

## The European Union-Turkey Cooperation on Migration matters: Towards a Review of the Migratory Statement of 18 march 2016



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### Abstract: .

**Keywords:** European Union, Turkey, immigration, border controls, EU-Turkey Statement, political agreement, international treaty.

**Resumen:** : La cooperación entre la Unión Europea (UE) y Turquía en materia migratoria es un elemento esencial en la política migratoria de la Unión Europea. Esta controvertida cooperación se ha reformulado en el marco de la respuesta a la crisis migratoria, siendo uno de sus elementos centrales la Declaración de la Unión Europea y Turquía, de 18 de marzo de 2016. Con independencia del contenido cuestionable del Acuerdo, resulta particularmente controvertido que un acuerdo de esta relevancia se haya recogido exclusivamente en una nota de prensa de una Declaración conjunta entre la UE y Turquía. De este modo, se ha evitado el procedimiento de negociación y celebración de tratados internacionales, previsto en el Tratado de Funcionamiento de la Unión Europea; en especial, la participación del Parlamento Europeo y la intervención de los parlamentos nacionales. Con fecha 28 de febrero de 2017, el Tribunal General, ha inadmitido a trámite tres recursos de anulación contra dicho Acuerdo. El Tribunal, en una interpretación excesivamente formal, declara su falta de competencia para conocer del fondo del asunto. Así, el Tribunal considera que el Acuerdo no es un acto propio de la Unión, sino un acto adoptado por los Jefes de Estado y de Gobierno; por tanto, no es competente para pronunciarse sobre la legalidad de un acuerdo internacional celebrado por los Estados miembros. El Tribunal no tiene presente que el citado Acuerdo contiene auténticas obligaciones jurídicas para la propia UE, como se desprende de su ejecución durante el período en el que ha estado siendo aplicado. En términos similares, el Tribunal Supremo español ha evitado realizar un pronunciamiento sobre el fondo y el contenido de la Declaración. A partir de marzo de 2020, en un momento de importantes tensiones entre la UE y Turquía, se ha iniciado un proceso de reflexión sobre la cooperación UE-Turquía en materia migratoria, que debe concluir con la revisión de los compromisos contenidos en la Declaración de 2016.

**Palabras clave:** Unión Europea, Turquía, inmigración, controles fronterizos, Declaración UE-Turquía, acuerdo político, tratado internacional.

**Résumé:** La coopération entre l'Union européenne (UE) et la Turquie en matière de migration est un élément essentiel de la

politique migratoire de l'Union européenne. Cette coopération controversée a été reformulée dans le cadre de la réponse à la crise migratoire étant la Déclaration de l'Union européenne et de la Turquie du 18 mars 2016, un de ses éléments principaux. Indépendamment du contenu discutable de l'accord, c'est particulièrement controversé qu'un accord de cette importance a été inclus exclusivement dans un communiqué de presse d'une déclaration commune entre l'UE et la Turquie. De cette manière, le processus de négociation et de signature des traités internationaux, prévu dans le Traité sur le Fonctionnement de l'Union européenne, a été évitée; en particulier, la participation du Parlement européen et l'intervention des parlements nationaux. Le 28 février 2017, le Tribunal a rejeté trois recours en annulation contre cet accord. Le Tribunal, dans une interprétation excessivement formelle, déclare son incompétence pour connaître le fond du sujet. Ainsi, le Tribunal considère que la Déclaration n'est pas un acte de l'Union, plutôt un acte adopté par les Chefs d'État et de Gouvernement; donc, il n'est pas compétent pour se prononcer sur la légalité d'un accord international conclu par les États membres. Le Tribunal ne sait pas que l'accord susmentionné contient de véritables obligations juridiques pour l'UE elle-même, comme on perçoit en regardant son exécution pendant la période dans laquelle il est appliqué. Dans des termes similaires, la Cour suprême espagnole a évité de se prononcer sur le fond et le contenu de la Déclaration. Depuis mars 2020, dans un moment de tensions importantes entre l'UE et la Turquie, un processus de réflexion sur la coopération UE-Turquie en matière de migration a commencé, lequel devrait conclure avec la révision des engagements contenus dans la Déclaration de 2016.

**Mots clés:** Union européenne, La Turquie, immigration, contrôles aux frontières, déclaration UE-Turquie, accord politique, traité international.

## I. PRELIMINARY QUESTIONS: ON THE DETERRITORIALIZATION OF BORDER CONTROLS IN THE EUROPEAN UNION

The former President of the European Commission, Jean-Claude Juncker, in the 2016 State of the European Union Address stated that “the Union is, at least in part, in an existential crisis”. The President of the Commission continued to verify a worrying reality, since “I have never before seen that there is so little in common between our Member States, so few areas in which they agree to work together”<sup>2</sup>. Although this rhetoric has been used on various occasions during the evolution of the European integration process, the truth is that in recent years the European Union (EU) and its states are facing problems of an outstanding magnitude. In this way, neither the European institutions nor the Member States are able to reach agile and efficient solutions that are at the height of the seriousness of the problems that the Union has been facing in the last decade.

The circumstances that have led to this situation of “existential crisis” are of a very different nature and with repercussions in different areas of the integration process. Until the outbreak of the health crisis in 2020, as a result of Covid-19, the main factors of this existential crisis in the EU can be highlighted: the economic and financial crisis, Brexit, the weak integration in security and defence matters, the migration crisis and the

weak position of the Union in the face of global challenges. This set of elements has caused the EU to enter a moment of crisis as an economic, political and social project.

Despite the situation described, the EU has managed to approve certain structural reforms that have allowed, perhaps with little agility, to face some of the problems mentioned<sup>3</sup>. The migration crisis is the area in which the EU's responses are being particularly questionable, mainly due to the profoundly divergent positions of the Member States, calling into question even essential principles enshrined in the Treaties, such as the principle of protection of Fundamental Rights, the principle of solidarity and the principle of loyal cooperation. This is demonstrated by the fact that Ursula von der Leyen, current President of the European Commission, in the State of the Union Address in 2020 and in the midst of the health crisis, continues to consider migration as one of the main challenges for the EU and its member States, pointing out the need for greater European cooperation on migration<sup>4</sup>.

The current migration crisis has forced the EU and its Member States to adopt a broad set of measures, sometimes improvised and sometimes counterproductive, aimed at managing the massive displacement of people to the EU. As is known, the migratory crisis, which began immediately in 2013 and worsened as of 2015, finds its main cause in the prolonged armed conflicts in various States of the Middle East, mainly in Syria<sup>5</sup>. In this way, during the

last decade, the EU has suffered an outstanding increase in migratory pressure, through different routes, which end in Mediterranean Sea States: Turkey, Libya and Morocco ("The Gates of Europe")<sup>6</sup>.

Although the initiatives promoted by the EU and the Member States have focused on various areas of "Policies on border checks, asylum and immigration"<sup>7</sup>, the basis of the measures adopted in recent years is to develop migration control instruments, the sole objective of which is to prevent and / or deter the arrival of migrants to the territory of the EU States. On the one hand, preventive measures or interception measures are established, which are the set of legal, administrative and executive actions aimed at blocking or interrupting the entry, in the European States of destination, to all those migrants who do not access in accordance with immigration regulations. Elements such as: greater cooperation and shared information respond to this logic, through the Border Guard and Coast Agency<sup>8</sup>, improved harmonization

of common rules and standards applied under the Schengen Borders Code; and risk analysis, providing contingency plans and rapid response capabilities. On the other hand, measures of a reactive nature are adopted, which aim to promote the departure of irregular immigrants from the territory of the EU States, through policies of return and readmission to the States of origin<sup>9</sup>.

