees to return.³⁶ By June 1, 2016, Greek Appeals Committees had already issued ten decisions asserting Turkey is not a “safe third country” for Syrian refugees.³⁷ In addition, adherence to the existing Dublin Regulation prohibits return of refugees with family ties to EU member states.³⁸

32. *Turkey Suspends European Convention on Human Rights*, DEUTSCHE WELLE (July 21, 2016), <http://www.dw.com/en/turkey-suspends-european-convention-on-human-rights/a-19416857>; see also *Alarm in Germany over Turkey*, DEUTSCHE WELLE (July 22, 2016), <http://www.dw.com/en/alarm-in-germany-over-turkey/a-19420312> (stating that, as a result of the failed coup attempt, human and civil rights have been suspended in Turkey).

33. Tim Arango & Ceylan Yeginsu, *E.U. Woos Turkey for Refugee Help, Ignoring Rights Crackdown*, N.Y. TIMES (Mar. 8, 2016), <https://www.nytimes.com/2016/03/09/world/europe/turkey-european-union-refugees.html>.

34. Barbara Wesel, *EU Concerned about Turkey’s Path to Dictatorship*, DEUTSCHE WELLE (July 22, 2016), <http://www.dw.com/en/eu-concerned-about-turkeys-path-to-dictatorship/a-19421030>.

35. Collett, *supra* note 27.

36. Nikolaj Nielsen, *Greek Court Halts Syrian Deportations to “Unsafe” Turkey*, EUOBSERVER (June 3, 2016), <https://euobserver.com/migration/133691>.

37. Apostolis Fotiadis et al., *Syrian Refugee Wins Appeal against Forced Return to Turkey*, GUARDIAN (May 20, 2016), <http://www.theguardian.com/world/2016/may/20/syrian-refugee-wins-appeal-against-forced-return-to-turkey>; Press Release, Pro Asyl, *Appeals Committee on Lesbos Stops Deportations to Turkey* (June 1, 2016), <https://www.proasyl.de/en/pressrelease/appeals-committee-on-lesbos-stops-deportations-to-turkey/>.

38. Daniel Robinson, *How the EU Plans to Overhaul ‘Dublin Regulation’ on Asylum*

In Section IV, I revisit the Refugee Deal's illegality under EU and international law and its incompatibility with European democratic values. I demand the Refugee Deal be repealed immediately. Even a new and updated version of the Refugee Deal will not suffice because only serious and constructive discussions between EU and Turkish officials can effectively address the refugee crisis and guide Turkey toward an EU-style democracy. European officials must call for a clear commitment to adjusting Turkish policymaking with regards to democratic governance and human rights. Financial incentives and visa liberalization in exchange for the return of Syrian refugees can be the answer neither to solving the refugee crisis nor to aligning both parties on the same path. Only if EU officials provide their Turkish counterparts with an earnest chance to join the Union can they expect a genuine effort to improve the current situation in Turkey. Considering the refugee crisis, I further question the EU's approach in taking shortcuts in times of increasing populism. Moreover, I challenge the EU's apparent complacency with circumventing its own laws and values in times when adherence to them is needed most. No excuse, I urge, suffices to ignore the one simple truth that "[r]efugees need protection, not rejection."³⁹

II. BACKGROUND

A. *The European Union*

The Maastricht Treaty, signed by members of the European Community on February 7, 1992, and entered into force on November 1, 1993, originally established the European Union.⁴⁰ Today, the EU is an economic and political union that consists of twenty-eight European countries adhering to a common

Claims, FIN. TIMES (Jan. 20, 2016), <https://www.ft.com/content/d08dc262-bed1-11e5-9fdb-87b8d15baec2>.

39. Press Release, UNHCR, *UNHCR on EU-Turkey Deal: Asylum Safeguards Must Prevail in Implementation* (Mar. 18, 2016), <http://www.unhcr.org/en-us/news/press/2016/3/56ec533e9/unhcr-eu-turkey-deal-asylum-safeguards-must-prevail-implementation.html?query=EU-Turkey%20refugee%20deal>.

40. See generally Treaty on European Union, July 29, 1992, 1992 O.J. (C 191/01) (establishing the EU and forming the basis for EU law).

understanding and rule of law.⁴¹ The EU is “the richest political bloc in the world,” and it requires that everything the Union does be based on agreed-upon treaties.⁴² Those treaties must be voluntarily and democratically accepted by all of the EU’s member states.⁴³ Likewise, all members must adhere to the Union’s shared core values of human dignity, freedom, democracy, equality, the rule of law, and respect for human rights.⁴⁴ In fact, the EU specifically proclaims the promotion of human rights, both internally and around the world, as one of its major objectives.⁴⁵ Further, the EU’s Charter of Fundamental Rights functions as a document that brings all these essential rights together in one place.⁴⁶ In accordance with the Lisbon Treaty of 2009, all of the EU’s institutions, as well as the member states’ governments, when applying EU law, are legally bound to uphold EU rights at all times.⁴⁷

B. The Republic of Turkey

In 1923, Mustafa Kemal Atatürk founded the Republic of Turkey based on a democratic, secular, and parliamentary system.⁴⁸ The Republic of Turkey replaced the Ottoman system.⁴⁹ Today, Turkey is seen as Europe’s gateway to Asia and the EU has continued to recognize Turkey as a European country.⁵⁰ Due to its geographical location on both the European and the Asian

41. *The EU in Brief*, *supra* note 2.

42. *No Safe Refuge*, *supra* note 15, at 8; *The EU in Brief*, *supra* note 2.

43. *The EU in Brief*, *supra* note 2.

44. *Id.*

45. *Id.*

46. *Id.*; see Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326/02), at 391–407.

47. See generally Treaty of Lisbon Amending the Treaty on European Union and Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306/02); *The EU in Brief*, *supra* note 2.

48. *The World Fact Book—Turkey*, *supra* note 4; Michael Jansen, *Turkey’s Democracy*, JORDAN TIMES (July 19, 2017), <http://www.jordantimes.com/opinion/michael-jansen/turkey%E2%80%99s-democracy> (explaining Turkey’s roots in a secular parliamentary democracy since Kemal’s founding efforts).

49. *The World Fact Book—Turkey*, *supra* note 4.

50. See generally FRÄSS-EHRFELD, *supra* note 5, at 13–18 (explaining Turkey’s geographical significance); Diez, *supra* note 8, at 419.

continents, divided only by the Bosphorus and the Dardanelles, Turkey controls access to the Black Sea.⁵¹ For obvious reasons, this competitive advantage makes Turkey a key global player in international trade, transportation, and logistics.⁵² Yet, in the context of the Refugee Deal, Turkey's geography is particularly significant because the Eastern Mediterranean route taken by Syrian refugees from Turkey to Greece is the main source of maritime arrivals on EU territory.⁵³

With an eye on becoming a full member of the Union, Turkey took a continuous path to heightening democracy and adopting meaningful Western values by, for instance, amending its Constitution in an effort to guarantee fundamental rights or by implementing "all categories of judgments of the European Court of Human Rights."⁵⁴ Furthermore, Turkey abolished the death penalty, legalized education and broadcasts in the Kurdish language, granted more rights to non-Muslim minorities, and restrained the influence of the military over politics.⁵⁵ Even though economic reforms over the past decade have stimulated Turkey's economy, economic growth slowed recently due to political uncertainty.⁵⁶ Moreover, in the aftermath of an attempted coup d'état against Turkish state institutions on July 15, 2016, there have been alarming political developments that

51. See FRÄSS-EHRFELD, *supra* note 5, at 13–18 (describing important geographical characteristics that offer Turkey a competitive advantage); see also *Convention Regarding the Regime of the Straits*, 31 AM. J. INT'L L. 1, 2 (1937) (giving Turkey control over the Bosphorus Straits and the Dardanelles).

52. See, e.g., *World Eye Reports—Turkey*, *supra* note 7, at 8 ("Turkey is key player in East-West trade, especially for Japan"); see also WORLD TRADE STATISTICAL REVIEW 2016, *supra* note 7, at 94.

53. UNHCR Staff, *The Sea Route to Europe*, *supra* note 6.

54. EUR. PARL. ASS. DEB. 18th Sess. 677 (June 22, 2004); see generally Mutlu Yildirim, *The Development of Democratic Consolidation in Turkey Since 2000s*, 5 INT. J. SOC. SCI. & HUMANITY (Mar. 2015) (describing the development of democracy in Turkey since the early 2000s).

55. Arango & Yeginsu, *supra* note 33.

56. *The World Fact Book—Turkey*, *supra* note 4; see also WORLD TRADE STATISTICAL REVIEW 2016, *supra* note 7, at 33 (highlighting a decline in the value of Turkish exports by thirteen percent in 2015); Press Release, WBG, Economic Activity in Turkey Slowing Down as Political Uncertainty Continues, Says World Bank (Oct. 14, 2015) (explaining Turkey's widening account deficit and the political reasons for the deficit).

need to be considered when analyzing the Refugee Deal.⁵⁷ I examine these implications below.

C. *Promises of Accession*

Turkey, as a matter of fact, has had a long-standing ambition to become a full member of the European community dating back to 1949 when Turkey entered the Council of Europe.⁵⁸ In 1952, Turkey joined the North Atlantic Treaty Organization (NATO) and, in 1963, Turkey signed the Ankara Agreement with the European Economic Community (EEC), the predecessor of the European Union.⁵⁹ The Ankara Agreement was based on Article 238 of the Treaty of Rome and can be interpreted as Turkey's first step towards full EEC membership.⁶⁰ Article 238 of the Ankara Agreement functioned as the guiding reference for "European countries with stable democracies and market economies" seeking accession to become full members of the EEC.⁶¹ Then, in 1987, Turkey officially applied for full EEC membership, but the European Commission determined that the Turkish democracy was not sufficiently stable.⁶² Consequently, the European Commission postponed accession negotiations.⁶³ In 1997, the European Union emphasized that Turkey would not become a candidate to start accession negotiations due to its apparent inability to satisfy the Copenhagen criteria.⁶⁴ The Copenhagen criteria set out requirements that countries seeking to become EU members must conform with, such as preserving democratic institutions and respecting the rule of law and human rights.⁶⁵ In

57. Mark Lowen, *Is Turkey Still a Democracy?*, BBC NEWS (Nov. 5, 2016), <http://www.bbc.com/news/world-europe-37883006> (listing several instances of social and political uprisings in Turkey in the wake of the coup).

58. Nicola, *supra* note 9, at 742.

59. *Id.*

60. *Id.*

61. *Id.*; see Treaty Establishing the European Economic Community art. 238, Mar. 25, 1957, 298 U.N.T.S. ("The Community may conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures . . .").

62. Nicola, *supra* note 9, at 744.

63. *Id.*

64. *Id.* at 745.

65. European Neighbourhood Policy and Enlargement Negotiations: *Accession*

particular, Turkey failed to satisfy the Copenhagen criteria because of insufficient human rights standards, deficient implementation of fundamental freedoms concerning women's rights and religious freedom, inadequate protections for various minority groups in its territory, continued restrictions of broadcasting and training in minority languages, and cases of mistreatment, including torture.⁶⁶

The 1990s were generally challenging times for Turkey because, even though officials initiated change, transformations were difficult due to unstable coalition governments and a continued inability to commit to democracy.⁶⁷ Furthermore, European criticisms of the state of freedom of speech, which is a fundamental constituent of human rights, were at their height.⁶⁸ One might even argue "[t]here is a tradition in Turkey in which the state tends to silence opposition when seen as necessary and even wield its power against citizens who are critical of state institutions."⁶⁹

Despite little improvement on human rights issues, the EU, again, declared Turkey as a candidate for accession during the Helsinki European Council in 1999.⁷⁰ EU officials then explained that "Turkey is a candidate state destined to join the Union on the basis of the same criteria as applied to other candidate states," which then included the Eastern European countries.⁷¹

In October 2005, membership talks were finally launched.⁷² Turkey's goal seemed to be closer than ever because even critical

criteria, EUR. COMM'N, https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accesion-criteria_en (last updated Dec. 6, 2016).

66. Nicola, *supra* note 9, at 746; Erich Hochleitner, *The Political Criteria of Copenhagen and Their Application to Turkey*, AUSTRIAN INST. FOR EUR. SECURITY POL'Y 1, 4–5 (Aug. 2005).

67. Alemdar, *supra* note 10, at 574.

68. *Id.* at 575.

69. *Id.* at 568.

70. Nicola, *supra* note 9, at 746 (citing Christos Kassimeris & Lina Tsoumpanou, *The Impact of the European Convention on the Protection of Human Rights and Fundamental Freedoms on Turkey's EU Candidacy*, 12 INT'L J. HUM. RTS. 329, 335 (2008)).

71. *Id.*

72. See, e.g., Dimitrios Dagdeverenis, *Turkey's EU Accession Process 2005–2014 and the EU Conditionality* 1, BRIDGING EUR. (2014) (analyzing EU-Turkey accession talks beginning in Oct. 2005).

EU member states held a well-founded glimmer of hope that Prime Minister Recep Tayyip Erdogan would be able to guide Turkey as a modern, democratic, and economically powerful country into the Union.⁷³ No considerable development, however, has been made since and it appears that accession talks came to an insurmountable halt when the European Commission published a report on Turkey in 2015.⁷⁴ This report highlights various difficulties, but it is primarily concerned with human rights, constitutional issues about freedom of expression, and the state of public administration in Turkey.⁷⁵ For example, the report discusses the adoption of key legislation, in areas including the rule of law, freedom of expression, and freedom of assembly, which contradicted European standards.⁷⁶ Among other issues, the report specifically directs attention to the following shortcomings:

- Freedom of expression is frequently challenged, in particular through arbitrary and restrictive interpretation of the legislation, political pressure, dismissals[,] and frequent court cases against journalists which also lead to self-censorship.
- Freedom of assembly is overly restricted, in law and practice, in particular through disproportionate use of force in policing demonstrations and a lack of sanctions for law enforcement officers.
- Non-discrimination is not sufficiently enforced, in law and in practice, and the rights of the most vulnerable groups and of persons belonging to minorities are not sufficiently upheld. Gender-based violence, discrimination and hate speech against minorities, and respect for the rights of lesbian, gay, bisexual, transgender[,] and

73. Riegert, *supra* note 14.

74. See generally *Commission Staff Working Document—Turkey 2015 Report*, *supra* note 14 (criticizing political action, contrary to EU norms and values, taken by Turkish officials).

75. Ben Wright, *Reality Check: How Soon Can Turkey Join the EU?*, BBC NEWS (Mar. 17, 2016), <http://www.bbc.com/news/uk-politics-eu-referendum-35832035>.

76. *Commission Staff Working Document—Turkey 2015 Report*, *supra* note 14, at 4.

intersex (LGBTI) persons are major areas of concern.⁷⁷

Even European Commission President Jean-Claude Juncker acknowledged that Turkey will not be considered for EU membership in the near future.⁷⁸ Nonetheless, Turkish leadership is still convinced that the European continent is home to both parties—Turkey and the EU—united by shared values, norms, and principles.⁷⁹ In fact, Turkish administration declared that the development of democracy, the observance of human rights, the creation of a free market economy, and modern life standards are crucially important to its EU policy.⁸⁰

D. *The European Refugee Crisis*

According to Amnesty International, the world is experiencing the worst refugee crisis since World War II.⁸¹ During World War II and in the postwar period, about sixty million Europeans were forced to leave their homes.⁸² Currently, there are also about sixty million people displaced due to conflict, violence, and persecution.⁸³ The International Organization for Migration explains that 1,011,712 migrants arrived in Europe in 2015 and, through March 2016, an additional 143,886 migrants entered the EU through Turkey.⁸⁴ A great majority of those migrants came to Europe by boat via the Eastern Mediterranean route from Turkey to Greece.⁸⁵ For instance, more than 792,000

77. *Id.* at 22.

78. Riegert, *supra* note 14.

79. See Message by H.E. Mevlüt Çavusoglu, Minister of Foreign Affairs of Turkey, on the Occasion of Europe Day, 9 May 2017, REP. OF TURK. MINISTRY OF FOREIGN AFF., http://www.mfa.gov.tr/message-by-h_e_-mevl%C3%BCt-%C3%A7avu%C5%9Fo%C4%9Flu_-minister-of-foreign-affairs-of-turkey_-on-the-occasion-of-europe-day_-9-may-2017.en.mfa.