Within the category of preventive or interception measures, one of the core elements of European migration policy is represented by the creation of control mechanisms for migration flows beyond the external borders of the EU. Thus, with the aim of strengthening border control, the EU and its Member States have progressively developed a policy of "externalization", "relocating" or "deterritorializing" border controls. Although with different nuances, these concepts refer to a diversity of state actions aimed at establishing border controls and migration policy functions outside the territory (land, air or sea) of the States; either by actions of the State itself beyond its borders or by activities carried out by third States<sup>10</sup>.

The term "extraterritoriality" of border control functions refers to migration control activities or functions carried out by public officials of the EU and/ or its Member States in the territory of third States, with their agreement. In other words, in these cases there is direct or indirect control by the EU or its Member States. Therefore, they are responsible for migration control operations, including international obligations regarding the Human Rights of migrants. As stated by the European Court of Human Rights (ECHR), in the *Hirsi Jamaa* Matter<sup>11</sup>, "when a State, through agents operating outside its territory, exercises control and authority, and, therefore, its jurisdiction, over an individual, such State is obliged, by virtue of Article 1, to guarantee this individual all the rights and freedoms provided for in Title 1 of the Convention that are pertinent to the situation of that individual"<sup>12</sup>.

However, at present, the possible responsibility of European States has not been determined in those cases in which they do not exercise direct or indirect control over migration control operations but do finance them and provide technical support. For example, this is the case of the lawsuit filed, against Italy, before the ECHR by the British NGO Global Legal Action Network and which focuses on the events that occurred on November 6, 2017, when the Libyan coastguard allegedly obstructed attempts by an NGO boat to rescue 130 migrants from a sinking boat. As a result of this action, about 20 people

died and those who survived were returned to Libya. According to the lawsuit, in Libya, these people were illegally detained and subjected to extreme violence and inhumane treatment. This procedure must determine Italy's responsibility for financing and technically supporting the Libyan coastguard.

In similar terms, the same NGO has requested a ruling from the EU Court of Auditors on EU aid to the Libyan coastguard. As is known, in 2011, a conflict broke out in Libya, with consequences in the most diverse areas, affecting the political and economic interests of the EU. Libya has become a failed state, which together with its geographical proximity to the Italian coasts, make it a suitable territory for the operations of migratory mafias. This circumstance determines that, through the EU Emergency Trust Fund for Africa<sup>13</sup>, since 2014, the EU has mobilized 338 million € in projects related to migration in Libya; 318 million € below the EU Emergency Trust Fund for Africa and 20 million € as bilateral aid<sup>14</sup>. Undoubtedly, it represents an essential element for the EU Court of Auditors, within its powers, to carry out an audit and control of such an important amount of resources; included, if the actions financed with these resources are in accordance with European Union law and are respectful of Human Rights.

With the expression “externalization” of border control or the management of migratory flows, reference is made to those cases in which third States perform border control and migration policy functions as a direct or indirect consequence of an agreement with the EU or with the EU Member States. In this case, the EU-Turkey statement, 18 March 2016<sup>15</sup>, which gives a third State, in this case Turkey, a leading position in the control of the external borders of the EU and in the control of migratory routes to across the Eastern Mediterranean<sup>16</sup>.

In these terms, the purpose of this work is to carry out an analysis of the EU-Turkey statement, March 18, 2016, which stands out as the most relevant

instrument in EU-Turkey relations for managing the migration crisis. Thus, not only will the controversial content of the EU-Turkey statement and its compatibility with European Union law be analyzed, but special attention will also be paid to the legal nature of the EU-Turkey statement, either as a standard of a conventional nature or as a mere political agreement. In this area, the case law of the General Court will be the object of critical evaluation<sup>17</sup>, which has not considered the EU-Turkey statement as an EU agreement, opening the possibility of its classification as an agreement of the Member States. Four years after the 2016 Statement, a period of reflection on EU-Turkey cooperation on migration has been opened. Reality shows how Turkey uses migration cooperation as a constant pressure factor in its relations with the EU and that the EU must rethink its relations with Turkey and, therefore, also cooperation in the field of migration.

## II. THE COOPERATION BETWEEN THE EUROPEAN UNION AND TURKEY ON MIGRATION POLICY: THE IMMEDIATE BACKGROUND OF THE EU-TURKEY STATEMENT

The migratory crisis reached its highest degree of intensity in 2015, when there was an unprecedented number of displacements of people since World War II. According to the International Organization for Migration, during 2015, 1,005,504 irregular migrants had arrived, by land or sea, in six countries of entry to the European Union: Greece, Bulgaria, Italy, Spain, Malta and Cyprus<sup>18</sup>. According to the United Nations High Commissioner for Refugees (UNHCR), 50% of those displaced to Europe are Syrians<sup>19</sup> fleeing the war in their country; another 20% are Afghans and 7% Iraqis.<sup>20</sup> In this way, the

migratory conflicts promoted migratory routes that were already established, such as the routes that run through the Eastern Mediterranean and the Central Mediterranean<sup>21</sup>.

The outbreak of the migratory crisis showed the limitations of European migration policy, with little planning of migratory flows, absence of structural responses and poor management of “external borders”. Indeed, Italy and, above all, Greece<sup>22</sup> were unable to cope with the massive arrival of migrants. Faced with this situation, as happens so many times in the European crises, the first reactions were mainly state-owned and the measures adopted by the EU and its Member States were insufficient in the face of the massive displacement of people to the EU.

On April 19, 2015, in one of the largest shipwrecks in the recent history of the Mediterranean, between 700 and 900 people died and was a major turning point in the EU. Faced with this situation, the European Commission decided to boost its migration policy, through the adoption, on May 13, 2015, of the European Agenda on Migration<sup>23</sup>. The Agenda is “not only the instrument from which to start in order to adopt urgent measures, but it also constitutes the road map around which the common policies for border control, asylum and migration will be articulated, which will require greater European cooperation to be effective and sustainable in the long term”<sup>24</sup>. Especially illustrative are the statements of Federica Mogherini, former High Representative of the Union for Foreign Affairs and Security Policy (between November 1, 2014

and December 1, 2019), “in recent years we have created a foreign policy of migration of the EU, when before there were none”<sup>25</sup>.

The four pillars on which the European Agenda on Migration is structured are: reducing incentives for irregular immigration, saving lives, making external borders secure, a renewed asylum policy and a new policy on legal migration. Within the first pillar of the European Agenda on Migration, cooperation with third States, especially those of origin and transit, appears as a fundamental element of EU migration policy<sup>26</sup>. Undoubtedly, one of the essential aspects of cooperation with third States (of origin or transit) is represented by establishing a system of incentives for these States to control migratory flows. As mentioned above, by outsourcing border controls, the EU and its Member States establish agreements with third States in order for them to carry out border control functions. Among the functions that these agreements attribute to third States are: the surveillance of their borders, the detention and return of migrants or the regularization processes<sup>27</sup>. This alternative is not a novelty in the EU and its Member States, Spain-Morocco cooperation is based on a similar model. This precedent, which has been considered by the EU, uses external aid to third States as a counterpart or conditions for migration control measures and the acceptance of the readmission of migrants and refugees<sup>28</sup>.

This model, based on the externalization of border controls, is the one present in the cooperation of the EU and its Member States with Turkey on migration matters; especially, if the transcendental relevance of cooperation with Turkey in this matter is taken into account. Given its geographical situation, Turkey is a prominent host and transit country for migrants and refugees. As a result of the conflicts in Syria and Iraq, around 4 million refugees have arrived in Turkey, the highest number in the world. These include 3.6 million registered

Syrian refugees and 370,000 registered refugees and asylum seekers, mainly from Afghanistan, Iraq, Iran and Somalia<sup>29</sup>.

The European Council, in an extraordinary meeting on April 23, 2015, focused exclusively on migration policy, indicates among the commitments made the need to “improve cooperation with Turkey in view of the situation in Syria and Iraq”<sup>30</sup>. Furthermore, among the essential elements of the European migration policy are mentioned: on the one hand; mobilize instruments (including development cooperation funds) for the implementation of readmission agreements, concluded by the EU and its Member States, with third countries, in order to promote the readmission of unauthorized economic immigrants in the countries of origin and transit; and, on the other hand, establish a new returns program, which respects the right to request asylum, for the rapid return of illegal migrants from front-line Member States, coordinated by Frontex<sup>31</sup>. In



similar terms, the European Council of June 25 and 26, 2015, concludes that it is of paramount importance to reinforce “overall cooperation with countries of origin and transit, both on stemming the flows of irregular migrants and on tackling the root causes of migration so as to reduce the incentives for illegal migration and to combat the smuggling networks.”<sup>32</sup> Likewise, the need to promote “cooperation with Turkey and the relevant countries of the Middle East (in particular Iraq, Jordan and Lebanon)” is highlighted<sup>33</sup>.

For the last years, the EU and its Member States have promoted a broad set of regulatory and strategic planning instruments, the purpose of which is for Turkey to carry out a function of border control and management of migratory flows to control, restrict or prevent physical access to the territory of the EU States. EU-Turkey cooperation takes shape at the EU-Turkey Summit

of October 5, 2015, which results in the EU-Turkey Joint Action Plan of October 15, 2015<sup>34</sup>. The main commitments made by Turkey under this Joint Action Plan are: to improve the implementation of its bilateral Readmission Agreement with Greece<sup>35</sup>; implement the EU-Turkey Readmission Agreement for third country nationals as of June 1, 2016<sup>36</sup>; strengthen the interception capabilities of the Turkish Coast Guard and strengthen legislation, action and cooperation with EU Member States in the fight against illegal trafficking and smugglers. It is especially surprising that, among the commitments assumed by Turkey, is the implementation of rules of a conventional nature, therefore, already legally binding, such as the bilateral readmission agreement with Greece and the EU-Turkey readmission agreement. In June 2018, the Government of Turkey decided to suspend the bilateral readmission agreement with Greece, as a result of Greece’s refusal to extradite eight Turkish soldiers accused of participating in the failed Turkish Coup d’état of July 2016. This situation shows how Turkey uses migration agreements as an element of pressure in the most diverse areas of its relations with the EU.

For its part, the EU, in implementation of the policy of financial support in exchange for cooperation in the area of migration, is committed to activating the Mechanism for Turkey in favour of refugees. As will be explained below, this commitment is one of the essential lines of the EU-Turkey statement and it is specified in the disbursement in favour of Turkey of two tranches of 3,000 million €. Alongside this, the EU assumes commitments of a political nature, such as accelerating compliance with the visa liberalization roadmap and revitalizing Turkey’s accession process. The priority areas of action will include humanitarian aid, education, integration into the labour market, access to health care, social inclusion. However, the agreement does not include any

mention of the human rights situation or the principle of “non refoulement” on the part of Turkey, nor concrete measures aimed at ensuring that funds from the Facility for Turkey in favour of refugees are effectively used to improve refugee conditions in Turkey<sup>37</sup>.

On September 23, 2020, the European Commission presented the New Pact on Migration and Asylum, which will replace the European Agenda on Migration. As will be explained in section IV, this New Pact continues to consider Turkey as an essential partner in matters of migration cooperation and considers that the EU-Turkey statement, 18 March 2016, is an effective instrument for the control of the external borders of the EU<sup>38</sup>.

As the main novelties of the New Pact on Migration and Asylum, the European Commission proposes: a new compulsory control prior to entry, through an accelerated procedure on departure, including the performance of health and security controls; common EU system for returns, reinforce Frontex with a permanent corps of more than 10,000 personnel, promote legal migration mechanisms and an “equitable sharing of responsibility and solidarity”. This last aspect, subject to significant criticism, allows States to choose between relocation from the main States of entry or to finance returns to countries of origin or transit through technical or financial support. This alternative means continuing with the Common European Asylum System<sup>39</sup>. According to this System, the first country of entry is responsible for examining asylum applications, and the asylum seeker may remain in the territory of the State while their asylum application is resolved. With the system proposed by the European Commission in the New Pact on Migration and

Asylum, the states that are the EU's external border will continue to process asylum procedures and bear the human costs of guaranteeing the rights of migrants during the resolution of the asylum procedure.

### III. THE EU-TURKEY STATEMENT, 18 MARCH 2016

#### 1. The acquired Commitments

As mentioned above, the EU-Turkey statement, 18 March 2016 is part of a broad set of relations between the EU and Turkey aimed at managing the migration issue, with the aim of stopping the massive flows of irregular migration that are destined for The EU. However, unlike previous instruments, such as the EU-Turkey Joint Action Plan, this Declaration establishes some very specific legal obligations, "setting a framework for cooperation that is deeper than that which could be expected from an instrument of this nature"<sup>40</sup>. In this way, the first of the acquired commitments establishes that, as of March 20, 2016, new irregular migrants, whose asylum application has been considered unfounded or inadmissible, who pass from Turkey to the Greek islands will be returned to Turkey. In return, the EU undertakes to resettle in its territory the same number of Syrian migrants in a regular situation from Turkey, giving "priority to migrants who have not previously entered or tried to enter the EU in an irregular manner". Despite the fact that these measures are continuous in nature with the Readmission Agreements concluded between the EU and Turkey or between Greece and Turkey, the readmission of all immigrants in an irregular situation has a completely new character, since it

was not included in any instrument previous<sup>41</sup>.

In addition, as a mechanism for the effective compliance of the obligations acquired, the Statement contemplates that the EU commits to the disbursement of 3,000 million €, through the Mechanism for refugees in Turkey. Throughout the 2016-2017 period, the first € 3,000 million were mobilized, € 1,000 million from the EU budget and the rest from contributions from Member States. In March 2018, the Commission proposed to expand funding under the Facility with an additional 3,000 million €, as the entire initial budget had already been used<sup>42</sup>. At the European Council of June 28, 2018, the Member States agree to unblock the second tranche, of 3,000 million

€, of the Mechanism for refugees in Turkey<sup>43</sup>. At a meeting of the Committee of Permanent Representatives, the States agree that 2,000 million € of that amount is financed from the EU budget. On the other hand, the remaining 1,000 million come from contributions from the Member States calculated according to their share in the gross national income of the EU. As expressly specified in these agreements, the EU and its Member States acknowledge that through this mechanism the commitments assumed with Turkey in the Statement, 18 March 2016 are being fulfilled<sup>44</sup>.