80. *Id.*

81. *No Safe Refuge*, *supra* note 15, at 4.

82. Chauncy D. Harris & Gabriele Wülker, *The Refugee Problem of Germany*, 29 ECON. GEOGRAPHY 10 (1953).

83. *No Safe Refuge*, *supra* note 15, at 8.

84. *Mediterranean Update—Migration Flows Europe: Arrivals and Fatalities*, INT'L ORG. FOR MIGRATION (Nov. 11, 2016); *Mediterranean Update—Migration Flows Europe: Arrivals and Fatalities*, INT'L ORG. FOR MIGRATION (Mar. 18, 2016).

85. See Press Release, Int'l Org. for Migration, *Mediterranean Migrant Arrivals in*

migrants arrived in Greece irregularly by sea between January 1 and December 10, 2015.⁸⁶ In the same timeframe, however, EU member states collectively managed to resettle only 8,155 refugees from around the world, which represents not more than a fraction of a single percentage point of all refugees who came to Europe.⁸⁷ It is important to note that many of the migrants coming to Europe are young children with special protection needs.⁸⁸

Both the EU and Turkey desperately tried to cope with the ever-increasing influx of refugees.⁸⁹ Turkey, contrary to widespread public belief, does not solely function as a transit country for refugees on a westward journey from Syria to Central Europe, but, in fact, provides shelter for displaced Syrians in refugee camps near the Syrian border.⁹⁰ Today, with a refugee population of over three million, Turkey is the largest refugee-hosting country in the world.⁹¹

III. ANALYSIS

One might initially assume the impact of the refugee crisis on both the EU and Turkey would have provided reasonable grounds to explore a coordinated approach in addressing the issue for the benefit of both parties, in which the EU (given Turkey's desire to

2016 Near 155,000; Deaths Reach 467 (Mar. 18, 2016).

86. *Europe's Gatekeeper—Unlawful Detention and Deportation of Refugees from Turkey*, AMNESTY INT'L (Dec. 2015), <https://www.amnesty.org/download/Documents/EUR4430222015ENGLISH.pdf>.

87. *No Safe Refuge*, *supra* note 15, at 9 (citing Eurostat, *Resettled Persons – Annual Data*, EUR. COMM'N, <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00195&plugin=1>).

88. See European Civil Protection and Humanitarian Aid Operations, *Refugees and Internally Displaced Persons*, EUR. COMM'N, http://ec.europa.eu/echo/refugee-crisis_en (last updated June 19, 2017) (“51% of the global refugee population are children under 18 . . .”); see also UNHCR, REFUGEE CHILDREN: GUIDELINES ON PROTECTION AND CARE (1994), available at <http://www.unhcr.org/en-us/protection/children/3b84c6c67/refugee-children-guidelines-protection-care.html?query=needs%20of%20refugee%20children>.

89. See Ahmet İcduygu, *Syrian Refugees in Turkey: The Long Road Ahead*, MIGRATION POL'Y INST. (Apr. 2015) (“Turkey now hosts the world's largest community of Syrians displaced by the ongoing conflict in their country.”).

90. *Id.* at 6.

91. *No Safe Refuge*, *supra* note 15, at 8.

become a member of the Union) holds the upper hand. The European Union finally found itself in a prime position to forcefully encourage Turkey to further improve its democratic structures and to demand full adherence to globally accepted human rights standards while, at the same time, calling for unified efforts in handling the refugee crisis. EU officials could have widely opened the doors to Turkish EU membership in exchange for such changes in policy and relief with regards to the refugee crisis. Nevertheless, the contrary seems to be the case.

In this comment, I address major shortcomings and argue the refugee crisis, indeed, shifted the balance of power between the EU and Turkey because the EU was caught in a moment of weakness, of which Turkish leadership took advantage.⁹² Not only did the EU fail to capitalize on its supreme bargaining position, thereby forfeiting a chance to initiate positive change in Turkey, but the Union ultimately entered into a deal that, if followed through, is illegal under EU and international law and furthermore contradicts the EU's proclaimed understandings of human rights and democracy.⁹³

A. Contemporary EU Laws on Migration

In general, migration into and within Europe is regulated by a combination of national law, EU law, the ECHR, the ESC, and other international obligations entered into by European states.⁹⁴ Between 2011 and 2014, the EU reformed its common legislation

92. See Arango & Yeginsu, *supra* note 33 (pointing to Turkey's increased demands during negotiations of the Refugee Deal).

93. *Id.* (featuring the criticism of a political leader in Turkey who accuses Europe of "bowing to Turkey's demands and not taking a tougher line with Ankara on its domestic troubles"); see Collett, *supra* note 27 ("... [O]bservers have raised serious questions as to whether the deal itself is legal... [T]he deal has also unveiled a paradox for a European Union that has spent several decades preaching its own high asylum standards to neighboring countries.").

94. See *A European Agenda on Migration*, *supra* note 21, n.3; see also EU Immigration Portal, *Explaining the rules*, *supra* note 21 ("The EU and its Member States share the competence in the area of immigration. There are certain common immigration rules valid across the EU, while other aspects are determined by each EU country."); see generally *Useful Texts*, EUROPEANMIGRATIONLAW.EU, <http://www.europeanmigrationlaw.eu/en/pages/useful-texts> (last visited Oct. 24, 2017) (curating the different laws that interplay, ranging from the EU, UN, and the Council of Europe).

on asylum in order to establish the Common European Asylum System (CEAS), but legislation considering asylum and refugee status was first considered in Europe in the wake of the 1951 Geneva Convention.⁹⁵ To be specific, the 1951 Geneva Convention and its subsequent 1967 Protocol introduced a specialized treaty on rights of refugees.⁹⁶ At its core, the Geneva Convention and its Protocol embrace the principle of *non-refoulement*, guaranteeing refugees will not be returned to a country where they have a reason to fear persecution.⁹⁷ The *non-refoulement* principle, enshrined in Article 33, must be construed to include circumstances of generalized violence that pose a threat to life or freedom whether or not such threat rises from persecution.⁹⁸ It not only applies to a refugee's country of origin, but also to any other country where the refugee might potentially face persecution.⁹⁹ In the context of the refugee crisis, the *non-refoulement* principle, therefore, prevents the EU from returning Syrian refugees back to Syria, countries supporting Syrian President Bashar al-Assad, in addition to countries controlled by the Islamic State of Iraq and the Levant (ISIL).¹⁰⁰

All EU member states are parties to the 1951 Geneva Convention.¹⁰¹ EU law largely incorporated the principles of the Geneva Convention in its Qualification Directive, which

95. See generally Migration and Home Affairs, *Common European Asylum System*, *supra* note 22.

96. See generally Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, *supra* note 23 (extending application of the Convention to new persons).

97. See *id.*

98. Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion* 87, 125, UNHCR, <http://www.unhcr.org/en-us/publications/legal/419c75ce4/refugee-protection-international-law-scope-content-principle-non-refoulement.html>.

99. See Protocol Relating to the Status of Refugees, *supra* note 23.

100. Mike Sanderson, *The Syrian Crisis and the Principle of Non-Refoulement*, 89 INT'L L. STUD. 776, 780 (2013) (“... [R]eference to both general international human rights and humanitarian law discloses an extensive set of legal norms which, if used effectively, will support a very comprehensive right of *non-refoulement* for individuals displaced from Syria to the surrounding States.”).

101. Anita Orav, AT A GLANCE: THE EU AND THE UN REFUGEE AGENCY (UNHCR) (Eur. Parl. Res. Serv., PE 557.004, May 2015), EUR. PARL., <http://www.europarl.europa.eu/EPRS/EPRS-AaG-557004-EU-and-UNHCR-FINAL.pdf>.

established a set of common standards for the qualification of persons as refugees or those in need of international protection.¹⁰² Moreover, the CEAS is based on the Geneva Convention and its subsequent Protocol, thereby affirming the principle of *non-refoulement*.¹⁰³ On the other hand, Turkey, even though it signed the 1951 Geneva Convention, never fully adopted its regulations and instead applies the *non-refoulement* principle only with regards to refugees *from* Europe.¹⁰⁴ Hence, Turkey, in theory, is not obligated to refrain from returning Syrian refugees to Syria or other countries where the refugees might fear threats to their lives or freedom.