Along with these obligations of undoubtedly legal content, the EU-Turkey statement, 18 March 2016 contains agreements of a political nature. Thus, the EU is committed to promoting visa liberalization for Turkish citizens, promoting work on the improvement of the customs union and reinvigorating Turkey's accession process to the EU. Along with this, Turkey is committed to adopting measures aimed at preventing the opening of new illegal migration routes. "Undoubtedly, these commitments are characterized by a marked political nature, in such a way that the political and the legal are intermingled in this Statement, assuming commitments of different nature"<sup>45</sup>.

The return of irregular migrants who have not obtained protection by an EU State to Turkey, perhaps, is the most controversial commitment of the EU-Turkey statement, as it implies that the EU considers Turkey a safe third country<sup>46</sup>. Readmission agreements, whatever their nature, of the EU and its Member States have to respect the Directive laying down standards for the reception

of applicants for international protection<sup>47</sup>, the European Convention on Human Rights and Fundamental Freedoms and the jurisprudence of the ECHR.

Although the EU-Turkey statement states that it will be applied in accordance with international law and European Union law, there are more than serious doubts as to whether Turkey meets the requirements to be considered a safe third country<sup>48</sup>, regulated in the art. 38 of the Directive laying down standards for the reception of applicants for international protection. The first of these is that the applicant for international protection does not see his life or freedom threatened, for reasons of “race, religion, nationality, belonging to a particular social group or political opinion”. The second principle requires that applicants for protection do not incur the risk of serious harm. Serious damage is understood as

the death penalty or its execution, or torture or inhuman or degrading punishment or treatment of an applicant in his / her country of origin, or serious and individual threats against life or physical integrity of a civilian motivated by indiscriminate violence in situations of international or internal armed conflict.<sup>49</sup>

The third of the requirements is respect for the principle of non-refoulement enshrined in the 1951 Geneva Convention on the Status of Refugees<sup>50</sup>. The next necessary requirement for qualification as a safe third country is the prohibition of expulsion in case of violation of the right not to be subjected to torture or cruel, inhuman or degrading treatment. Finally, European legislation

requires that a third State offers the possibility of requesting refugee status in accordance with the 1951 Geneva Convention and, where appropriate, benefit from the protection provided therein.

Similarly, article 39 of the Directive laying down standards for the reception of applicants for international protection establishes the concept of a safe European third country. Based on this article, it can only be considered as such when the following requirements are met: having ratified the Geneva Convention without geographical restrictions and observing its provisions, having an asylum procedure provided for by law, and having ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>51</sup>.

From a systematic analysis of European legislation, it can be deduced that Turkey does not meet the stated requirements to be considered a safe third country. Although Turkey has ratified the 1951 Convention Relating to the Status of Refugees, it has not done so with its 1967 New York Additional Protocol, therefore there is a geographical restriction in the application of the provisions of the 1951 Convention. Moreover, the application of refugee status in Turkey will only be possible to those asylum seekers originating in European States<sup>52</sup>. That is, “de jure Syrians cannot apply for refugee status or receive protection under the Geneva Convention, in Turkey, as required by the Directive in order to consider that State a safe third country”<sup>53</sup>. Likewise, at present, there is also no certainty that asylum applications will be analyzed

individually; there are accelerated procedures with reduced deadlines and limited recourse possibilities<sup>54</sup>.

Furthermore, the expulsion and return measures agreed by the EU and its States must respect the European Convention on Human Rights and the jurisprudence of the ECHR. In order to decide whether the expulsion of a foreigner is in accordance with the Convention, it is necessary to assess in the specific case whether the expulsion of a foreigner to a certain State entails a risk of violation of any of the provisions of the European Convention on Human Rights and Fundamental Freedoms<sup>55</sup>. In particular, expulsion and return measures must respect: the right to life (Art. 2 Convention, Protocol No. 6 and Protocol No. 13 of the Convention), the prohibition of returns and expulsions under the threat of being applied to them death penalty<sup>56</sup>; the prohibition of torture, punishment or inhuman or degrading treatment<sup>57</sup> and the prohibition of “non refoulement” (art. 3 Convention)<sup>58</sup>. Repeated

condemnations of Turkey by the ECHR show that Turkey does not comply with the requirements of the ECHR so that an expulsion or return measure can be agreed<sup>59</sup>. In particular, Turkey does not respect the content of the Convention due to detention conditions in refugee camps, characterized by overcrowding and unsanitary conditions (Article 3 Convention)<sup>60</sup> and there are indications that Turkey does not respect the principle of “non refoulement”<sup>61</sup>. The ECHR has even condemned Turkey because asylum seekers run



the risk of suffering, in Turkish territory, torture and inhuman and degrading treatment<sup>62</sup>. Likewise, the Parliamentary Assembly of the Council of Europe highlights the high risk that, in application of the EU-Turkey statement, migrants returned to Turkey will be sent back to a place where they risk persecution, torture or treatment degrading.

Ultimately, the EU-Turkey statement, March 18, 2016 and the European Commission<sup>64</sup>, consider Turkey as a “safe third country”. This circumstance can be considered as the main legal obstacle to an application of the agreement in accordance with International Law and the European Union Law

## 2. The Legal Nature. The controverted pronouncement of the General Court

The other of the most controversial elements of the EU-Turkey statement refers to its legal nature and, consequently, the procedure followed for its adoption and publication<sup>66</sup>. As noted, the General Court (GC) has had the opportunity to rule on the nature of the EU-Turkey statement, regarding three annulment actions, in which the plaintiffs (two of Pakistani nationality and one of Afghan nationality) argued that the Statement It is a binding legal act that produces legal effects against them. Within the scope of this appeal, the GC had to answer two essential questions. Firstly, whether the EU-Turkey statement has been concluded by the European Council or by the EU Member States outside the institutional system from the EU<sup>67</sup>. Secondly, if the EU-Turkey statement is a political agreement or a Treaty that produces authentic legal effects, violating the procedure for the conclusion of treaties provided for in art. 218 TFEU.

In this sense, the GC, by Order of February 28, 2017, decided to dismiss the annulment appeals filed by the three asylum seekers against the EU-Turkey statement, as a result of not having jurisdiction to hear the merits of the matter. The GC also considers that there is an imprecision in the identification of the authors of the Statement, 18 March 2016, making it necessary to specify

the content of the expression “members of the European Council”, which is used in the Statement<sup>68</sup>. Therefore, the Court’s first element of analysis focuses on determining whether the EU-Turkey statement was concluded by the Institution of the European Council or whether, on the contrary, the Heads of State or Government of the Member States of the Union. The GC begins by warning of the means used to make the Statement public, such as a press release from the European Council. For this reason, the terms used in the EU-Turkey statement cannot be interpreted according to legal parameters, since it is pursued “an informative objective and has no legal value”, using “deliberately simplified formulas and simple and concise language”<sup>69</sup>. In view of these circumstances, a literal interpretation of the EU-Turkey statement cannot be resorted to and the expression “members of the European Council” cannot be understood to refer to the European Council Institution.