In addition to the fundamental principles of the Geneva Convention and its Protocol, Article 78 of the Treaty on the Functioning of the European Union (TFEU) demands a policy for asylum, subsidiary protection, and temporary protection, which in effect ensures compliance with the principle of *non-refoulement*.¹⁰⁵ Article 78 must be applied in accordance with the 1951 Geneva Convention, its Protocol, and other relevant treaties, such as the ECHR.¹⁰⁶ Although the ECHR does not expressly guarantee a right to obtain asylum as such, Article 3 of the ECHR prohibits an EU member state from turning away an individual, whether at the border or elsewhere within the member state's jurisdiction, if the individual is subject to a risk of torture or inhuman or degrading treatment or punishment in the receiving country.¹⁰⁷

Furthermore, Article 18 of the EU Charter of Fundamental Rights also prohibits *refoulement* and explicitly guarantees the right to asylum, thus going beyond the mere right to *seek* asylum.¹⁰⁸ Article 19 of the Charter prohibits countries from

102. Council Directive 2011/95, 2011 O.J. (L 337) 9 (EU).

103. *Id.*

104. *See, e.g.,* Atakan Foça, *supra* note 25 (directing attention to Turkey's application of a "limited" version of the Geneva Convention since 1968) (emphasis added); *see also* Latif, *supra* note 26, at 2–3 (discussing limitations on Turkey's application of the Geneva Convention).

105. Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 23, art.78.

106. *Id.*

107. European Convention on Human Rights art. 3.

108. Charter of Fundamental Rights of the European Union, *supra* note 23

removing, expelling, or extraditing refugees to a country where they might be subjected to the death penalty, torture, or other inhuman or degrading treatment or punishment.¹⁰⁹

In its Qualification Directive, the EU generally defines grounds on which asylum-seekers can expect international protection.¹¹⁰ For instance, the Qualification Directive grants subsidiary protection even to persons who do not qualify as refugees.¹¹¹ In particular, subsidiary protection is granted to persons who would face a real risk of suffering serious harm, torture, inhumane or degrading treatment or punishment, and/or serious and individual threat to life or person by reason of indiscriminate violence in situations of international or internal armed conflict if they were returned to their countries of origin or former habitual residences.¹¹²

In the course of determining eligibility for refugee or subsidiary protection under EU law, it is mandatory to take into consideration whether the country of proposed return is in the position to provide the applicant with effective and non-temporary protection against the harm feared.¹¹³ In other words, one key determination EU member states have to make is whether the country the person is supposed to be returned to is considered a *safe* country.¹¹⁴ This means EU member countries may still be permitted to return an applicant to another country for the asylum application examination if that country is considered safe and if specific safeguards are established.¹¹⁵ The

(emphasis added) (containing references to the 1951 Convention Relating to the Rights of Refugees and the 1967 Protocol).

109. *Id.*

110. Eva-Maria Poptcheva, BRIEFING: EU LEGAL FRAMEWORK ON ASYLUM AND IRREGULAR IMMIGRATION 'ON ARRIVAL' STATE OF PLAY (Eur. Parl. Res. Serv., PE 551.333, May 2015) EUR. PARL., http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551333/EPRS_BRI%282015%29551333_EN.pdf.

111. Council Directive 2011/95, *supra* note 102, art. 21.

112. *Id.* art. 15.

113. *Id.* art. 16.

114. See, e.g., Anita Orav & Joanna Apap, BRIEFING: SAFE COUNTRIES OF ORIGIN: PROPOSED COMMON EU LIST (Eur. Parl. Res. Serv., PE 569.008, Feb. 2017), EUR. PARL., [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/569008/EPRS_BRI\(2015\)569008_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/569008/EPRS_BRI(2015)569008_EN.pdf) (suggesting a list of safe return countries with regards to asylum policies).

115. Council Directive 2013/32, 2013 O.J. (L 180) 64, 68 (EU).

Asylum Procedures Directive lists a set of requirements a country must meet to be considered safe.¹¹⁶ These requirements include actual admission of the asylum-seeker by the safe third country, the possibility to seek protection, and treatment of the applicant in accordance with the 1951 Geneva Convention and its *non-refoulement* principle if the applicant is found to be in need of international protection.¹¹⁷

EU member states may also revert to the Dublin Regulation when seeking to extradite an applicant.¹¹⁸ The Dublin Regulation essentially invokes a mechanism to allocate responsibilities among EU member states in examining applications for international protection and provides for a hierarchy of criteria guiding the process in circumstances where applicants entered the EU in one member state and subsequently travelled to another.¹¹⁹ As a general rule, the member state responsible for allowing the applicant to enter the EU is also assumedly responsible for reviewing the application.¹²⁰ One of the major issues associated with the Dublin Regulation is that it puts an immense burden on Mediterranean member countries like Italy and Greece, where a majority of migrants first set foot on EU territory.¹²¹

If an applicant is not granted the right to remain in the EU, under EU law, the Return Directive provides for certain safeguards concerning the issuance of return decisions and generally encourages the use of voluntary departures over forced removals.¹²² Most interestingly, Article 13 of the Return Directive guarantees an applicant the right to appeal a removal decision before a competent independent body, such as a judicial or administrative authority, with the power to temporarily suspend

116. *Id.* art. 38.

117. *Id.*

118. Commission Regulation 604/2013, 2013 O.J. (L 180) 31, 32.

119. *Id.*

120. *Id.* arts. 3, 9; see also Patrick J. Lyons, *Explaining the Rules for Migrants: Borders and Asylum*, N.Y. TIMES (Sept. 16, 2015), <https://www.nytimes.com/2015/09/17/world/europe/europe-refugees-migrants-rules.html> (explaining the Dublin Regulation and procedures EU member states have to follow in its application).

121. Robinson, *supra* note 38.

122. Council Directive 2008/115, arts. 7, 8, 14, 2008 O.J. (L 348) 102–04 (EC).

the removal while such review is pending.¹²³ In addition, Article 9 of the Return Directive specifically concerns the *non-refoulement* principle and demands that a removal decision be postponed if it constitutes a breach of this principle.¹²⁴ Ultimately, removals have to be carried out safely and humanely, and must protect the dignity of the individual.¹²⁵ In any given circumstance, a removal of an applicant under the Return Directive, or the transfer of the applicant to another EU member country under the Dublin Regulation, must conform with the right to asylum and the principle of *non-refoulement*.¹²⁶

For a complete analysis, it must be noted, however, there is no absolute right to the *non-refoulement* principle.¹²⁷ Neither the 1951 Geneva Convention nor the Qualification Directive prohibit *refoulement* by all means.¹²⁸ Rather, the articles do allow for the removal of a refugee when that refugee constitutes a danger to the security of the host country or is determined to be a danger to the community after committing a serious crime.¹²⁹

B. *The European Union's Refugee Deal with Turkey*

On October 15, 2015, the EU and Turkey agreed on an initial joint action plan to collectively address the refugee crisis.¹³⁰ On

123. *Id.* art. 13.

124. *Id.* art. 9.

125. *Id.* art. 8.

126. 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 1, 3, 5 (Mar. 23, 2016), <http://www.unhcr.org/56f3ec5a9.pdf> [hereinafter UNHCR REFUGEE REPORT].

127. David Weissbrodt & Isabel Hörtreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 25 (1999).

128. *Id.* at 25–26; see generally EUR. UNION AGENCY FOR FUNDAMENTAL RTS., SCOPE OF THE PRINCIPLE OF NON-REFOULEMENT IN CONTEMPORARY BORDER MANAGEMENT: EVOLVING AREAS OF LAW (Dec. 2016) (discussing limitations to *non-refoulement* under the Qualification Directive).