In this way, the General Court considers that an analysis of the preparatory acts of the EU-Turkey statement must be carried out, in order to identify their authorship. In this sense, the Court notes that on the dates indicated, the Heads of State or Government held two meetings in parallel. The first one under the formation of the European Council, subject to European Union law (March 17). And, the second one, on March 18, 2016, the Heads of State or Government met with the Prime Minister of Turkey, in order to restore public order, essentially on the territory of Greece<sup>70</sup>. In other words, the meetings of March 17 and 18 were organized in parallel and followed different routes from the legal, protocol and organizational point of view.

So, the GC uses surprisingly rigid reasoning and seems to be unaware that precisely the choice of a press release is a deliberate way of bypassing the decision-making procedures provided for in the founding Treaties. Likewise, the Court obviates the substantially different nature of the commitments acquired in the EU-Turkey statement to the commitments assumed in previous meetings between the EU and Turkey. As mentioned previously, the obligation to readmission for all immigrants in an irregular situation who arrived after March 20 is a totally new element that was not included in any

previous legal instrument<sup>71</sup>. Finally, it is difficult to understand that the EU-Turkey statement, 18 March 2016 could have been achieved without a drive and an active and decisive participation of the Union's institutional system, using the negotiating position of all 28 EU Member States.

For these reasons, in the Court's opinion it is irrelevant that the EU-Turkey statement is a legal or political act, since

even assuming that an international agreement had been informally concluded at the meeting of March 18, 2016, which, in the present case, the European Council, the Council and the Commission deny, that agreement would have been reached by the Heads of State or Government of the Member States of the Union and the Turkish Prime Minister.<sup>72</sup>

Thus, according to Article 263 TFEU, the Court does not have jurisdiction to rule on an international agreement concluded by the Member States, since it is not an act attributable to any EU Institution, which constitutes a requirement of admissibility of the annulment.

As a consequence of the argumentative logic followed by the Court and characterized by extreme formalism, the Court does not proceed to assess whether the EU-Turkey statement, March 18, 2016 exceeds the character of a political agreement and is situated in the field of rules of nature conventional. In this matter, the first element of analysis must necessarily be constituted by the 1969 Vienna Convention on the Law of Treaties, which understands that the central element is the production of international-legal effects, regardless of its name and/or its shape<sup>73</sup>. In similar terms, the jurisprudence of the International Court of Justice (ICJ) has consistently considered that the law of treaties does not refer to the name of the Agreement to determine its legal nature. Thus, in the Matter of Maritime Delimitation and Territorial Issues between

Qatar and Bahrain, the ICJ admitted as an international treaty a note between the Ministers of Foreign Affairs of both States, stating that

this instrument is not a simple record of the meeting (...). It is not limited to relating discussions and summarizing points of agreement and disagreement. List the commitments to which the parties have consented. Thus, it creates rights and obligations for the parties in International Law. It constitutes an international agreement.<sup>74</sup>

Accordingly, what "characterizes a treaty is the nature of the act or transaction contained therein, not its form"<sup>75</sup>.

These reflections are fully applicable to the EU-Turkey statement, since, as stated above, the content of the Statement reflects the assumption of genuine legal obligations for both parties. Thus, if the circumstances in which it was drawn up and the content of the EU-Turkey statement are taken into account, it can be said that it responds to the logic of conventional norms. Similar conclusions can be reached if an examination of the instrument provided to verify compliance with the Statement is carried out, such as the preparation of periodic reports detailing the degree of compliance with the different commitments acquired. The observation of compliance through periodic reports represents a common technique for controlling the execution of international treaties, especially in the area of Human Rights<sup>76</sup>. Likewise, as will be explained below, it should be borne in mind that the European Commission, as an EU Institution, is responsible for the preparation of said monitoring reports.

By virtue of the foregoing, it can be concluded that, despite the fact that part of the content of the EU-Turkey statement is political in nature, it does not in any way diminish that it has a relevant legal scope. In fact, it is due understand as an international agreement that produces effects of a legal

nature<sup>77</sup>; whether it is an Agreement of the EU or its Member States<sup>78</sup>. The result of this GC pronouncement is to place the EU-Turkey statement in a complex balance, not yet clearly defined, between general international law, EU law and the legal order of the member States.

Thereby, given its nature and content and insofar as it affects competencies shared by the EU and its Member States, the EU-Turkey statement should have been processed under the modality of a mixed agreement, with the participation of the European Institutions and of the Member States<sup>79</sup>.

As indicated by the jurisprudence of the Court of Justice of the European Union, recourse to this type of agreement is possible in the following circumstances: a) when the agreement regulates a matter that affects the competences of the EU and the Member States<sup>80</sup>; and b) when the financing of the agreement in question is going to be assumed by the Member States, even if it is related to exclusive competences of the EU<sup>81</sup>. Certainly, the procedure for the conclusion of mixed agreements presents important complexities, which

extend to the negotiation phase, the expression of consent, the delimitation of obligations between the EU and its States, and international responsibility<sup>82</sup>. In this case, it appears that the Member States have tried to avoid the difficulties of this procedure of concluding joint agreements by concluding an “informal declaration”. However, this character does not determine the legal status of the EU-Turkey statement, March 18, 2016, since, as mentioned above, International Law does not require rigid forms<sup>83</sup>.

In recent years, a trend can be observed for the EU and its Member States to conclude agreements that contain international commitments, but without them being formally concluded as international treaties<sup>84</sup>. The EU and its Member States have also shown a preference for the conclusion of this type of informal agreements on migration matters. Although the use of soft law instruments is not a novel technique, it should be noted that the implementation of informal arrangements and memoranda of understanding in the field of migration might have serious implications for asylum seekers and irregular migrants<sup>85</sup>. Likewise, the conclusion of this type of informal agreements greatly hinders their democratic control (since they are held without parliamentary participation) and their possible judicial control, either by state or supra-state courts.

As an example, one can cite the Memorandum of Understanding between Italy and Libya<sup>86</sup>, by virtue of which Italy assists Libyan maritime authorities to intercept vessels at sea<sup>87</sup>. However, the implementation of this agreement is leading to significant violations of the Human Rights of migrants, as people are returned to detention centers in Libya, where they are illegally detained and suffer serious abuses, including rape and torture<sup>88</sup>. As noted above, there is currently an open procedure at the ECHR, in which Italy’s responsibility for financing and technically supporting the Libyan coastguard must be determined, in application of this Memorandum.

### *3. The Pronouncement of the Spanish Supreme Court*

The Spanish Supreme Court had the opportunity to rule on the EU- Turkey statement, March 18, 2016 on the occasion of a complaint, against the President of the Government, presented by Izquierda Unida and Unidad Popular. In the opinion of the complainants, the participation of the Prime Minister in the conclusion of the EU-Turkey statement implies the following criminal acts: against humanity punished (art. 607 bis of the Penal Code); against persons and property protected in the event of a planned and punished armed conflict (arts 608 et seq. of the Penal Code); against moral integrity (art. 173 et seq. of the Penal Code); and that committed by a public official against constitutional guarantees (art. 542 of the Penal Code).

The Supreme Court, by means of an “Auto” of July 11, 2016, agrees that it is inadmissible, because the facts do not constitute any criminal offense<sup>89</sup>. As the Supreme Court Order indicates, the purpose of the criminal procedure is to determine the existence or not of criminal responsibility of the defendant for the crimes mentioned in the complaint. However, in addition to the reasoning

in criminal matters, the arguments of the Supreme Court on the Statement are of interest.

By the Supreme Court, using formal criteria, argues its decision on the basis that the EU-Turkey statement has been adopted following the provisions of art. 79 TFEU (common immigration policy) and art. 80 TFEU (principle of solidarity and equitable sharing of responsibility among the Member States).

The Spanish Supreme Court expressly states that

the adopted agreement, alone, can be seen as the institutional development of the principles of solidarity and equitable distribution in a massive immigration crisis caused by fear of reprisals from a warlike conflict,

since the Agreement it only seeks the protection of displaced persons and the equitable and orderly distribution of migratory flows.<sup>90</sup>

For this reason, in the opinion of the Supreme Court, the EU, within its institutional and financial possibilities, “tries to place immigrants in a space in which, by recovering their status as persons, their persecution is ended with full respect for their integrity moral, this does not imply degrading treatment or impairment of their integrity”<sup>91</sup>.

Based on these arguments, the Supreme Court affirms that it decides to reject the complaint for processing since the participation of the President of the Government in the EU-Turkey statement is not illegal. However, the Supreme Court refuses to carry out a more in-depth examination of the content of the Statement, in which it is analysed whether the commitments regarding the return of Syrian migrants to Turkey are compatible with the international obligations, assumed by Spain and the EU, regarding to asylum, subsidiary protection and temporary protection<sup>92</sup>.

#### *4. The Results of the EU-Turkey Statement: Difficulties for the Evaluation*

Four after the EU-Turkey statement, it is necessary to verify its effects on migratory flows through migratory routes to the EU, especially the Eastern Mediterranean route. It is also necessary to assess the consequences on the rights of migrants affected by the Declaration, as well as the use of funds transferred to Turkey through the Facility for Refugees in Turkey. The main official instrument for monitoring the EU-Turkey statement is made up of

the Commission Reports to the European Parliament, the Council and the European Council on the progress made in its implementation. As mentioned above, it is surprising that, according to the jurisprudence of the General Court, being an agreement outside the EU institutional system, the main monitoring mechanism is the European Commission Reports. In addition, the work of government organizations and NGOs dedicated to field to this sector is essential in this matter. Through direct contact with migrants, they provide useful information on the effects of the migration policy of the EU and its Members States on the rights and living conditions of migrants.

Initially, the EU-Turkey statement achieved its fundamental objective, which was to stop the massive arrival of migrants to the Greek coasts. Just one week after March 20, 2016, irregular arrivals to Greece dropped from 1,740 to 47 per day. Likewise, there was a notable decrease in the number of people leaving Turkey for Greece. In the three weeks prior to the application of the EU-Turkey statement, 26,878 people arrived irregularly on the Greek islands. In the three following weeks, 5,847 irregular arrivals were registered<sup>93</sup>. However, many other commitments in the Declaration are far from being fulfilled. Thus, since 2016 barely 2,000 returns have been executed from Greece to Turkey, due to the refusal of the Greek courts to accept Turkey as a safe country. Regarding resettlement, only 25,000 refugees (out of a total that had been set at 72,000 places) have been relocated from Turkey to the EU<sup>94</sup>.

However, as mentioned in the Commission Reports on the implementation of the EU-Turkey statement and subsequent events have confirmed, there was a risk of enhancing the other illegal migration routes to the EU, especially the southern and western Mediterranean route<sup>95</sup>. As the Commission has found, the number of arrivals via the western Mediterranean and Atlantic

route started to increase since June 2017<sup>96</sup>. Thus, throughout 2017 and 2018, there was a notable increase in the number of arrivals at the southern Spanish border; even surpassing arrivals to Italy via the central route and to Greece via the eastern route. Throughout the first half of 2018, a total of 15,000 arrivals by sea to Spain were registered, 40% more than in the same period in 2017. At the end of 2018, almost 60,000 arrivals, overcoming the 2006 crisis<sup>97</sup>. This circumstance forced the reactivation of the Readmission Agreement signed with Morocco in 1992<sup>98</sup> and, especially, accelerated returns to Morocco<sup>99</sup>.



The other essential element in the application of the EU-Turkey Statement is to assess what are the consequences on the rights of migrants affected by the Statement. As various NGOs have repeatedly denounced, the application of the EU-Turkey statement has caused the collapse of the Greek asylum system and that migrants live in refugee camps in overcrowded, unsanitary and insecure conditions. Furthermore, the Turkish authorities, already struggling to meet the basic needs of the people, are not guaranteeing refugees and asylum seekers the possibility of living in dignity. According to Amnesty International, Turkey has carried out returns of asylum seekers and refugees to countries where they were at risk of serious Human Rights violations, such as Syria, Iraq and Afghanistan<sup>100</sup>.

Precisely, the funds disbursed to Turkey through the Facility for Refugees in Turkey are intended to improve the situation of migrants in Turkey.

According to the European Commission, the Mechanism has been applied to humanitarian aid (1,400 million €) and non-humanitarian aid (1,600 million

€). On the one side, humanitarian aid applies to the most vulnerable refugees and other people in difficulties, providing assistance in areas such as education and health in emergency situations. On the other side, non-humanitarian aid targets structural issues, related to the socio-economic, health and educational prospects of refugees<sup>101</sup>.

In exercise of its powers, the EU Court of Auditors<sup>102</sup> has proceeded to examine whether the Mechanism effectively supported refugees in Turkey, focusing on the management of the Mechanism and the results achieved to date within its humanitarian branch. The Court of Auditors welcomes the rapid mobilization of funds from the Facility for Refugees in Turkey and notes that the needs of the refugees were correctly assessed. However, the Court of Auditors considers that the needs related to municipal infrastructure and socio-economic support have not been adequately assessed, as a result of disagreements between Turkey and the EU on how to address these areas. Furthermore, the Court of Auditors points out that the monitoring of cash assistance projects and the measurement of results presented deficiencies<sup>103</sup>.

#### IV. THE INEVITABLE REVIEW OF THE EU-TURKEY COOPERATION ON MIGRATORY POLICY

As discussed above, the EU and its Member States view Turkey as the key partner in controlling the migration route from the Eastern Mediterranean. As mentioned above, the New Pact on Migration and Asylum highlights the importance of EU-Turkey cooperation and highlights the results of the EU-Turkey statement, 18 March 2016.

However, four years after the EU-Turkey statement, EU-Turkey relations are marked by a climate of mutual mistrust and with major open disputes between the EU and its States, and Turkey. These circumstances mean that, on a constant basis, the Turkish authorities use migration cooperation as an element of pressure in their relations with the EU. Even in July 2019, the Turkish Foreign Minister, Mevlüt Çavuşoğlu, announced that the application of the immigrant readmission agreement adopted between the European Union and Turkey was suspended. As mentioned above, the effective implementation of the Migrants Readmission Agreement is one of the essential commitments of the EU-Turkey statement, 18 March 2016. On the one hand, the Turkish authorities pointed out that the EU had not initiated the liberalization process of visas, as agreed in the EU-Turkey statement, 18 March 2016. On the other hand, Turkey stated that the suspension of the Readmission Agreement constitutes a response to the EU's rejection of Turkey's explorations in the territorial waters of Cyprus and Greece.