129. Weissbrodt & Hörtreiter, *supra* note 127, at 26; Council Directive 2011/95, *supra* note 102, art. 21.

130. Euro. Comm'n Press Release, MEMO/15/5860, The Commission, EU-Turkey Joint Action Plan (Oct. 15, 2015).

one end of the bargain, the EU held out the prospect of payment of “substantial and concrete funds” to ease the financial burden on Turkey relating to refugee accommodation.¹³¹ Turkey, on the other hand, was required to strengthen its efforts in restricting migrants moving from Turkey to EU territory and, in addition, readmit all irregular migrants who entered EU territory through Turkey and were subsequently determined to not require international protection.¹³² The joint action plan, however, fell short of the desired outcome of reducing the number of irregular migrant arrivals in Europe.¹³³ Thus, on March 20, 2016, EU leaders, “with their backs seemingly against the wall, and in an atmosphere of palpable panic,” took action by reaching an agreement with Turkey to effectively address the refugee crisis—the EU-Turkey Refugee Deal (“Refugee Deal”).¹³⁴ The Refugee Deal, a game changer in the eyes of EU officials, was intended to discourage migrants from trying to enter EU territory on the dangerous sea route.¹³⁵

The statement released by the Council of the European Union regarding the Refugee Deal with Turkey provides, in pertinent part, that:

- 1) All new irregular migrants crossing from Turkey into Greek islands as from 20 March, 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement . . . Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey
- 2) For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to

131. *Id.*

132. *Id.*

133. *No Safe Refuge*, *supra* note 15, at 10.

134. Collett, *supra* note 27, at 1.

135. *Europe's Murky Deal with Turkey*, *ECONOMIST* (May 26, 2016), <http://www.economist.com/news/europe/21699466-eu-gambling-its-reputation-secure-its-borders-europes-murky-deal-turkey>; *Migrant Crisis: EU-Turkey Deal Comes into Effect*, *BBC NEWS* (Mar. 20, 2016), <http://www.bbc.com/news/world-europe-35854413>.

the EU taking into account the UN Vulnerability Criteria

5) The fulfilment of the visa liberalisation roadmap will be accelerated vis-à-vis all participating Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016, provided that all benchmarks have been met

8) The EU and Turkey reconfirmed their commitment to re-energise the accession process as set out in their joint statement of 29 November 2015.¹³⁶

The core message of the agreement addresses the seemingly overwhelming and burdensome influx of not only asylum-seekers, but also smuggled migrants, entering European territory, from Turkey to the Greek islands via the sea route across the Aegean.¹³⁷ Deterrence, in fact, seems to be the EU's main goal with the Refugee Deal as officials want to prevent unchecked arrivals from entering the Union.¹³⁸ I, however, argue the Refugee Deal, if enforced as proclaimed, not only violates EU law, but also contradicts European understanding of democratic and humanitarian values.

C. *Legal and Human Rights Concerns Associated with the Refugee Deal*

There is no doubt that, under international law, nations “are entitled to control their borders, which also includes expelling foreign nationals from their territories under certain conditions.”¹³⁹ All border control arrangements, nonetheless, “must be taken in accordance with domestic, regional, and international legal commitments.”¹⁴⁰ As described above, the European Union, since the signing of the Geneva Convention in 1951 and its subsequent Protocol, has set forth clear and unambiguous standards that must be followed when admitting and extraditing migrants and asylum-seekers.¹⁴¹ The Refugee

136. *EU-Turkey Statement*, *supra* note 19.

137. Collett, *supra* note 27, at 1, 4.

138. *EU-Turkey Statement*, *supra* note 19; Collett, *supra* note 27, at 1–2.

139. *No Safe Refuge*, *supra* note 15, at 10.

140. *Id.* at 10–11.

141. See OFF. OF THE UN HIGH COMM’R FOR H.R., EXPULSIONS OF ALIENS IN

Deal, nonetheless, violates those rules and procedures in order to limit the number of new migrants arriving in the EU.¹⁴² This said, I am compelled to ask the following question: since when can well-established European laws be arbitrarily disposed of at the desperate whim of political decision-makers?

1. Collective Expulsion Is Illegal Under EU and International Law.

The first sentence of the EU-Turkey statement associated with the Refugee Deal notes, “[a]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March, 2016 will be returned to Turkey.”¹⁴³ Such language falls just short of a blatant breach of EU and international law. Returning *all* irregular migrants is collective expulsion, which is illegal under international law in general and Article 4 of the European Convention on Human Rights in particular.¹⁴⁴ In response, one might justify that the rest of the paragraph safeguards against collective expulsion by stating that “[t]his will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion.”¹⁴⁵ However, I question this line of argument, because how can the EU return *all* new irregular migrants entering the EU through Turkey, while, at the same time, adhering to EU and international law with regards to collective expulsion? The remainder of the paragraph, therefore, contradicts the first sentence and leaves the inquiry into the EU’s true intentions unanswered. One thing, however, is clear: extraditing *all* new irregular migrants entering the EU through Turkey is illegal under EU and international law.¹⁴⁶

INTERNATIONAL HUMAN RIGHTS LAW 9–16 (Sept. 2006), <http://www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf>.

142. Collett, *supra* note 27, at 1.

143. *EU-Turkey Statement*, *supra* note 19.

144. See, e.g., EXPULSIONS OF ALIENS IN INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 141, at 15–16 (discussing international human rights instruments prohibiting collective expulsion); Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol, art. 4, Sept. 16, 1963, E.T.S. No. 046.

145. *EU-Turkey Statement*, *supra* note 19.

146. EXPULSIONS OF ALIENS IN INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 141,

2. The EU Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals Requires a Case-by-Case Analysis Regarding Immigration of Illegal Migrants That Goes Beyond the Mere Fact of an Illegal Stay.

On December 16, 2008, the EU issued a directive on common standards and procedures member states must follow when returning illegally staying third-country nationals.¹⁴⁷ Section (6) specifically requires that the directive “be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go *beyond the mere fact of an illegal stay*.”¹⁴⁸

The Refugee Deal, however, does not take any objective criteria into consideration other than the determination of whether a migrant is irregular—in other words, illegal, or not. All the Refugee Deal seemingly guarantees is that “[m]igrants 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,”¹⁴⁹ which arguably satisfies the case-by-case analysis requirement. Nevertheless, the Refugee Deal falls short with regards to the second prong of Section (6) of the 2008 Directive. Based on the Section (6) considerations coupled with the announcement that “[a]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March, 2016 will be returned to Turkey,”¹⁵⁰ one cannot reasonably contend any consideration, other than the mere fact of an illegal stay, is relevant in the ultimate decision-making process. Therefore, the Refugee Deal violates governing EU law with respect to the aforementioned.

at 9–15.

147. See generally Council Directive 2008/115, *supra* note 122, at 98 (providing for standards and procedures EU member states have to follow when returning third-country nationals who are illegally staying in EU territory).

148. *Id.* (emphasis added).

149. *EU-Turkey Statement*, *supra* note 19.

150. *Id.*

3. The Refugee Deal Encourages Refugee Bartering Contrary to European Values.

The Refugee Deal further provides “[f]or every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria.”¹⁵¹ The moral and legal flaws with this one-in-one-out scheme, in essence, are that every resettlement place tendered to a Syrian refugee in the EU is contingent upon another Syrian refugee “embarking on the deadly sea route to Greece.”¹⁵² The EU and Turkey are “horse trading away the rights and dignity of some of the world’s most vulnerable people,”¹⁵³ which unquestionably contradicts the EU’s shared core values of human dignity, freedom, democracy, equality, the rule of law, and respect for human rights.¹⁵⁴

Moreover, because the Refugee Deal only addresses the resettlement of Syrians, another critical question that needs clarification is what happens to refugees from other war-stricken countries, such as Afghanistan or Iraq? For these and other reasons further examined below, “human rights groups have harshly criticized the Refugee Deal, with Amnesty International accusing the EU of turning its back on a global refugee crisis.”¹⁵⁵

4. Turkey is not a “Safe” Country and Ignores Non-Refoulement Requirements.

The Refugee Deal further assures that “[a]ll migrants will be protected in accordance with the relevant international standards and in respect of the principle of *non-refoulement*.”¹⁵⁶ The EU apparently wants to make clear that migrants who can show that they are not safe in Turkey are entitled to protection by EU member states.¹⁵⁷ Specifically, one requirement for returning

151. *Id.*

152. Press Release, Amnesty Int’l, *EU-Turkey Summit: EU and Turkish Leaders Deal Death Blow to the Right to Seek Asylum* (Mar. 8, 2016), <https://www.amnesty.org/en/press-releases/2016/03/eu-turkey-summit-reaction/>.

153. *Id.*

154. *The EU in Brief*, *supra* note 2.

155. *Migrant Crisis: EU-Turkey Deal Comes into Effect*, *supra* note 135.