The EU Institutions have expressed their concern about the increase in the arrival of migrants through the Eastern Mediterranean route<sup>105</sup>. Thus, the Justice and Home Affairs Council, of March 4, 2020, pointed out that "it strongly rejects Turkey's use of migratory pressure for political purposes. This situation at EU's



external borders is not acceptable. The Council expects Turkey to fully implement the provisions of the 2016 Joint Statement with regard to all Member States”<sup>106</sup>.

Faced with this situation, on March 9, 2020, the President of the European Council, Charles Michel, and the President of the European Commission, Ursula von der Leyen, meet with President Recep Tayyip Erdoğan in Brussels. Despite major disagreements with Turkey, the EU expresses its commitment to the EU-Turkey Statement. As the President of the European Council noted, “Today’s meeting with President Erdoğan is an important step in the right

direction. Both Turkey and the EU must work on the full implementation of the EU-Turkey Declaration on Migration in order to defuse tensions”<sup>107</sup>.

Turkey’s gas exploration in the waters of Cyprus and Greece continues in 2020 and is currently one of the main points of tension between the EU and Turkey<sup>108</sup>. This situation has forced the European Council, of 1 and 2 October 2020, to condemn “firmly the violations of the sovereign rights of the Republic of Cyprus, which must cease. The European Council calls on Turkey to refrain from taking similar actions in the future that violate international law”<sup>109</sup>.

In short, there are significant tensions between the EU and Turkey as Turkey uses the control of migratory flows as an instrument of pressure in its relations with the EU. Despite this, the EU is committed to maintaining migration cooperation with Turkey in the terms established in the EU-Turkey statement, March 18, 2016 and the application of the EU-Turkey Migrants Readmission Agreement. At the European Council on 1 and 2 October, the EU notes its commitment to modernizing the customs union and facilitating trade with Turkey and permanent cooperation on migration issues, in line with the EU-Turkey statement, 18 March 2016.<sup>110</sup>

However, this position may significantly weaken the position of the EU and its Member States in their relations with Turkey and compromises their position in defense of the principles of democracy, the rule of law and the defense of Human Rights in foreign action (Articles 21 and 22 of the Treaty on European Union). For this reason, the EU has been forced to point out that if Turkey continues with its violations of International Law and of the sovereignty of Greece and Turkey, the EU will make use of all the instruments and options at its disposal, in accordance with, among others, the Article 29 of

the TEU and Article 215 of the TFEU (interruption or reduction, in whole or in part, of economic and financial relations with one or more third countries), to defend their interests and those of their Member States.<sup>111</sup>

Therefore, Turkey’s positions and its constant recourse to migration control oblige the EU and its Member States to review migration cooperation with Turkey under the conditions expressed in the EU-Turkey statement, 18 March 2016. As long as the EU continues with its policy of deterritorialization of border controls, Turkey will have an important instrument of pressure in its relations with the EU.

## V. FINAL REFLECTIONS

In recent years, the European Union and its Member States have had to manage a major migration crisis, with profound repercussions on the structural aspects of the integration process. The responses of the European Union have shown the limitations of the European migration policy, with little planning of migratory flows, absence of structural responses to the migratory phenomenon and deficient management of the “external borders”.

The basis of the measures adopted in recent years is to develop migration control instruments, whose main objective is to prevent and / or dissuade the arrival of migrants to the territory of the EU States. In this way, with the aim of strengthening the control of external borders, the EU and its Member States have progressively developed a policy of “deterritorialization” of border controls. Thus, the European Union and its Member States have promoted the establishment of border controls outside the territory (land, air or sea)

of the EU States; either by actions of the State itself beyond its borders or by activities carried out by third States.

Turkey represents an essential state in controlling migration routes to Europe, particularly due to its geographical proximity to European Union states (especially Greece). For this reason, the Union and its Member States promote close cooperation with Turkey, which has as its essential objective the control by Turkey of migratory flows to the European Union.

Within the framework of this migration cooperation between the EU and Turkey, the EU-Turkey Statement is inserted. As has been stated throughout this paper, the aforementioned Statement deserves deep criticism, both for its form

and for its content. In the first place, the EU-Turkey statement, 18 March 2016, despite establishing commitments of an undoubted legal nature, has not been concluded as an international treaty, which has not allowed the participation of either the European Parliament or the national parliaments in its holding procedure. Second, the commitments made in the EU-Turkey statement new irregular migrants, whose asylum application has been considered unfounded or inadmissible, who go from Turkey to the Greek islands will be returned to Turkey. This commitment implies that the EU and its Member States regard Turkey as a safe third country. However, as has been stated, the current reality of Turkey prevents it from being considered a safe third country and returns to Turkey are not compliant with the Directive laying down standards for the reception of applicants for international protection, nor with the Convention European Human Rights and Fundamental Freedoms and the jurisprudence of the European Court of Human Rights (ECHR). The jurisprudence of the Court of Justice of the European Union, applying formalistic criteria, has chosen not to rule on the compatibility of the EU-Turkey statement both with the EU Law an International Law.

These elements determine that Turkey constantly resort to border control as a means of pressure in its relations with the European Union. This is evidenced by Turkey's illegal explorations in waters under the sovereignty of Cyprus and Greece, which represent a violation of the sovereignty of the European Union States. As Romano Prodi, former President of the European Commission, recently pointed out, EU policies have now allowed control of the Mediterranean Sea to be in the hands of Turkey and Russia.<sup>112</sup>

Based on these circumstances, the European Union and its member states have opened a period of reflection in their relations with Turkey and, therefore, also on migratory cooperation. Despite this, the EU continues to support the validity of the EU-Turkey statement, March 18, 2016. The EU must promote migratory cooperation with Turkey that respects Human Rights and addresses the structural causes of migratory flows. Specifically, the EU should make the disbursement of future financial assistance to Turkey conditional on compliance with international obligations regarding the protection of the rights of migrants.

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By way of examples, as a reaction to the financial and economic crisis, economic and financial integration (especially among the Eurozone States) has been promoted; the foundations have been laid to advance the Common Security and Defence Policy and adopted a common position on the Paris Agreement on Climate Change.

State of the European Union Speech 2020, delivered by the President of the European Commission,

There are other relevant conflicts in the International Society that have given rise to the displacement of people: Afghanistan, Iran, Libya, among others. Despite this, the conflict that has led to the largest mass displacement of people has been the protracted Syrian conflict. On the Syrian conflict and the EU’s responses, Ferrer Llorca, J., “La Unión Europea ante el conflicto sirio (2014-2016): ¿Una potencia normativa?”

In general, the main migratory routes to Europe can be summarized as: the Eastern Mediterranean route (the sea crossing from Turkey), being the main route used by people fleeing the conflicts in Syria and Afghanistan; the Western Mediterranean route, using migrants from sub-Saharan Africa and North Africa, passing through Morocco; the Central Mediterranean route, which facilitates the transit of migrants from sub-Saharan Africa and North Africa through Libya; and the Western Balkan route. Vid. MitSiLeGAS, V., “Cartografía de la externalización del control migratorio. Ideas a partir del régimen de la UE sobre tráfico ilícito de migrantes”,

Chapter 2 of Title V of the Treaty on the Functioning of the European Union (TFEU). It should be borne in mind that matters referring to the Area of Freedom, Security and Justice belong to the category of shared competences between the EU and the Member States (Article 4.2.j of the TFEU). Vid. GARCÍA ANDRADA, P., *La Acción Exterior de la Unión Europea en Materia Migratoria: un problema de reparto de competencias*, Ed. Tirant lo Blanch, Valencia, 2014; “La Unión Europea y el establecimiento de una política común en materia de inmigración”

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Externalización de controles migratorios versus derechos humanos

“La dimensión externa del derecho de la Unión Europea en materia de refugio y asilo: un examen desde la perspectiva del non-refoulement”, *Revista de Derecho Comunitario Europeo*, núm. 56, 2017, pp. 119-158-pp. 125-131; deLVALLE GÁLVEZ, A., “Refugee Crisis and Migrations at the Gates of Europe: Deterritoriality, Extraterritoriality and Externalization of Border Controls

This procedure begins with the demand of eleven Somali nationals and thirteen Eritreans, who were part of a group of two hundred people, who boarded in Libya bound for Italy. According to the facts presented in this judgment, all of them were intercepted on the high seas by the Customs Surveillance Service of the Italian police and the Coast Guard, 35 nautical miles south of Lampedusa. The occupants of the boats were transferred, in Italian military ships, to Tripoli (Libya) and handed over to the Libyan authorities. According to the version of the



Italian authorities, these actions complied with the bilateral cooperation agreements with Libya to fight against irregular immigration. The plaintiffs alleged that the decision to surrender was not communicated to the Libyan authorities, they were not identified, and their documents and other personal effects were also confiscated.

For a doctrinal analysis on this judgment of the European Court of Human Rights, among others, de CASTRO SÁNCHEZ, C., “ECHR - Sentencia de 23.02.2012 (Gran Sala), Hirsi Jamaa E.A. c. Italia, 27765/09 - «Artículo 3 y 13 del CEDH; artículo 4 del Protocolo n.o 4 - Tortura y tratos inhumanos y degradantes - Derecho a un recurso efectivo - Prohibición de las expulsiones colectivas de extranjeros». El CEDH como límite de las políticas migratorias europeas”, *Revista de Derecho Comunitario Europeo*, año 17, n. 46, 2013, 1119-1135; CARRILLO SALCEDO, J.A., “Reflexiones en torno a la Sentencia del Tribunal Europeo de Derechos Humanos en el caso Hirsi Jamaa y otros contra Italia (sentencia de 23 de febrero de 2012)”, in Torres Bernárdez, S. (Coord.), *El Derecho Internacional en el mundo multipolar del siglo XXI, Obra homenaje al profesor Luis Ignacio Sánchez Rodríguez*, Ed. IPROLEX, Madrid, 2013, pp. 647-665; MORENO-LAX, V., “Hirsi Jamaa and Others v. Italy or the Strasbourg Court versus Extraterritorial Migration Control?”, *Human Rights Law Review*, vol. 12, issue 3, 1 september, 2012, pp. 574-598; SOLER GARCÍA, C., “La prohibición de las expulsiones colectivas de extranjeros en la jurisprudencia del Tribunal Europeo de Derechos Humanos: especial referencia al caso de España”

Furthermore, in 2015, Greece was still suffering the effects of the economic and financial crisis and the subsequent budgetary stability policies imposed by the EU, which caused a significant level of adjustment in public services.

“La Agenda Europea de Migración: últimos desarrollos

“La Unión Europea y la crisis de los refugiados: fallas de gobernanza, securitización y “diplomacia de chequera”

Syrian citizens under temporary protection

Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, (OJ L 134, de 7 de mayo de 2014). It should be borne in mind that this Agreement contemplates its entry into force as of three years after the parties have completed their ratification procedures

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions

Regulation (EU) No 604/2013 of the European Parliament and of The Council of 26 June 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

La política común de inmigración en la Unión Europea: algunas reflexiones

La declaración Unión Europea-Turquía de 18 de marzo de 2016: ¿Un tratado disfrazado?

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013,

Art. 15 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

Convention relating to the Status of Refugees, made in Geneva on July 28, 1951 and Protocol relating to the Status of Refugees, made in New York on January 31, 1967. The 1951 Geneva Convention limited refugee status to people of European origin, but the 1967 Protocol eliminates this geographical restriction.

Turkey has been repeatedly condemned by the European Court of Human Rights (ECHR) for inhuman or degrading treatment of refugees. As the most recent Judgment highlights, *S.A. v. Turkey*, December 15, 2015.

As mentioned above, the EU-Turkey Declaration establishes the commitment to return irregular migrants to Turkey, but the resettlement commitment only affects migrants of Syrian origin.

El Derecho Migratorio, Internacional y Europeo, como límite desde los derechos humanos a la discrecionalidad de los Estados en materia migratoria, ed. Tirant Lo Blanch, Valencia, 2017, pp. 307-308. As the author points out, it is in this area where there are the most important doubts about the legality of the EU-Turkey Declaration, having analyzed the compatibility of these provisions with EU law, especially with the Directive laying down standards for the reception of applicants for international protection.

For these purposes, the ECHR has as criteria to assess a possible violation of art. 3 Convention, the general situation of Human Rights in the State where the migrant is expelled or returned and his personal situation in the State of destination. ECHR Judgment of July 11, 2000, *Jabari v. Turkey*,

ECHR Judgment of September 22, 2009, *Abdolkhani and Karimnia, v. Turkey*

“El difícil encaje de las devoluciones de refugiados a Turquía ¿y a Libia? con el principio de non refoulement desarrollado por el Tribunal Europeo de Derechos Humanos”,

Annulment allows the CJEU to control the legality of compulsory legal acts adopted by the EU Institutions (arts. 263 and 264 TFEU). The following types of acts may be subject to this appeal: a) legislative acts; b) acts of the Council, the Commission and the European Central Bank that are not recommendations or opinions; and c) acts of the European Parliament and of the European Council intended to produce effects vis-à-vis third parties (art. 263.1 TFEU). However, international agreements concluded by the EU cannot be annulled, since they cannot be equated with acts adopted by the EU Institutions; however, an annulment may be filed against the Council’s decision to conclude an international agreement.

Art. 1.a) Vienna Convention on the Law of Treaties. Vid. Díez de Velasco, M. “Capítulo V: Los Tratados Internacionales (I): El proceso de celebración de los Tratados Internacionales según el Derecho internacional”, in Díez de Velasco, M., *Instituciones de Derecho Internacional Público*, Tecnos, Madrid, 18ª ed., 2013, pp. 158-159; tuSt, A., *Modern Treaty Law and Practice*

La política común de inmigración en la Unión Europea: algunas reflexiones”, loc. cit. p. 154. Using formal criteria, a small doctrinal sector has come out in favour of the exclusively political nature of the EU-Turkey Declaration. “Since the agreement will take the form of a ‘statement’, (...) 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. Nor can it be legally challenged as such”

However, as has been stated, the jurisprudence of the ICJ and the CJEU do not adopt this formalistic criterion, since the central element is the production of international-legal effects, regardless of their name and/or their form.

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Art. 287.4 par. 2 TFEU: “The Court of Auditors may also, at any time, submit observations, particularly in the form of special reports, on specific questions and deliver opinions at the request of one of the other institutions of the Union”.

“Le casse-tête du grand jeu gazier et de la reconfiguration stratégique qui l’accompagne, en Méditerranée orientale