156. *EU-Turkey Statement*, *supra* note 19 (emphasis added).

157. Lenz Jacobsen, *Was im Türkei-Deal Steht – und Was Nicht*, ZEIT ONLINE (Mar. 18, 2016), <http://www.zeit.de/politik/ausland/2016-03/eu-gipfel-tuerkei-abkommen->

migrants to Turkey is that they are treated in accordance with the Geneva Convention.¹⁵⁸ Turkey, however, ratified the 1951 U.N. Convention on the Status of Refugees only with a geographic limitation, “which means that only those fleeing as a consequence of ‘events occurring in Europe’ can be given refugee status.”¹⁵⁹ Applying the EU Asylum Procedures Directive to the Refugee Deal, Greek authorities may, nonetheless, return a migrant to Turkey if the migrant’s asylum application is “inadmissible.”¹⁶⁰ Inadmissibility is established if Turkey is either a “first country of asylum” or a “safe third country” for the migrant.¹⁶¹ Hence, one of the main assumptions EU leaders make is that Turkey is a safe third country. As a matter of fact, however, “[i]t is becoming increasingly difficult to maintain the claim that Turkey is a safe place for refugees.”¹⁶² Amnesty International even demanded that the EU immediately halt plans to return asylum-seekers to Turkey on the false pretense that it is a “safe country” for refugees.¹⁶³

The “safe third country concept” applies to the country a migrant entered when fleeing from the country of origin and where the migrant could have applied for international protection, but failed to do so, or where the migrant sought protection but status was not determined.¹⁶⁴ The UNHCR made clear the following:

Application of the concept requires an individual assessment of whether the previous state will readmit the person; grant the person access to a fair and efficient

fluechtlinge-angela-merkel.

158. *Id.*

159. *Protecting Refugees*, HUMAN RIGHTS WATCH, <https://www.hrw.org/reports/2000/turkey2/Turk009-10.htm> (last visited Mar. 11, 2018).

160. Council Directive 2013/32, *supra* note 115 (stating an exception that member countries may use to revoke migrants’ rights to remain in the Union by finding their applications inadmissible).

161. *Id.* (stating EU directive restrictions which Turkey agreed to in the Refugee Deal).

162. Alkousaa et al., *supra* note 19.

163. Thierry Roge, *EU’s Reckless Refugee Return to Turkey Illegal*, AMNESTY INT’L (June 3, 2016), <https://www.amnesty.org/en/latest/news/2016/06/eus-reckless-refugee-returns-to-turkey-illegal/>.

164. UNHCR REFUGEE REPORT, *supra* note 126, at 2.

procedure for determination of his or her protection needs; permit the person to remain; and accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including protection from *refoulement*.¹⁶⁵

Hence, for the Refugee Deal to be legal, Turkey must allow refugees returned from Europe to request refugee status and to have access to all rights conferred by the 1951 Convention.¹⁶⁶ The reality, however, is the opposite.

In Turkey, refugees are often unlawfully detained or even deported.¹⁶⁷ For instance, just hours after the Refugee Deal was agreed upon, *about thirty Afghan asylum-seekers were detained, denied access to asylum procedures, and forcibly returned to Afghanistan despite fearing Taliban attacks*.¹⁶⁸ Research conducted by Amnesty International in Turkey's southern border provinces exposed the harsh reality of Turkish authorities gathering and expelling groups of Syrian men, women, and children to Syria on a near daily basis since mid-January 2016.¹⁶⁹ Other reports offer detailed accounts of asylum-seekers who were beaten and even shot by Turkish border guards as they tried to enter Turkey.¹⁷⁰

Furthermore, European policymakers are seemingly willing to violate well-settled EU law on guarantees, like the right to

165. *Id.*

166. *Id.* at 6.

167. See, e.g., Amnesty Int'l, *Europe's Gatekeeper—Unlawful Detention and Deportation of Refugees from Turkey*, at 3–10, AI Index EUR 44/3022/2015, Dec. 2015 (providing an account for refugees who have been held in detention or even forcibly returned to Syria and Iraq).

168. See Turkey "Safe Country" Sham Revealed as Dozens of Afghans Forcibly Returned Hours after EU Refugee Deal, AMNESTY INT'L (Mar. 23, 2016), <https://www.amnesty.org/en/latest/news/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/>.

169. Press Release, Amnesty Int'l, *Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal* (Apr. 1, 2016), <https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>.

170. See Turkey: Border Guards Kill and Injure Asylum Seekers, HUMAN RIGHTS WATCH (May 10, 2016, 12:01 AM), <https://www.hrw.org/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers> (describing numerous incidents of Turkish border guards shooting and beating Syrian asylum seekers who try to reach Turkey).

appeal, to significantly reduce the arrival of refugees and increase their return to Turkey.¹⁷¹ For example, local lawyers in Askale, a town in East Turkey that hosts a deportation center for irregular migrants, reported illegal conduct by the center's staff, such as arbitrarily blocking access to clients, denying clients' asylum applications without proper examination, keeping minors in isolated cells without access to family members, and possibly ill-treating and torturing migrants.¹⁷²

Such atrocities not only contradict the language of the Refugee Deal, but are illegal under EU and international law. Moreover, the undermining of Europe's human rights commitments in such an overt fashion may prove even more costly in the long-term.¹⁷³ European leaders, however, have appeared to lower their own standards in order to make the Refugee Deal work.¹⁷⁴ Even Greek appeals committees, which are responsible for examining asylum cases on appeal in accordance with EU law, already held that Turkey is not safe enough to return Syrian refugees.¹⁷⁵ In addition, on October 29, 2016, the U.S. Department of State issued a travel warning for Turkey, which was updated on March 28, 2017.¹⁷⁶ All of these circumstances point to the conclusion that "[i]n their desperation to seal their borders, EU leaders have willfully ignored the simplest of facts: Turkey is not a safe country for Syrian refugees and is getting less safe by the day."¹⁷⁷

5. Anti-Democratic Movements in Turkey Change Commonalities Between Both Parties to the Refugee Deal.

On July 15, 2016, members of the Turkish military attempted

171. Collett, *supra* note 27.

172. Orçun Ulusoy, *Turkey as a Safe Third Country?*, OXFORD L. FAC. (Mar. 29, 2016), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third>.

173. Collett, *supra* note 27.

174. *Europe's Murky Deal with Turkey*, *supra* note 135.

175. Nielsen, *supra* note 36.

176. U.S. EMBASSY & CONSULATES IN TURKEY, *Security Message for U.S. Citizens: Turkey Travel Warning Update* (Mar. 28, 2017), <https://tr.usembassy.gov/security-message-u-s-citizens-turkey-travel-warning-update/>.

177. Press Release, Amnesty Int'l, *supra* note 169.

a coup d'état at several locations in Ankara and Istanbul during which over 300 people were killed and more than 2,100 others were injured as Turks took to the streets to block the *fifth* military takeover in the country's history.¹⁷⁸ As a result, President Erdogan ordered mass detentions and arrests of more than 40,000 people, among them numerous opposition party leaders, removed 2,745 judges from duty, and closed down approximately 170 media outlets.¹⁷⁹ Also, tens of thousands of employees, such as teachers, police officers, state bureaucrats, and airline employees, arbitrarily lost their jobs.¹⁸⁰ In total, President Erdogan "created an administrative vacuum by purging or arresting about 175,000 people."¹⁸¹ The failed coup attempt, in fact, reignited the country's volatility toward coups, an assumption about Turkey that was no longer considered to be of any concern to the European community.¹⁸²

In the aftermath of the attempted coup, the Turkish Government instituted a three-month state of emergency, which was consecutively extended in October 2016, January 2017, April 2017, and July 2017.¹⁸³ Under the state of emergency, Turkey is able to suspend parts of the European Convention on Human Rights, which immediately impacts the refugees the EU returns to Turkey.¹⁸⁴ As a result, in November 2016, the World Justice

178. Sophia Pandya, *The Roots of the Turkish Crisis*, 43 DEMOCRACY J. (Winter 2017), available at <https://democracyjournal.org/magazine/43/the-roots-of-the-turkish-crisis/>; Lowen, *supra* note 57.

179. Arango & Yeginsu, *supra* note 33; Roger Cohen, Opinion, *Turkey's Coup That Wasn't*, N.Y. TIMES (July 16, 2016), <https://www.nytimes.com/2016/07/18/opinion/turkeys-coup-that-wasnt.html>; Lowen, *supra* note 57.

180. Arango & Yeginsu, *supra* note 33.

181. Patrick Kingsley, *Turkey's Erdogan: Democracy's Savior or Saboteur?*, N.Y. TIMES (Apr. 14, 2017), <https://www.nytimes.com/2017/04/14/world/europe/turkey-erdogan-democracy-referendum.html>.

182. *See id.* (discussing how Turkey's extreme reaction to the failed coup contradicted the EU's belief that the country was moving toward a democratic government).

183. Emre Peker, *Turkey Extends State of Emergency in Wake of Attack Claimed by Islamic State*, WALL ST. J. (Jan. 4, 2017), <http://www.wsj.com/articles/turkey-seeks-to-extend-state-of-emergency-1483475370>; *Turkey Extends State of Emergency by Three Months, Deputy PM Says*, *supra* note 31; *Turkish Government Extends State of Emergency Rule for Another 3 Months*, *supra* note 31.

184. *Turkey Suspends European Convention on Human Rights*, *supra* note 32; *see Alarm in Germany over Turkey*, *supra* note 32 (discussing Turkey's suspension of human

Project's rule of law index placed Turkey 99th of 113 countries, just behind Iran and Myanmar.¹⁸⁵ With Turkey already leading the world in jailing journalists, President Erdogan even suggested reintroducing the death penalty.¹⁸⁶

In general, one can reasonably argue that the failed coup offers President Erdogan "a golden opportunity to expand his power."¹⁸⁷ Many of President Erdogan's critics fear he countered the failed coup attempt with his own coup, "attempting to crush all meaningful resistance to his rule under the cover of a legitimate purge of military conspirators."¹⁸⁸ German jurists, for instance, have identified a threat to the independence of the judicial branch in Turkey.¹⁸⁹ Independent jurist associations and judicial federations go even further and claim there is no longer an independent judiciary in Turkey.¹⁹⁰

As a matter of fact, in 2016, President Erdogan initiated efforts to change the constitution and centralize power in the hands of the presidency.¹⁹¹ Turkey's parliament approved the proposed constitution in January 2017, after which Turkish voters also approved it in a referendum in April 2017.¹⁹² The approved constitutional changes transform Turkey's modified parliamentary system into a presidential one, thereby paving the

and civil rights in the wake of the failed coup attempt).

185. Lowen, *supra* note 57.

186. Lucy Westcott, *Turkey Is World's Leading Jailer of Journalists: CPJ*, NEWSWEEK (Dec. 13, 2016, 12:10 AM), <http://www.newsweek.com/turkey-jailed-largest-number-journalists-2016-cpj-531095>; Katie Foster, *Erdogan Announces Turkish Parliament Will Consider Bringing Back the Death Penalty*, INDEP. (Oct. 29, 2016, 3:32 PM), <http://www.independent.co.uk/news/world/europe/turkey-death-penalty-erdogan-reintroduce-debate-consider-turkish-parliament-a7386591.html>.

187. Wesel, *supra* note 34.

188. Aron Lund, *How Will the Failed Coup in Turkey Affect Syria?*, CARNEGIE MIDDLE E. CTR. (July 28, 2016), <http://carnegie-mec.org/diwan/64206>.

189. *Juristentag: Rechtsstaatlichkeit und Menschenrechte in Tuerkei Bedroht*, EURACTIV (Sept. 13, 2016), <https://www.euractiv.de/section/eu-aussenpolitik/news/juristentag-rechtsstaatlichkeit-und-menschenrechte-in-tuerkei-bedroht/>.

190. *Alarm in Germany over Turkey*, *supra* note 32.

191. Patrick Kingsley, *Erdogan Claims Vast Powers in Turkey After Narrow Victory in Referendum*, N.Y. TIMES (Apr. 16, 2017), <https://www.nytimes.com/2017/04/16/world/europe/turkey-referendum-polls-erdogan.html>.

192. *Id.*

country's path toward dictatorship.¹⁹³ The new constitution essentially shifts “the basic structure of the system by abolishing the office of prime minister and giving the president the authority to appoint the members of the cabinet.”¹⁹⁴ Furthermore, under the new constitution, the president is allowed to be the head of a political party and has power over the High Council of Judges and Prosecutors.¹⁹⁵ One might argue that such a constitution, at first look, appears to be similar to the United States Constitution; however, contrary to the political system in the U.S., there will be no “checks and balances”¹⁹⁶ in the Turkish system, and President Erdogan could possibly remain in power until 2029.¹⁹⁷

As Deutsche Welle's Bernd Riegert argued:

President Erdogan has gone from being a reformer to being an autocratic president, who undermines the rule of law, curtails freedoms of the press and expression and has most recently begun using emergency laws to prepare for the transformation of the Turkish state into a presidential, autocratic regime.¹⁹⁸

The changed political system in Turkey will not only complicate its bid to join the EU, for which democratic safeguards

193. Noah Feldman, *Turkey's New Constitution Would End Its Democracy*, BLOOMBERG VIEW (Jan. 22, 2017, 10:03 AM), <https://www.bloomberg.com/view/articles/2017-01-22/turkey-s-new-constitution-would-end-its-democracy>; see Sevgi Akarcesme, Opinion, *Turkey's Intelligentsia Kneels to Erdogan*, N.Y. TIMES (Sept. 14, 2016), https://www.nytimes.com/2016/09/15/opinion/turkeys-intelligentsia-kneels-to-erdogan.html?_r=0 (describing how the attempted coup in Turkey provided President Erdogan with the pretext to demonize and arrest members of the opposition, creating the conditions for a dictatorial transformation).

194. Feldman, *supra* note 193.

195. *Id.*

196. Vanessa Steinmetz, *Worüber Erdogan die Türkei Abstimmen Lassen Will*, SPIEGEL ONLINE (Jan. 21, 2017, 4:44 PM), <http://www.spiegel.de/politik/ausland/tuerkei-worueber-recep-tayyip-erdogan-sein-land-abstimmen-lassen-will-a-1130689.html>; see *id.* (noting, for example, that there is no lifetime appointment for members of the judiciary to “guarantee . . . de facto independence”).

197. Steinmetz, *supra* note 196; Sewell Chan, *Turkey's Parliament Starts Debate on Expansion of President's Powers*, N.Y. TIMES (Jan. 9, 2017), <https://www.nytimes.com/2017/01/09/world/middleeast/turkeys-parliament-starts-debate-on-expansion-of-presidents-powers.html>.

198. Riegert, *supra* note 14.

are essential, but also exacerbate the problematic situation for refugees who are already in Turkey or will be returned there from the EU.¹⁹⁹ One must critically question “whether a nation that for decades has served as a crucial bridge between Europe and the Muslim world can possibly have a stable and prosperous future under someone with so little respect for democratic structures and values.”²⁰⁰ Nevertheless, contrary to everything the democratic Union stands for, EU officials continue to disregard President Erdogan’s “steady march toward authoritarianism,”²⁰¹ and turn a blind eye to Turkey’s human rights violations.

D. The Refugee Deal in Action

Finally, I argue, apart from its illegality under EU and international law, the Refugee Deal’s practical applicability reduces it ad absurdum.

The EU expected Greece would expedite procedures to send migrants back to Turkey, but Greek asylum officials and judges are reluctant to recognize Turkey as a “safe third country,” even though the EU demands so.²⁰² As mentioned above, Article 13 of the Return Directive guarantees an applicant the right to appeal a removal decision before a competent independent body, such as a judicial or administrative authority, with the power to temporarily suspend the removal while the review is pending.²⁰³ In fact, shortly after the Refugee Deal came into effect, Greek Appeals Committees ruled Turkey is not safe enough to return Syrian refugees.²⁰⁴ For instance, on May 20, 2016, a Syrian national won an appeal against a decision that would have led to his forcible return to Turkey and, by June 1, 2016, Greek Appeals Committees had already issued ten decisions asserting Turkey is

199. Chan, *supra* note 198.

200. Editorial, *Democracy Loses in Turkey*, N.Y. TIMES (Apr. 17, 2017), <https://www.nytimes.com/2017/04/17/opinion/democracy-loses-in-turkey.html>.

201. Arango & Yeginsu, *supra* note 33; Öykü Altuntaş, ‘EU Turned Blind Eye to Turkey’s Human Rights Violations’: Amnesty Secretary-General, HÜRRIYET (May 25, 2016), <http://www.hurriyetdailynews.com/eu-turned-blind-eye-to-turkeys-human-rights-violations-amnesty-secretary-general.aspx?pageID=238&nID=99671&NewsCatID=339>.

202. Alkousaa et al., *supra* note 19.

203. Council Directive 2008/115, *supra* note 122, art. 13 at 104.

204. Nielsen, *supra* note 36.

not a “safe third country” for Syrian refugees.²⁰⁵ The European Commission opines Greek appellate judges may actually stop one in three deportations of Syrians back to Turkey.²⁰⁶ Unless EU officials are willing to violate well-settled EU law on the right to appeal, no significant increase in the number of refugees returned to Turkey will be reached.²⁰⁷

In February 2016, more than 57,000 migrants arrived on the Greek islands: 52 percent were Syrians, 25 percent were Afghan, and 16 percent Iraqi nationals.²⁰⁸ Given the current unrest in those countries, all three population groups represent individuals with undeniable protection needs.²⁰⁹ Yet, the Refugee Deal only addresses the fate of Syrian refugees. If the EU executes the agreement in conformity with international and EU law, few arrivals are likely to be returned because refugees have the right to appeal their return. Furthermore, asylum claims made in Greece must still be considered according to the existing Dublin Regulation, “suggesting that those with valid and verified family connections would be transferred to the appropriate EU Member State to complete asylum procedures rather than be returned to Turkey.”²¹⁰

Moreover, while the EU agreed under the Refugee Deal to resettle one Syrian refugee from Turkey for each irregular migrant who is returned, only five out of twenty-eight EU countries have agreed thus far to accept refugees.²¹¹ Another major issue that emerged since the Refugee Deal took effect is the fact that more and more migrants die trying to cross the Mediterranean Sea on boats from North Africa to Europe.²¹²

Considering the aforementioned shortcomings of the Refugee Deal in today's geopolitical context, even European politicians do

205. Fotiadis et al., *supra* note 37; Press Release, Pro Asyl, *supra* note 37.

206. Alkousaa et al., *supra* note 19.

207. Collett, *supra* note 27.

208. *Id.*

209. *Id.*

210. *Id.*

211. Nielsen, *supra* note 36; Alkousaa et al., *supra* note 19.

212. UNHCR Staff, *Mediterranean Death Toll Soars, 2016 Is Deadliest Year Yet*, UNHCR (Oct. 25, 2016), <http://www.unhcr.org/en-us/news/latest/2016/10/580f3e684/mediterranean-death-toll-soars-2016-deadliest-year.html>.

not believe in the practicability of the Refugee Deal, and many of them complain no one follows the Refugee Deal except the refugees themselves.²¹³

IV. CONCLUSION

This comment has examined the EU-Turkey Refugee Deal's illegality under EU and international law and its incompatibility with European democratic values. A clear takeaway from an analysis of the Refugee Deal amounts to the following: if the EU needs Turkey badly enough, everything is open to discussion.²¹⁴ EU officials rushed into a deal that could have been the cornerstone of Turkey's path to an enhanced democracy and even to becoming a full member to the Union. Yet, this unique opportunity is now lost, and with regards to EU membership, President Erdogan has already openly proclaimed that on behalf of the country, "[w]e'll go our way, you go yours."²¹⁵ Either way, it seems as if "[t]he beautiful dream of a European Turkey has burst like a soap bubble."²¹⁶

The Refugee Deal is nothing more than a trade-off of well-established EU and international laws on migration and human rights in exchange for a potential, yet highly unlikely, reduction in the number of refugees entering the EU. If the Refugee Deal is applied literally, it allows for collective expulsion; contradicts the EU Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, which requires a case-by-case analysis regarding immigration of illegal migrants that goes beyond the mere fact of an illegal stay; encourages refugee bartering; and illegitimately classifies Turkey

213. Manuel Bewarder & Marcel Leubecher, *Vater des Flüchtlingsdeals Warnt vor dem Kollaps*, WELT (Sept. 9, 2016), <https://www.welt.de/politik/deutschland/article158455709/Vater-des-Fluechtlingsdeals-warnt-vor-dem-Kollaps.html>.

214. *Europe's Murky Deal with Turkey*, *supra* note 135.

215. Constanze Letsch & Jennifer Rankin, *EU-Turkey Visa Deal on Brink as Erdogan Refuses to Change Terror Laws*, GUARDIAN (May 6, 2016), <https://www.theguardian.com/world/2016/may/06/erdogan-turkey-not-alter-anti-terror-laws-visa-free-travel-eu>.

216. Riegert, *supra* note 14.

as a “safe” country for migration and asylum purposes.²¹⁷ The EU disregards Turkey’s purposeful ignorance for *non-refoulement* requirements—despite the Refugee Deal’s explicit demand for adherence to these principles—and turns its back on anti-democratic movements in Turkey. Doing so, the EU overtly neglects the Union’s shared core values of human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, and engages in conduct that is illegal under international rules, but also, more incredibly, violates its own laws.

For the reasons discussed above, the Refugee Deal must be repealed. Instead of replacing the agreement with a new version, the EU should seize the moment and take advantage of the opportunity to initiate real democratic change in Turkey. On the one hand, serious and constructive discussions between EU and Turkish officials can effectively address the refugee crisis and, on the other hand, guide Turkey toward an EU-style democracy. Given the long-standing desire of Turkey to become a full member state to the Union, European officials must capitalize on their bargaining advantage by demanding a distinct commitment to changes in Turkish policymaking with particular emphasis on democratic governance and human rights. Unless Turkey commits to democratic and human rights improvements, both parties will undoubtedly drift even further apart, and the EU will no longer consider Turkey as a potential future member state. Financial incentives and visa liberalizations in exchange for the return of Syrian refugees can neither be the answer to solving the refugee crisis nor to bringing both parties closer together. Only if EU officials offer their Turkish counterparts an earnest prospect of joining the Union might there be a genuine effort to improve the current state of affairs in Turkey. However, before the EU can extend such an opportunity to Turkey in good faith, the EU must first rescind the Refugee Deal.

In challenging times of increasing populism, the EU, with all its financial resources and humanitarian capabilities, bowed to

217. Council Directive 2008/115, art. 13, 2008 O.J. (L 348) 98, 98 (EC); Kondylia Gogou, *The EU-Turkey Deal: Europe’s Year of Shame*, AMNESTY INT’L (Mar. 20, 2017), <https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/>.

right-wing political forces instead of taking a stand for the most vulnerable of people—the ones who fled their war-stricken home countries in hopes of finding a better life in Europe. “Wir schaffen das,”²¹⁸ German Chancellor Angela Merkel’s encouragement to Europeans in response to the refugee crisis, seems to have become just a hallow phrase. The “Union” in “European Union” appears to be applicable only in situations that are related to financial crises and bureaucracy. How can this Union ensure its long-term survival if it fails to apply its laws and core values in times of humanitarian crises, especially when it is financially capable and ethically obligated to do so? Revisiting Johnnie Cochran’s all-too-relevant recommendation that “we’ve got to be judged by how we do in times of crisis,” the final verdict reached by the EU regarding its approach to the refugee crisis is sobering.²¹⁹ The EU’s excuse that it “‘had to get tough’ on the migrant issue, for the sake of self-preservation” is nothing more than just that—an excuse.²²⁰ The European Union unpretentiously elected to overlook the fundamental, unassailable reality that “[r]efugees need protection, not rejection.”²²¹

218. Translated: “*we can do it.*”

219. BOOK OF AFRICAN-AMERICAN QUOTATIONS 35 (Joslyn Pine ed., 2011).

220. Steven Erlanger, *Facing Migrant Crisis, E.U. Makes a Dubious Deal with Turkey*, N.Y. TIMES (Mar. 10, 2016), https://www.nytimes.com/2016/03/11/world/europe/europe-turkey-erdogan-refugees-migrants.html?rref=collection%2Ftimestopic%2FTurkey&action=click&contentCollection=world®ion=stream&module=stream_unit&version=search&contentPlacement=10&pgtype=collection.

221. Press Release, UNHCR, *supra* note 39.